

ORIGINAL

No. 2011-0109

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.*, Michelle BENNER, Mary Pratt, Kara Mumford,
Nicole Montecalvo, Trisha Narkum, Shannon Surrena, Stephanie Yash,
Tiffany Smith, Brandi McNair, Amanda Wallace, Loni Fredenburg,
Jessica Scarsella, Amanda Barbe, Jasmin Roque, April Ellis and Erica Jackson

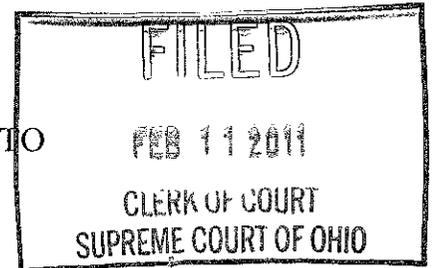
Relators

vs.

MAHONING COUNTY COURT #4 IN AUSTINTOWN OHIO
6000 Mahoning Avenue
Austintown, Ohio 44515

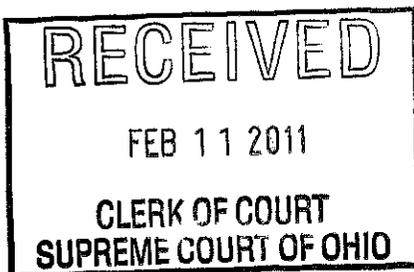
and

HONORABLE JUDGE DAVID A. D'APOLITO
6000 Mahoning Avenue
Austintown, Ohio 44515



Respondents

**RELATORS' BRIEF IN RESPONSE TO
RESPONDENTS' MOTION TO DISMISS**



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BRIEF IN RESPONSE TO RESPONDENTS' MOTION TO DISMISS

Respondents do not dispute the facts. Their sole argument is that prohibition is improper because “an adequate remedy at law” exists “by way of appeal following” a trial and “final adjudication.” (Resp. Brief 5). Respondents’ brief fails to recognize that “in cases of a patent and unambiguous lack of jurisdiction, the requirement of a lack of an adequate remedy of law need not be proven because the availability of alternate remedies like appeal would be immaterial.” *State ex rel. Florence v. Zitter* (2005), 106 Ohio St. 3d 87, 90.

The misdemeanor cases against Relators are based on (1) unsigned arrest warrants, (2) arrest warrants without a probable cause determinations, and (3) arrest warrants founded upon facially insufficient complaints. A “warrant is void *ab initio* if not signed by a judge.” *State v. Williams* (1991), 57 Ohio St. 3d 24, 26. The government cannot bootstrap to a prosecution from arrest warrants issued without probable cause or upon invalid complaints. “No warrant shall issue, but upon probable cause.” U.S. Const. amend IV and Ohio Const. Article I § 14. The complaint must support “probable cause to believe” that defendant committed an offense. Crim. Rule 4(A)(1). See *Whiteley v. Warden* (1971), 401 U.S. 560, 565 (“complainant’s conclusion” that the accused “perpetrated the offense” is inadequate support for arrest warrant); *Giordenello v. U.S.* (1958), 357 U.S. 480, 484 (complaint reciting “no more than the elements of the crime charged” is insufficient support warrant).

Respondents seem unaware of the process necessary to invoke jurisdiction to proceed to trial. These defects, similar to the defects in a civil case from failure of service, prevent a criminal case from starting. The criminal process requires the following: First, a valid

complaint must be filed. Second, a clerk determines probable cause by reviewing the complaint. Third, if probable cause is established, the clerk issues the warrant. Fourth, the accused is arrested, arraigned and the case proceeds to trial.

There is no constitutional or statutory process that permits unsigned or invalid warrants from proceeding to a trial with the hope of securing a conviction or a plea. This ignores the Fourth Amendment. The county court is powerless to proceed with any prosecution without first establishing probable cause. The words “probable cause” and “warrant” are not found anywhere in Respondent’s brief.

