In The
Supreme Court of Ohio

THE STATE OF OHIO, ex rel. MATTHEW A. THOMPSON Relator, v. **NINTH DISTRICT COURT OF APPEALS, et al.,** Respondents.	CASE NO: 2023-1427 ORIGINAL ACTION IN MANDAMUS

RELATOR'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION TO DISMISS RELATOR'S AMENDED COMPLAINT

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MEMORANDUM IN RESPONSE

I. Introduction

On November 9, 2023, Relator petitioned this Court in application for a writ of mandamus pursuant to Article IV, Section 2(B)(1)(b) of the Ohio Constitution and R.C. §2731.04. On December 6, 2023, the Ohio Attorney General ("AGO") filed a motion to dismiss Relator's complaint on behalf of the Respondent Ninth District Court of Appeals ("Ninth District"). On December 13, 2023, Relator filed an amended complaint in light of the AGO's motion to dismiss. On January 3, 2024, the AGO filed a motion to dismiss Relator's amended complaint on behalf of the Respondent Ninth District. The AGO contends that Relator's complaint should be dismissed pursuant to S.Ct.Prac.R. 12.04 and Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted and because the Ninth District Court of Appeals is not *sui juris*, while apparently reserving argument pertaining to the claim that the individual judges named have not been "properly served with the amended complaint." *Motion to Dismiss Amended Complaint, pg 4, footnote 1*. The AGO's request that this original action in mandamus should be dismissed lacks both merit and legal authority.

II. Law and Argument

Original Actions in Mandamus – Legal Authority

The AGO's motion raises several issues that call into question the very legal authority upon which the motion is based. Relator contends that an analysis of these issues is warranted.

In *California v. San Pablo & Tulare Railroad* (1893) 149 U.S. 308, 314, the U.S. Supreme Court held:

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is

> not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

In *Kincaid v. Erie Ins. Co*., 128 Ohio St. 3d 322, 2010-Ohio-6036, ¶9, this Court, upon quoting the above, explained that "[a]n actual controversy is a genuine dispute between adverse parties" that is "more than a disagreement; the parties must have adverse legal interests." *Id*. at ¶10. In *State ex rel. Wilson v. Preston* (1962), 173 Ohio St. 203, 19 O.O.2d 11, 181 N.E.2d 31, this Court considered whether the summary-judgment procedure was applicable to an action in mandamus. This Court expressed its opinion as follows:

> From the foregoing review of the expressions of this court it remains only for us to summarize that in Ohio an action for a writ of mandamus is a civil action. *Id*. at 208.

In summarizing its own prior opinions and concluding that an action in mandamus is a civil action without considering the obvious constitutional obstacles, this Court extended beyond the limitations of its duty as delineated in *San Pablo & Tulare Railroad* to declare an unconstitutional abstract proposition.

The overbroad generalization in *State ex rel. Wilson v. Preston* suffers the same fault as this Court's more recent holding in *In re Affidavit of Helms*, 166 Ohio St.3d 548, 2022-Ohio-293. In both cases, flawed logic expands a discrete question into an overbroad generalization which is patently unconstitutional. In *Helms*, this Court concluded that a court of appeals is not a court of record within the meaning of R.C. §2935.09(D) based on the flawed premise that "the statute would purport to grant the court jurisdiction over a cause of action that the Constitution does not authorize." *Id*. at ¶8. Rather than recognizing the General Assembly's constitutional authority to impose duties upon a "judge", separately from the court over which said judge presides, pursuant to Article IV Section 18 of the Ohio Constitution, this Court read the language defining a R.C.

