

IN THE SUPREME COURT OF OHIO

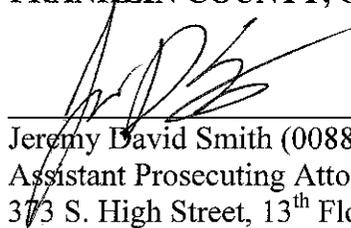
State ex rel.  
 MICHAEL ROBERTS, :  
 Relator, : No. 2012-1136  
 v. :  
 THE HONORABLE KIMBERLY : Original Action in Procedendo  
 COCROFT, :  
 Respondent. :

**MOTION TO DISMISS OF THE HONORABLE KIMBERLY COCROFT**

Now comes Respondent, the Honorable Kimberly Cocroft, by and through counsel, and submits this Motion to Dismiss pursuant to Civ.R. 12(B)(6). The basis for this motion is that Relator has failed to comply with the statutory requirements for procedendo actions. This is more fully explained in the Memorandum in Support, which is attached and incorporated by reference.

Respectfully Submitted,

**RON O'BRIEN**  
**PROSECUTING ATTORNEY**  
**FRANKLIN COUNTY, OHIO**

  
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**FILED**  
 JUL 27 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

## MEMORANDUM IN SUPPORT

Relator has requested that this Court issue a writ of Procedendo to Respondent, the Honorable Kimberly Cocroft, ordering her to rule on two Motions that are pending in Franklin County Court of Common Pleas case number 07-CR-8717. Relator's Petition should be denied as he has failed to comply with the statutory requirements for filing procedendo actions and has failed to state that he has a right to the requested relief.

R.C. § 2969.25 states that an inmate who files a civil action against a government entity and seeks a waiver of filing fees shall file an affidavit of indigency. This affidavit must contain a statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months, as certified by the institutional cashier, and a statement that sets forth all other cash and things of value owned by the inmate at that time.

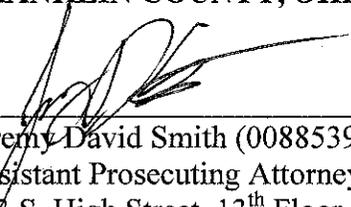
Relator has filed an affidavit of indigency; however, it does not comply with R.C. § 2969.25. Relator filed one document stating the balances in his inmate account on January 4, 2012, and on July 4, 2012. This is certified by the institutional cashier. Though this document provides the balances at the beginning and end of a six month period, it does not state the balance in his account for each of the preceding six months, as required by R.C. § 2569.25(C)(1). Another document displays the activity in his account for the same six month period, however, it is not certified by the institutional cashier. As Relator has failed to include in his affidavit of indigency a document, certified by the institutional cashier, that states the balance in his inmate account for each of the preceding six months, he has not complied with R.C. § 2969.25(C)(1).

Furthermore, Relator's complaint fails to state that he has a right to the requested relief. In order to be entitled to the extraordinary relief of *Procedendo*, Relator must state that he has a clear legal right to the requested relief. *See State ex rel. Weiss v. Hoover* (1999), 84 Ohio St.3d 530, 532-32, 705 N.E.2d 1227 (stating that, in order to be entitled to a writ of *procedendo*, Relator must establish, *inter alia*, a clear legal right to relief) *Id.* Relator states that he is entitled to the requested writ of *procedendo* because Rule 40 of the Rules of Superintendence states that motions shall be ruled upon within 120 days from the date of filing. However, Rule 40 does not create rights in litigants. *State ex rel. Richard v. Calabrese* (1993), 66 Ohio St.3d 193, 610 N.E.2d 1002.<sup>1</sup> As this is the basis for Relator's claim, no facts stated in his complaint or expected to be proven by Relator can establish that he has a legal right to his requested relief.

For these reasons, Respondent respectfully requests that this Court grant her Motion to Dismiss.

Respectfully Submitted,

**RON O'BRIEN**  
**PROSECUTING ATTORNEY**  
**FRANKLIN COUNTY, OHIO**



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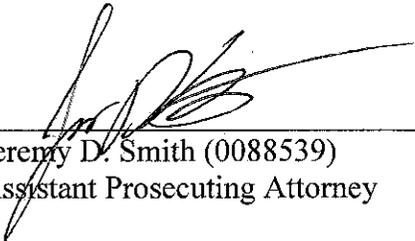
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<sup>1</sup> This decision held that C.P.Sup.R. 6 did not create rights in litigants. The Staff Notes to Rule 40(A)(3) indicate that it is identical to rule C.P.Sup.R. 6.

**CERTIFICATION OF SERVICE**

This is to certify that a copy of the foregoing has been sent via U.S. Regular mail, this 27<sup>th</sup> day of July, 2012, to:

Michael Roberts, # 609-069  
P.O. Box #5500  
Chillicothe Correctional Institution  
Chillicothe, OH 45601

  
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