Respondents cite cases which were commenced after a grand jury properly determined probable cause. The speedy trial issue arises jurisdiction has vested and is dependent on it. The issues in this case occur at the outset and numerous cases from this court confirm that prohibition is appropriate if the trial court is proceeding without jurisdiction. See also, *State, ex rel. Rice, v. McGrath* (1991), 62 Ohio St.3d 70, 71 (“judge loses his authority to proceed in a matter when he unconditionally dismisses it. Thus, such judge is without jurisdiction whatsoever to act, and a writ will issue to prohibit him from taking any further action in the case”); *State ex rel. Johnson v. County Court of Perry County* (1986), 25 Ohio St. 3d 53, 58 (“writ of prohibition” granted because “county court is without authority to punish indirect contempt”); *State ex rel. Yates v. Court of Appeals for Montgomery Cty.* (1987), 32 Ohio St.3d 30, 31 (“writ of prohibition” granted to “prevent the court of appeals from exercising jurisdiction” over appeal from judgment of acquittal from a final verdict that “the state could not appeal.”); *State, ex rel. Lewis, v. Warren Cty. Court of Common Pleas* (1990), 52 Ohio

St. 3d 249, 251 (issued writ prohibiting common pleas of one county “from entertaining jurisdiction and proceeding further in the action to enjoin the annexation” from adjoining county).

There is a patent and unambiguous lack of jurisdiction because the (1) arrest warrants are supported by criminal complaints facially incapable of supporting probable cause, (2) arrest warrants are unsigned (3) arrest warrants are issued without probable cause, (4) arrest warrants are issued by police employees, and (5) the defects are longstanding and have injured thousands during the past decade.

I. THE COURT LACKS JURISDICTION OVER UNSIGNED WARRANTS.

Respondents seek to proceed to trial with unsigned arrest warrants (Exhibit 2) in contravention to this court’s prior ruling that “A search warrant is void *ab initio* if not signed by a judge prior to the search.” *State v. Williams*, 57 Ohio St. 3d 24 (1991) syllabus. This applies equally to “arrest as well as search warrants.” *Giordenello v. U.S.* (1958), 357 U.S. 480, 486.

In *Williams* a warrant was issued but “never signed by the issuing judge.” This Court held that “knowledge that a warrant has been properly issued is essential” to best affect the protections of the Fourth Amendment. *Williams*, 57 Ohio St. 3d at 25. Without the signature a “citizen is left to guess whether such a warrant has validity.” *Id.* The signature safeguards an “individual’s rights provided in the Fourth Amendment and Section 14, Article I of the Ohio Constitution.” *Id.* at 26. “To protect this constitutional right, it is necessary to require the signature of the issuing judge on a search warrant prior to the search. Accordingly, we hold that a search warrant is void *ab initio* if not signed by a judge prior to the search.” *Id.*

Respondents argue that Relators are engaged in a “relentless pursuit to avoid standing trial for their alleged crimes.” (Resp. Brief pg 2). The corollary is that the county prosecutor relentlessly seeks to proceed to trial with unsigned warrants. Even if there is confusion over the half century of case law regarding the legality of bare bones complaints, there cannot be any confusion that an unsigned warrant is void. It is a greater abuse for the county prosecutor to continue Relators’ prosecutions, having been shown the statutory and constitutional violations, than it is for police officers to initiate the arrest pursuant to unsigned warrants in the first instance.

Respondents seek to exercise jurisdiction to proceed to trial commenced by unsigned arrest warrants. The United States Constitution, the Ohio Constitution, and the Ohio Criminal Rules preclude trial under these circumstances and this Court should direct Respondents to dismiss the six cases founded upon unsigned warrants.

II. THE COURT LACKS JURISDICTION OVER ARREST WARRANTS ISSUED WITHOUT ANY PROBABLE CAUSE DETERMINATION.

Respondents do not dispute the fact that the “Austintown Clerks do not review the criminal complaint before signing the warrant.” (Comp. ¶ 25). The words “probable cause” and “warrant” are not found anywhere in Respondents’ brief. The forty arrest warrants, like the Respondents’ brief, lack any statement that the warrant is issued upon probable cause:

“Whereas, there has been filed before me an affidavit, the original of which is herewith attached, and by reference made a part of this warrant. There are, therefore, to command you to take the” accused and “safely” bring “his/her body forthwith before me” to “answer said complaint.”

