IN THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO, *ex rel.*, RICHARD F. SCHWARTZ, In His Capacity As The Director Of Law And Prosecuting Attorney Of The City Of Newton Falls, Ohio, Relator, vs. LARRY TURNER, In His Capacity As Judge Of The Newton Falls Municipal Court, Respondent.	CASE NO. 07-0303 ORIGINAL ACTION IN PROHIBITION **RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS ON THE BASIS OF MOOTNESS**

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CLERK OF COURT
SUPREME COURT OF OHIO

Relator, Richard F. Schwartz, Director of Law and Prosecuting Attorney, City of Newton Falls, Ohio, respectfully opposes the Motion to Dismiss on the Basis of Mootness filed by Respondent, Larry Turner, Judge, Newton Falls Municipal Court. As demonstrated below, Respondent's renewed request for dismissal of this prohibition action is without merit. Accordingly, this Court should deny the Motion to Dismiss, issue the previously-requested Alternative Writ, establish a briefing schedule, and determine this matter on its merits.

I. INTRODUCTION AND RELEVANT ADDITIONAL FACTS

As the Court is well aware, the principle question at issue in this case is whether Respondent was legally authorized to conduct judicial proceedings at a location outside the statutory-prescribed jurisdiction of the Newton Falls Municipal Court. Relator maintains that, because the Newton Falls Municipal Court is a court of limited jurisdiction established by statute, its jurisdiction must be narrowly construed; therefore, absent a specific grant of authority to act outside the jurisdiction of that Court, all proceedings must be held within the limited territory of that Court.

Respondent once before moved to dismiss this action, arguing then that the underlying conduct had ceased and therefore prohibition was not warranted. Relator opposed that motion, and it remains pending.

Respondent's latest argument arises out of yet another *sua sponte* Journal Entry, issued on July 5, 2007. (Ex. 1 to Mot. to Dismiss.) This Journal Entry provides that, instead of conducting in-jail arraignments and other judicial proceedings at the Trumbull County Jail, Respondent will utilize video technology to hold arraignments, probable cause hearings, and initial bond hearings, with the defendants located at the Trumbull County Jail and Respondent in the Newton Falls Courthouse.

(*Id.* at 2.) In addition, the Journal Entry purports to "permanently supersede[]" the Journal Entries of January 9 and 23, 2007 that initially gave rise to this action. (*Id.*)

As was true with every other Journal Entry that has been at issue in this case, [1] this Journal Entry was not the product of any hearing or deliberative process by which the Court received evidence, argument, or submissions from anyone. Instead, it is merely yet another *ipse dixit* pronouncement, designed and intended to put the "best light" on the prior Journal Entries in an effort to seek an elegant escape from this action. For the reasons that follow, the latest Journal Entry does not require dismissal of this case on the basis of mootness.

II. RELATOR'S REQUEST FOR RELIEF IS NOT SUBJECT TO DISMISSAL ON THE BASIS OF MOOTNESS

The essence of Respondent's argument is that because the July 5, 2007 Journal Entry "permanently supersede[s]" the January 2007 Journal Entries, this Court may no longer consider the merits of Respondent's request for a writ of prohibition. For three reasons, Respondent is wrong.

First, it is a well-established that the voluntary cessation of an activity does not render a case moot and therefore subject to dismissal.

Second, Respondent's Motion to Dismiss fails to address in any way the fact that prohibition is the proper means to correct a prior jurisdictionally-unauthorized activity. This is telling, as Relator asserted this same argument in his Memorandum in Opposition to Respondent's original Motion to Dismiss.

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[1] For unknown reasons, Respondent fails to inform this Court of the existence of yet another Journal Entry, this one apparently entered on May 2, 2007. That Journal Entry, a copy of which is attached hereto as Exhibit 1, purported to authorize seven different categories of video proceedings, including arraignments, bond modification hearings, probation and sentencing violation hearings, and the like. It too was issued without the benefit of any deliberative process. It made no effort to withdraw or supersede the January 2007 Journal Entries.

