

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO ex rel.)
JOHN J. ROHRER,)
Petitioner/Relator,

Case No. 14-0268

-vs-)

THE HONORABLE LEONARD.)
HOLZAPFEL, et al.)
Respondents

MEMORANDUM IN SUPPORT OF PROHIBITION,
MANDAMUS, HABEAS CORPUS, & ALTERNATE WRITS

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I. STATEMENT OF THE CASE AND FACTS

Prior to being prosecuted in 2009 in the case below, the only other significant contact with the criminal justice system that 33 year old petitioner/relator [John] has had, occurred in June, 2006. In a state of mental confusion and possibly suffering his first psychotic break, before he was ever prescribed any medications, John wandered into the wrong house, believing it to be the house of a friend. [3/14/11 Ts. p. 4] Plaintiff's prior attorney charged John with burglary in 2006, but the judge in that matter ultimately disposed of that case as a fourth degree felony trespass, finding John Not Guilty by Reason of Insanity on 7/1/08. The court's jurisdiction in the 2006 case ended on 1/15/10.

On September 1, 2009, following several years in which John had been medicated according to the dictates of the State's mental health system, both before and after the NGRI finding of 7/1/08, John was arrested when he struck another man who had previously struck him in one of the state's "supervised" group homes. Plaintiff's former attorney, the Ross County prosecutor at the time, immediately initiated a felonious assault prosecution of John in September, 2009 in Ross County Case No. 09 CR000393, which is the subject of the ongoing litigation below. The docket sheet in that case [Ev. Relator Item I] shows that John was continuously incarcerated at the Ross County Jail from September, 2009 through February, 2010, much of that time being in solitary confinement. [Ev. Relator Item IV Ex. D & Ev. Relator Item XXII]

In 2011 Dr. Joseph Glenmullen, a Harvard psychiatrist, published a study that found that a large number of the drugs John was taking as prescribed at that time cause violent behavior among those not otherwise violent.

[http://duluthreader.com/articles/2012/04/05/299_many_pschoactive_drugs_are_strongly_associated]. The Glenmullen study further indicates that the other drugs John was taking as prescribed

in 2009, or which he was being withdrawn from, such as Lexapro, Celexa, Abilify, Wellbutrin, Geodon, Ambien, Klonopin, and Neurontin and which he is no longer taking, were far more violence producing even than the Risperdal that respondent ABH refuses to consider reducing even on a trial basis. According to the study, Risperdal on average increases the risk of violence by a factor of 2.2.

The docket sheet in the 2009 case below documents that on 10/14/09 the prior judge permitted John's public defender to change his plea to NGRI, and on the same day, also ordered psychological evaluations by Shawnee Forensic Center, but only as to the issues of John's sanity at the time of the assault and his competence to stand trial. The docket sheet makes no reference to any person or entity as being appointed to conduct an evaluation of John as a "mentally ill person subject to hospitalization by court order". It does, however, show that a 1/20/10 Entry scheduled an "evaluation hearing" for 1/22/10. No such hearing occurred.

On January 25, 2010, John waived jury trial in the case below, during an approximately 5 minute proceeding which combined a determination of competence to waive jury trial and other trial rights, with the taking of the plea of Not Guilty by Reason of Insanity at the time of the assault. A February 1, 2010 Entry [Ev. Relator Item XXI], said to be the memorialization of the January 25, 2010 proceeding, suggests that during the same five minute hearing, the previous judge may have made some sort of effort to find John to have been a "mentally ill person" according to Ohio Rev. Code Sec. 2945.40 and 5122.01. Besides finding John NGRI, the February 1, 2010 Entry recites that the Court found John competent to waive his jury trial and other trial rights, and mentions that the attorneys not only "stipulated" to a police report about the September 1, 2009 incident in the group home, they also marked it as Joint Exhibit "A" and presumably placed it into evidence. The Entry of 2/1/10 goes on to recite that the third finding,

i.e. that John was a “mentally ill person subject to hospitalization by court order”, was supported solely by a “report” from a “Dennis M. Eshbaugh”, said to have been “stipulated to” by the attorneys but never marked as an exhibit, never admitted into evidence, and not quoted from. Although the 2/1/10 Entry refers to the existence of two (2) off-the-record purported psychological reports that are recited as having been stipulated to during the hearing, neither one was ever marked or made an exhibit. Although Ohio Rev. Code Sec. 2945.40(D) mandates that the Court “make and maintain a full transcript” of this type of proceeding, this was not done. The undersigned is having to order it, and, due to its brevity, it is expected to become available within a few days. Until that transcript becomes available it is not known definitively whether either “report” was ever read into the record, but it is believed that neither was. John was never made privy to the contents of either alleged “report”.

The 2/1/10 Entry is silent on the issue of whether John waived his rights under Sec. 2945.40(C) as a distinct act from his waiver of his trial rights. It is believed that in the rushed atmosphere of the combined hearing, it would have been almost impossible for most people to have understood that the hearing rights under Sec. 2945.40(C) were different and separate from, the trial rights that had been discussed minutes earlier in the same hearing. The transcript is expected to re-affirm that John never waived his rights under Sec. 2945.40(C) regardless of whether the prior judge performed his statutory non-delegable duty in reading John those rights.

Despite the findings in the 2/1/10 Entry claiming that Sec. 2945.40(C) rights were “explained”, there remain some serious questions about whether the prior judge ever adequately discharged this non-delegable duty to John. The Entry of 2/1/10 is silent as to whether *the consequences* of giving them up, or *the consequences* of the “stipulation” to the Eshbaugh “report”, were ever explained.

In any case, it appears that John *did not waive any of his statutory or due process rights* during the original 1/25/10 proceedings purporting to authorize locking John in a state mental hospital. Regardless of whether he was read the rights, he was not permitted in that hearing to exercise any of them except, arguably, the right to a court appointed attorney.

On March 4, 2011, an eight minute proceeding was conducted in which the previous judge stated that John was to be forced drugged, that conclusion based entirely on another stipulation by the attorneys to another off-the-record “report” – this one by a “Dr. Santer” of Twin Valley, which was alleged to contain grounds for forced drugging. Once again no such “report” was admitted into evidence, nor its contents read into the record, as is shown in the transcript of that proceeding. [Ev. Relator Item II] John was the only witness to testify during the March, 2011 proceeding, stating that he had a dispute about levels of medication with the hospital doctor, that he agreed he did not want to experience psychosis, wanted to take enough medication to avoid that, and that he was able to avoid symptoms by taking the medications only every third day. [Ts. p. 3] The testimony was uncontroverted by anything in the record. The previous judge noted that John was “lucid” but that his “perspective” was “skewed” without stating any specifics. [Ts. p. 4] The prior judge suggested that when John fully complied with whatever the psychiatrists prescribed, his problems were “relatively minor”, but that when he did not, they became “real serious” – referring to the 2009 assault. [Ts. p. 4, Ev. Relator Item II] John began to point out that during the 2006 case there were no medications to be compliant with, and would have been able to testify that he had been fully compliant during the time leading up to the 2009 case but the judge interrupted him. During the March, 2011 hearing John expressed his understanding that objecting to the forced drugging was probably futile, that

“This is Twin Valley we’re dealing with, so it’s not like I’m going to have a chance . . . a snow ball’s chance in hell of changing the court’s decision

on this matter, but I just wanted to state my view and try to get you to see my humanity I guess.” [ts. p. 4]

At no time did the previous judge attempt to disabuse John of the notion that he was indeed completely at the mercy of the court and the hospital. The transcript shows that at no time did the previous judge or the previous public defender advise John that he had the right to cross examine witnesses against him, that his attorney’s stipulation to the “report” took away that right, or that John had the right to an “independent expert evaluation”. The prior judge likewise never informed John that due process protected his liberty interests in maintaining control over what was injected into his body, or that such fundamental rights could not be infringed by means of secret evidence.

