

IN THE SUPREME COURT OF OHIO

*State ex rel.* DAVID UNTIED,

*Relator,*

v.

JUDGE DAVID BRANSTOOL, et al.,

*Respondents.*

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: Case No. 2014-1059  
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: Original Action in Prohibition  
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MOTION TO DISMISS OF RESPONDENT  
OHIO ATTORNEY GENERAL MICHAEL DEWINE

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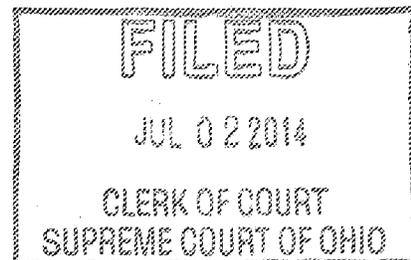
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Ohio Attorney General

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*Ohio Attorney General Mike DeWine*



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Pursuant to Sup. Ct. Prac. R. 12.04(A)(1) and Civ. R. 12(B)(6), Respondent Attorney General Michael DeWine hereby moves this Court to dismiss him from Relator's complaint for a writ of prohibition. A memorandum in support is attached.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Ohio Attorney General



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*Counsel for Defendant*

*Ohio Attorney General Mike DeWine*

## MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

### **I. INTRODUCTION**

Relator David Untied filed this original action for a writ of prohibition against a number of persons, including Respondent Attorney General DeWine. Although the Attorney General has nothing to do with the underlying criminal proceeding at issue in this case, Relator requests an order compelling the Attorney General to direct all prosecutors "to cease and desist using Ohio Revised Code 2913.02 to prosecute cases." Because Relator fails to state a claim against the Attorney General for which this Court may grant relief, the Attorney General respectfully asks this Court to dismiss him from Relator's complaint.

### **II. STATEMENT OF FACTS**

In June 2013, Relator was indicted in Licking County for violating R.C. 2913.02. Compl., ¶ 3. Relator alleges that a trial date was set, but that five days before the trial, a grand jury re-indicted him. *Id.* He further alleges that, instead of dismissing the original case, the county prosecutor filed the re-indictment under the same case number, and that the case is proceeding to trial. *Id.*

In his complaint for a writ of prohibition, Relator asserts that the Licking County Court of Commons Pleas does not have jurisdiction, and that R.C. 2913.02 is unconstitutional as applied to him. *See generally* Compl. Relator indicates that the Attorney General was served because Relator is challenging the constitutionality of a statute. *Id.* ¶ 2. Relator seeks an order that, in relevant part, requires the Attorney General to order all prosecutors "to cease and desist using Ohio Revised Code 2913.02 to prosecute cases." *Id.* ¶ 27.

### 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-2057, ¶ 11. When considering the factual allegations of the complaint, a court must accept incorporated items as true and 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 does not provide relief on any possible theory. Civ. R. 12(B); *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, ¶ 8.

#### B. The Attorney General is not a Required Party Under R.C. 2721.12(A).

Based on the lack of specific pleadings, it appears that Relator named the Attorney General as a party pursuant to a misunderstanding of the notice requirement of R.C. 2721.12(A). Under the statute, a party bringing a claim for declaratory judgment challenging the constitutionality of a statute must serve the Attorney General with a copy of the Complaint. The statute states in relevant part:

[I]f any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard.

R.C. 2721.12(A).

Importantly, R.C. 2721.12 only requires service and does not obligate the Attorney General to participate as a party. The Supreme Court of Ohio has specifically held that “R.C. 2721.12 requires service of a copy of the proceeding on the Attorney General when a party challenges the constitutionality of a statute in a declaratory judgment action. R.C. 2721.12 does not require, however, that the Attorney General be named as a party in such an action.” *Ohioans*

for *Fair Representation, Inc. v. Taft*, 67 Ohio St.3d 180, 182, 616 N.E.2d 905 (1993); see also *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 97, 728 N.E.2d 1066 (2000) (noting that “the statute does not require that the Attorney General be made a party to the action” (emphasis removed)).

In this case, given the requirements of R.C. 2721.12, it was unnecessary for Relator to name the Attorney General as a party. Because R.C. 2721.12 allows the Attorney General to decide whether to participate in declaratory judgment proceedings, dismissal is appropriate.

**C. Relator is not Entitled to the Extraordinary Relief of a Writ of Prohibition.**

To be entitled to a writ of prohibition, the Relator must establish that (1) the entity is about to or has exercised judicial power, (2) the exercise of power is unauthorized by law, and (3) denying the request would result in an injury for which there is no adequate remedy. *State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999 N.E.2d 630, ¶ 9. If an entity is not about to or has not exercised judicial or quasi-judicial authority, a writ of prohibition is not appropriate. *State ex rel. Bruggeman v. Ingraham*, 87 Ohio St.3d 230, 231, 718 N.E.2d 1285 (1999) (holding that a request for a writ of prohibition against a prosecutor was “obviously meritless” because the prosecutor was not seeking to exercise judicial or quasi-judicial authority). Furthermore, “[t]he unconstitutionality of a statute does not deprive a court of the initial jurisdiction to proceed according to its terms,” and in such cases, the relator has another remedy by way of an appeal. *Id.*

To the extent that Relator is seeking a writ of prohibition against the Attorney General, such a writ is not appropriate. First, the Attorney General is not about to and has not exercised judicial authority, so a writ of prohibition does not apply. *Id.* Second, the only allegation that could be construed against the Attorney General is that R.C. 2913.02 is unconstitutional, which Relator has other means to challenge, such as an appeal. *Id.* Accordingly, because Relator has

failed to plead any viable theory of relief, the Attorney General should be dismissed from the complaint.

**D. Relator is not Entitled to the “Other Writ” Under R.C. 2503.40.**

The Relator also notes that R.C. 2503.40 authorizes the Court to issue writs of supersedeas and other writs. Compl., ¶ 28. Under that statute, this Court may “on good cause shown . . . issue writs of supersedeas in any case, and other writs not specially provided for and not prohibited by law, when necessary to enforce the administration of justice.” R.C. 2503.40. However, this Court has noted that it has “never granted an other writ pursuant to R.C. 2503.40 as a substitute for a writ of prohibition.” *State ex rel. Parrott v. Brunner*, 117 Ohio St.3d 175, 2008-Ohio-0813, 882 N.E.2d 908, ¶11. This Court declined to issue such a writ in *Parrott*, and the Attorney General requests that, to the extent Relator is asking for such a writ, this Court decline to issue one in this case.

**IV. CONCLUSION**

For the forgoing reasons, Respondent Attorney General Michael DeWine respectfully asks this Court to dismiss him from Relator’s complaint.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Ohio Attorney General



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ZACHERY P. KELLER (0086930)\*

*\*Counsel of Record*

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*Counsel for Defendant*  
*Ohio Attorney General Mike DeWine*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Motion to Dismiss of Respondent Attorney General Michael DeWine was served by first class mail via the U.S. Postal Service on July 2, 2014, upon the following:

David Untied  
48295 Outpost Road  
Caldwell, Ohio 43724

*Relator Pro Se*



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ZACHERY P. KELLER (0086930)  
Assistant Attorney General