

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2012-1583

STATE OF OHIO ex rel.  
RICHARD FERNBACH,

Relator,

v.

TWELFTH DISTRICT COURT OF  
APPEALS, et al. Judges,

Respondent.

FILED  
OCT 25 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

: Original Action In Mandamus/Procedendo  
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**RELATOR'S S.CT.PRAC.R.10.5(B) MEMORANDUM IN OPPOSITION TO THE  
RESPONDENT'S "MOTION TO DISMISS"**

Now comes Richard Fernbach, Relator (Pro-Se)(hereinafter "Relator"), and pursuant to **S.Ct.Prac.R.10.5(B)** hereby moves this Honorable Court **IN OPPOSITION** to the Respondent's "Motion To Dismiss" filed for record October 15<sup>th</sup>,2012 in the above captioned case number. Reasons that are clearly in support of sustaining Relator's instant Memorandum In Opposition/Rebuttal with corresponding Exhibits of evidentiary support, as well as granting the writ of mandamus/procedendo or an alternative writ, are fully articulated in the Memorandum that follows.

MEMORANDUM

**I. INTRODUCTION**

The Relator initiated this Original Action in mandamus/procedendo in this Honorable Court as he asserts that the Twelfth District Court of Appeals and the Judges thereof have a specifically enjoined duty under Ohio law as well as the United States and Ohio Constitutions to dismiss the "Appeal" filed under Case Nos. CA2005-12-127 & CA2005-12-128, as said Court and Judge's thereof patently and unambiguously lacked jurisdiction over appeal case nos. CA2005-12-127 & CA2005-12-128. State ex rel.

Priddy v. Shaker Heights (1971), 26 Ohio St.2d 85, 55 O.O. 2D 134; State ex rel. Freeman v. Valentine.

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*(1971)*, 25 Ohio St.2d 183, 54 O.O.2d 296; *See also Relator's Complaint* ¶16-22. This principle applies when the source of the duty involved is a state statute. *State ex rel. Tulley v. Brown (1972)*, 29 Ohio St.2d 235, 58 O.O.2d 489. Relator's Complaint filed for record September 18<sup>th</sup>,2012 clearly and unambiguously articulates facts supporting this assertion as well as corresponding "Counts" that demonstrate the duty specifically enjoined under the law. Moreover, Relator's "Exhibits A & B" clearly and unequivocally demonstrate, as well as, confirm the allegations of the Relator as asserted in his Complaint filed in the above captioned case.

## **II. STATEMENT OF FACTS**

The Relator asserts that the Respondent's "Statement of Facts" are cloudy at best, and are in fact completely twisted between the instant action and the reason for the instant action. However, the Respondent has, accepted and acknowledged as true, the Relator's "Statement of Facts" as the Respondent has not refuted any of the Relator's Facts as set forth in the Relator's Complaint filed for record September 18<sup>th</sup>,2012. Regarding the Respondent's contention that the Relator was ever "convicted", the Relator asserts that there is absolutely zero evidence in or on the face of the record in case Nos. 05CR22343 & 05CR22570 of ANY "conviction" ever occurring through the proceedings in the Warren County Common Pleas Court. This is (1) one of the specific reasons, facts, assertions, and specifically enjoined duty's on the part of a trial court in this state before a citizen of the United States can be incarcerated in the State of Ohio. Moreover, a "conviction" must occur and become finalized BEFORE an appeal can be taken and BEFORE an appellate court can exercise any jurisdiction in any case in the State of Ohio. Thus, the Twelfth District Court of Appeals had absolutely no authority or jurisdiction to "issue any decision" as the Respondent has asserted. *See* Respondent's Motion To Dismiss @ II. Statement of Facts, pg. 2.

Furthermore, the Respondent has completely twisted their "Statement of Facts" to support their contention that res judicata somehow applies. The Respondent has alleged that this Honorable Court granted the Twelfth Appellate District Court of Appeals motion to dismiss in the Relator's prior action.

This Honorable Court DID NOT grant the Respondent, Twelfth Appellate District Court of Appeals' motion to dismiss. In FACT, this Honorable Court granted the Relator's "Motion For Leave To Withdraw The Complaint Filed June 6<sup>th</sup>,2012 And Dismissal Without Prejudice" filed August 17<sup>th</sup>,2012. *See State ex rel. Fernbach v. Twelfth Appellate District Court of Appeals*, Ca. No. 2012-0970; *See also* Relator's "Exhibit F", which is the actual "Entry" filed in Ca. No. 2012-0970. This "Entry" clearly and unequivocally is in favor of the Relator in Ca. No. 2012-0970, NOT the Respondent, Twelfth Appellate District Court of Appeals, as the Respondent would have you believe.

