

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.

RICHARD CLARK SR.

PETITIONER

-vs-

R. SCOTT KRICHBAUM, ET AL.

RESPONDENTS

CASE NO.: 07-0925

AN ORIGINAL ACTION IN MANDAMUS

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COMBINED ANSWER AND MOTION FOR JUDGMENT ON THE PLEADINGS OF  
ONE OF THE RESPONDENTS: JUDGE R. SCOTT KRICHBAUM

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RICHARD CLARK SR.  
INMATE NO. A470648

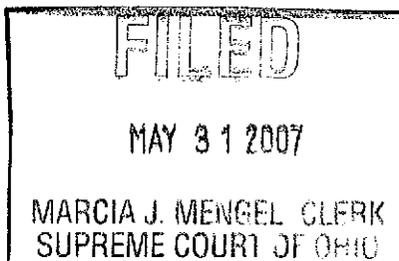
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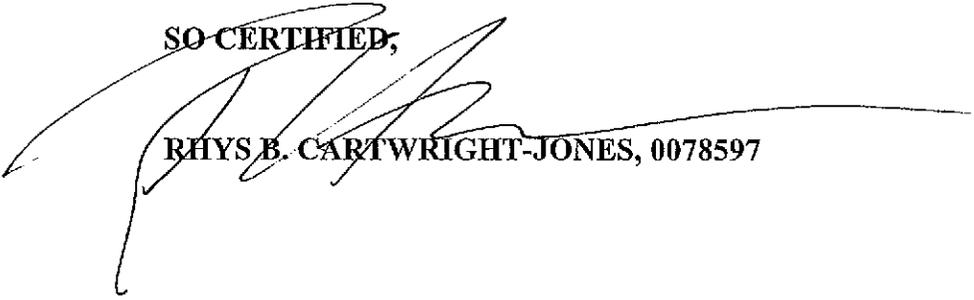
COUNSEL FOR THE STATE OF OHIO AND  
STATUTORY COUNSEL FOR ONE OF THE  
RESPONDENTS, JUDGE R. SCOTT  
KRICHBAUM



**PROOF OF SERVICE**

Served to defense counsel pro se, address appearing on the face of this motion, on this motion's date of filing, by regular mail.

**SO CERTIFIED;**



**RHYS B. CARTWRIGHT-JONES, 0078597**

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## GENERAL DENIAL

Respondent, JUDGE R. SCOTT KRICHBAUM (“Respondent” or “Judge Krichbaum”), answers the mandamus petition of Relator, RICHARD CLARK Sr. (“Relator” or “Clark”), denying each and every, all and singular, generally and specifically, the allegations contained in the petition, and each and every part thereof, and in this connection denies that Clark has been injured or damaged in any sum, or otherwise, or at all.

## AFFIRMATIVE DEFENSES

(1) As a first separate and/or affirmative defense to the Petition and each cause of action thereof, Respondent submits that the Petition does not state facts sufficient to constitute a cause of action against this Respondent and that the Petition is subject to dismissal under Civ.R. 12(B)(6), Civ.R. 12(C), or under common law demurrer, either in whole or in part.

(2) As a second separate and/or affirmative defense to the Petition and each cause of action thereof, this matter contains no mention of an active case or controversy and is, therefore, moot.

(3) As a third separate and/or affirmative defense to the Petition and each cause of action thereof, this matter contains no mention of an active case or controversy and is, therefore, unripe for review.

(4) As a fourth separate and/or affirmative defense to the Petition and each cause of action thereof, the decision of this Court’s Chief Justice relative to Clark’s affidavit of disqualification in the matter styled State v. Clark, 08-AP-44 bars this cause under the doctrine of res judicata either in part or in whole.

(5) As a fifth separate and affirmative defense to the Petition and each cause of action thereof, this action fails where Clark failed to appropriately name this Respondent as a respondent in his capacity as a Common Pleas Judge.

(6) As a sixth separate and affirmative defense to the Petition and each cause of action thereof, Clark has no right to extraordinary relief because he has a plain and adequate remedy in the ordinary course of the law, to wit: direct appeal.

