

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.	)	CASE NO. 2015-0080
LEWIS LEROY MCINTYRE, JR.	)	
	)	
Relator	)	
	)	ORIGINAL ACTION IN
v.	)	PROHIBITION, MANDAMUS,
	)	AND PROCEDENDO
SUMMIT COUNTY	)	
COURT OF COMMON PLEAS, et al	)	
	)	
Respondents	)	

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**RELATOR'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS**

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Relator Lewis Leroy McIntyre, Jr., by and through undersigned counsel, hereby responds to the Motion to Dismiss filed by Respondents Summit County Court of Common Pleas, Judge William Victor<sup>1</sup>, Judge Mary Spicer, and Judge Thomas Teodosio.

### **Standard to Evaluate Motion to Dismiss**

The Respondents' motion should be construed as one under Civ. R. 12(B)(6). The Ohio Rules of Civil Procedure apply to this action unless clearly inapplicable. S. Ct. Prac. R. 12.01(A)(2). In reviewing a Civ. R. 12(B)(6) motion, the Court must accept as true all factual allegations in the complaint and all reasonable inferences must be drawn in favor of the nonmoving party. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. To this end, this Court must accept the factual allegations in McIntyre's Complaint as true, resolve all inferences in his favor and determine whether the law provides him a claim to which he can be granted relief. Under this standard, he clearly prevails. In addition, he should prevail in being granted the writs he seeks.

### **No Final Appealable Order**

In their motion, the Respondents ignore a plethora of issues raised by McIntyre in his Complaint and Memorandum. For starters, they state that all charges have been resolved and that there is a final appealable order. They could not be more wrong. McIntyre will recap the charges that have not been disposed of:

1. The prior aggravated felony specification in the original indictment;

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<sup>1</sup> In response to the first footnote in the Motion to Dismiss, McIntyre and his counsel were uncertain whether to name Judge William Victor as a party since he is deceased. However, without any case law direction on this point, McIntyre and his counsel decided to cover their bases and name Judge Victor because the case involves him in his official capacity and a writ of prohibition does apply to declare past acts as non-jurisdictional.

2. The felonious assault charge in Supplement One, as amended in trial, including the accompanying firearm and prior aggravated felony specifications;
3. The firearm specification in Supplement Two;
4. The prior aggravated felony specification in Supplement Five; and
5. The prior offense of violence specification in Supplement Five.

Regarding the felonious assault charge in Supplement One, the Respondents contend that it was properly dismissed by Judge Teodosio and cited *State ex rel. McIntyre v. Teodosio*, Summit County App. 26619 (9th Dist.) (February 21, 2013) to claim there is no pending count for retrial. The record speaks otherwise.

As McIntyre stated in his Complaint and Memorandum, the felonious assault charge was amended during trial to include a second victim. The jury was unable to reach a verdict on this charge. Judge Victor never announced a declaration of a mistrial. The charge was not dismissed or retried.

The issue laid dormant for 21 years until McIntyre raised it in his Notice to Proceed to Trial filed June 14, 2012, which is Page 33 in Appendix 6 of 7. Two weeks later, after the State wrote it would not retry the charge, Judge Teodosio dismissed the original charge without an open court hearing required by Crim. R. 48(A). As McIntyre argues in his Complaint and Memorandum, this was not a valid dismissal, so the charge remains pending. Even if it were valid, the amended felonious assault charge still remains pending because Judge Teodosio's dismissal only referenced the original charge.

### **No Res Judicata**

Respondents are hiding behind the Ninth District Court of Appeals' erroneous proclamations of the last 24 years to avoid discussing the true substance in the record. The Ninth

District has continually and hideously erred in its adjudication of McIntyre's case, starting with original direct appeal that it had never jurisdiction to accept.

Not only were Supplements Three, Four, Five, and Six pending at the time of the direct appeal was filed on October 4, 1991, the amended felonious assault charge and its specifications were pending too. Therefore, because not all charges were disposed, the Ninth District did not have jurisdiction to accept the appeal under Article IV, Section 3(B)(2) of the Ohio Constitution. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, ¶6 (citing *State v. Muncie*, 91 Ohio St.3d 440, 444 (2001) and *State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 36 (1984)); *State v. Brown*, 59 Ohio App.3d 1 (Ohio App. 8 Dist. 1989); *State v. Goodwin*, 2007-Ohio-2343 (9th Dist.); *State v. Rothe*, 2009-Ohio-1852 (5th Dist.); *State v. Purdin*, 2012-Ohio-752 (4th Dist.).