An “Entry” file-stamped March 14, 2011 [Ev. Relator Item III] purports to order forced drugging according to a list of drugs supposedly found in an “attachment A”. “Attachment ‘A’” was never attached to the “Entry” nor is it to be found in the court file or as an exhibit from the March 4, 2011 hearing. [Ev. Item III] The previous judge made no reference in the hearing or later, in the “Entry” fragment, to facts from which it could have been concluded that John was a “mentally ill person subject to hospitalization by court order”, but the Entry fragment of 3/14/11 recites this conclusion anyway.

On September 10, 2012 the previous judge held another proceeding in which he referred to another “report” from Twin Valley recommending John to be transferred to respondent hospital - ABH. [Ev. Relator Item IV] Again John’s public defender and the prosecutor stipulated to the “report”, which, though it was said to have been “filed”, is likewise not contained in the court file. No “report” was admitted into evidence or marked as an exhibit during the September 10, 2012 proceeding. The parties did not stipulate that John remained a mentally ill person subject to hospitalization by court order. The previous judge again made no references to

facts from which it could have been concluded that John continued to be a “mentally ill person subject to hospitalization by court order” – only that

“you are being compliant with your medication and you are participating in therapeutic activities, that you are getting along with everybody and the staff, you’re following the rules and that you haven’t any other recent episodes of threatening r [sic] aggressive behavior.” [Ts. 9/10/12, p. 10]

and ordered John transferred to respondent hospital [ABH], a less secure facility, for involuntary civil commitment, where he remains to date. The September 17, and September 18, 2012 Entries purporting to memorialize the hearing of September 10, 2012 were signed by the *plaintiff’s* former attorney, who had originally initiated the prosecution in the matter below, now serving as common pleas judge. The September, 2012 Entries recite without supporting facts, that John “remains a mentally ill person subject to hospitalization”. [attached Entries of September 17 and 18, 2012, Ev. Relator Items VI and VII]]

On December 4, 2013, John filed three motions in Ross County Case No. 09CR000393, the primary motion being one seeking to vacate the March, 2011 forced drugging “order”, to be granted unconditional release from respondent hospital [ABH], and for alternative relief involving ABH’s patient rights violations. The other two December 4, 2011 motions deal with transportation of John from the hospital and to court appearances. One of those other two motions sought a pre-trial order enforcing John’s right to be transported to his privately retained medical doctors for evaluation and treatment. [Ev. Relator Item IV] The third sought a pre-trial order authorizing respondent ABH to transport him directly to the courthouse or his attorney’s office for future court appearances in the case below. [Ev. Relator Item IX]

The docket sheet reveals that on December 30, 2014 respondent judge conducted an off-the-record status conference which John was not permitted to attend. On the same day respondent judge entered an order setting only John’s motion to vacate the forced drugging order and related

relief, for hearing on February 27, 2014, reserving that one day for its “completion”. [Ev. Relator Item X] The two motions pertaining to transportation of John, to court, and to his physicians, have never been granted or scheduled for hearing. On January 3, 2014, respondent judge issued an Order for Warrant of Removal directing respondent sheriff to “take custody of” John by February 28, 2014. [Ev. Relator Item XI] No grounds for such action were cited.

John filed a motion objecting to the Order for Warrant of Removal on January 14, 2014 [Ev. Relator Item XII], and on January 21, 2014, a request for evidentiary hearing on his December 4, 2013 motions seeking transportation directly to court and to his doctors, or that they be granted *ex parte*, there having never been filed objections to any of John’s motions by the plaintiff below. [Ev. Relator Item XIV] On January 24, 2014 John filed a motion objecting to respondent’s limitation on the time allotted to the hearing to one day – for both sides to present. [Ev. Relator Item XX] Respondent judge continues to refuse to rule on any of John’s pre-trial motions on the transportation issues or time limitations, although he has scheduled a pre-trial hearing for February 21, 2014 to resolve other pre-trial issues. [Ev. Relator Item XVII] The plaintiff state continues to file no responsive pleadings as to any of John’s motions.

On January 22, 2014 respondent judge issued a new Order for Warrant of Removal [Ev. Relator Item XV], *without vacating the January 3, 2014 Order for Warrant of Removal on February 28, 2014*, in which he again directs respondent sheriff to “take custody of” John, this time stating “PLEASE HAVE DEFENDANT AT THE ROSS COUNTY JAIL BY FEBRUARY 26, 2014.” [emphasis supplied] [Capitals in Original]. The hearing date for John’s primary motion of 12/4/13 remains set for February 27, 2014.

John’s motions requesting an Order requiring respondent ABH to transport him to his privately retained physicians for evaluation and treatment if indicated, are supported by a

September, 2013 affidavit of his former family doctor, Dr. Sandra Pinkham [Ex. "G"], stating that his health had been deteriorating over the previous year that he had then been at ABH, based in part on ABH blood test results for that time period. Also supporting John's various motions seeking transport to Drs. Pinkham and DeMio, is John's own statement describing symptoms of tardive dyskinesia or Neuroleptic Malignant Syndrome consisting of painful neck and facial tics, as well as mitral valve prolapse likely produced by ABH's drugs. [Ex. "D"] Respondent judge continues to refuse to require respondent ABH to transport John to either of his medical doctors, although Dr. Pinkham's affidavit makes it clear that she is unwilling to attempt to conduct a medical examination in the ABH visiting room.

Respondent judge's December 30, 2013 Order for a 2/27/14 hearing recites that it is to be completed that day. On January 24, 2014 John filed objections to the time restriction [Ev. Relator Item XX], pointing out that his primary motion contains 11 (eleven) separate grounds in support of vacating the forced drugging motion. He also has 4 (four) separate arguments supporting his entitlement to an immediate unconditional discharge and 7 (seven) separate examples of inhumane, unlawful conditions of confinement being maintained by ABH, which it is essential to present in order to establish that ABH has been acting in contempt of the original "orders" directing plaintiff to provide him with "treatment", not warehousing. Respondent has to date made no ruling as to the issue of his previously imposed time restriction, though he may do so at the upcoming February 21, 2014 pre-trial hearing.

On 2/6/14 respondent issued the most recent Order for pre-trial hearing specifying that he would consider motions "except for those filed 12/4/13". [Ev. Relator, Item XXII] John's motions seeking ABH transportation to court and to his physicians were both filed 12/4/13. Respondent has to date lifted neither the warrant that is to be executed by February 26, 2014 nor

the one issued for February 28, 2014. Respondent also continues to refuse to require ABH to transport John to his privately retained medical doctors, even though ABH has a history of transporting John to medical doctors outside of the hospital.