(7) As a seventh separate and affirmative defense to the Petition and each cause of action thereof, Clark has no right to extraordinary relief as to this Respondent because this Respondent, having already acted as Clark demands, to wit: having provided Clark with his rights to allocution, is under no clear, legal duty to act any further.

(8) As a eighth separate and affirmative defense to the Petition and each cause of action thereof, Clark has no right to extraordinary relief because Clark has no clear legal right to the relief prayed for.

(9) As a ninth separate and affirmative defense to the Petition and each cause of action thereof, this Respondent reserves the right to allege other affirmative defenses as they may arise during the course of discovery or in response to further pleadings.

Respectfully Submitted,

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RESPONDENTS, JUDGE R. SCOTT  
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## STATEMENTS OF THE CASE AND FACTS AND INTRODUCTION

To provide some background, the original matter underlying this action is a child rape case from 2003. The case proceeded on an indictment for one count of Rape under R.C. 2907.02(A)(1), with a mandatory life sentence for rape of a minor under age ten, and one count of Gross Sexual Imposition under R.C. 2907.05(A)(4), punishable by five years' imprisonment. The indictment included a sexual predator specification as to both counts. Following trial, the jury convicted Mr. Clark on all charges. The trial court sentenced him on June 22, 2004 to life for Rape and to five years for Gross Sexual Imposition, sentences to run consecutively, attaching the specification. The case proceeded through direct appeals, sentencing appeals, and collateral attacks, all of which have yielded for Mr. Clark no relief, save for a resentencing order under this Court's decision in *State v. Foster* (2006), 109 Ohio St.3d.1. Further, Clark's recent action in disqualification, No. 07-AP-44, resulted in this Court's Chief Justice denying the same as being moot, where Clark was already resentenced.

This action incorporates roughly the same terms as Clark's disqualification action, alleging that Judge R. Scott Krichbaum denied Clark his common law right to allocution at his sentencing. Nevertheless, Clark's petition fails both as a matter of law and as a matter of fact. First, given the elements of mandamus, *infra*, which require among other things that the petitioner have no adequate remedy in the ordinary course of law, Clark's action fails, where he has a direct appeal pending relative to his sentence—verily an adequate legal remedy for any sentencing defect. Second, even if Clark did have a legal inroad to mandamus relief, his claims fail as a matter of fact—at least as to Judge Krichbaum—where the trial court afforded him full rights in allocution at his sentencing. Thereby, given all the reasons this Brief contains,

incorporating this Respondent's answer, statutory counsel moves this Court to deny Clark's request for relief and to tax to him the costs of this action.

## LAW AND DISCUSSION

### (I)

Clark's petition fails under the common law of mandamus. In order to establish the right to a writ of mandamus, Clark must demonstrate (1) a clear legal right to the relief prayed for, (2) that the respondent is under a clear legal duty to perform the requested act, and (3) that the relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Evans v. Indus. Comm.* (1992), 64 Ohio St.3d 236, 238, 594 N.E.2d 609. And, according to the Courts, "If any of these elements is not shown, the petition *must* be denied." *State ex rel. Felson v. McHenry* (1<sup>st</sup> Dist. 2001), 146 Ohio App.3d 542, 545, 767 N.E.2d 298, emphasis added, and the keyword being *must*.

Among other possibilities, the key here is the third element: available remedies in the ordinary course of law. To the extent that one can discern a clear request from his petition as to this Respondent, Clark demands roughly a new sentencing with further rights in allocution and the right to call witnesses on his behalf and further opportunity to speak with his appointed attorney. But even if the trial chamber had denied him his rights to counsel and allocution in his May 13, 2007 sentencing, Clark has adequate remedy in the ordinary course of law, to wit: direct appeal. See, e.g., *Mempa v. Rhay* (1967), 389 U.S. 128, upholding the right to counsel at sentencing hearings; see, also, *Green v. U.S.* (1961), 365 U.S. 301, identifying the basic right to allocution as an opportunity to speak, on one's own behalf, and to present a statement in mitigation of a sentence. *State v. Mikolaj*, 7<sup>th</sup> Dist. No. 05-MA-157, 2007-Ohio-1563, reversing

for resentencing due to a violation of Defendant-Mikolaj's right to allocution; U.S. Const. Amend. V, U.S. Const. Amend. XIV; Oh. Const. Art I, sec. 3. Indeed, Clark is pursuing that avenue today, the Court of Appeals having taking notice of his sentencing appeal, following his resentencing, and having appointed him an attorney to pursue it. *State v. Clark*, 7<sup>th</sup> Dist. No. 07-MA 87, noticed May 18, 2007.