The text of the warrants is clear; once the complaint is filed, the arrest warrant is issued without determining probable cause. The clerks “sign[] the arrest warrants without a probable cause review or determination.” (Comp. ¶ 8). This runs afoul of the guarantee that “No warrant shall issue, but upon probable cause.” U.S. Const. amend. IV. The Sixth Circuit Court of Appeals in *United States v. Evans* (6th Cir. 1978), 574 F.2d 352 vacated defendant’s conviction because the judge never examined the complaints:

“Here warrants were issued for [defendant’s] arrest based on the complaint of a police officer. It is clear that no determination of probable cause . . . was ever made by the judge who issued the warrants; in fact he never saw the [complaint]. . . to make sure that the actions described constituted a crime.”

Evans, 574 F.2d at 354-55.

This court found a “complete want of jurisdiction” to support prohibition in *ex rel. Special Prosecutors v. Court of Com. Pleas* (Ohio 1978), 55 Ohio St. 2d 94, 98 where the motion to withdraw a guilty plea was contrary to the Criminal rules. “Crim. R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent” to “appellate court” decision. *Id.* at 97.

The criminal cases against Relators is similarly proceeding without jurisdiction in violation of the criminal rules. The criminal “rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction.” Crim. Rule 1(A). The rules do not permit a trial without a prior probable cause determination. The arrest is either with or without a warrant and the criminal rules provide procedures for both.

Crim. Rule 4(A)(1) requires that a “warrant for the arrest” of defendant “shall be issued” only upon “probable cause.” The clerks did not undertake the probable cause determination, consequently Relators’ misdemeanor arrests were warrantless arrests.

However, the “purportedly criminal lap dances occurred outside” the officers “presence” over “one year before the charges were filed.” (Comp. ¶ 5, 28). Ample time existed to obtain a warrant. An “officer may not make a warrantless arrest for a misdemeanor unless the offense is committed in the officer’s presence.” *State v. Henderson* (1990), 51 Ohio St. 3d 54, 56. See R.C. § 2935.03(A)(1) (police officer “shall arrest and detain, until a warrant can be obtained, a person found violating” a law of this state); *State v. Mathews* (1976), 46 Ohio St. 2d 72, 75-76 (the “found violating” language authorizes “a warrantless arrest for misdemeanor only where the offense has been committed in the officer's presence.”)

Crim. Rule 4(E)(2) specifies the procedure that must be followed after the warrantless arrest has been made. The accused is to be taken “without unnecessary delay before a court” and that the “court shall proceed in accordance with Crim. R. 5.” Crim. Rule 5(B)(1) requires that the court schedule a hearing “not later than fifteen consecutive days following arrest” if the defendant “is not in custody.” Crim Rule 5(B)(4) requires that upon conclusion of the hearing the “court shall” either “find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial” or “order the accused discharged.”

Rule 4(A)(1) requires “probable cause” when the warrant is issued. Rule 5(B)(4)(b) requires a finding of “probable cause” at a preliminary hearing. The Criminal rules do not permit the court to “retain the case for trial” without probable cause.¹ If probable cause is lacking the court shall “order the accused discharged.”

¹ See Crim Rule 4(A)(1) (“If it appears from the complaint” that “there is probable cause to believe that an offense has been committed, and that the defendant has committed it”); Crim Rule 5(B)(4)(b) (court must “find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it”)

All forty arrest warrants were issued without probable cause. The Writ of Prohibition is appropriate because there is a complete want of jurisdiction to proceed to trial without first complying with the constitutional and statutory probable clause mandate. This Court should issue the writ of prohibition and direct Respondents to discharge Relators.

III. THE COURT LACKS JURISDICTION OVER ARREST WARRANTS ISSUED BY CLERKS THAT WORK FOR THE POLICE DEPARTMENT.

Teresa Drummond, Sandy Williams and Sue Cabot “work for the police department” and also “issue summonses, and on occasion warrants, upon the request of police officers.” (Comp. ¶ 34) (Exhibit 5). All forty complaints begin with: “Before me, Teresa Drummond, deputy clerk of said county court.” (Exhibit 1). The warrants issued by these clerks comprise three defects: (1) the complaint is facially insufficient to support probable cause, (2) the warrant is issued without probable cause and (3) the clerk is not neutral and detached.

The court of appeals in *State v. Torres* (Aug. 22, 1986), Wood County App. No. WD-85-64, 1986 Ohio App. Lexis 7948 found that the “arrest warrant was invalid” because a “police dispatcher having the dual function of a clerk is not a neutral and detached magistrate.” *Id.* *5. Moreover, the “good faith” exception “does not apply to cases involving an arrest warrant issued by a magistrate that was not neutral and detached.” *Id.* *6.