Third, despite his arguments to the contrary, given Respondent's proclivity to issue Journal Entries without prior notice to and without obtaining input from affected parties, it is substantially likely that Respondent will issue yet another Journal Entry reinstating the practice of in-jail arraignments or otherwise purporting to sanction judicial activity of the Newton Falls Municipal Court outside of its territorial jurisdiction. Therefore, the January 2007 Journal Entries and/or the underlying unlawful conduct remain reviewable under the "capable of repetition, yet evading review" exception to the mootness doctrine.

A. Voluntary Cessation Of An Unlawful Activity Does Not Render A Case Moot.

Respondent asserts this case is moot because the Journal Entry authorizing arraignments and other judicial proceedings at the Trumbull County Jail has been permanently superseded and he is no longer engaging in such activity. This argument rests on the premise that the voluntary cessation of an activity renders legal proceedings moot. The law, however, does not concur.

More than fifty years ago, the United States Supreme Court addressed this issue in *United States v. W.T. Grant Co.* (1953), 345 U.S. 629. There, the issue was the legality of the Clayton Act's prohibitions on interlocking corporate directors. The case arose out of Mr. Hancock's membership on a variety of boards in companies that allegedly competed. After he resigned from several boards, the companies sought dismissal of the government's enforcement action on the grounds that the dispute was moot. The Supreme Court rejected this argument, explaining as follows:

> Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of

> right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

Id. at 632 (citations omitted); *accord Ohio Academy of Nursing Homes v. Barry*, Franklin Cty. App. No. 92AP-1266, 1993 Ohio App. LEXIS 2708, at *6-*7; *Ervin v. Village of Dalton*, Wayne Cty. App. No. 1700, 1981 Ohio App. LEXIS 13740, at *4.

Those same principles apply equally here. Just because Respondent has issued a Journal Entry reciting that the January 2007 Journal Entries are "permanently superseded" does not mean that he will not, at some future time, resume the extraterritorial judicial activities that gave rise to this case in the first instance. In the words of the Supreme Court, at any time Respondent "is free to return to his old ways."

Establishing mootness is a heavy burden. *See Akers v. McGinnis* (6th Cir. 2003), 352 F.3d 1030, 1035 ("The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."). Respondent has simply not carried that burden here.

B. A Writ Of Prohibition Remains The Proper Means By Which To Correct Prior Jurisdictionally-Unauthorized Activity, Such As That At Issue In The Complaint.

As Relator explained previously, this Court has made clear that even if a dispute giving rise to an application for a writ of prohibition is moot (and Respondent does not concede that the present case is moot), the writ may nevertheless issue if necessary to correct a prior jurisdictionally-unauthorized activity. *See State, ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶ 15 (per curiam); *see also State, ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, at ¶ 12 ("If a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition and mandamus will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.") (per curiam). Although this

Court denied the writ in *Cruzado*, it did so on the merits, finding that the trial court did not unambiguously lack jurisdiction. *See Cruzado*, 111 Ohio St.3d at 356, 2006-Ohio-5796, at ¶ 15.

Respondent unambiguously lacked jurisdiction to conduct arraignments and probation violation proceedings – or any other judicial proceedings for that matter – at any location outside of the territorial jurisdiction of the Newton Falls Municipal Court. As explained in Relator's Memorandum in Support of Motion for Alternative Writ of Prohibition and in Section II(C) of Relator's Memorandum in Opposition to Motion to Dismiss, a court of limited geographical jurisdiction such as the Newton Falls Municipal Court may not conduct proceedings at any location outside of its statutorily-defined territory. That is precisely what Respondent did when he conducted arraignments and probation violation hearings of the various Newton Falls Municipal Court defendants at the Trumbull County Jail itemized in the Complaint. (Complaint, ¶ 11 & 12.) That location is, of course, outside of the territory of the Newton Falls Municipal Court. Thus, a writ of prohibition is necessary to correct Respondent's prior jurisdictionally-unauthorized activity.

