

I. PRELIMINARY STATEMENT

Respondent's motion for stay of judgment and waiver of bond due to indigency fails to establish why he should not be held in contempt for failure to fully comply with this Court's Order of September 6, 2006. In the absence of an affidavit that complies with S. Ct. R. XV(3), a purported claim of indigency is not a sufficient basis to grant a motion to stay. Further, merely submitting an 11th hour petition for a writ of certiorari does not entitle Respondent to delay enforcement of this Court's Order. This Court, the United States District Court for the Southern District of Ohio, and the United States Court of Appeals for the Sixth Circuit have already considered and rejected Respondent's constitutional arguments, and there is no reason to believe that the Supreme Court of the United States will even accept Respondent's petition for filing, much less grant the writ. The motion for stay should be denied, and Respondent should be found in contempt.

II. ARGUMENT

A. Respondent's Alleged Indigence Is Not A Basis To Grant A Motion To Stay.

Once again Respondent's principal objection to this Court's Order appears to be his alleged inability to pay the costs of the action and the \$50,000 civil penalty imposed by the Court. The Court has soundly rejected this argument in denying Respondent's motion for reconsideration of its Order and Opinion of September 6, 2006. See Reconsideration Entry filed November 1, 2006. Under Ohio law, indigence is not a defense to the imposition of a fine. Rather, indigence may be a defense to incarceration for failure to pay a fine that has already been

imposed. See *Williams v. Illinois* (1970), 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586; *Tate v. Short* (1971), 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130; and R.C. 2947.14.¹

Moreover, a person claiming indigency bears the burden of going forward with evidence showing that failure to make the required payments “must be excused essentially because of practical impossibility.” *State v. Woods* (1982), 7 Ohio App. 3d 81, 82, 454 N.E.2d 554. Rule XV of the Rules of Practice of the Supreme Court of Ohio requires an affidavit that states “the specific reasons the party does not have sufficient funds” to pay the required fees or security deposit. Here, Respondent failed to submit an affidavit of any kind in support of his motion for stay, to say nothing of an affidavit setting forth the specific reasons for non-payment as required by S.Ct. R. XV.

“Indigence” is not defined in the Revised Code, but the Ohio Attorney General has identified specific criteria that are helpful in determining indigency.² These criteria include “the ready availability of real or personal property owned; employment benefits; pensions; annuities; social security; unemployment compensation; inheritances; number and age of dependents; outstanding debts, obligations and liabilities; and any other relevant considerations concerning the financial condition of an individual.” Ohio Atty. Gen. Opinion No. 90-088, 1990 WL 546997 at syl. ¶ 2; see also *State v. Watson*, Lake Cty. No. 95-L-166, 1996 WL 649117.

Therefore, even if the affidavit Respondent previously submitted with his motion for reconsideration were considered, the affidavit is insufficient to support a conclusion that he is

¹ R.C. 2947.14 provides that a court must hold a hearing to determine if an offender is unable to pay a fine or if he is able to pay, but refuses to do so. R.C. 2947.14 is part of Title XXIX, which governs criminal statutes and procedure. Because the statute addresses constitutional due process and equal protection concerns, however, its procedural safeguards are equally applicable in the civil arena.

² While specifically discussing “indigence” in the context of R.C. 2925.03(L) which deals with drug trafficking offenses, the Opinion includes a broad survey of the meaning of the term, making its application appropriate in other settings.

unable to pay.³ The purported affidavit of indigency includes no statements as to income, assets, liabilities, dependents, or other relevant information that would assist the Court in determining Respondent's present and future ability to pay the civil penalty. To the contrary, Respondent's own testimony before the Court on February 26, 2006, indicated that he received substantial income from business activities. In the absence of evidence that meets the requirement of S. Ct. R. XV(3), a motion for stay of judgment based on indigency should be denied. E.g., *State v. Cannon* (2000), 87 Ohio St.3d 1484, 722 N.E.2d 90 (denying motion for stay where appellant's document was not notarized).

B. Respondent's Petition For A Writ Of Certiorari Does Not Warrant A Stay Of Judgment.

Respondent has previously tried and failed to invoke the jurisdiction of the Supreme Court of the United States, and there is no reason to believe that Respondent's current attempt will result in a different outcome. On its face, the petition fails to comply with the Rules of the Supreme Court of the United States and may not be accepted for filing. See S. Ct. R. 12 and 13. Even if that hurdle is surmounted, a petition for a writ is granted only for compelling reasons. See S. Ct. R. 10. A petition for a writ of certiorari is rarely granted, where, as here, "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

This Court, the United States District Court for the Southern District of Ohio, and the United States Court of Appeals for the Sixth Circuit have uniformly rejected Respondent's constitutional claims. *Cincinnati Bar Ass'n v. Bailey* (2000), Case No. C2 00 1229, U.S. Dist. Ct. S. D. Ohio (improper removal of equal protection and due process claims by Bailey); *Bailey v. Columbus Bar Ass'n, et al.*, No. C2-01-0169, 2001 WL 506522 (S.D. Ohio 2001) (dismissing

³ Respondent submitted a purported Affidavit of Indigency as an Exhibit to his motion for reconsideration filed on September 15, 2006.

civil rights claims and property rights action); *Bailey v. Columbus Bar Ass'n, et al.*, Case No. 01-3459, 25 Fed. Appx. 225 (6th Cir. (Ohio) 2001) (awarding costs and fees for frivolous appeal of dismissal); *Bailey v. Moyer*, Case No. 2:05CV556, 2005 WL 1490827 (S.D. Ohio 2005) (dismissing complaint regarding constitutionality of Rule VII for the Government of the Bar). Accordingly, the likelihood that Bailey will prevail in the Supreme Court is infinitesimal and does not warrant a stay of this Court's Order. E.g., *Grendell v. Davidson* (2000), 88 Ohio St.3d 1454, 725 N.E.2d 671 (denying motion for stay of enforcement of sanctions pending appeal to the United States Supreme Court).

III. CONCLUSION

For all the foregoing reasons, Respondent's motion for stay and waiver of bond should be denied, and Respondent should be found in contempt for failure to comply with this Court's Order of September 6, 2006.

Respectfully submitted,

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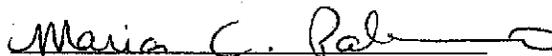
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon D. Allan Asbury, Secretary to The Supreme Court of Ohio, Board of Commissioners on the Unauthorized Practice of Law, 65, S. Front Street, 7th Floor, Columbus, Ohio 43215, and Donald L. Bailey, 4345 Donlyn Court, Building C, Columbus, Ohio 45232, by regular U.S. mail on this 1st day of February, 2007.



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