The court in *State v. Schultz* (July 7, 1983), Cuyahoga App. No. 45511, 1983 Ohio App. Lexis 15492 held that “there was no probable cause to issue the warrant” because “the clerk issuing the warrant asked only if everything stated in the complaint was true.” *Id.* at *2. A “person assigned to the police cannot issue warrants.” *State v. Hendricks* (June 15, 1983), 1983 Ohio App. Lexis 13971.

The Sixth Circuit in *United States v. Parker* (6th Cir 2004) , 373 F.3d 770 voided two warrants issued by a county commissioner who “was employed by and worked” for the “County jail.” *Id.* at 773. The commission “was not sufficiently disengaged from activities of law enforcement to satisfy the Fourth Amendment’s neutral and detached requirement.” *Id.* at 774. Even the good-faith exception “is inapplicable when a warrant is signed by an individual lacking the legal authority necessary to issue warrants.” *Id.* It “is a violation of the Fourth Amendment to authorize individuals insufficiently detached from law enforcement to issue warrants. In other words, such individuals never could be *legally* authorized to issue warrants.” *Id.* at 775. Because the commissioner “was not a neutral and detached magistrate” the “warrants she signed were *void from the beginning.*” *Id.*

A warrant “signed by someone who lacks the legal authority necessary to issue” the “warrant is void *ab initio.*” *United States v. Scott* (6th Cir. 2001), 260 F.3d 512, 515.

IV. THE COURT PATENTLY AND UNAMBIGUOUSLY LACK JURISDICTION OVER COMPLAINTS INCAPABLE OF SUPPORTING PROBABLE CAUSE.

Respondents do not respond to the analysis in Relators’ principal brief that the Supreme Court in *Whiteley* or *Giordenello* voided arrest warrants issued on bare bones complaints similar to ones in this case.² Respondents are also silent on the fact that Crim. Rule 4(A)(1) permits arrest warrants to “issue” only if “it appears from the complaint” that “there is probable cause to believe” that “defendant has committed” an offense, and a bare bones “complaint faile[s] to comply with Crim. Rule 4(A)(1), and thus no summons [or warrant]

² *Whiteley v. Warden* (1971), 401 U.S. 560, 563 found the following complaint incapable of supporting the warrant: “On [date], in [location], the [defendants] did then and there unlawfully break and enter a locked and sealed building.” *Giordenello v. U.S.* (1958), 357 U.S. 480, 481 found the following deficient: “On [date], at [location], [defendant]” did receive “heroin” with “knowledge of unlawful importation; in violation of [statute].”

could be properly issued based on the complaint.” *City of Centerville v. Reno* (July 3, 2003), Montgomery County App. No. 19687, 2003 Ohio 3779, P25.³

This court found a “complete want of jurisdiction” to support prohibition in *State ex rel. Special Prosecutors v. Judges, Court of Com. Pleas* (Ohio 1978), 55 Ohio St. 2d 94, 98 where the motion to withdraw a guilty plea was contrary to the criminal rules. “Crim. R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent” to “appellate court” decision. *Id.* at 97. The Respondents seek to proceed with total and complete want of jurisdiction in violation of Crim. Rule 4(A)(1).

The syllabus in *State v. Johnson* (1988), 48 Ohio App. 3d 256 confirms that an “arrest warrant” was “issued without probable cause, *i.e.*, issued on the strength of a ‘bare bones’ affidavit.” *Johnson*, syllabus.⁴ “Law enforcement officers must present the magistrate sufficient information to determine probable cause; a warrant cannot be supported by a ‘bare

³ The court of appeals in *City of Centerville v. Reno* held that the “trial court should have dismissed” the complaint alleging that on certain date defendant “did unlawfully” in [location] “violate” the city ordinance by engaging in “home occupation” in “violation” of city code. *Reno*, 2003 Ohio 3779 at P22-24. A “defendant has a constitutional right to a finding of probable cause before a warrant or summons is issued for him to answer.” *Id.* at P16. “The complaint only listed the officer’s “conclusion” that defendant had “committed” the “violation without any reference to the source of the affiant’s information.” *Id.* at P25.