§2935.09 "reviewing official" to include a "judge of a court of record" to mean the court itself. However, applying this Court's logic to judges of courts of common pleas and justices of the Supreme Court would likewise lead to the conclusion that these courts are not courts of record either because the subject matter jurisdiction of courts of common pleas and the Supreme Court are likewise not extensible by R.C. §2935.09's "reviewing official" language. In fact, that language cannot constitutionally be interpreted to confer jurisdiction upon any court because it includes the prosecuting attorney as a reviewing official. Article IV Section 1 of the Ohio Constitution prohibits judicial power from being conferred upon a prosecutor, who is an officer of the executive branch. Also, the inclusion of officers from multiple branches of government removes any ambiguity that this language confers a ministerial duty upon those officers. "When an official duty does not belong inherently to the office itself, but may be devolved upon some other officer to perform, it is ministerial and its performance may be required by mandamus." *Hornack v. State of Ohio*, 8th Dist. Cuyahoga, 39 Ohio App. 203, 208. Hence, the *Helms* decision unconstitutionally both excludes judges of courts of appeals from their constitutional duty to act as R.C. §2935.09 "reviewing officials" and denies Mr. Helms' right "to remedy by due course of law" guaranteed by Article I Section 16 of the Ohio Constitution by holding that filing an affidavit pursuant to R.C. §2935.09 with a reviewing official who is "a judge of a court of record" will be summarily denied based on a lack of jurisdiction of the court over which that judge presides. Relator suggests that this Court should have used the *Helms* case to cease the statewide usurpation of judicial authority by judges of this State in denying these affidavits by entering judgment that the duty of the R.C. §2935.09 reviewing official concludes with the filing of charges pursuant to the affidavit thereby invoking the jurisdiction of a court of competent jurisdiction to hear the criminal case whereupon said court's jurisdiction is exercised to acquire

personal jurisdiction over the defendant pursuant to R.C. §2935.10. The sole purpose of R.C. §2935.10 is for the criminal court, upon having its jurisdiction invoked by the filing of the affidavit pursuant to R.C. §2935.09, to acquire personal jurisdiction over the defendant. The "due course of law" invoked in R.C. §2935.09 requires the affiant's right to be litigated within that criminal proceeding as the General Assembly has made clear in its statutory scheme extending to R.C. §2935.13 and into R.C. Chapter 2937.

(Alternatively, this Court could exercise its superintendence power pursuant to Article IV Section 5(A) of the Ohio Constitution to provide authoritative guidance to all judges of courts of record in this state regarding the R.C. §2935.09 procedural scheme. First, judges across this state are unconstitutionally refusing to file charges pursuant to these affidavits. Second, judges presiding over courts with criminal jurisdiction must be aware that when a case is initiated pursuant to R.C. §2935.09, the procedures in Chapter 2935 and 2937 are to be followed rather than the Rules of Criminal Procedure. The statutes are written in consideration of the rights of the complaining witness whereas the Rules are written for State-initiated prosecutions. The right of the People to initiate criminal prosecutions is undeniable. In fact, the authority of prosecutors to initiate these prosecutions comes from the People, a power which has been retained.)

Conveniently, the due process requirement of personal jurisdiction over the defendant delivers the fatal blow to the contention that an action in mandamus is a civil action. "It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154. The General Assembly has unambiguously authorized a writ of mandamus "without notice." *R.C. §2731.04*. The language authorizing a writ of mandamus "without notice" has existed since at least the 1921 General Code of Ohio wherein identical language is found in G.C. §12286 with a citation

to Section 6743 of the Revised Statutes dating back to 1880. In *State ex rel. Broadway Petroleum Corp., v. Elyria* (1969), 18 Ohio St.2d 23, 47 O.O.2d 149, 247 N.E.2d 471, this Court held that a court did not err "in issuing a peremptory writ of mandamus without affording *** [Respondents] an opportunity to be heard."

Characterizing actions in mandamus as civil actions is not a mere technical constitutional violation, but a legal atrocity denying the fundamental right to seek "remedy by due course of law" to every citizen of the State of Ohio anytime a public official refuses to perform an act for which said citizen is entitled. Additionally, it necessarily imbues a right in every public official in the State of Ohio to refuse to perform their lawful duties. Therefrom flows the consequential unconstitutional invasion of the General Assembly's authority to mandate duties upon public officials.

As quoted above, it is fundamental that the duty of all courts is limited to cases in which parties have adverse "legal interests". The U.S. Constitution and the Ohio Constitution protect rights of the people, which shall not be infringed. When rights are allegedly infringed upon, Article I Section 16 of the Ohio Constitution guarantees the right to seek "remedy by due course of law" for that infringement. When the perpetrator of the alleged infringement has a legal right at stake, such as the right to defend against a monetary judgment against them, the entirety of the law pertaining to civil actions guarantees "due course of law" for the litigation of the adverse rights. The assumption of adversarial legal rights is inherent in the exercise of civil jurisdiction. The Ohio Rules of Civil Procedure are promulgated for the purpose of ensuring the administration of justice in the exercise of civil jurisdiction and thus also inherently assume adversarial legal rights exist.