The *Rothe* and *Purdin* cases are on point with McIntyre's case because they involved charges in which the jury hung, but then those charges were never retried or dismissed with prejudice. The appellate courts in the Fifth and Fourth Districts stated they did not have jurisdiction to accept the appeal because not all charges had been disposed of.

The Ninth District should have known better because in its May 27, 1992 decision on the direct appeal, which is Page 35 in Appendix 6 of 7, it acknowledged that the jury hung on the felonious assault charge in Supplement One. However, despite knowing there was an unresolved charge, it proceeded to adjudicate the appeal anyway.

Since the Ninth District did not have jurisdiction to accept the direct appeal, McIntyre cannot be subject to res judicata, which only activates upon the right of a direct appeal. *State v. Griffin*, 138 Ohio St.3d 108, 2013-Ohio-5481, ¶3. A right of direct appeal only activates upon the issuance of a final appealable order. *Id.* As stated previously, McIntyre has never had a final appealable order.

To this end, McIntyre is not using the writ petition as an appeal substitute. There is nothing to substitute. McIntyre has never had a right to a direct appeal because he has never had a final appealable order. In fact, when McIntyre motioned for a retrial on the outstanding felonious assault charge on December 22, 2010, Page 17 in Appendix 6 of 7, and then appealed the denial, the Ninth District acknowledged that the denial order was not final and appealable. See Page 42 in Appendix 7 of 7. Therefore, this writ petition has been his only legal option beyond the trial court. *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609.

The Respondents point to the many filings made by McIntyre over the years, including motions and appeals. It is utterly unfair to chastise and criticize McIntyre for his filings when they were based on the original sins of the Summit County Court of Common Pleas not fully disposing his case and the Ninth District Court of Appeals accepting a direct appeal that was not ripe. Those courts created and perpetuated a procedural mess, yet McIntyre is the one constantly marginalized in his efforts to clean it up.

The mere passage of time does not magically legitimize the trial and appellate courts' errors. The sentencing entries of September 9, 1991 and May 22, 1992 are void. The term "void" means a fundamental infirmity in the proceedings. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. \_\_\_, 130 S.Ct. 1367 (2010). For the reasons explained in his Complaint and Memorandum, multiple fundamental infirmities have occurred in McIntyre's case. Whenever there is a fundamental infirmity, it can be raised after the judgment is final because the judgment is void. *Id.*

The Respondents' claim that all matters are settled and cannot be revisited is nonsense. There is no valid judgment in McIntyre's case. Therefore, any proclaimed judgments, including

the September 9, 1991 and May 22, 1992 sentencings, are void. This Court has long stated that “a court has inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity.” *Van DeRyt v. Van DeRyt*, 6 Ohio St.2d 31, 36 (1966).

Unfortunately, the Summit County Court of Common Pleas and the Ninth District Court of Appeals will not recognize the void judgments in McIntyre’s case. Perhaps after 24 years of rulings and proclamations, they do not want to now admit that they missed issues so basic and then realize all of their energy and efforts in making those rulings and proclamations were a waste. This Court should hold them accountable and not seek to save them from any embarrassment. McIntyre’s life and liberty should not be collateral damage to safeguard any egos that might be affected.

### **Conclusion**

For the foregoing reasons, the Respondents’ Motion to Dismiss should be denied. McIntyre has clearly stated claims in his Complaint and Memorandum upon which the law can grant relief. A basic tenet of Ohio jurisprudence is that cases should be decided on their merits. *Perotti v. Ferguson*, 7 Ohio St.3d 1, 3 (1983). The Respondents are desperately trying to avoid the issues in McIntyre’s case from being heard on their merits and hope all the errors of the last 24 years will quietly go away.

As McIntyre has made clear in the last 24 years, he will not go away. He refuses to suffer for the gross mistakes committed by others so they may maintain their career statuses and reputations. While his wrongful conviction may have cost him a professional boxing career, McIntyre still has every resolve, tenacity, and persistence that a boxer must have to survive round after round, getting up again and again after taking punch after punch.

McIntyre respectfully requests this Court to deny the Respondents' Motion to Dismiss and issue all peremptory and/or alternative writ relief necessary to achieve justice in his case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A true copy of the foregoing Response was delivered by e-mail to Colleen Sims, Assistant Summit County Prosecutor and Attorney for Respondents at [simsc@prosecutor.summitoh.net](mailto:simsc@prosecutor.summitoh.net) on February 20, 2015.

/s Stephen P. Hanudel  
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