

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.
KRISTOFFER T. MORRIS,

Relator,

v.

JUDGE DAVID E. CAIN, et al.,

Respondents.

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: Case No. 2013-0565
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: Original Action in Mandamus/Prohibition
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**MOTION TO DISMISS OF RESPONDENT
THE TENTH DISTRICT COURT OF APPEALS**

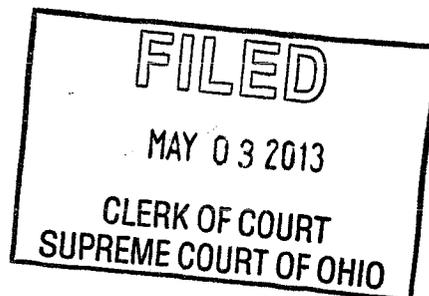
KRISTOFFER T. MORRIS
2338 Northwest Street
Lima, Ohio 45802

Relator

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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

Relator Kristoffer Morris filed this original action in prohibition against Respondent the Tenth District Court of Appeals ("Tenth District"), requesting a writ prohibiting the Tenth District from assuming jurisdiction over Relator's appeal from his criminal convictions. Because Relator fails to state a claim for which this court may grant relief, the Tenth District respectfully asks this Court to dismiss Relator's complaint.

II. STATEMENT OF FACTS

On July 22, 2004, Relator was indicted, and ultimately tried, on the following twelve counts: one count of aggravated burglary; four counts of aggravated murder, all with death penalty specifications; three counts of attempted murder; two counts of felonious assault; and two counts of having weapon under disability. Relator's Mem. in Support at 2; *see also* Relator's Ex. A-1, B-1.¹ Ten counts contained firearm specifications. *Id.*

Relator's jury trial commenced on August 8, 2005, and Relator was convicted of aggravated burglary, with a firearm specification; murder, with a firearm specification; aggravated murder, with a firearm specification; two counts of involuntary manslaughter, with a firearm specification; attempted murder, with a firearm specification; two counts of felonious assault, with a firearm specification; and two counts of having a weapon under disability. Relator's Mem. in Support at 2; *see also* Relator's Ex. B-1, C-1.

¹ Documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6), without converting the motion into a motion for summary judgment. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997).

On August 23, 2005, after a mitigation hearing, the jury determined that the aggravating circumstances did not outweigh the mitigating factors beyond a reasonable doubt, and recommended a prison sentence of 30 years to life. The trial court filed its judgment entry of conviction and sentence on August 25, 2005, and an amended entry on September 14, 2005. Relator was sentenced to a total prison sentence of 66 years to life for all counts. Relator's Mem. in Support at 2. Relator appealed his conviction to the Tenth District. Relator's Mem. in Support at 4.

On December 19, 2012, Relator moved the trial court to issue a new sentencing entry. Relator's Mem. in Support at 3. That motion was subsequently denied, and Relator appealed that decision to the Tenth District. *See* Respondent's Ex. 1.² The appeal is currently pending.

Relator requests a writ of mandamus compelling Judge David Cain of the Franklin County Court of Common Pleas to issue a separate sentencing order. Relator's Complaint at 1. Relator also requests a writ of prohibition be issued against the Tenth District, arguing that the Tenth District lacked jurisdiction over Relator's original appeal because Judge Cain failed to issue a separate sentencing order, as Relator requests in his mandamus petition. *Id.*

III. ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim challenges the sufficiency of the complaint itself. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d. 494, 2010-Ohio-

² Civil Rule 12(B)(6) requires that, where a motion to dismiss presents matters outside of the complaint, the court must treat the motion as a summary judgment motion under Civil Rule 56. The court may consider documents attached to or incorporated into the complaint in a motion to dismiss, however. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). Here, Relator's complaint references both his underlying criminal case, and his motion for a new sentencing entry. Relator's Mem. in Support at 3. The docket from this case is attached, for the Court's convenience, at Respondent's Exhibit 1.

2057, ¶ 11. When considering the factual allegations of the complaint, a court must accept incorporated items as true and “[f]urthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom.” *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Finally, a court must find that the plaintiff’s complaint appears beyond doubt that it can prove none of the facts it sets out. Civ. R. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St.3d 98, 99, 562 N.E.2d 1383 (1990).