⁴ In *Johnson* a police officer received information from “juveniles” that defendant “had given them beer.” *Johnson*, 48 Ohio App. 3d at 256. The prosecutor “prepared a warrant to arrest” the defendant for contributing to “delinquency” of a minor. *Id.* The police officer took the “the warrant” to the deputy court clerk “swore that the allegations” were true and the “clerk issued the warrant” for the defendants arrest. *Id.* The complaint provided that defendant did on “[date] in [location] did act in a way tending to cause a child to become an unruly” by “purchasing beer for [juvenile]. In violation of [statute].” *Id.* at 259. The trial court found that “there was no probable cause upon which to issue the warrant.” *Id.* at 257.

bones' affidavit." *Johnson*, 48 Ohio App. 3d 259 (Stephenson, J., concurring). The clerk in *Johnson* actually performed the probable cause determination. The warrant included following passage: "There appearing to be probable cause that the above offense has been committed by the defendant a warrant will be issued herein." *Id.*

The arrest warrants can only issue upon probable cause if the basis of the police officer's knowledge is apparent on the face of the complaint. "The forty complaints fail to allege the basis for Sergeant Solic's information. There are no allegations that the information in the complaint is based on personal knowledge, or knowledge gained from other officers, or knowledge gained from an informant or citizen." (Comp. ¶ 6). The forty complaints filed against Relators (Exhibit 1) contain the identical constitutional defects presented in *Whiteley*, *Giordenello*, *Johnson* and *Reno*.

The Fourth Amendment protects Relators from the consequences of an arrest without probable cause, and from the burden of going to trial without first establishing probable cause to support the arrest in the first instance. The Writ of Prohibition is appropriate under these facts because there is a "complete want of jurisdiction" to proceed to trial without first complying with the constitutional and statutory probable clause mandate. This Court should issue a Writ of Prohibition and direct Respondents to dismiss the complaints.

V. THE WRIT IS NECESSARY TO END THE BREADTH AND DEPTH OF THE LONGSTANDING ABUSE OF THE IV AMENDMENT, OHIO CONST. ART. I § 14 AND CRIMINAL RULES 4 AND 5.

This Writ is not a "relentless pursuit to avoid standing trial." (Resp. Brief pg 2). To the contrary, this case is about the complete failure of the county prosecutor to comply with constitutional and statutory safeguards. See U.S. Const. amend. IV ("No warrant shall issue,

but upon probable cause.”); Ohio Const. Article I § 14 (same); Crim Rule 4(A)(1) (“probable cause” required to issue warrant); Crim Rule 5(B)(4)(b) (“probable cause” required at preliminary hearing to stand trial). The real question is why, even after this has been brought to their attention, has the Prosecutor’s office continued to ignore the Fourth Amendment, Ohio Const. Article I § 14, and Crim. Rules 4 and 5?

This “court has allowed a writ of prohibition when a party has engaged in a continuing and vexatious abuse of the judicial process.” *Commercial Sav. Bank v. Wyandot Cty Court of Common Pleas* (1988), 35 Ohio St. 3d 192, 193. In *Commercial Sav. Bank* respondents filed numerous legal challenges establishing that they were “attempting to use the legal system” in a “continuing and vexatious abuse of the judicial process” allowing a “writ of prohibition preventing [respondents] from further abusing the judicial process.” *Id.* at 193-94. In *ex rel. Stark v. Summit Cty of Common Pleas* (1987), 31 Ohio St. 3d 324, 326 respondents “engaged in a continuing and vexatious abuse of the judicial process by instituting duplicative proceedings in multiple jurisdictions.” *Id.* at 326. “Those actions constitute...extraordinary circumstances”. *Id.* The court issued a writ of prohibition.

Respondents do not dispute that on “average thirty-eight insufficient complaints are filed in the Austintown Court each week” or that “1,942 defective complaints, with companion warrants” are filed each year or that 19,426 criminal cases were filed in the past decade. (Comp. ¶ 31-32; Ex. 4). The longstanding custom “has forced thousands to be arrested, charged, booked, fingerprinted, photographed, and confined to the local jail for hours, then forced to post bond and retain counsel for their defense, all without ever having a judicial officer determine if probable cause to arrest the accused ever existed.” (*Id.* ¶ 33).

