ORIGINAL

IN THE

SUPREME COURT OF OHIO

RAYMOND DEAN AUSTIN	:	Case No. 2010-1096
Petitioner-Appellant	:	On Appeal from the Ross County Court of Appeals
vs.	:	
ROBIN KNAB, WARDEN	:	Court of Appeals Case No. 10CA003143
Respondent-Appellee	:	

MERIT BRIEF OF RESPONDENT-APPELLEE

RICHARD CORDRAY
Ohio Attorney General

William H. Lamb (0051808)
Assistant Attorney General

Criminal Justice Section
441 Vine Street
1600 Carew Tower
Cincinnati, Ohio 45202
(513) 852-3497
(513) 852-4374 (FAX)

COUNSEL FOR RESPONDENT-APPELLEE

Raymond Dean Austin, #A240-084
Pro Se
P.O. Box 5500
Chillicothe Correctional Institution
Chillicothe, Ohio 45601

PETITIONER-APPELLANT

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Statement of Facts

Raymond Dean Austin was convicted pursuant to his plea of five counts of rape. *State v. Austin,* Summit App. No. 15277, 1992 Ohio App. LEXIS 1963 (April 15, 1992). The victim was his nine-year-old stepdaughter. *State v. Austin,* Summit App. No. 20554, 2001 Ohio 1781 (November 21, 2001). According to the online offender information provided by the Ohio Department of Rehabilitation and Correction, Austin was sentenced to an indefinite minimum sentence of 15 years and an indefinite maximum sentence of seventy-five years. Ohio Department of Rehabilitation and Correction, Offender Search Detail under Raymond Austin at http://www.drc.ohio.gov/OffenderSearch/Search.aspx under the name Raymond Austin. Austin's next parole board hearing will be in February 2011. *Id.* Austin is currently incarcerated at the Cillicothe Correctional Institution. *Id.*

In January 21, 2010, Austin filed what appears from numerous documents to be a writ of habeas corpus in the Fourth Appellate District, Ross County, Ohio. On May 10, 2010, the Fourth Appellate District, Ross County, denied Austin's habeas petition on the basis that it was fatally defective because Austin failed to comply with R.C. 2969.25 in that he did not file an affidavit containing a description of each civil action or appeal of a civil action that he filed in the previous five years in any state or federal court. Austin's motion for reconsideration was denied on May 26, 2010. Austin then filed his notice of appeal to this Court on June 22, 2010, and his merit brief on August 12, 2010.

Argument

Introduction

Austin's pleading before this Court is even more confusing than his pleadings below. He advances six propositions in this Court that bear no semblance to the eight grounds presented below and argues that this case is of great public interest to prevent "SLAVERY-PEONAGE-VILLIENAGE within the STATE OF OHIO..." etc. See, Austin's habeas appeal in this Court at iii and iv. In Austin's habeas petition below he set forth eight grounds that come closer to lucidity than his pleading in this Court and were the basis of the Court of Appeals' review. Setting aside, therefore, Austin's six apparent propositions of law in this Court as indecipherable and not helpful, the question is whether the lower Court of Appeals was correct to deny Austin's petition on the ground stated or, even if in error, whether this Court should deny Austin's appeal of his habeas petition for other reasons. *State ex rel. Swain v. Bartleson,* 123 Ohio St. 3d 125; 2009 Ohio 4690, *citing, State ex rel. Deiter v. McGuire,* 119 Ohio St. 3d 384; 2008 Ohio 4536 at ¶21. The eight grounds presented to the Court of Appeals begin at about the eighth page from the beginning of Austin's habeas petition presented below and are numbered pages 5-7.

Proposition of Law No. 1:
The Court of Appeals' decision to deny the petition because Austin did not comply with R.C. 2969.25 should be affirmed.