B. Relator is not entitled to the extraordinary relief of a writ of prohibition.

Relator’s request does not meet the requirements for a writ of prohibition to issue. In order for Relator to be entitled to the requested writ, he must establish that (1) the Tenth District is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) the court’s denial of the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Hamilton County Bd. of Comm’n v. Hamilton County Ct. of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 18. Relator does not demonstrate that the Tenth District is exercising a power that is unauthorized by law, and Relator has an adequate remedy in the ordinary course of the law.

The second and third requirements for a writ of prohibition can only be satisfied if the Tenth District “patently and unambiguously lacks jurisdiction to proceed.” *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, ¶ 12. “In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject matter jurisdiction can determine its own jurisdiction, and a party contesting that jurisdiction has an adequate remedy by appeal.” *State ex rel. Plant v. Cosgrove*, 119 Ohio St.3d 264, 2008-Ohio-3838, 893 N.E.2d 485, ¶ 5. Prohibition is a preventive writ rather than a corrective remedy, designed to prevent a tribunal from proceeding in a matter that it is not authorized to hear and determine. *State ex rel. LTV Steel Co.*

v. Gwin, 64 Ohio St.3d 245, 248, 1992-Ohio-20, 594 N.E.2d 616. Accordingly, prohibition does not apply retroactively but is instead “directed to the prevention of the usurpation of judicial power and does not lie to review an accomplished act.” *State ex rel. Flannery v. Sidwell*, 24 Ohio St.2d 74, 75, 53 Ohio Op. 2d 158, 263 N.E.2d 568 (1970).

Relator was sentenced on August 25, 2005, and an amended sentencing entry was issued on September 14, 2005. Relator appealed from this decision on September 26, 2005, and the Tenth District rendered its decision on May 17, 2007. *See* Relator’s Exhibit D-4. Therefore, Relator’s request for a writ of prohibition is a request for a corrective remedy, not a preventative one. Further, prior to the 2008 amendments, the statute at issue, R.C. 2929.03(F), applied only to the imposition of the death penalty or life imprisonment. *See* 2007 S.B. No. 10, eff. Jan. 1, 2008. In Relator’s case, the court imposed neither a death sentence nor a term of life imprisonment. Therefore the Tenth District did not “clearly and unambiguously” lack jurisdiction.

Further, Relator seeks an extraordinary writ where he has an adequate remedy at law and will suffer no injury if prohibition is denied. *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, ¶ 13. Relator moved for a new sentencing order in the trial court on December 19, 2012. Relator’s Mem. in Support at 3. This motion was denied, and Relator appealed to the Tenth District, where it is currently pending. Respondent’s Ex. 1. Because Relator has an adequate remedy at law, which he is currently exercising, his request for a writ of prohibition is inappropriate. Additionally, Relator has failed to allege any injury he may sustain if prohibition is denied. Because an adequate remedy of law exists and the Relator has failed to establish that any injury will result if this Court denies the writ of prohibition, this Court must dismiss Relator’s complaint.

IV. CONCLUSION

For the foregoing reasons, Respondent the Tenth District Court of Appeals respectfully requests that this Court to dismiss Relator's complaint for a writ of prohibition.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



DARLENE FAWKES PETTIT (0081397)

*Counsel of Record

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Counsel for Respondent

Tenth District Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion to Dismiss* was served by regular U.S. mail, postage prepaid, on May 3RD, 2013 upon the following:

KRISTOFFER T. MORRIS
2338 Northwest Street
Lima, Ohio 45802

Relator



SARAH PIERCE (0087799)

Assistant Attorney General



Home **Case Information Online** Court Schedule

Last Name: First Name: Middle Init: Court: All Case: 04 CR 004866

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CRIMINAL CASE DETAIL

CASE NUMBER 04 CR 004866	HOW FILED INDICTMENT	DATE FILED 07/22/2004	MUN FCS	COMP 16560/04	ARREST DATE 07/13/2004	STATUS CLOSED
JUDGE DAVID E CAIN	COURTROOM COURTROOM 7F 345 SOUTH HIGH STREET 7TH FLOOR COLUMBUS, OH 43215				PROSECUTOR ANDREW YOSOWITZ SCOTT C KIRSCHMAN SCOTT C KIRSCHMAN FRED M MANN	

DEFENDANT(S)

Name KRISTOFFER T MORRIS

Co-Defendant(s) None

Attorney ANDREW P AVELLANO

CHARGES (Disclaimer: The listed "Off. Date" may be inaccurate on cases filed prior to 10/9/92. This is the date the electronic docket for this case was converted to a new system, and not the actual date of the Offense. See docket entries below for Case History.)