IV. ARGUMENT: ASSIGNMENTS OF ERROR

PROPOSITION NO. 1: RESPONDENT JUDGE AND RESPONDENT HOSPITAL ARE CLEARLY ACTING OUTSIDE THEIR LAWFUL POWERS BY RESTRAINING PETITIONER OF HIS LIBERTY BY COMPELLING HIM TO PARTICIPATE IN "HEALTH CARE SERVICES" THOUGH PROHIBITED FROM DOING SO BY SEC.1.21 OF THE OHIO CONSTITUTION WITH THE ONLY POSSIBLE JUSTIFICATION FOR SUCH ASSAULTS ON JOHN'S LIBERTY BEING VOID COURT RULINGS THAT DISREGARD UNCONTROVERTED EVIDENCE JOHN HAS NOT BEEN A MENTALLY ILL PERSON SUBJECT TO HOSPITALIZATION SINCE AT LEAST 2010

It is clear from the transcripts and other documents attached to the Complaint and Petition herein that respondent judge is continuing to enforce both the March, 2011 forced drugging Entry fragment and "orders" for involuntary commitment based on a record devoid of evidence from the very beginning. The docket sheet shows that some sort of proceeding occurred on January 25, 2010 in which John waived his right to jury trial, and was found not guilty by reason of insanity based on his earlier plea. Ohio Rev. Code Sec. 2945.40 Sec. (A) indicates that upon being found NGRI

"the trial court *shall* conduct a full hearing to determine whether the person is a mentally ill person subject to hospitalization by court order".
[emphasis supplied]

As described in the complaint and in the statement of facts herein, the prior judge conducted a 5 minute or so proceeding in which he took no evidence, except for a police report that *was* marked and admitted into evidence by stipulation. He attempted to combine three proceedings into one- the first phase being one in which John was *observed to be sufficiently competent to waive jury*

trial and other trial rights, and the second phase devoted to the making of the NGRI finding. In the third phase *of the same proceeding* he purported to also conduct a full commitment hearing under Ohio Rev. Code Sec. 2945.40(A). The February 1, 2010 Entry indicates that during this third stage of the 5 minute proceeding, the earlier judge admittedly considered an off-the-record “report” by a psychologist named “Dennis M. Eshbaugh” as constituting the sole basis for the “clear and convincing evidence that the defendant is a mentally ill person who is subject to hospitalization by court order”, even though such report was never marked as an exhibit, never admitted into evidence, and never even quoted from. The 2/1/10 Entry specifies that “[n]o other testimony, evidence or argument were offered” to support John’s involuntary commitment.

It is believed that the transcript of the hearing will reveal that the statement in the 2/1/10 Entry that the prior judge “explained to the defendant his rights” under Sec. 2945.40(C), was at the very least, misleading. Even had Sec. 2945.40(C) rights been read to John, the 2/1/10 Entry makes no claim that John understood or that he ever waived those rights. Indeed many of those rights sound confusingly similar to the rights John had just a few minutes earlier waived in the context of his waiver of his trial rights. The 1/25/10 proceedings took place in the context that John had been incarcerated in the jail, much of the time in solitary confinement, for the previous five (5) months, a fact never noted in the Entry. The Entry did take the trouble of stating that John had

“waived his right to trial by jury and agreed to proceed with a trial to court”

but clearly declined to find that John waived his Sec. 2945.40(C) rights. There is likewise no finding that John even understood, as many lay people would not have, that the Sec. 2945.40(C) rights are *different* from the rights he had just waived a few minutes earlier – and that their waiver bears different consequences. In particular, the prior judgment does not find and the transcript will not support, that the judge explained to John or that John waived, any of the following rights:

1. His right under Ohio Rev. Code Sec. 2945.40(A), to a “full hearing” devoted to whether he was a “mentally ill person” within the meaning of Sec. 5122.01(A) and (B),
2. His due process right to reasonable notice and a reasonable opportunity to appear and present objections and evidence objecting to the proposed involuntary commitment. *The court file reveals that no motion seeking involuntary commitment was ever filed or served.*
3. His right to a public hearing under Sec. 2945.40(D) unless he objected to it, which he did not do,
4. His right to require the state to produce witnesses proving he fit the “mentally ill” definition by clear and convincing evidence under Ohio Rev. Code Sec. 2945.40(E). *No such witnesses were ever produced.*
5. His right to cross-examine any such witnesses under Ohio Rev. Code Sec. 2945.40(C), and that *his attorney’s stipulation to a “report” John never saw, effectively waived his right to cross-examination of the person who authored the report,*
6. His right to the services of an “independent expert evaluation” at public expense as an indigent person. *No such individual was ever appointed.*
7. His “right to have copies of any relevant medical or mental health document in the custody of the state”, even though not admitted into evidence. *John has not to date been shown all of these documents. And*
8. His right to court appointed counsel, which has been held to mean the right to the effective assistance of counsel, which at a minimum **appears to have been denied by the public defender’s stipulation to matters not in evidence and contrary to John’s liberty interests.**

The 2/1/10 Entry, though it finds John waived his trial rights, made no finding that he waived any of the above rights or any due process rights. Besides these rights having not been

effectively waived, they were affirmatively, if not verbally, taken away during the 5 minute 1/25/10 proceeding. With no effective waiver, the prior judge's refusal to honor those rights is inexcusable and the proceedings were rendered a nullity.

In reviewing what occurred as a whole during those 5 minutes on January 25, 2010, it seems obvious that John never had a full or fair hearing consistent with due process, because, on top of the affirmative denials of rights, the context of the hearing was actively misleading. Indeed, for those the State sought to commit prior to *In re Fisher*, 39 Ohio St. 2d 71 (1974), a finding of being NGRI at that time *did* automatically result in a confinement in a psychiatric hospital against one's will. The legislation that came on the heels of *Fisher* was supposed to repair those unconstitutional procedures. Both Ohio Rev.Code Secs. 5122 and 2945.40 now codify many of the constitutional rights of psychiatric patients that were being trampled in the pre-*Fisher* days. The pre-*Fisher* abuses, however, clearly continue, but now under the cover of a semblance of statutory compliance. The hurried pace of the January 25, 2010 proceeding, which juxtaposed all three mental health issues into one less than 5 minute hearing was affirmatively misleading and would have been so to any lay person, whether or not mentally ill. *This is particularly true given that the 1/25/10 hearing occurred in the context of John's emergence from months of solitary confinement.* The conclusion seems inescapable that the January 25, 2010 proceeding could not have, and given the absence of evidence, *did* not adequately inform John of his rights to not be locked up as a mentally ill person without a full range of procedural protections in place.

These abuses continued throughout the next four years, and even to this day. In the absence of a constitutionally adequate finding in January, 2010 that John knowingly and intelligently waived his due process and Sec. 2945.40(A) rights to a full hearing with all due process and enumerated procedural safeguards, *before* they were taken away from him, John's rights to liberty

remained. And they remain to this day. So serious is the threat of constitutional and human rights abuse in the context of involuntary commitment proceedings, that the failure to conduct the full Sec. 2945(A) hearing with full compliance with that statute, within ten days of a finding of NGRI, bears the following consequences under Ohio Rev. Code Sec. 2945.40(B):

“Failure to conduct the hearing within the ten-day period shall cause the immediate discharge of the respondent, unless the judge grants a continuance for not longer than ten court days for good cause shown or for any period of time upon motion of the respondent.”