### III. ARGUMENT/MEMORANDUM IN OPPOSITION

The crux of the instant case is whether or not the Twelfth Appellate District Court of Appeals had jurisdiction over Case Nos. CA2005-12-127 & CA2005-12-128. The Relator asserts that the Twelfth Appellate District Court of Appeals did not have jurisdiction to render any type of decision and/or judgment other than an outright dismissal of the appeal filed in Case Nos. CA2005-12-127 & CA2005-12-128 for lack of jurisdiction. Moreover, for appointed counsel, Johnathan Smith to ignore this issue and not address it, constitutes ineffective assistance of counsel.

**O.R.C. §2505.02** sets forth several types of final orders that may be appealed. The potentially pertinent categories here are those specified in **O.R.C. §2505.02(B)(1), (2), & (4)**. These provisions provide:

**"(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:**

**(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;**

**(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;**

**(4) An order that grants or denies a provisional remedy and to which both of the following apply:**

**(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.**

**(b)The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.”**

A “substantial right” is “a right that the United States Constitution, Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” **O.R.C. §2505.02(A)(1)**. **S.Ct.Prac.R.10.5(B)** standard is that this Court must now determine whether dismissal, an alternative writ, or a peremptory writ is appropriate. Dismissal, which the Respondent, Court of Appeals requests in its “Motion To Dismiss”, is required if it appears beyond doubt, after presuming the truth of all material factual allegations of the Relator's Complaint and making all reasonable inferences in his favor, that he is not entitled to the requested extraordinary relief. State ex rel. Duke Energy Ohio, Inc. v. Hamilton County Court of Common Pleas, 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶ 13.

If the pertinent facts are controverted and it appears beyond doubt that the Relator is entitled to the requested relief, this Honorable Court will grant a peremptory writ. Duke Energy @ ¶ 15. In the case at bar, the pertinent and controverted Facts as well as evidentiary support contained in the Complaint and herein prove beyond a reasonable doubt that the Relator is, in fact, entitled to the requested extraordinary relief that he seeks in the instant action herein.

In a case where a court did not have judicial discretion, *i.e.*, the authority to act such as when an inferior court is without jurisdiction to render judgment, mandamus will lie to compel that court to vacate its judgment and findings. State ex rel. Ballard v. O'Donnell (1990), 50 Ohio St.3d 182, P two of the Syllabus. Moreover, “[i]t is well-established that the rule that mandamus will not lie to control the judicial discretion of an inferior court does not apply to an attempt of that court to exercise its discretion beyond its jurisdiction. Id. 56 Ohio St.3d @ 183. (Mandamus will lie where it is apparent from the record that the inferior court had no jurisdiction, and the writ will lie even though the party aggrieved may also be entitled to appeal). Id. @ 184 (internal citations omitted); *See also Relator's Complaint* ¶ 16-22.

In Ohio it is well established that “[a] court only speaks through its journal and not by oral pronouncement or mere written minute or memorandum.” Schenley v. Kauth (1953), 160 Ohio St. 109, P one of the Syllabus. Additionally, in State v. Simkins, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, this Court established that, “In general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act.” See also State v. Payne, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, P 27. Applying the reasoning in Simkins, this Court’s previous determination in State ex rel. Ballard, supra, @ 184, must be expanded to now read “a decision rendered by a court without jurisdiction [or the authority to act] is unauthorized by law and amounts to usurpation of judicial power.” Id., citing State ex rel. Osborn v. Jackson (1976), 46 Ohio St.2d 41, 52. Accordingly, as stated by this Court in State ex rel. Ballard:

**“Consistent with these decisions, we hold that if an inferior court is without jurisdiction to render a judgment, mandamus will lie to compel the court to vacate its judgment and findings. See State ex rel. Tollis v. Cuyahoga Cty. Court of Appeals (1988), 40 Ohio St.3d 145, 148, 532 N.E.2d 727,729. See also Peralta v. Heights Medical Center, Inc. (1988), 485 U.S. 80, 86-87. ; Cf. Whitaker-Merrell v. Geupel Constr. Co., 29 Ohio St.2d 184, 186, 280 N.E.2d 922.”**

This Courts decisions have created an axiom of law that a court “acting without authority” is synonymous with a court “acting outside of its jurisdiction”, which renders any subsequent judgment therefrom “void”. Thus, according to this Courts reasoning, mandamus is an appropriate remedy in the instant case to compel such judgment to be vacated. State ex rel. Ballard, supra.