Off. Date	Code	Description	Disposition	Degree
04/15/04	2911.11	AGGRAVATED BURGLARY	PLEA OF GUILTY TO THE INDICTMENT	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2921.51	IMPERSONATE OFFICER	NOLLE PROSEQUI - CHARGE	F3
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2911.01	AGGRAVATED ROBBERY	NOLLE PROSEQUI - CHARGE	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2911.02	ROBBERY	NOLLE PROSEQUI - CHARGE	F2
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2911.02	ROBBERY	NOLLE PROSEQUI - CHARGE	F3
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2905.01	KIDNAPPING	NOLLE PROSEQUI - CHARGE	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2905.01	KIDNAPPING	NOLLE PROSEQUI - CHARGE	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2905.01	KIDNAPPING	NOLLE PROSEQUI - CHARGE	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM, USE OF FIREARM		
04/15/04	2923.13	WPN-UNDR DISABILITY	NOLLE PROSEQUI - CHARGE	F3
	Specifications:	None		
07/12/04	2911.11	AGGRAVATED BURGLARY	FINDING OF GUILTY - BY COURT	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM		
07/12/04	2903.02	MURDER	FINDING OF GUILTY OF LIO - BY JURY	XX
	Specifications:	None		
07/12/04	2903.01	AGGRAVATED MURDER	FINDING OF GUILTY - BY JURY	XX
	Specifications:	PURPOSE OF ESCAPING DETECTION, ETC., DISPLAYED OR BRANDISHED FIREARM		
07/12/04	2903.04	INVOL. MANSLAUGHTER	FINDING OF GUILTY OF LIO - BY JURY	XX
	Specifications:	None		
07/12/04	2903.04	INVOL. MANSLAUGHTER	FINDING OF GUILTY OF LIO - BY JURY	XX
	Specifications:	None		
07/12/04	2903.02	ATTEMPTED MURDER	FINDING OF GUILTY - BY JURY	F1
	Specifications:	ATTEMPT, DISPLAYED OR BRANDISHED FIREARM		
07/12/04	2923.13	WPN-UNDR DISABILITY	FINDING OF GUILTY - BY COURT	F3
	Specifications:	None		
07/13/04	2903.02	ATTEMPTED MURDER	FINDING OF NOT GUILTY - BY JURY	F1
	Specifications:	ATTEMPT, DISPLAYED OR BRANDISHED FIREARM		
07/13/04	2903.11	FELONIOUS ASSAULT	FINDING OF GUILTY - BY JURY	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM		
07/13/04	2903.02	ATTEMPTED MURDER	FINDING OF NOT GUILTY - BY JURY	F1
	Specifications:	ATTEMPT, DISPLAYED OR BRANDISHED FIREARM		
07/13/04	2903.11	FELONIOUS ASSAULT	FINDING OF GUILTY - BY JURY	F1
	Specifications:	DISPLAYED OR BRANDISHED FIREARM		
07/13/04	2923.13	WPN-UNDR DISABILITY	FINDING OF GUILTY - BY COURT	F3
	Specifications:	None		