The Court of Appeals denied Austin's habeas petition because he failed to comply with R.C. 2969.25 in that Austin did not file an affidavit describing all civil actions and appeals filed in the preceding five years. The Court of Appeals noted that the information the inmate is required to provide includes a brief description of the action, the case name, the case number, and the court where the action was filed, the name of each party, and the outcome of the action. Decision and Judgment Entry, May 10, 2010. The Court of Appeals held that Austin's complaint

did not include an affidavit supplying the required information; and, furthermore, Austin cannot correct the omission because the statute expressly states that a verified statement shall be filed at the time the inmate commences the action. *Id.* According to the Court of Appeals, the requirements of R.C. 2969.25 are mandatory and failure to comply subjects Austin's habeas action to dismissal. *Id.*

The Court of Appeals is correct that Austin did not comply with R.C. 2969.25. Austin filed over seventy pages of documents, mostly written by himself and mostly indecipherable, of which two pages contain information regarding "prior civil filings." The pages of Austin's pleading below date January 21, 2010, are not sequentially numbered and are difficult to find. The two pages in question that are approximately 38 pages in from the beginning of the document give a case number, the case caption, the court, and a short phrase regarding Austin's version of the outcome. The two pages of this information do not contain all of the information required by R.C. 2969.25 insofar as there is no information regarding a description, even a brief one, of the nature of the civil action or appeal, and there is no information regarding the name of each party or whether the court dismissed the action or appeal as frivolous or malicious. R.C. 2969.25(A)(1) through (4). Thus it appears Austin did not in good faith comply with the relatively simple requirements of the statute.

As noted by the Court of Appeals, the requirements of R.C. 2969.25 are mandatory. *State ex rel. White v. Bechtel,* 99 Ohio St.3d 11, 2003 Ohio 2262 at ¶5 and cases cited therein. The failure to comply with R.C. 2969.25 is sufficient to deny the habeas petition, and the decision of the Court of Appeals should be upheld on that basis. Moreover, there are several other reasons this Court should not grant the habeas petition in this case.

Proposition of Law No. 2:
Austin's habeas corpus petition is not cognizable because Austin fails to meet his burden to show, and indeed does not allege, that the court was without jurisdiction to render the judgment against him.

As Austin argued it below, he is entitled to relief based on eight grounds he alleged in his petition to the Court of Appeals. Austin's grounds begin at about the eighth page in his voluminous pleading and are numbered 5-7. The most charitable thing one can say about the eight grounds argued in the Court of Appeals is that they are extremely confused. It appears grounds one through seven object to Austin's "TERM OF IMPRISONMENT" (sic) which does not appear to be an attack on the court's jurisdiction but rather on the sentence. Ground eight appears to attack Austin's parole board. Nothing in Austin's pleading, to the extent it is understandable, attacks the jurisdiction of the court.

Habeas corpus shall not be allowed so long as the court had jurisdiction to render the judgment. R.C. 2725.05. Austin failed to show, and does not even attempt to show, that the court below was without jurisdiction to convict and sentence him. Thus, he is not entitled to a writ of habeas corpus.

Austin bears the burden of proof to establish his right to release. *Chari v. Vore*, 91 Ohio St. 3d 323, 325, 2001 Ohio 49; *Halleck v. Koloski* (1965), 4 Ohio St. 2d 76, 77. Every party who bears the burden of proof necessarily bears the burden of going forward with evidence. *Chari v. Vore*, 91 Ohio St. 3d 323 at 326. ("...the court of appeals erroneously compelled the sheriff to introduce evidence first, in contravention of the proper allocation of the burden of proof."). Here, Austin's confused pleading does not meet his legal burden to establish his right to release.

Proposition of Law No. 3:
The grounds in Austin's habeas petition are not cognizable in habeas.

A. Grounds one through seven: "TERM OF IMPRISONMENT" (sic).

Grounds one through seven attack Austin's "TERM OF IMPRISONMENT." (sic) If this means that Austin objects to his sentence, his grounds are not cognizable, and he had an adequate remedy in the ordinary course of law by direct appeal to raise that issue and any other issue related to his guilty plea. *Shie v. Smith,* (2009), 123 Ohio St. 3d 89; *see also, Turner v. Brunsman* (2009), 123 Ohio St. 3d 445.

Habeas corpus is not the proper mode of redress where the petitioner has been convicted of a criminal offense and sentenced to imprisonment by a court of competent jurisdiction; if errors or irregularities have occurred in the proceedings or sentence, a writ of error, i.e. an appeal, is the proper remedy. *Ex parte Van Hagan* (1874), 25 Ohio St. 426 at syllabus paragraph 2; see also *Burch v. Morris* (1986), 25 Ohio St.3d 18, citing *Van Hagan.* In *Walker v. Maxwell* (1965), 1 Ohio St.2d 136, 137-8, the court stated as follows:

> The General Assembly has provided an adequate post-conviction remedy by appeal for the review of alleged errors in the conviction of an accused, and, once a conviction is had, prior irregularities merge into the judgment and must be raised by appeal. The validity of such judgment cannot be questioned by collateral attack. *State v. Wozniak,* 172 Ohio St. 517; and *Perry v. Maxwell, Warden,* 175 Ohio St. 369. This remedy is available to all persons as a matter of right within 30 days after conviction and by motion for leave to appeal at any time. Where an accused has failed to pursue his appeal within the statutory period for appeals as a matter of right, he had available to him the motion for leave to appeal. This is not an empty right. If the accused can show reasonable grounds for his delay in pursuing his appeal as a matter of right within the statutory time period or if the failure to grant such appeal would result in a clear miscarriage of justice, to deny such motion would constitute an abuse of discretion.
>
> That habeas corpus is not the proper remedy after conviction for the review of errors or irregularities has been pointed out many times.

"Habeas corpus 'is not and never was a postconviction remedy for the review of errors or irregularities of an accused's conviction or for a retrial of the guilt or innocence of an accused.'" *Bellman v. Jago* (1988), 38 Ohio St.3d 55, 56.

Habeas corpus is an extraordinary remedy and normally is appropriate only when there is no alternative legal remedy. *State ex rel. Jackson v. McFaul,* 73 Ohio St.3d 185, 1995 Ohio 228. The existence of an alternative remedy is enough to remove a petitioner's allegations from habeas consideration, whether the remedy is still available or not, as long as the petitioner could have taken advantage of it previously. See *Luna v. Russell*, 70 Ohio St.3d 561, 1994 Ohio 264; *State v. Perry*, (1967), 10 Ohio St.2d 175; *Hughley v. Saunders,* (2009), 123 Ohio St. 3d 446. Habeas corpus is not a substitute for appeal. *Cornell v. Schotten*, 69 Ohio St.3d 466, 1994 Ohio 74.

B. Ground eight: "FINAL RELEASE" (sic) parole board conspiracy.

Austin will be entitled to habeas relief if he can establish that he is entitled to immediate release from prison. *State ex rel. Jackson v. McFaul,* 73 Ohio St. 3d 185, 188; 1995 Ohio 228. Habeas corpus is an extraordinary remedy and shall not issue when a petitioner has other remedies available at law. *Id.* at 185-6. Austin's relief if, as appears from his confused pleading, he objects to the denial of parole is a new hearing and not immediate release from prison. *State ex rel. Crigger v. Ohio Adult Parole Auth.*, 82 Ohio St. 3d 270, 272; 1998 Ohio 239. There is no constitutional or statutory right to parole. *Id. citing, State ex rel. Henderson v. Ohio Dept. of Rehab. & Corr.* 81 Ohio St. 3d 267, 268; 1998 Ohio 631.

What was said about grounds one through seven is true here as well. Austin has an alternative legal remedy which is enough to remove his petition from consideration whether the

remedy is still available or not. See *Luna v. Russell*, 70 Ohio St.3d 561, 1994 Ohio 264; *State v. Perry*, (1967), 10 Ohio St.2d 175; *Hughley v. Saunders,* (2009), 123 Ohio St. 3d 446.

Proposition of Law No. 4:
Austin fails to state a claim upon which relief could be granted.

In order for a court to dismiss a case for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242.

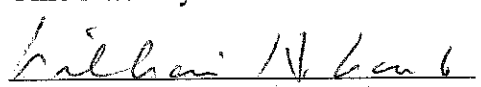
Austin can prove no set of facts that would entitle him to relief in this action because he does not attack, and indeed cannot attack, the jurisdiction of the court below and his claims cannot be reviewed in a habeas corpus proceeding.

CONCLUSION

For the foregoing reasons, Austin's complaint for a writ of habeas corpus must be dismissed.

Respectfully submitted,

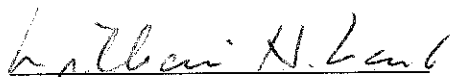
RICHARD CORDRAY
Ohio Attorney General



William H. Lamb (0051808)
Assistant Attorney General
Criminal Justice Section
441 Vine Street
1600 Carew Tower
Cincinnati, Ohio 45202
(513) 852-3497
(513) 852-3484 (Fax)
william.lamb@ohioattorneygeneral.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by regular, first-class mail to Raymond Austin, #A240-084, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, on the 17th day of August, 2010.



WILLIAM H. LAMB
Assistant Attorney General