C. Even If The Operative Provisions Of The January 2007 Journal Entries Are Deemed Moot By The July 5, 2007 Journal Entry, Respondent's Conduct Remains Reviewable Under The "Capable Of Repetition, Yet Evading Review" Doctrine.

Respondent's mootness argument also fails, because under the particular facts of this case, the objectionable conduct remains reviewable under the "capable of repetition yet evading review" doctrine, an exception to the general principal that a moot controversy will not be subject to judicial review. As this Court have previously explained, "this exception arises when the challenged action is too short in duration to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again." *State, ex rel. Dispatch Printing Company v. Louden*, 91 Ohio St.3d 61, 64, 2001-Ohio-268 (per curiam).

This Court has routinely applied this exception to review trial court orders restricting public or media access to courts. For example, in *Dispatch Printing Company*, this Court issued a writ of prohibition directing that a trial court not enforce a courtroom closure order, even though the order was claimed to be moot. *Id.* This Court specifically noted that application of this exception to the mootness doctrine was warranted because "there is a reasonable expectation that in the absence of the requested writ, [Respondent] will again close further proceedings." *Id.*; *see also State, ex rel. Beacon Journal Publishing Co. v. Donaldson* (1992), 63 Ohio St.3d 173, 175 (per curiam).

As Respondent has previously asserted, this case is analogous to courtroom closure cases. Respondent summarily issued an *ex parte* order determining that he would conduct a variety of judicial proceedings outside of the jurisdiction of the Newton Falls Municipal Court. Just as summarily, he issued another order that temporarily halted that practice. (Complaint ¶ 7.) He then summarily issued another series of orders regarding video hearings. Now, he contends that because his last Journal Entry "permanently superseded" his January 2007 Journal Entries, the underlying dispute is not capable of repetition, yet evading review.

In point of fact, the latest Journal Entry makes it all the more apparent that this Court must apply the capable of repetition, yet evading review doctrine. Respondent's proclivity for issuing *ex parte* Journal Entries regarding Court procedures is manifest. There have now been **four** since mid-January. Each has been issued without a hearing being held; without evidence having been received; without participation from interested parties; indeed, without any procedure whatsoever. It is thus not, as Respondent suggests, outside reasonable expectation to believe that Respondent may, if so moved, "permanently supersede" the July 5, 2007 Journal Entry with another that restores in-jail arraignments and judicial proceedings, or one that purports to authorize him to conduct other judicial proceedings outside the territorial jurisdiction of the Newton Falls Municipal Court. Were that to

happen, Relator would be forced to recommence these proceedings. Then, Respondent could easily "permanently supersede" that Journal Entry and thereby again avoid review. A never-ending cycle of filings, dismissal, and "permanently superseded" Journal Entries would ensue, all in an effort to avoid review by this Court. *See, e.g., Stephens v. Painesville Raceway, Inc.* (6th Cir. 1981), 667 F.2d 1029 (holding that court could review decision to deny a horse stall space for race meet, explaining: "A racing meet is less than three months long. If appellants' case was mooted when the meet ended, they would never get appellate review of a decision to deny them stall space.").

Fortunately, that is precisely the fact pattern that the capable of repetition, yet evading review doctrine is design to forestall. Accordingly, if the Court were to find the Complaint moot by virtue of the latest Journal Entry, this Court should apply this doctrine to review the underlying legal question and issue an appropriate ruling declaring it legally impermissible.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in Relator's Memorandum in Support of Motion for Alternative Writ of Prohibition and Memorandum in Opposition to Dismiss, this Court should deny Respondent's Motion to Dismiss on the Basis of Mootness, issue the previously-requested Alternative Writ, establish a briefing schedule, and hear this matter on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2007, a true and correct copy of the foregoing was sent by electronic-mail and first-class mail, postage-prepaid, properly addressed, to the following: Anne Marie Sferra, Esq. & Jennifer A. Flint, Esq., BRICKER & ECKLER LLP, 100 South Third Street, Columbus, Ohio 43215-4291.

