

MEMORANDUM IN SUPPORT

A. FACTUAL BACKGROUND

Relators' Complaint for Writ of Prohibition is another step in what appears to be a relentless pursuit to avoid standing trial for their alleged crimes. By way of background, in April, 2010, Relators were charged with prostitution stemming from their employment with an exotic dance club known as the GoGo Girls Cabaret.¹ These criminal matters are currently pending in Respondent Mahoning County Court No. 4 ("Court") before Respondent Judge David D'Apolito ("Judge D'Apolito") (collectively "Respondents"). On January 12, 2011, Relators filed a Motion to Dismiss their criminal complaints for a lack of jurisdiction asserting the exact same grounds alleged to this Court in their Complaint for Prohibition. See Relators' Complaint, ¶12. Respondent, Judge D'Apolito denied this Motion on January 12, 2011. *Id.* at ¶13.

After Respondent Judge D'Apolito denied their Motion to Dismiss, Relators attempted to obtain immediate appellate review of this Order by filing a pleading captioned "Defendant's (sic) Motion to Certify to Court of Appeals" with the Respondent Court. A certified copy of Relators' Request to Certify is attached as Exhibit A. On the same day, Respondent Judge D'Apolito denied this motion. A certified copy of Judge D'Apolito's Order is attached hereto as Exhibit B.

Approximately eight days later, Relators filed the instant action in Prohibition with this Court. However, it is without a doubt that Relators' Complaint lacks even the

¹ Incidentally, the GoGo Girls Cabaret and its owner and operators have been indicted by the Mahoning County Grand Jury on charges of RICO, money laundering, perjury and promoting prostitution. Some of these defendants are likewise represented by counsel of record James Vitullo.

basic elements needed to support Prohibition in this case. As such, Respondents respectfully request that this Court grant their Motion to Dismiss.

B. LAW AND ARGUMENT

In order to be entitled to a writ of prohibition, a Relator must establish that the following three elements: (1) that Respondents exercised or are about to exercise judicial power, (2) the exercise of that power is unauthorized by law, and (3) that denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel Reese v. Cuyahoga Cty. Bd. of Elections*, 115 Ohio St.3d 126, 2007-Ohio-4588, 873 N.E.2d 1251, at ¶16. It is undisputed that Respondents exercised judicial power. However, the other two predicate elements are missing in this case, therefore dismissal is appropriate.

a. Relators Cannot Prove the Requisite Elements of Prohibition.

i. The Exercise of Power is not Unauthorized by Law as Respondents Have the General Subject-Matter Jurisdiction Over Misdemeanor Criminal Cases.

Relators argue that Respondents lack the jurisdiction to proceed over what they self-servingly describe as “facially insufficient complaints.” See Brief in Support and Complaint, generally. And Relators spend a great deal of time restating the arguments they raised in their Motion to Dismiss that Respondent Judge D’Apolito considered and overruled. However, such claims do not demonstrate a lack of jurisdiction by Judge D’Apolito or the Mahoning County Court No. 4.

The purpose of a writ of prohibition is to prevent a court from assuming jurisdiction over a matter beyond its scope. Prohibition may not be used to prevent a court from deciding erroneously or from enforcing an erroneous judgment in a case in

which it has a right to adjudicate. *State ex rel. Cleveland Telephone Co. v. Court of Common Pleas of Cuyahoga Cty.* (1918), 98 Ohio St. 164, 120 N.E. 335. And absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the Court's jurisdiction has an adequate remedy at law by way of appeal. *State ex rel. Enyart v. O'Neill*, 71 Ohio St.3d 655, 646 N.E.2d 1110, 1995-Ohio-145.

In the case at bar, Respondent Judge D'Apolito has not exceeded his jurisdiction by presiding over Relators' criminal prostitution cases as it is without doubt that county courts have the general subject matter jurisdiction to proceed in such matters misdemeanor cases. R.C. §1907.02. It is undisputed that the Relators herein have been charged with misdemeanors in County Court No. 4. See Relators' Complaint, ¶3. As such, Relators cannot establish that Respondent D'Apolito's exercise of jurisdiction over this case is unauthorized by law.

ii. Relators have an Adequate Remedy at Law.