No statutorily or constitutionally adequate Sec. 2945.40(A) hearing has yet been conducted. John has been unlawfully confined for the past four and one half years and must now be discharged.

The final sentence of the 2/1/10 Entry contains language paraphrasing Ohio Rev. Code Sec. 2945.401(C) which has initiated a pattern in this case of ongoing transmissions of secret evidence and off-the-record *ex parte* communications from ABH and unknown others with the court – over the course of these past four plus years. The ostensible justification for this practice seems to be found in the highly disturbing language of Ohio Rev. Code Sec. 2945.401(C) that purports to place a stamp of approval on these transmissions of hearsay allegations. Sec. 2945.401(C)’s condonation of flagrant hearsay is being deemed somehow acceptable in the case of the “mentally impaired” or for those who, like John, also meet the definition of disabled under Title 42 Sec 126 USC Sec. 2102(1)(C) simply by “being regarded as having such an impairment”. That offending statutory language of Sec. 2945,401(C) is as follows:

“The department of mental health or the institution , facility, or program to which a defendant or person has been committed under section 2945.39 or 2945.40 of the Revised Code shall report in writing to the trial court, at the times specified in this division, as to whether the defendant or person remains a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order and, in the case of a defendant committed under section 2945.39 of the Revised Code, as to whether the defendant remains incompetent to stand trial. The department, institution, facility, or program shall make the reports after the initial six months of treatment and every two years after the initial report is made. The trial court shall provide copies of the reports to the

prosecutor and to the counsel for the defendant or person.”

No reasonable provision is made for these reports to be made available to the patient himself. Indeed John does not receive copies of this information. Nor have these “reports” or other communications been provided to the undersigned. The due process implications of such secret hearsay communications of unknown authorship to be even *seen* by sentencing courts for non-disabled criminal defendants would be staggering. Sec. 2945.401(C) disturbingly leaves the door open for additional *ex parte* communications even beyond those we already suspect are occurring. There is no way to know the extent to which these communications have been going on. For the non-disabled criminal defendant, such a practice would be unthinkable. It must also be considered as such for the disabled.

Transcripts from the March 4, 2011 and the September 10, 2012 proceedings below seem to bear the taint of these secret communications from unknown hospital personnel to court. Those transcripts reveal even less regard for John’s rights under Ohio Rev. Code Sec. 2945.40(C) than seems to have occurred on January 25, 2010. In both the 2011 proceedings and in the 2012 proceedings, hearsay “reports” said to have been “stipulated” to, were again never marked and never admitted into evidence. There is not a shred of evidence in the record to indicate either the contents or *whereabouts* of the secret non-evidentiary “reports”.

The docket sheet for 2011 shows *the absence of even a motion filed seeking forced drugging.* It further reveals that John was never served with any notice of any “reports”, that he never had a reasonable opportunity to be heard, and that he was continuously jailed for the five months preceding the hearing and for a few days thereafter. The transcript of the March 4, 2011 hearing as well as the Entry of March 14, 2011 memorializing it, both clearly show no attempt was made

to advise him of any of his Sec. 2945.40(C) rights, including the right to his own independent expert and the right of cross-examination. Then the court stripped him of all of his Sec. 2945.40(C) rights including his rights of cross-examination by basing his forced drugging and continuing confinement of John on an off-the record phantom report. This was especially egregious during the March 4, 2011 proceeding because John made it quite clear on the record that he was under the impression, correctly as it turned out, that the decision about what was going to be done to his body and to his health, had already been made and that he had no rights, no power to change anything – only the ability to briefly vocalize the hope that the judge would “see my humanity” [Ts. p. 3]. The previous judge did nothing to correct this mis-impression of Ohio law, or John’s learned perception that as an NGRI defendant he is a second class citizen. The prior judge likewise advised John of none of his Sec. 2945.40(C) rights to resist continued confinement during the September, 2012 proceedings. Then he took away all of those rights.

The purported Orders that emanated from all subsequent proceedings, like the initial purported commitment “order” of 2/1/10, are nullities. Ironically the only evidence legitimately in the record, either in March, 2011 or September, 2012 favored a finding that John, if he had ever been “mentally ill and subject to hospitalization by court order” was no longer in that category. In the March, 2011 proceeding the only evidence of record was John’s very rational testimony that he opposed the forced drugging because his efforts to try a lesser dosage were working well, and the judge’s acknowledgement on the record that he was “lucid”. As indicated hereinabove, the prior judge also made a record during the September 10, 2012 proceedings that appeared quite inconsistent with forced hospitalization, or drugging.

As argued in the currently unopposed Motion to Vacate Forced Drugging Order, there are a vast assortment of other grounds that establish that the forced drugging Entry fragment of

3/14/11 is void, both as to forcing drugging and as to forcing hospitalization. In neither the March 4, 2011 proceeding nor the March 14, 2011 written attempt to memorialize it, were there any attempts to make any of the three findings required by *Steele v. Hamilton Cty Comm'y Mental Health Bd.*, 90 OhioSt3d 176 (2000) and *State v. Lantz*, 2011-Ohio-5436 – (1) lack of capacity to receive informed consent, (2) best interests of the patient, or (3) non-existence of less intrusive alternative treatments. *Steele* and *Lantz* are clear that forced drugging as a continuing course of treatment – which has now been inflicted on John for years – is unjustifiable under *parens patriae* without these three findings. The State police power is to be exercised solely in the emergency context, when there is an imminent and substantial physical danger. Hospitals routinely exercise the police power, both appropriately and inappropriately, without bothering with court orders.

There can be no question then that respondent judge's exercise of judicial power to continue enforcing such void mandates is patently and unambiguously unauthorized by law, just on statutory and federal constitutional grounds. Moreover, since the 2011 enactment of the Health Freedom Amendment to the Ohio Constitution [Sec. 1.21], respondents' efforts to keep John confined are now specifically prohibited. That amendment prohibits state actors such as respondents Holzapfel and ABH from compelling John or any other citizen to submit to unwanted "health care services". This argument is set forth in greater particularity at p. 23 of relator's forced drugging motion of 12/4/13 and in his 12/4/13 Motion for Temporary Emergency Orders.

Ohio Rev. Code Sec. 2317.54 provides patients with the basic human right to informed consent prior to treatment – whether by drugging or hospitalization. John's right to this has never been challenged much less litigated. Any such litigation would have had to take into account, the Americans with Disabilities Act, which the record shows has never occurred. Even the NGRI patient, even if previously found by a court at the time of commitment to have been "dangerous as

a matter of law”, which never occurred in this case, but which did in the case of the plaintiff in *Hargrave v. Vermont*, 340 F3d 27,33 (2nd Cir. 2003), may not be stripped of his or her right to informed consent, without violating the ADA, unless the state facility meets its

“burden to establish that [the person with the mental disability poses a **‘direct threat’** of harm to others”. [*Hargrave v. Vermont*, 340 F3d 27,33 (2nd Cir. 2003)] [emphasis supplied]

Such a burden has never been met, or even attempted. The plaintiff below has never alleged of record that such a threat exists, nor that it was substantial or imminent. The plaintiff has certainly not produced evidence to support such an accusation, much less proved it by the clear and convincing evidence standard required by Ohio Rev. Code Sec. 2945.401. In any event, 42 U.S.C. Sec. 12132 of Title II of the Americans with Disabilities Act, takes priority over any even hypothetically conflicting provision of state law that would have otherwise taken away John’s right to receive informed consent to any form of treatment – whether drugging or hospitalization.