On the other hand, public officials have sworn an oath to perform certain duties for which the public has a right to call upon them to perform. The right of access to public records is one example. In *State ex rel. Police Officers for Equal Rights v. Lashutka* (1995), 72 Ohio St.3d 185, 648 N.E.2d 808, this Court said:

> This is yet another in a series of cases involving public records. While we have, time and time again, informed public officials and public agencies of their duties pursuant to R.C. 149.43 (to release records in their possession, which records clearly belong to the public), we, nevertheless, continue to see obfuscation, cunctation, delay and even arrogance in far too many cases. *Id*. at 186.
>
> The mandamus portion of relators' petition, which seeks the ultimate relief of release of the records sought, is granted. In addition, an award of attorney fees is allowed. R.C. 2731.06 provides, in part, that "[w]hen the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may allow a peremptory mandamus." This case cries out for such action. *Id*. at 187.
>
> In the previously referenced letter of February 17, 1995, the Division of Police takes exactly the opposite view of what *Steckman* says and holds. It might very well be said that the action of respondents in relying on *Steckman* to deny relators' request is an intentional act of disregard. Throughout *Steckman*, we referenced "pending criminal case," "criminal proceeding itself," and "prosecuting a criminal matter," so as to make clear in what context *Steckman* applies. To now see the case being used to deny records that are clearly public and not exempt under any of the exceptions to R.C. 149.43 borders itself on the criminal. *Steckman* was designed to be used as a shield—not a sword. Intentional improper use of the case could very well result in modification. A word to the wise should be sufficient. Again and again and again: *Steckman* applies to actual pending or highly probable criminal prosecutions and defines, in that context, the very narrow exceptions to R.C. 149.43. Further, while relators do not cite *Henneman v. Toledo* (1988), 35 Ohio St.3d 241, 520 N.E.2d 207, that case is clearly on point with regard to the records they seek. *Id*.

If a Proposition of Law were applicable here, it would simply be: "Public officials have no right to refuse to perform the lawful duties of their office." It is such an obvious statement. How can something be a duty if the duty-bound has the <u>right</u> to refuse to perform it ? The clear frustration evident in the tone of this Court's decision in *Lashutka* is directed at a refusal to perform a lawful duty, not the exercise of a right. (Perhaps Chief Justice Kennedy's recognition of this distinction, that she does not have a right being litigated in Case #2023-1147, explains her decision to not recuse herself, even though she is the named Respondent. Although, as explained

herein, with that understanding and the conclusions flowing therefrom, the granting of a motion to dismiss an action in mandamus is unconstitutional.)

Further, in *State ex rel. Temke, v. Outcalt* (1977), 49 Ohio St. 2d 189, 3 O.O. 3d 248, 360 N.E. 2d 701, this Court used the language "an alleged right to performance" and "nonperformance of the alleged duty" in describing an action in mandamus. This language clarifies that a mandamus action has nothing to do with adversarial rights, but the right that a duty is performed. Also, this Court said "Relators in mandamus must plead and prove the existence of all necessary facts." *Id*. Relator has sufficiently pleaded, if not proven, the existence of all necessary facts in the Amended Complaint.

In *Logan v. United States* (1892), 144 U.S. 264, the U.S. Supreme Court repeatedly referenced the relationship between the public official's duty and the right of the citizen to its performance:

> The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States. *Id*. at 284.
>
> There was a co-extensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection and peace; and a corresponding right of those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. *Id*. at 285.
>
> This duty and the correlative right of protection.... *Id*. at 295.

A public official's duty to perform an act corresponds directly with the right of the public to have that act performed. By not recognizing the mandate to perform a lawful duty, the correlative right to have that duty performed is infringed upon. By characterizing an action in mandamus to compel the performance public official's lawful duty as a civil action, a proceeding in which both parties possess adversarial rights, the duty to perform the act is no longer a duty but a right to not perform the act.

Although the notice requirement distinction is dispositive against actions in mandamus being civil actions, how to characterize them is little more than an "abstract proposition" without import in this case. However, the correct procedure to be followed in litigating a mandamus action is central to this case and it is dispositive of Respondents' Motion to Dismiss Relator's Amended Complaint.

Article IV Section 2(B)(3) of the Ohio Constitution confers a right to invoke this Court's original jurisdiction as follows:

> No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

Relying on this Court's mischaracterization that this action in mandamus is a civil action, Respondent has cited two rules, S.Ct.Prac.R. 12.04 and Civ.R. 12(B)(6), seeking to prevent the invocation of this Court's jurisdiction in direct defiance of Article IV Section 2(B)(3) of the Ohio Constitution. In doing so, Respondent advances the proposition that the individual respondent judges "have not been properly served with the amended complaint" and explicitly preserves "any arguments pertaining to service." As explained earlier, the language of R.C. §2731.04, dating back to the 1800's, unambiguously dispenses with "any arguments pertaining to service."