## (II)

Moreover, Clark's claim, even if properly pled in mandamus, would give him no right to relief. Clark's petition evincēs a certain bewilderment as to what allocution is. He gives one the impression that he thinks he stumbled across an ancient legal rite that is sure to set him free. He has not. The right to allocution, embodied in Crim.R. 32(A)(1)<sup>1</sup> and R.C. 2929.29(A)(1), is simply this: the trial court's duty to ask a defendant whether he has anything to say on his own behalf and the defendant's respective right to say it. See, also, *Green*, supra, identifying the right as the simple right to speak in mitigation of one's own sentence—not, as Clark would have it, to prove oneself not-guilty at a third sentencing hearing. As the Nevada Supreme Court had it,

The right of allocution is not intended to provide a convicted defendant with an opportunity to introduce unsworn, self-serving statements of his innocence as an alternative to taking the witness stand. The proper place for the introduction of evidence tending to establish innocence is in the guilt phase of trial. At the penalty phase, the defendant's guilt has already been assessed and is no longer in issue.

*Echavarria v. State* (1992), 108 Nev. 734, 744, 839 P.2d 589. Further, under Ohio law, the right to allocution in a non-capital case is simply the right to speak for oneself on one's own behalf.

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<sup>1</sup> According to the Rule, the trial court shall, inter alia, "[a]fford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment."

The law does not demand witness testimony, and a defendant has no right to present it. *State v. Wilson*, 5<sup>th</sup> Dist. No. 05-CA-5, 2005-Ohio-6201.

Given the definition above, the trial court afforded Clark full rights to allocution. Granted, following a hearing on Clark's pro se motions, and due to nearly a dozen interruptions from Clark, the trial Court had not asked Clark whether he had anything to say on his own behalf when Clark demanded it. The transcript, at pg. 40-42, emphasis added, reflects the following colloquy,

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**CLARK:** But, Your Honor, I have a right to allocution.

**THE COURT:** I'm willing to listen. Your lawyer already told me what he has to say--

[Interruption from Clark.]

**THE COURT:** --and now I'll listen to what you have to say.

[...]

**THE COURT:** So whatever you have to say in mitigation of punishment or as to why judgment and sentence cannot be pronounced or should not be pronounced you are welcome to present that at this time.

At which point, Clark spent the next twelve transcript pages speaking in his own behalf. [Tr. at 40-52.] Granted, the trial court did not state this in the form of a question—"do you have anything to say on your own behalf, Mr. Clark"—but the Court need not follow the rules of Jeopardy, only the common law, and the Criminal Rules, no case interpreting which sets out any specific incantations, the only requirement being that the trial court offer counsel the opportunity to speak and the defendant the opportunity to speak and introduce information in mitigation. That occurred here, as the next dozen pages of the transcript contain Clark speaking on his own behalf, albeit unsuccessfully.

As to whether the trial court afforded Clark enough time to speak with his trial attorney, this is largely a question for Respondent-Mooney. Nevertheless, no cases interpreting the right to counsel at sentencing hearings define a set time frame. Notably, Clark received for sentencing the same attorney who prosecuted his appeal and secured reversal of his sentencing, and any claim that his attorney was not prepared to deal with sentencing issues is specious. Further, Clark makes no showing of prejudice as to this alleged breach. What could anyone do? Clark faces a mandatory life sentence for forcible child rape. Again, the Court's only discretion is whether to issue a one, two, three, four, or five year term of confinement consecutive to the life sentence. Either way, Clark is in prison for life, and any claim to prejudice as to his not having appropriate time to confer with counsel affords him no right to relief.

#### **CONCLUSION**

**WHEREFORE**, the State prays this Court adjudge this action on the pleadings, dismissing Relator-Clark's petition, denying his request for relief, and taxing to him the costs of this action.

Respectfully Submitted

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