Moreover, mandamus is the appropriate remedy to compel a government entity to comply with statutory edict. See State ex rel. Wallace v. State Med. Bd. Of Ohio (2000), 89 Ohio St.3d 431,434, 732 N.E.2d 960. Mandamus lies to compel the performance of an act which is clearly enjoined by law upon a respondent. State ex rel. Pistillo v. Shaker Heights (1971), 26 Ohio St.2d 85, 55 O.O.2d 134; State ex rel. Freeman v. Valentine (1971), 25 Ohio St.2d 183, 54 O.O.2d 296. This principle applies when the source of the duty involved is a state statute. State ex rel. Tulley v. Brown (1972), 29 Ohio St.2d 235, 58 O.O.2d

If a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition will issue to “correct the results of prior jurisdictionally unauthorized actions”. See State ex rel. Otten v. Henderson, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 22. (emphasis added).

In the case sub judice, the Twelfth District Court of Appeals patently and unambiguously lacked jurisdiction to entertain ANY appeal filed from Tr. Ct. Ca. Nos. 05CR22343 & 05CR22570 and assigned App. Ct. Ca. Nos. CA2005-12-127 & CA2005-12-128 by the Clerk, due to the Facts as alleged in the Relator's Complaint and corresponding Counts filed for record in the above captioned case. See Relator's Complaint; See also Relator's Exhibits A & B attached to the Complaint filed for record September 18<sup>th</sup>,2012. “It is well established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction”. Gen Acc. Ins. Co. of N.Am. (1989), 44 Ohio St.3d 17,20, 540 N.E.2d 266; Cf. Whitaker-Merrell v. Geupel Constr. Co., 29 Ohio St.2d 184, 186, 280 N.E.2d 922. The trial courts “Judgment Entry's of Sentences” in Case Nos. 05CR22343 & 05CR22570, Relator's Exhibits A & B, did not determine the action, *i.e.*, the entirety of the criminal case. **O.R.C.§2505.02(B)(1)**. Consequently, neither **O.R.C.§2505.02(B)(1)** nor **O.R.C.§2505.02(B)(2)** authorizes the Court of Appeals to the exercise of jurisdiction over Relator's appeal in assigned App. Ct. Case Nos. CA2005-12-127 & CA2005-12-128. See Relator's Complaint and corresponding *Counts* as well as Relator's Exhibits A, B, C, D, & E paragraph 21 of the Complaint.

When a court patently and unambiguously lacks jurisdiction, the availability of other remedies, such as an appeal, is immaterial. State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist., 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶ 12.

When the Relator discovered the jurisdictional issues, the Relator attempted rectification and compliance of his procedural due process rights through the filings of April 12<sup>th</sup>,2012 and April 30<sup>th</sup>,2012. See Relator's Complaint ¶ 21 and corresponding Exhibits C, D, & E.

Though the Respondent contends that the Relator failed to allege any facts indicating that the numerous jurisdictional defects exist to back up their convoluted reading of the Relator's Complaint, the Respondent's theory is completely misplaced and unsubstantiated. As for the Respondent's allegation regarding the application of res judicata, the Relator has clearly demonstrated, with "Exhibit F" herein, that res judicata does not apply and the Respondent's theory in these regards is also completely misplaced and in direct contradiction to this Courts "Entry" filed for record August 21<sup>st</sup>,2012 in Case No. 201-0970.

Constitutional violations are remedied by restoring the victim of the violation to the position they would have been in absent the violation. Milliken v. Bradley, 418 U.S. 717, 746 (1974). The appropriate remedy is to grant the instant writ or an alternative writ, whichever remedy this Honorable Court deems appropriate and just under the law, which will then place the Relator in the position he was in prior to the deprivations that have occurred thereby granting the relief requested by the Relator in the Complaint filed for record September 18<sup>th</sup>,2012 in the instant case, relief to which the Relator is entitled. Anything less does not "mitigate the constitutional errors". Rushen v. Spain, 464 U.S. 114 (1983).

Until the void portions of the Relator's "Judgment Entry's of Sentences" are corrected (Relator's Complaint ¶ 18 & Relator's Exhibits A & B), it cannot be considered valid and filed and journalized pursuant to Crim.R.32(C) because those portions are as if there has been no judgment. See State ex rel. Carnail v. McCormick, 126 Ohio St.3d 124, 2010-Ohio-2671 @ [\*\*P34], citing State ex rel. Culgan v. Medina Cty. Court of Common Pleas, 119 Ohio St.3d 535, 2008-Ohio-4609, 809 N.E.2d 805, which is the primary authority relied upon by Carnail, *supra*. Moreover, the Twelfth Appellate District Court of Appeals had a prerequisite duty specifically enjoined by law and was required "to raise the jurisdictional issues sua sponte". In re Murray (1990), 52 Ohio St.3d 155,159 @ fn. 2.