PROPOSITION NO. 2: DENIAL OF WRITS OF PROHIBITION, MANDAMUS OR *HABEAS CORPUS* TO STOP RESPONDENTS FROM CONTINUING TO COMPEL RELATOR TO SUBMIT TO INVOLUNTARY “TREATMENT” WOULD RESULT IN CONTINUING LEGAL AND MEDICAL INJURY, FOR WHICH NO OTHER ADEQUATE REMEDY EXISTS IN THE ORDINARY COURSE OF LAW

Respondent continues to perpetuate supposed court orders entered flagrantly in disregard of due process and without jurisdiction. **The ongoing absence of jurisdiction is now patent and unambiguous, merely from a summary review of the trial docket below and the short 2011 and 2012 transcripts.** In a free and just society, such rampant disregard of both state and federal statute, as is set forth in the previous Proposition hereinabove, cannot form a pretext for locking away citizens. Where subject matter jurisdiction is patently and unambiguously absent, as it surely is when “findings” are made based on secret information, the issue of whether an appeal

would be available or adequate has been held to be immaterial. E.g. *State ex rel. Corn v. Russo*, 90 OhioSt3d 551, 554 (2001) (Supreme Court may always act to prevent usurpation of jurisdiction by an inferior court); *State ex rel. Henry v. Britt*, 67 OhioSt2d 71 (1981).

As indicated in the Complaint herein, even if John were to wait for a possible appeal, he would first have to suffer with being unlawfully jailed, and declining physical health without access to his medical doctors. Once stripped also of the informed testimony of these medical doctors, he would have to further be subjected to a proceeding on February 27, 2014 which would be a shell of a proceeding. Without the reasonable ability to make a record, appeal would then be futile - another instance of justice denied by being delayed. There would be no plain or adequate remedy in the court of appeals for respondent's patently and unambiguously unlawful use and threatened exercise of judicial power. Since there is a claim that John's confinement can continue until 2018, it is hardly even clear that any decision arising from a proceeding on February 27, 2014 would itself even be deemed a final, appealable order.

As with the granting of the other writs, the remedy of *habeas corpus* also depends on the plain absence of any legitimate legal authority to take away a person's liberty. Where a person is involuntarily hospitalized because the State takes away his fundamental procedural protections, *habeas corpus* is proper even though the court issuing the purported detention order can claim general jurisdictional power to do so. *In re Fisher*, 39 Ohio St. 2d 71 (1974). Purported orders that take away a citizen's liberty must be based on more than judicial capacity generally. In *Fisher*, this Court honored the great writ of *habeas corpus* because, as in the case at bar, the procedures used to take away a citizen's liberty were plainly in violation of basic substantive and procedural due process. *In re Fisher*, 39 Ohio St. 2d 71 (1974). *Fisher* held that denial of the right to counsel was a sufficient due process infringement that *habeas corpus* could be used to

correct the injustice created by an trial court Order entered without due process.

The transcripts of the proceedings of March, 2011 and September, 2012 below, lead to the inescapable conclusion that John is now in his fifth year of confinement based on zero evidence that he was then or is now, “mentally ill and subject to hospitalization by court order”. As in *Fisher* the trial court failed to provide John with important hearing rights, without which there is no right to take a person’s liberty. In *Fisher*, the government took the patient’s liberty without appointing him an attorney. Although unlike in *Fisher*, John was provided with an attorney, the series of public defenders John was provided, were the functional equivalents of no attorney at all, or worse. By opposing the clearly stated position of his or her own client and joining with the prosecution in a “stipulation” calculated to cause the loss of his liberty interests, there is little question that in the case below as well, John has been forced to litigate without any effective assistance of counsel. As a Wisconsin judge has noted

“A lawyer who does nothing, or who assists the prosecution, is obviously not the effective assistance of counsel that is envisioned by the Sixth and Fourteenth Amendments to the Constitution. These petitioners would undoubtedly have been better off without any counsel who became part of the prosecution effort to detain or commit them.”
[*State ex rel. Memmel v. Mundy*, No. 441-417 (Milwaukee Co. Cir Ct., Wis. Aug. 18, 1976) rep’d in 1 Mental Dis. L. Rep. 183 (1976), *aff’d*, 75 Wis.2d 276, 249 NW2d 573 (1977)]

The ineffective assistance of counsel of course compounds the many other constitutional rights deprivations briefed hereinabove and shown to have infected the integrity of the entire hearing that took away John’s liberty. Since *Fisher*, many rights to substantive and procedural due process for those facing involuntary commitment have now been codified. However, as the case below graphically demonstrates, **the mere codification of due process rights does not necessarily mean that such rights will be enforced.** See Gui, J., Braden, C. Lavin, J. “The new

Ohio Mental Health Act” 11 Akron L. Review 104 (1977)

[<https://www.uakron.edu/dotAsset/9c26f185-626a-453d-bfca-a28791b135db.pdf>] The principles of *Fisher* remain, along with the right to *habeas corpus* it championed for those who lose their liberty based on commitment hearings that infringe important constitutional rights.

In *State ex rel. Harris v. Anderson*, 76 Ohio St.3d 193 (1996) this Court held that improper bindover procedures required the issuance of *habeas corpus*, regardless of an appellate opinion indicating that the errors were appealable. Indeed

‘the very nature of the writ [of *habeas corpus*] demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.’ *State ex rel. Pirman v. Money*, 69 Ohio St.3d 591, 594 (1994) quoting from *In re Petition for Mallory*, 17 Ohio St.3d 34,36-37(1985).

If the writ of *habeas corpus* were to be denied, such a denial could demonstrate not just the defeat of all concepts of ordered liberty and due process. It would also deprecate the constitutional significance of the Healthcare Freedom Amendment to the Ohio Constitution, which stands as a recent testament to the hard-won victory fought by Ohio citizens whose grass-roots efforts finally vindicated the demands of the people of Ohio for freedom from the dictates of health care providers not of their choosing. There is no need to subject John to more forced drugging, more forced confinement, at taxpayer expense, along with more wasting of judicial resources in hearings certain to be battles of mental health experts. The continuing viability of orders clearly void when entered, is a legal matter. Less drastic conflicts than this have been remedied by the imposition of the extraordinary writ of prohibition. E.g. *State ex re. Gelman v. Common Pleas Court of Cuyahoga County*, 172 OhioSt. 70 (1961). Granting of the writ of *habeas corpus* may be the only means by which John may be free to get the medical help he needs and try to pick up the pieces of his life that early health problems and psychiatric bungling of them helped create.

