

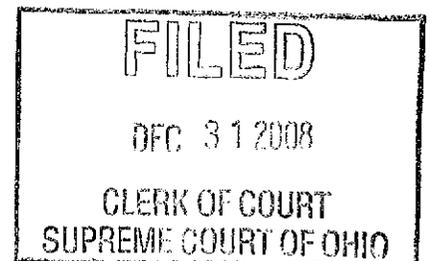
IN THE SUPREME COURT OF OHIO

STATE, ex rel. LARRY E. EALY, : CASE NO. 08-2400
Relator, :
v. : Original Action in Mandamus
JUDGE BARBARA GORMAN, :
Respondent. :

**MOTION TO DISMISS OF RESPONDENT,
JUDGE BARBARA GORMAN**

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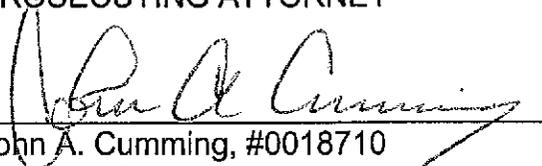
MOTION TO DISMISS

Pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure and S. Ct. Prac.R. X, Sec. 5, the Respondent moves the Court to Dismiss Relator's "Complaint in Mandamus" in its entirety, for the reason that Relator's "Complaint in Mandamus" fails to state a claim against Respondent upon which relief in mandamus can be granted.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: _____


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MEMORANDUM

On December 16, 2008, Relator, Larry E. Ealy ("Ealy"), filed his "Complaint in Mandamus" in this action. Although his "Complaint in Mandamus" contains much extraneous and irrelevant material, the Complaint alleges generally that Ealy has a traffic matter pending in the Dayton Municipal Court as Case No. 08-TRD-03189; that the traffic case has been assigned to Visiting Judge James D. Ruppert sitting by assignment as Visiting Judge in the Dayton Municipal Court; that Ealy filed an Affidavit to Disqualify Visiting Judge Ruppert; and that the Respondent herein, Montgomery County Common Pleas Court Judge Barbara P. Gorman ("Judge Gorman"), refused to

disqualify Visiting Judge Ruppert. See "Decision, Order and Entry Overruling Defendant's Affidavit of Disqualification Regarding Visiting Judge James R. Ruppert" filed by Judge Gorman on September 12, 2008 in Case No. 2008-CV-8417, a copy of which is attached to Ealy's Complaint. In his "Complaint in Mandamus," Ealy requests this Court to issue an order "directing Judge Gorman to disqualify Judge James R. Ruppert."

For the reasons which follow, Judge Gorman submits that Ealy's Complaint fails to state a claim upon which relief in mandamus can be granted, and that his Complaint should be dismissed as a matter of law.

I. EALY'S "COMPLAINT IN MANDAMUS" SHOULD BE DISMISSED BECAUSE HE HAS NO CLEAR LEGAL RIGHT TO THE RELIEF HE HAS REQUESTED, AND BECAUSE JUDGE GORMAN IS UNDER NO CLEAR LEGAL DUTY TO PERFORM THE REQUESTED ACT.

In order to be entitled to a writ of mandamus, a petitioner must demonstrate: (1) that he has a clear legal right to the relief requested; (2) that the respondent is under a clear legal duty to perform the requested act; and (3) that he has no plain and adequate remedy in the ordinary course of law. State ex rel. Lorain v. Stewart (2008), 119 Ohio St.3d 222, 2008-Ohio-4062, ¶ 23; State ex rel. Gen. Motors Corp. v. Indus. Commission (2008), 117 Ohio St.3d 480, 2008-Ohio-1593, ¶ 9; State ex rel Luna v. Huffman (1996), 74 Ohio St.3d 486, 487.

In the instant case, Ealy has no "clear legal right" to the relief he has requested. Indeed, he has no legal right at all to the relief he has requested. As Judge Gorman properly ruled in her Decision, Order and Entry overruling Ealy's request that Visiting Judge Ruppert be disqualified, Ealy's Affidavit to Disqualify Visiting Judge Ruppert was

deficient procedurally in that it failed to comply with the mandatory requests of O.R.C. § 2701.031(B), and was deficient on its merits in that it failed to set forth any legitimate reason why Visiting Judge Ruppert should be disqualified. See Judge Gorman's "Decision, Order and Entry Overruling Defendant's Affidavit of Disqualification Regarding Visiting Judge James R. Ruppert" filed on September 12, 2008 in Case No. 2008-CV-8417, a copy of which is attached to Ealy's "Complaint in Mandamus." Similarly, Judge Gorman was under no "clear legal duty" to disqualify Visiting Judge Ruppert. On the contrary, for the reasons stated in her Decision, Order and Entry, Judge Gorman acted lawfully and correctly in refusing Ealy's request to disqualify Visiting Judge Ruppert. In short, for the reasons stated by Judge Gorman in her Decision, Order and Entry Overruling Ealy's Affidavit to Disqualify Visiting Judge Ruppert, Ealy certainly has no clear legal right to the relief he is requesting in this action, and Judge Gorman is certainly had no clear legal duty to disqualify Visiting Judge Ruppert, as Ealy is requesting in his Complaint. For this reason alone, Ealy's "Complaint in Mandamus" should be dismissed as a matter of law.

Parenthetically, it is noted that Ealy makes reference in the "Supporting Memorandum" portion of his "Complaint in Mandamus" to an alleged video tape of his traffic stop which he claims was "destroyed" by the Dayton Police. This "allegation" is not directed against Judge Gorman, and is irrelevant to Ealy's request for a writ of mandamus directing Judge Gorman to disqualify Visiting Judge Ruppert.

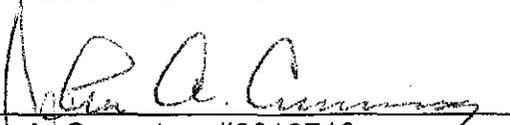
II. CONCLUSION

For all of the reasons stated herein, Judge Gorman respectfully submits that Ealy's "Complaint in Mandamus" should be dismissed as a matter of law, with prejudice.

Respectfully submitted,

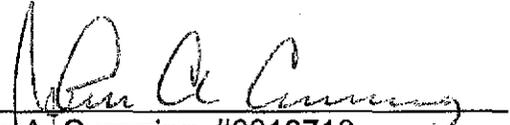
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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by ordinary U.S. Mail, postage prepaid, on the 21st day of December, 2008, to Larry E. Ealy, Relator, 4687 Marlin Avenue, Trotwood, Ohio 45416.


John A. Cumming, #0018710
Assistant Prosecuting Attorney