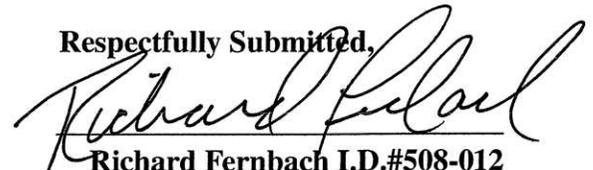
The Relator cannot theorize any more of an "extraordinary circumstance", than that of the courts patent and unambiguous lack of jurisdiction, to warrant the expansion of time as prescribed by Appellate Rule 14(B) to include the Reconsideration under Appellate Rule 26(A), which is the exact situation that

has occurred in the instant case and in direct relation to the Relator herein. Cf. State v. Gandy, 1<sup>st</sup> Dist. No. C-070152, 2010-Ohio-2873, 2010 Ohio App. LEXIS 2413; See also Relator's Complaint ¶ 21 and Relator's Exhibits C, D, & E.

As clearly demonstrated by and through the Relator's Complaint and the instant Memorandum In Opposition, the Relator has met the (3) three necessary elements required in order for a writ to issue in the instant case of (1) the Relator has a clear legal right to the requested relief; (2) the Respondent has a clear legal duty to perform the requested relief; and (3) the Relator has no adequate remedy at law notwithstanding the availability of appeal as the Twelfth Appellate District Court of Appeals patently and unambiguously lacked the jurisdiction to entertain any appeal under law.

Wherefore, the Relator, Richard Fernbach pursuant to **S.Ct.Prac.R.10.5(B)** hereby moves this Honorable Court with his **MEMORANDUM IN OPPOSITION** to the Respondent's "Motion To Dismiss" filed for record October 15<sup>th</sup>,2012 in the above captioned case number. The Relator respectfully requests this Honorable Court to **SUSTAIN** the Relator's instant Memorandum In Opposition with corresponding Exhibits as evidentiary support for the instant action in mandamus/procedendo and the Relator respectfully requests this Honorable Court to grant the relief as was requested in the Complaint filed by the Relator and any other relief that this Honorable Court deems just and appropriate including any relief of an alternative writ that the Relator is entitled to pursuant to law.

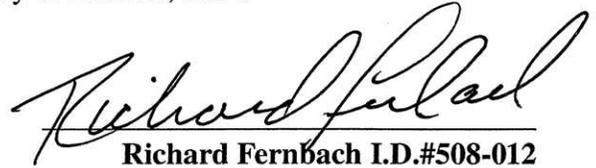
Respectfully Submitted,



**Richard Fernbach I.D.#508-012**  
**Lebanon Correctional Institution**  
**Honor Camp Unit 6**  
**P.O. Box 56**  
**Lebanon, Ohio 45036**  
**Relator-Pro-Se.**

**CERTIFICATE OF SERVICE**

I, the undersigned hereby certify that a true copy of the foregoing Memorandum In Opposition was served upon Sarah Pierce Atty For Respondent @ 30 East Broad Street, 16<sup>th</sup> Floor Columbus, Ohio 43215 by way of ordinary U.S. Postal Service this 22<sup>nd</sup> day of October, 2012.



**Richard Fernbach I.D.#508-012**

**Relator-Pro-Se.**

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SUPREME COURT OF OHIO

# The Supreme Court of Ohio

State ex rel. Richard Fernbach

Case No. 2012-0970

v.

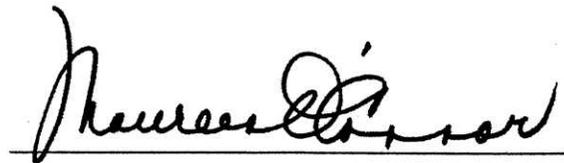
IN MANDAMUS AND PROCEDENDO

Twelfth Appellate District Court of Appeals for  
Warren County, Ohio

ENTRY

This cause originated in this court on the filing of a complaint for a writ of mandamus and procedendo.

Upon consideration of relator's application for dismissal, it is ordered by the court that the application for dismissal is granted. Accordingly, this cause is dismissed.



Maureen O'Connor  
Chief Justice

"EXHIBIT F"