The law is clear that prohibition may only issue when there is no regular, ordinary and adequate remedy. *Silliman v. Court of Common Pleas of Williams Cty.* (1933), 126 Ohio St. 338, 185 N.E.2d 420. Thus, the extraordinary remedy of prohibition may not be employed before trial on the merits or as a substitute for appeal to review mere errors or irregularities in the proceedings of a court having proper jurisdiction. *State ex rel Enyart v. O'Neill* (1995), 71 Ohio St.3d 655, 646 N.E.2d 1110, 1995-Ohio-145.

In fact, this very Court has ruled many times that the denial of a motion to dismiss a criminal complaint is not subject to extraordinary relief because the Relator has an adequate remedy at law. In *State ex rel. Wentz v. Correll*, (1975), 41 Ohio St.2d 101, an

individual accused of drunk driving moved to dismiss the charges against him on speedy trial grounds. The trial court denied the motion and the defendant then filed an action in mandamus. This Court dismissed the mandamus action holding that the defendant has an adequate remedy by way of appeal from his conviction. A similar conclusion was reached by this Court in *State ex rel. Woodbury v. Spitler* (1974), 40 Ohio St.2d 1 wherein extraordinary relief was also sought as a result of a trial court's failure to dismiss charges on speedy trial grounds. This Court dismissed the action, holding:

Appellants claim that the trial court was in error in failing to grant the motions for immediate discharge. However, whether the court was in error, the action was properly before the court and within its jurisdiction. Where an action is pending and undetermined in a lower court of competent jurisdiction, and where there is otherwise an adequate remedy by way of appeal, this court has no authority to determine what judgment should be rendered by the lower Court. Appellants have an adequate remedy by way of appeal from the final judgments of the trial court.

Internal citations omitted. *Id.* at 3-4.

In the current case, it is undisputed that each of the Relators have criminal prostitution cases pending before Respondent Judge D'Apolito. It is also undisputed that Relators allege that the criminal complaints filed against them are facially defective. However, this issue was presented to Judge D'Apolito in the form of a Motion to Dismiss which Judge D'Apolito considered and correctly denied. Thus, regardless of whether Relators liked or agreed with Judge D'Apolito's decision to overrule their motions to dismiss, they have an adequate remedy at law by way of appeal following the final adjudication of their respective criminal cases. To hold otherwise, would permit piecemeal litigation and override a century of past precedent on this issue. As a result,

because Relators have an adequate remedy at law, they are unable to meet the third prong of the writ of prohibition test.

C. CONCLUSION

Relators's Complaint lacks even the basic elements needed to support Prohibition in this case. Respondents have the general subject-matter jurisdiction to proceed over misdemeanor prostitution cases filed within the geographical limits of the Respondent Court under R.C. §1907.21. And further, Relators have an adequate remedy at law. For these reasons, Respondents respectfully request that this Court dismiss Relators' Complaint.

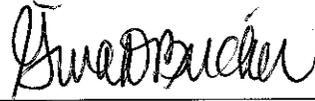
Respectfully submitted,



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Attorney for Respondents

CERTIFICATE OF SERVICE

This shall certify that a true and accurate copy of the foregoing Motion to Dismiss was sent to Relators' counsel, James Vitullo at 5232 Nashua Drive, Condo Unit 5, Austintown, OH 44515 by U.S. regular mail this 31st day of January, 2011.



Gina DeGenova Bricker (#072559)
Assistant Prosecuting Attorney
Mahoning County Prosecutor's Office

MAHONING COUNTY COURT
AREA 4
**IN THE MAHONING COUNTY COURT NO. 4
AUSTINTOWN, OHIO**

STATE OF OHIO

Plaintiff,

v.

Stephanie Yash, Amanda Wallace Shannon
Surrena, Tiffany Smith, Jessica Scarsella,
Mary Pratt, Trisha Narkum, Kara Mumford,
Nicole Montecarvo, Brandi McNair, Eric
Jackson, Loni Fredenburg, April Ellis,
Amanda Barbe

Defendant.