BONDS
No Bonds Issued

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Date Chg. Description Lvl

Start Date May 2 2013

Image Fiche Frame Pages

Respondent's Ex. 1

04/18/13	00	MISCELLANEOUS PAPER FILED	58211	M75	1
04/18/13	00	RECORD TRANSMITTED TO COURT OF APPEALS	58195	V24	1
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03/26/13	00	MOTION FILED	58197	X26	2
03/26/13	00	APPOINTMENT OF COUNSEL - MOTION FOR	58198	C48	2
03/26/13	00	AFFIDAVIT OF INDIGENCY	58195	I27	1
03/26/13	00	TRANSCRIPT - REQUEST TO FILE	58195	I25	2
03/26/13	00	NOTICE OF APPEAL FILED - COURT OF APPEALS	58195	I20	1
03/08/13	01	MOTION DENIED	58181	C65	1
01/15/13	00	MEMORANDUM CONTRA FILED	58150	J55	6
12/27/12	00	MEMORANDUM CONTRA FILED	58140	L87	5
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06/23/10	00	APPEAL DISMISSED - OHIO SUPREME COURT	57533	O34	1
04/08/10	00	APPEAL DECISION	57474	V56	12
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04/21/09	00	MISCELLANEOUS PAPER FILED	57241	C05	2
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02/06/09	00	MISCELLANEOUS PAPER FILED	57183	V86	1
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08/30/07	00	MISCELLANEOUS PAPER FILED	55798	D02	3
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08/24/07	00	MISCELLANEOUS PAPER FILED	55741	J13	1
07/16/07	01	JUDGMENT AFFIRMED - COURT OF APPEALS	55392	J05	1
06/12/07	00	APPEAL OPINION	55116	H01	17
09/27/06	00	ATTORNEY FEES ORDER	52901	A01	8
09/27/06	00	ATTORNEY FEES - MOTION FOR	52901	A01	8
08/01/06	00	ADDITIONAL COST BILL FROM NIGHTLY RUN	52530	E15	1
07/31/06	00	WARRANT TO CONVEY RETURNED - PAPERS ONLY	52350	C08	1
07/27/06	00	WARRANT TO CONVEY	52331	C01	1
07/24/06	00	NOTICE - PRISON IMPOSED	52308	E02	1
07/24/06	00	SENTENCING DISPOSITION SHEET	52308	D19	1
07/24/06	01	JAIL TIME CREDIT	52308	E03	3
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07/24/06	01	PLEA OF GUILTY TO THE INDICTMENT	52308	D20	2
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07/24/06	09	NOLLE PROSEQUI - CHARGE	52308	D20	2
07/24/06	10	NOLLE PROSEQUI - CHARGE	52308	D20	2
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07/18/06	00	CRIMINAL DISPOSITION SHEET FILED	52202	D12	1

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07/17/06	00	SUBPOENA - FILED	52354	G20	1
07/14/06	00	WARRANT TO CONVEY RETURNED - SERVED	52230	A19	2
07/11/06	00	NOTICE RETURNED	52191	J12	1
07/05/06	00	WARRANT TO CONVEY	52133	D19	1
06/30/06	00	COURT ORDERED WARRANT - ISSUED	52101	I03	1
06/30/06	00	COURT ORDERED WARRANT - ENTRY ORDERING ISSUED	52101	I02	1
06/30/06	00	COURT ORDERED WARRANT - STATE APPLICATION	52101	I01	1
06/28/06	00	SUBPOENA - RETURNED SERVED	52077	B07	1
06/28/06	00	SUBPOENA - RETURNED SERVED	52077	D02	1
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06/26/06	01	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	01	CONTINUANCE ORDER	52035	G01	1
06/26/06	02	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
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06/26/06	07	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	07	CONTINUANCE ORDER	52035	G01	1
06/26/06	08	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	08	CONTINUANCE ORDER	52035	G01	1
06/26/06	09	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	09	CONTINUANCE ORDER	52035	G01	1
06/26/06	10	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	10	CONTINUANCE ORDER	52035	G01	1
06/26/06	11	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	11	CONTINUANCE ORDER	52035	G01	1
06/26/06	12	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	12	CONTINUANCE ORDER	52035	G01	1
06/26/06	13	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	13	CONTINUANCE ORDER	52035	G01	1
06/26/06	14	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	14	CONTINUANCE ORDER	52035	G01	1
06/26/06	15	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	15	CONTINUANCE ORDER	52035	G01	1
06/26/06	16	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	16	CONTINUANCE ORDER	52035	G01	1
06/26/06	17	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	17	CONTINUANCE ORDER	52035	G01	1
06/26/06	18	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	18	CONTINUANCE ORDER	52035	G01	1

06/26/06	19	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	19	CONTINUANCE ORDER	52035	G01	1
06/26/06	20	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	20	CONTINUANCE ORDER	52035	G01	1
06/26/06	21	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	21	CONTINUANCE ORDER	52035	G01	1
06/26/06	22	WAIVER OF RIGHT TO SPEEDY TRIAL	52035	G01	1
06/26/06	22	CONTINUANCE ORDER	52035	G01	1
06/23/06	00	SUBPOENA - FILED	52068	D18	1

Respondent's Ex. 1