Rather than applying the Rules of Civil Procedure, this Court is mandated to follow the statutory procedure enacted in R.C. §2931.06 resulting in the issuance of either a peremptory or alternative writ. The language of R.C. §2931.07, requiring the entry upon the journal for the issuance of either a peremptory or alternative writ, confirms the constitutional requirement that the Court's jurisdiction is invoked by writ issuance.

The language of R.C. §2731.09 sets forth when and how a Respondent is able to respond. First, the General Assembly has mandated the procedure to be such that Respondent's first opportunity to litigate an action in mandamus is "[u]pon the return day of an alternative writ of

mandamus." The General Assembly, pursuant to Article IV Section 2(B)(3) of the Ohio Constitution, explicitly requires that an alternative writ must be issued before Respondent has any right to respond. Although Respondent has claimed Relator does not have standing, it is Respondent who lacks standing to file any pleading without an alternative writ of mandamus first having been issued. Further, the General Assembly used the language "as in a civil action" or "as in civil actions" three times in the four sentences of R.C. §2731.09. Certainly, this Court recognizes the General Assembly's constitutional authority to mandate the procedures to be carried out in mandamus actions in any way it sees fit whether by reinventing the wheel or by adopting established methods used in civil actions. Certainly the General Assembly can do so without the courts nullifying its authority to enjoin lawful duties upon public officials by imbuing a right to refuse to perform said duties in mandamus actions which are specifically purposed to enforce the performance of said duties.

Additionally, in 1913, this Court decided *State ex rel. Goodman v. Redding*, 87 Ohio St. 388, 101 N.E. 275, 10 Ohio Law Rep. 610. In that case, the Ohio Attorney General, Timothy S. Hogan, represented the Relator. Of course, this makes sense in light of R.C. §2731.04 and R.C. §109.02. A petition in mandamus is filed "in the name of the state on the relation of the person applying." R.C. §2731.04. R.C. §109.02, in relevant part, provides:

> The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested.

Prior to filing the amended complaint, Relator contacted the Supreme Court to inquire about service of the amended complaint. Relator was instructed that providing service to the AGO was sufficient because, by statute, judges of courts of appeals are represented by the AGO. Relator does not contest such a statute exists, but suggests that said statute might be applicable

when actual rights of said judges are implicated rather than their alleged default in the performance of their lawful duties. Since the AGO is the chief law enforcement officer in this State, why is the AGO arguing and actively defending against the right of the People to have public officials carry out their lawful duties ? The AGO represents the People of the State of Ohio ! At what point did the AGO turn against the People ?

Merits of Respondents' Motion to Dismiss Relator's Action in Mandamus

Subsequent to the filing of the amended complaint in this case, Relator became aware that the General Assembly had enacted legislation on April 6, 2023, exactly one day prior to the order dated April 7, 2023 denying his request for Marsy's Law relief, which was the basis of the petition filed with the Ninth District on April 22, 2023. The applicability of R.C. Chapter 2930 and the amendments enacted therein is well established, as this Court has ruled in *State v. Court of Appeals* (1922), 104 Ohio St. 96, 103:

> In the case of *Feuchter v. Keyl*, 48 Ohio St., 357, this court held: "A new remedy provided by statute for an existing right, where it neither denies an existing remedy nor is incompatible with its continued existence, should be regarded as cumulative, and the person seeking redress may adopt and pursue either remedy at his option."

Consistent with the above doctrine, R.C. §2930.011, eff. April 6, 2023 provides:

> Nothing in this chapter shall prevent a victim or the victim's other lawful representative from asserting the rights enumerated in Ohio Constitution, Article I, Section 10a.
>
> R.C. §2930.19, eff. April 6, 2023 provides, in part:
>
> (A)(1) A victim, victim's representative, or victim's attorney, if applicable, or the prosecutor, on request of the victim, has standing as a matter of right to assert, or to challenge an order denying, the rights of the victim provided by law in any judicial or administrative proceeding.

This provision squarely rebuts the Ninth District's contentions that Relator lacks standing as well as the non-existent limitation on the type of proceeding in which these rights may be invoked. It is Respondents' motion that is inapplicable in this proceeding, however.