Darrell A. Clay

15033/508975-1

ATTN: DARRYL CLAY

IN THE NEWTON FALLS MUNICIPAL COURT
TRUMBULL COUNTY, OHIO

In the Matter of:	Case No. GEN-0700015
ARRAIGNMENT OF DEFENDANTS IN THE CUSTODY OF THE TRUMBULL COUNTY SHERIFF	Journal Entry

The matter came on for consideration this 2nd day of May 2007 upon the Court's own motion. It appearing that the current practice of transporting defendants in the custody of the Trumbull County Sheriff to this Court is (i) an excessive use of manpower by the Sheriff's Department; (ii) that such manpower can be far better utilized by the Sheriff protecting and serving the citizens of Trumbull County patrolling the roads and highways of the county and investigating criminal activity; (iii) there is an inherent danger to the public, the defendants and those deputies transporting them in taking prisoners to and from Court; (iv) the Court's personnel, Trumbull County Sheriff and the Trumbull County Commissioners have worked diligently to provided a system of electronic (video) arraignments to the Newton Falls Municipal Court; (v) the electronic equipment and software is now in place to facilitate such video arraignments; (vi) the Trumbull County Jail has accommodations for the holding video hearings in a judicial setting; (vii) no defendant's constitution or procedural safeguards will be prejudiced by holding Newton Falls Municipal Court video hearings where the Defendants are in the Trumbull County Jail and (viii) the Warren Municipal Court has contributed the necessary in-court equipment, at no costs to the taxpayers of the district, to accommodate the conducting of video arraignments where the Defendant is in the Trumbull County Jail and the Court is in its courtroom in Newton Falls.

As used in this Order, "video hearings" shall include (i) arraignment; (ii) probable cause and initial bond hearings; (iii) bond modification hearings; (iv) probation violation hearings; (v) sentencing violation hearings; (vi) early release hearings (with other witnesses, if any, in the courtroom), and (vii) sentencing modification hearings. Video hearings shall consist of the defendant being at the Trumbull County Jail, in the judicial suite, or at such other location as the Sheriff or other law enforcement agency determines and the Court in its courtroom, in open court, in Newton Falls. Communication between the defendant and the Court shall be by video and audio equipment of sufficient quality that the defendant can see and hear the Court and other participants in the case and the Court can see and hear the defendant.

The Court finds that it can schedule its Judge to conduct such video hearings in late mornings, subject to other Municipal Courts' usage schedules. Such scheduling by this Court is for Monday, Tuesday and Thursday of each week at 11:30 o'clock a.m., subject to modification for other scheduling requirements or for the convenience of the Sheriff's Department. In consideration whereof, its is, by this Court

ORDERED that its Judge shall hold video hearing for defendants in the custody of the Sheriff's Department in the Trumbull County Jail on Monday, Tuesday and Thursday mornings provided such dates are regular business days for the Court. It is further

ORDERED that such video hearing do not preclude the Sheriff's Department or other law enforcement agencies from transporting defendants to the Court for arraignment in Newton Falls; nor the Court directing that defendants appear in person in the Court for arraignment. It is further

ORDERED should any defendant object to the video hearing procedure and such objection being made prior to the hearing, such video hearing may, at the Court's discretion, be stayed and the Court direct that the defendant appear in person in the Court. Should the defendant, or counsel for the defendant, object to the video hearing at or subsequent to the start of the video hearing, the Court may, at its discretion, rehearing the matter with the defendant physically present in the Court. It is further

ORDERED that this accommodation shall continue so long as the Sheriff's Department and the Court are in agreement to such arrangement. It is further

ORDERED that any financial arrangements between the defendants and the Court; such as the posting of bond, payment of costs, etc.; shall be processed under the same guidelines as the Sheriff's Department has with other Courts conducting video arraignments. It is further

ORDERED that this Order shall not affect nor change the current practice of transporting defendants to the Newton Falls Municipal Court for reasons other than such proceedings as provided herein, unless ordered by this Court.

Lawrence S. Turner
Judge

May 2, 2007

Copy to: Trumbull County Sheriff
Warren Municipal Court