PROPOSITION NO. 3: RESPONDENT JUDGE HAS
UNLAWFULLY USURPED NON- EXISTENT
JUDICIAL POWER BY ORDERING RELATOR JAILED,
WHICH ORDER MAY BE ABOUT TO BE IMPLEMENTED
BY RESPONDENT SHERIFF, SUCH JAILING BEING
UNAMBIGUOUSLY UNAUTHORIZED BY LAW

Respondent judge's repeated actions in issuing purported orders to jail John, have clearly exceeded his judicial authority to do so. As of this writing John is subject at any time, to the warrants respondent judge has unlawfully issued for respondent Lavender to serve. While it is hoped that this particular state of affairs can be remedied prior to more prejudice to John personally and to his due process rights, the petition and statement of facts are correct as of the time written.

There are only a few places in the Ohio Revised Code that refer to the jurisdiction of a court to issue any type of warrant. None apply to this case or to John. In particular, Ohio Rev.Code Sec. 2941.40 applies very specially only to "convicts". John is not a "convict". He is an NGRI acquitee and psychiatric hospital patient. Ohio Rev. Code Sec. 2941.41 refers to "the accused", as do Sections. 2941.36, 2941.37, and 2941.38. John is not an "accused". Ohio Rev. Sec. 2933 *et seq.* provides for various warrants to "keep the peace", but these are even more ridiculously inapplicable to the type of warrant this Court purports to issue and which are ostensibly in effect as of the time of this writing.

Going beyond the *absence* of judicial authority to order John jailed ostensibly to secure his appearance for his own motions, respondent judge has taken this step even though such actions are *prohibited* under Ohio Rev. Code Sec. 5122.17, which disallows the housing of psychiatric patients in a

"nonmedical facility used for detention of persons charged with or convicted

penal offenses”,
as respondent judge and the plaintiff below have already been informed in the pleadings below. Nevertheless respondent judge has persisted in doing that which is affirmatively prohibited as well as merely unauthorized. The plaintiff below continues to decline to file any pleading opposing John’s objection to the warrants.

Particularly flagrant judicial conduct has included respondent’s willingness to unlawfully incarcerate John both before and after the 2/27/14 hearing. As of the time of this writing, it is believed that respondent sheriff is in possession of both warrants. This appears to send a strong message that inevitably chills John’s First and Fourteenth Amendment rights to be fully present at trial or any of the other proceedings he has the right to attend - such as the 2/21/14 pre-trial, which he has had to choose to forego if need be. Efforts by John’s attorney to resist the unlawful and still-in-effect jailing orders have severely prejudiced John and his counsel in their ability to prepare for hearing as to the other issues and to adequately defend him against whatever efforts the plaintiff may make to keep him confined and drugged indefinitely.

Had the 2/1/10 Entry purporting to commit John been entered with jurisdiction to do so, John could continue to be subject to respondent’s orders through 2018, because this date corresponds to the

“maximum prison terms . . . “[he] could have received if [he] had been convicted of the most serious offense with which he . . . was found not guilty by reason of insanity.” [Ohio Rev. Code Sec. 2945.401(J)(1)]

given that the maximum possible penalty for convicted persons under Ohio Rev. Code Sec. 2903.11 and Ohio Rev. Code Sec. 2929.14(A)(2) is eight years.

As indicated in his January 14, 2014 motion, John has intended to try to produce witnesses at the pre-trial hearing, including himself, in an effort to defeat the jailing issue, but respondents

Holzappel and ABH have been blocking him from doing that by refusing to honor any subpoena for him under Ohio Criminal Rule 17. [Ev. of Relator Item XIX—copy of returned subpoena for an earlier pre-trial.] Since respondent judge has specifically excluded the transportation issues from being considered at the 2/21/14 pre-trial [Ev. of Relator Item XVII], because of having been filed on 12/4/13, there is little question that John will be unable to present witnesses to show that ABH actually has a proper procedure for transporting its patients to court, as well as to physicians' offices, and a warrant for removal is not that procedure.

Besides being unlawful, the usage of armed Ross County Sheriff's deputies, given the general history of law enforcement brutality in Ohio's jails and its lack of training in dealing well with psychiatric patients [<http://www.pbs.org/wgbh/pages/frontline/social-issues/ohio-jail-to-stop-accepting-violent-mentally-ill-detainees/>] also seems unwise. Considering John's specific experiences in the Ross County jail, it appears particularly likely that respondent judge's currently ordered jailing of him would unnecessarily demoralize and physically debilitate John prior to the hearing in chief – on 2/27/14. Respondent judge's Orders for Warrants imminently threaten to decimate whatever shreds may remain of John's personal liberty. By steadfastly refusing to schedule hearings on either of John's December 4, 2013 transportation motions, respondent demonstrates a willingness to continue to ignore John's rights under 2945.40(C) to be present for all of his court appearances.

PROPOSITION NO. 4: DENIAL OF THE WRIT
OF PROHIBITION TO ENJOIN RELATOR'S
UNLAWFUL JAILING WOULD RESULT IN INJURY
TO RELATOR FOR WHICH NO OTHER
ADEQUATE REMEDY EXISTS IN THE ORDINARY
COURSE OF LAW

Certainly relator recognizes that prohibition is an extraordinary writ that may not be employed as a substitute for appeal. However, even if a court's lack of jurisdiction is not patent and

unambiguous, jurisdiction may still lie where an appeal is inadequate if it is not complete, beneficial and speedy. *State ex rel. Keenan v. Calabrese*, 69 OhioSt3d 176, 178 (1994). As indicated hereinabove, there are not only serious questions as to whether an interlocutory appeal would lie from any of the orders respondent has already issued, it is far from clear that whatever decision that might emanate from the 2/27/14 proceeding could even itself be appealable, given the commentary that abounds complaining of the difficulties for counsel in determining appealability issues even post-*Polikoff v. Adam*, 616 NE2d 213 (Ohio 1993). E.g. Buenger, M., *Ohio Appellate Practice before and after Polikoff: are things really all that much clearer?* 28 U.Ak L. Rev (Summer, 1994), *see also City of Columbus v. Adams*, 461 NE2d 887 (Ohio 1984)(pre-trial license suspension not appealable even though subsequent appeal would be ineffective).

Respondent's jailing orders still in effect as of this writing, coupled with his current failure to endorse John's attorney's efforts to have John subpoenaed, have already forced John to give up his right to be present at the crucial 2/21/14 pre-trial hearing rather than to risk what would await him in the custody of the Ross County sheriff. John's absence from such hearing, which, without cooperation from both respondents, would be impossible to avoid, would deal a further blow to the due process rights John has already lost. Any reasonable possibility of later being able to make a meaningful evidentiary record for purposes of an eventual possible appeal, would be highly compromised.

John's right to be able to litigate and defend his own liberty interests, consult effectively with counsel, have access to his witnesses, and to not be forced to litigate while ill, in pain and while dealing with the physical effects of solitary confinement in the Ross County jail, are not rights that could later be vindicated on appeal because they would taint the entire proceedings.