It is common practice for courts to develop various directives or standards. In this case the longstanding custom promulgated by the prosecutor has adopted a relatively simple rule, have clerks sign every warrant upon demand, plead everyone guilty, the township generates money and the prosecutor boasts about a high conviction rate. Long forgotten are the thousands that have misdemeanor convictions on their records. This intentional defiance of the protections promulgated by the Fourth Amendment, Ohio Const. Article I § 14, and Crim. Rules 4 and 5 mandates the extraordinary relief requested to realy the message that the custom poses a continuing risk to the people of Mahoning County.

Relators have a constitutional right under the Fourth Amendment, Ohio Const. Article I § 14, and Crim. Rule 4 and 5, not to be arrested without probable cause. They have a further right not to be tried unless probable cause has been constitutionally determined, either by a properly issued arrest warrant or by a trial court's determination upon an arrest without a warrant.

This Court held in *State ex rel. Connor v. McGough* (1989), 46 Ohio St. 3d 188 that "Prohibition can be an important remedy to vindicate fundamental due process rights despite the existence of an appeal process. . . . [¶] the respondent trial judge is attempting to exercise personal jurisdiction not sanctioned by the United States Constitution or Ohio statutes. By issuing a writ of prohibition, we will stop needless, fruitless and protracted litigation when the end result is not in doubt. Respondent, having no personal jurisdiction over [Relator], is directed to dismiss [the civil] action." *Id.* at 192 (citations and quotations omitted).

Respondents seek to "exercise personal jurisdiction not sanctioned by the United States Constitution or Ohio statutes." *McGough*, 46 Ohio St. 3d at 192. Unless Respondents are

prohibited from proceeding with the criminal prosecution, Relators, who have already been arrested without probable cause, will be further injured by being forced to trial where jurisdiction is nonexistent.

Immediate correction is necessary and without it Relators will suffer serious and irreparable injury. A Writ would not prevent the prosecution of crimes. It is an easy matter to institute the proper safeguards. The clerks, magistrates or judges must actually perform a probable cause determination, and the police and prosecutors must learn to file criminal complaints with sufficient facts to permit an independent probable cause determination. There is no reason for Mahoning County to bypass the constitutional and statutory procedures that every other jurisdiction utilizes.

“99.8% of the misdemeanor charges ended in guilty pleas.” (Comp. ¶ 31).⁵ The county prosecutors desire of a high conviction rate helps politically. The prosecutor has made it clear that he will not comply with the statutory and constitutional guarantees. He will continue to issue warrants without probable cause.

The unconstitutional customs promulgated by the county prosecutor continues to this day and there is a real and substantial threat that persons will be arrested in the future

⁵ The Austintown court “processes the highest number of cases, at this level in the State of Ohio.” (Comp. ¶ 32). In 2009, the Austintown court had 12,793 cases, 495 felonies, 1746 misdemeanors, and 753 dui’s. The rest are mainly traffic. Respondent the Honorable David D’Apolito is the sole judge and works two days a week approximately six hours of per day, which equals 624 hours per year. This gives Respondent three minutes per case on average (624 x 60 / 12,793). This could explain why “99.8% of the misdemeanor charges ended in guilty pleas.” (Comp. ¶ 31).

pursuant to this custom. "On average thirty-eight insufficient complaints are filed in the Austintown Court each week." (Comp. ¶ 32). This Court will issue a writ of prohibition to "stop needless, fruitless and protracted litigation when the end result is not in doubt." *McGough*, 46 Ohio St. 3d at 192. The custom is on-going and the writ is necessary to stop the county prosecutors "continuing and vexatious abuse of the judicial process." *Commercial Sav. Bank*, 35 Ohio St. 3d at 193.

VI. CONCLUSION.

Respondents patently lack jurisdiction over unsigned arrest warrants, warrants issued without probable cause or warrants issued upon insufficient complaints.

WHEREFORE, Relators pray that this Court deny the motion to dismiss and issue a writ prohibiting Respondents from exercising jurisdiction over Relators' complaints.

Respectfully submitted



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CERTIFICATE OF SERVICE

A copy of the forgoing was mailed on February 10, 2011 to Gina Bricker, Esq., Assistant Mahoning County Prosecutor, at 21 West Boardman Street, Sixth Floor, Youngstown, Ohio 44503.



James Vitullo (OH Bar No. 0015388)