R.C. §2930.044, eff. April 6, 2023 provides:

> A person who has not previously been identified as a victim by law enforcement, including a person claiming to be directly or proximately harmed as a result of the criminal offense or delinquent act, shall affirmatively identify the person's self to law enforcement, the prosecutor, and the courts in order to receive the information and exercise the rights described in this chapter.

This provision squarely rebuts the Ninth District's contention that Relator is not a victim based on the unconscionable dereliction of duty of every local law enforcement agency to which Relator has reported the underlying crimes. That a crime had to be charged in order for Marsy's Law to be applicable was never the law, but this statute is undeniably explicit in that regard.

R.C. §2930.02(A)(1)(b) provides that a "member of the victim's family" may exercise the rights of a victim under R.C. Chapter 2930 as the victim's representative. Relator has asserted these rights not only on his own behalf, but on behalf of his son, as evidenced by Exhibit 2 of the Amended Complaint.

R.C. §2930.01, eff. April 6, 2023, provides in relevant part:

> (A) "Criminal offense" means an alleged act or omission committed by a person that is punishable by incarceration and is not eligible to be disposed of by the traffic violations bureau.
>
> (H) "Victim" has the same meaning as in Section 10a of Article I of the Ohio Constitution.

As Relator has explained on this issue *ad nauseum*, the invocation of these rights cannot be denied simply because allegedly corrupt local authorities refuse to investigate the crimes out of protection of other allegedly corrupt local authorities. Relator has not only alleged to law enforcement, prosecutors, common pleas courts, and the Ninth District, but has also filed multiple affidavits pursuant to the statutory procedural scheme of R.C. §2935.09 *et seq*. as well as executing a citizen's arrest pursuant to R.C. §2935.04 only to have said allegedly corrupt public officials allegedly obstruct the due administration of justice as if they had a right to do so. All of these instances, as a matter of law, result in formal allegations of the crimes committed but

for the unlawful interference with Relator's right to do so. By all indications, Judge Swenski and the Ninth District acted as if R.C. Chapter 2930, effective April 6, 2023, did not exist. The AGO appears unaware even still.

Additionally, the Ninth District has argued that it has already performed its duty by ruling on the petition. *Respondent's Motion, pg. 7*. However, a court's determination that it lacks jurisdiction in a matter cannot be construed as having exercised said jurisdiction. Any pronouncement by a court lacking jurisdiction, as Respondents claim the circumstance to be, is a legal nullity.

As to Respondents' claim that an adequate remedy exists, R.C. §2930.19(A)(2)(b)(i), eff. April 6, 2023, provides:

> If the court denies the relief sought, the victim or the victim's attorney, if applicable, or the prosecutor on request of the victim, may appeal or, if the victim has no remedy on appeal, petition the court of appeals or supreme court for an extraordinary writ, and the victim has standing to assert a right of limited appeal as it pertains to the decisions impacting the rights of the victim. An interlocutory appeal filed under this section shall be filed not later than fourteen days after notice was provided to the victim as described in division (A)(1) of this section[1], and such an appeal divests the trial court of jurisdiction of the portion of the case implicating the victim's rights until the interlocutory appeal is resolved by the appellate court.

Judge Swenski's court and the Ninth District were subject to the newly enacted legislation as of April 6, 2023. Neither followed these statutory procedures at all. Both dismissed without consideration of merits claiming these procedures to be inapplicable, even though R.C. §2930.19(A)(1) unambiguously affords Relator the right to assert and to challenge the order denying the rights "in any judicial or administrative proceeding." This entire section was enacted to provide for expedient resolution of the invocation of these provisions. If a discretionary appeal to this Court were an adequate remedy at law, the General Assembly would

[1] Division (A)(2) is where the provisions for notice are described. Division (A)(1) says nothing about notice, so this is probably a typographical error.

not have enacted this elaborate scheme. It may very well be the case that availability of a discretionary appeal to this Court, in general, can be an adequate remedy. However, there is no other adequate remedy at law regarding the invocation of rights asserted by Relator in this instance.

III. Conclusion

For the foregoing reasons, Relator respectfully requests this Court deny or dismiss, as appropriate, Respondents' Motion to Dismiss Relator's Amended Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on January 16, 2024, the foregoing document was filed electronically and sent by email to:

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/s/ Matthew A. Thompson

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