PROPOSITION NO. 5: RESPONDENT
 JUDGE IS REFUSING TO FULFILL HIS CLEAR
 LEGAL DUTY TO ALLOW RELATOR REASONABLE
 ACCESS TO MEDICAL EVALUATION AND TREATMENT
 BY HIS PRIVATELY RETAINED PHYSICIANS
 OR TO ALLOW RELATOR A PRE-TRIAL
 HEARING TO PRESENT EVIDENCE AS TO
 HIS CLEAR LEGAL ENTITLEMENT TO SUCH
 MEDICAL CARE

The uncontroverted risks to John's health described in Dr. Pinkham's September, 2013 affidavit based in part on his blood tests from ABH, coupled with John's statement regarding his symptoms of tardive dyskinesia or Neuroleptic malignant syndrome, demonstrate the effects of the ongoing assaults on John's health that respondents' actions in denying him his own medical care are likely to exacerbate.

Ohio Rev. Code Sec. 5122.301 provides broad legal authority that protects all of John's civil rights *even while involuntarily hospitalized*. One of the most treasured of those rights is the right to access to one's own privately retained physicians. A fuller discussion of the right is set out in the Memorandum portion of his December 4, 2013 "Motion for Temporary Emergency Orders". Dr. Pinkham's affidavit [Ex. G] was attached to that motion as well as attached separately to the "Petitioner/Relator's Motion to Expedite Writs" being filed concurrently herein.

Over the course of the past two months as of the time of this writing, neither respondent judge nor plaintiff below has ever contested the right to medical evaluation and treatment, nor the fact that John's physical health has been deteriorating as indicated in Dr. Pinkham's September, 2013 affidavit. In further summary of arguments made below, the right to treatment by one's own physician is also spelled out in Ohio Administrative Code Sec 5122-14-11(D)(11). Also implicated in the right to one's own physician, is the right to freedom of contract and the right to privacy protected by both the Ohio and federal constitutions in an assortment of contexts. It

would also constitute another right reserved to the people under Sec. 1.20.

Since, as set forth throughout the December 4, 2013 pleadings, John does not receive legitimate medical treatment from ABH, his only opportunity for proper medical care is his own physicians. ABH "treatment" is compromised because their focus is on the ABH version of what it claims is best for society. Because John has the right to not be compelled to "participate in a health care system" against his will, there is no law or rule or statute that can now constitutionally require him to do so. He has already exercised his rights under OAC Sec. 4731-27-01(C) to dismiss the state psychiatrist, a right he exercised in August, 2013, as mentioned earlier. [Ev. Relator Item IV, Ex. D1] There is no known authority for the State to not only deny needed services but to also obstruct the acquisition of medical care privately. As is indicated in *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), those held under government control whose medical needs, like John's, are being ignored, even sabotaged in his case, have been held to be victims of "deliberate indifference" "constituting "unnecessary and wanton infliction of pain" proscribed by the Eight Amendment to the U.S. Constitution.

There is nothing inconsistent with medical ethics to require physicians to respect the constitutional rights of their patients. Even State psychiatrists are bound to respect the rights of their patients to a second opinion. AMA Rule of Conduct IX requires physicians to

"support access to medical care for all people",

a principle which is reiterated by Med. Board Opinion 10-01:

"The physician has an **obligation** to **cooperate** in the coordination of medically indicated care **with other health care providers**".

[emphasis supplied]

Finally, AMA Code of Medical Ethics, Opinion No. 8.041, recites the well-recognized patient right to be:

“free to obtain second opinions on their own initiative, with or without their physician’s knowledge. . . . With the patient’s consent, the first physician should provide a history of the case and such other information as the second-opinion physician may need.” [<http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8041.pag>]

Of course, in this case, John is seeking a first opinion. Respondent judge’s actions in taking away the possibility of getting medical care assure that John will continue to be physically ill and in pain at the time of the hearing as well as recently traumatized, or worse, by a stint of solitary confinement at the Ross County jail. As indicated hereinabove, these are not rights that could later be vindicated effectively on appeal.

PROPOSITION NO. 6: DENIAL OF THE WRIT
OF MANDAMUS OR HABEAS CORPUS TO REQUIRE
RESPONDENTS TO ENFORCE RELATOR’S CLEAR LEGAL
RIGHT TO ACCESS TO PRIVATE MEDICALCARE
WOULD RESULT IN FURTHER MEDICAL INJURY TO
HIM FOR WHICH NO OTHER ADEQUATE REMEDY
EXISTS IN THE ORDINARY COURSE OF LAW

Patently there exists no appellate remedy known to man speedy enough as to be capable of undoing the irreparable medical injury that Dr. Pinkham warns of in her affidavit. Without knowing the precise nature of the harm being done since respondent judge will not permit Dr. Pinkham to examine or treat him, it is impossible to know with specificity how much damage and how quickly, damage is being done, for example, by the neuroleptic drug, Risperdal, which has been forced on John for at least three years, although the drug is not designed to be taken long-term, at the very high levels that the state doctors have prescribed. John’s statements attached to the December 4, 2013 motion seeking his own medical evaluations, describe his physically and mentally painful adverse reactions to that drug, and how his facial twitching now no longer dissipates at the end of the two week period between injections.

Given the unknowns, it is difficult to calculate how much time John would have to continue being drugged with Risperdal before he would become irrevocably mentally disabled – completely unable to function or contribute to society. There is literature, however, indicating that given enough time, such permanent disability becomes almost inevitable, though it may not be now. One recent longitudinal study of patients on neuroleptics, such as Risperdal, [Madsen AI, Keiding N, Karle A, Esbjerg S, Hemmingsen R: (1998) “Neuroleptics in progressive structural brain abnormalities in psychiatric illness”, *The Lancet*, 352 (9130) 784] found that on the basis of CT scans of the brains of both schizophrenic and non-schizophrenic patients,

“the estimated risk of atrophy increases by 6.4% for each additional 10 g. of the neuroleptic drug” and that this occurred independently of whether the patient had been diagnosed schizophrenic.”

This finding supports the Robert Whitaker research. [Ev. Relator Item , Ex. Exhibit A] Other studies cited in John’s December 4, 2013 pleadings have attached exhibits and refer to evidence indicating that neuroleptics shrink the cerebral cortex, which controls the executive functioning of the brain. One would think that, even assuming the validity of the notion that the interests of “society” as interpreted by ABH, supersede John’s rights as a citizen, it hardly seems wise to create a class of individuals without good executive functioning of the brain. One would think that destroying the seat of impulse control would not be a good outcome, and much of the literature bears that out. Risperdal is notorious for the absence of “systematically obtained data” to support its use long term. The FDA considers long term use to be beyond three weeks, not the three years that John has been forced to be on Risperdal, [<http://www.drugs.com/pro/risperdal.html>] The 2011 Glenmullen study cited earlier herein is in accord. Glenmullen lists Risperdal in the top 27 most violence producing drugs.

For the chemical destruction of John’s brain to continue unabated and without the benefits even

of a second opinion, while John is forced to proceed with appeals or trial court proceedings in which he is prevented from introducing most of his medical evidence, would seem to be a process that is not in the interests of either himself or society. Without relief in the form of mandamus or *habeas corpus*, such brain damage will inevitably continue, as long as the drug manufacturers continue to sell the product and as long as respondent ABH continues to buy it from them. The only possible remedy that would be speedy enough to be effective and have a chance of salvaging what is left of John's health, is an extraordinary writ from this Court.