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ANTHONY VIVO, CLERK
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)
) Case No. 10 CRB 388-389; 10 CRB 402,
) 405, 408, 411; 10 CRB 387; 10 CRB
) 390, 391; 10 CRB 404; 10 CRB 368,
) 370, 372, 374, 377; 10 CRB 383, 384,
) 386; 10 CRB 371; 10 CRB 373, 375,
) 376, 378; 10 CRB 393; 10 CRB 420,
) 421, 422, 423; 10 CRB 403; 10 CRB
) 419; 10 CRB 410, 414, 415, 416,
) 417, 418

) Judge David A. D'Apolito
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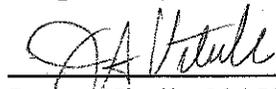
DEFENDANT'S MOTION TO CERTIFY TO COURT OF APPEALS

COMES NOW, defendants and through undersigned counsel, move this Honorable Court to certify the denial of the motion to dismiss to the Seventh District Court of Appeals, and in support states as follows:

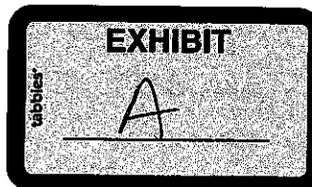
Defendants move to certify this courts overruling the motion to dismiss to the court of appeals. This issue raises important questions of jurisdiction, it impacts thousands of defendants each month who are charged with similar conclusory complaints. This court has authority to certify this issue to the court of appeals and stay the pending action in the interim.

WHEREFORE, for all of the reasons stated above, defendant's respectfully seek an order of this court certifying the order overruling the motion to dismiss for lack of jurisdiction to the Court of Appeals.

Respectfully submitted,



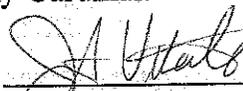
James Vitullo 0015388
5232 Nashua Drive, Suite 5
Austintown, Ohio 44515-5122
Cell (330) 207-8571



Certified True Copy of Original
Court No. 4 Case No. et al
Anthony Vivo, Clerk of Courts
James Vitullo Date 1-12-2011

CERTIFICATE OF SERVICE

The undersigned certifies that on January 11 2011 a true and accurate copy of the foregoing was hand delivered to prosecutor Kenny Cardinal.



James Vitullo

IN THE MAHONING COUNTY COURT NO. 4
AUSTINTOWN, OHIO

STATE OF OHIO)

Plaintiff,)

v.)

Stephanie Yash, Amanda Wallace Shannon)
Surrena, Tiffany Smith, Jessica Scarsella,)
Mary Pratt, Trisha Narkum, Kara)
Mumford, Nicole Montecarvo, Brandi)
McNair, Eric Jackson, Leni Fredenburg,)
April Ellis, Amanda Barbe)

Defendant.)

) Case No. 10 CRB 388-389; 10 CRB 402,
) 405, 408, 411; 10 CRB 387; 10 CRB
) 390, 391; 10 CRB 404; 10 CRB 368,
) 370, 372, 374, 377; 10 CRB 383, 384,
) 386; 10 CRB 371; 10 CRB 373, 375,
) 376, 378; 10 CRB 393; 10 CRB 420,
) 421, 422, 423; 10 CRB 403; 10 CRB
) 419; 10 CRB 410, 414, 415, 416,
) 417,418

) Judge David A. D'Apolito
)

JUDGMENT ENTRY

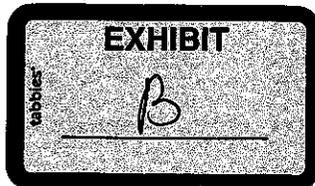
1/12/11 - This matter came before
the Court upon Defendant's Motion to Certify
To Court of Appeals.

The Court finds that the
Motion is not well-taken and the
Court hereby denies said Motion.
It is so ordered.

David A. D'Apolito

Judge - Mahoning County Court

Certified True Copy of Original
Court No. 4 Case No. et al
Anthony Vivo, Clerk of Courts
Debra Ray 1-12-2011
Deputy Date



MAHONING COUNTY COURT
AUSTINTOWN, OHIO
JAN 12 P 2:00
ANTHONY VIVO, CLERK