PROPOSITION NO. 7: RESPONDENT JUDGE'S
 PERSISTENT REFUSAL TO FULFILL HIS CLEAR
 LEGAL DUTIES TO ALLOW RELATOR REASONABLE
 ACCESS TO TESTMONY OF HIS MEDICAL
 WITNESSES AND TIME IN WHICH TO ADEQUATELY
 PRESENT HIS EVIDENCE, UNLAWFULLY TAKES
 AWAY JOHN'S CLEAR STATE AND FEDERAL CONSTITUTIONAL
 RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS
 AND UNLAWFULLY IMPEDES HIS REASONABLE
 ACCESS TO JUDICIAL REDRESS AT HEARINGS
 SCHEDULED BELOW UPON HIS MOTION

Of the rights John has been losing *recently*, It would be difficult to imagine a more blatant stripping of substantive and procedural due process rights than what has already been achieved by respondent judge's persistent refusal to allow John access to his medical witnesses. Had they been permitted to examine John near the time John requested access to them, in early December, 2013, they would now have been prepared to testify about their opinions concerning, among other things, John's competence to receive informed consent, his current physical and mental functioning, his body's ability to tolerate the current level of drugs, John's prognosis for future physical and mental health, the availability of alternative and complimentary medical treatments that they provide, as well as their opinions of the current "treatment" by ABH. Given respondents' blockage of John's access to his physicians, they are prevented from examining him,

and their abilities to give such testimony on February 27, 2014 have now been obliterated.

The *coup de gras* inflicted on John's trial rights that respondent judge has already harshly compromised, has been respondent judge's arbitrary time limitation of John's opportunity to put on evidence. By insisting that all proceedings on the merits begin and end on February 27, 2014, regardless of the time presumably to be consumed by plaintiff, respondent judge is shutting the door to a further continuation hearing. If respondent's arbitrary time limitations are not enjoined by writ, any hypothetical future availability of John's medical experts would then be of no use.

PROPOSITION NO. 8: DENIAL OF THE WRIT OF
MANDAMUS TO REQUIRE RESPONDENT
JUDGE TO IMPLEMENT RELATOR'S PROCEDURAL
DUE PROCESS HEARING RIGHTS TO INCLUDE REASONABLE
ACCESS TO HIS WITNESSES AND ADEQUATE TIME
TO PRESENT THEM, WOULD RESULT IN INJURY FOR WHICH
NO OTHER ADEQUATE REMEDY EXISTS IN THE ORDINARY
COURSE OF LAW

The late Justice O'Neill in his concurring opinion in the landmark case of *In re Fisher*, 39 Ohio St. 2d 71 (1974) observed that part of the right to counsel which that case vindicated through *habeas corpus*, is the right to counsel with adequate opportunity to prepare:

“Finally, it should be noted that counsel must be afforded a reasonable amount of time to investigate and familiarize himself with his client's case.
[*Fisher*, at p. 84]

A review of the pleadings in this case and the case below should amply demonstrate the degree of attorney effort that has been diverted simply to keeping John from being unlawfully incarcerated and denied access to medical witnesses and their treatments. Very little if any time is now left for trial preparation. And very little time is left in which John can still be medically evaluated and, if need be, treated. Although the undersigned anticipates being able to use the time already set aside on February 27, 2014, to cross-examine any of plaintiff's witnesses and to conduct direct

examination of his own, securing the attendance of adequately prepared medical witnesses is sure to require additional hearing time. Respondent judge's 12/30/13 Order made it clear that he will not permit that additional time.

An important feature of the way respondent has conducted proceedings to date, before evidence has even been taken, presents yet another component of the procedural due process that continues to be denied to John. Part of due process includes the right to an impartial hearing officer. The disquieting conduct of respondent judge to date, while no doubt a product of an honest but misguided attempt to perform his duties or having simply forgotten that mental patients have important rights raises yet another troublesome aspect to the recent denials of due process rights. Petitioner/relator raises this issue now, not in an effort to disqualify respondent judge, since clearly this is not the sort of proceeding in which to do so, but rather because "even the appearance of unfairness, rather than any real identifiable bias or prejudice" can present serious due process concerns. *State v. Ludt*, 180 OhioApp3d 672 (Mahoning, 2009) Due process under the Ohio and United States constitutions demands that the trier of fact be impartial.

It is hoped that appropriately crafted writs of mandamus and prohibition will be enough to preserve John's trial rights so that he will not be required to proceed with a meaningless pre-trial on February 21, 2014 and a meaningless trial on February 27, 2014. This will require at the very least, a writ of mandamus to command respondent judge to enforce John's transportation rights to doctors and to court, and to set aside sufficient time that John can adequately defend against the plaintiff's efforts to take away more of what is left of his life, health, and liberty.

IV. CONCLUSION

Although some may argue that secret evidence and assembly-line detention procedures constitute acceptable courtroom procedures in federal court with non-citizen terror suspects or

illegal immigrants, such tactics have no place in courts of law for American citizens who are neither. However Ohio law post *Fisher* should now be clear that American citizens cannot be locked away in mental hospitals based on proceedings which only mimic, but do not provide due process of law, or conformity with Ohio statute.

At a minimum John asks that this Court issue all appropriate Writs prohibiting respondent judge from exercising any further judicial power to jail him, to keep him forced drugged, to keep him involuntarily committed, to keep him from his medical doctors, to enforce void orders against him, to take away his right to attend hearings, to take away his right to reasonable access to his witnesses, to and to take away his right to a reasonable amount of time to present his evidence.

However, there is a more effective remedy to unblock John's rights to fully vindicate his rights to personal liberty. Since John was never lawfully committed as a result of the January 25, 2010 proceeding, and since the transcripts of subsequent proceedings affirmatively demonstrate a complete absence of proof supporting John's involuntary commitment, with the only proof remaining tending to show that John is not a mentally ill person subject to such commitment, the simplest, most appropriate, and most just solution is for this Court to simply grant the great writ - of *habeas corpus*, order respondent to vacate all further hearings scheduled below, and discharge John pursuant to Ohio Rev. Code Sec. 2945.40(B). Should there remain any doubt that *habeas corpus* with a Sec. 2945.40(B) discharge, would produce the correct result, the writ of *habeas corpus* could be issued provisionally, during the time respondents have in which to respond to the within Petition and Complaint. This would eliminate the transportation issues because John's friends and family could provide his transportation to court and to his medical doctors so that the February 21, 2014 and February 27, 2014 hearings could proceed to the extent possible, in the event respondent judge or plaintiff

below could still have any conceivable grounds to continue with them. With the grant of only provisional *habeas corpus*, without a full discharge under Sec. 2945.40(B), John would still require that his procedural rights in connection with the upcoming hearings of February 21, 2014 and February 27, 2014 be preserved with an alternative writ of prohibition directing respondent judge to withdraw the orders for warrant, and a writ of mandamus issued to correct the transportation to court and doctor issues, and the time restriction issues so that the February 21, 2014 and February 27, 2014 hearings can proceed with the full benefit of all of petitioner's witnesses.



David L. Kastner

CERTIFICATION

This is to certify that on this _____ day of February, 2014, I mailed a true and correct copy of the above and foregoing Memorandum in Support of Prohibition, Mandamus, *Habeas Corpus*, & Alternative Writs to the offices of the Ross County Prosecutor, at 72 N. Paint Street, Chillicothe, Ohio 45601



David L. Kastner