

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel.	:	
James Malcolm Irvine	:	VERIFIED
10751 Grand Prairie Lane	:	ORIGINAL ACTION IN
Strongsville, OH 44136-8811	:	MANDAMUS
	:	
Relator	:	PEREMPTORY WRIT
	:	REQUESTED
V.	:	
Gerald T. McFaul,	:	CASE NO. _____
Cuyahoga County Sheriff	:	
1215 W. 3rd Street	:	
Cleveland, Ohio 44113	:	
	:	
Respondent	:	

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COMPLAINT OF JAMES MALCOLM IRVINE

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L. Kenneth Hanson III (0064978), Counsel of Record  
Joanna R. Fettrow (0076447)  
Firestone and Brehm, Ltd.  
15 West Winter Street  
Delaware, Ohio 43015  
740-363-1213 (voice)  
740-369-0875 (fax)

COUNSEL FOR JAMES MALCOLM IRVINE

Now comes Relator, by and through undersigned counsel, pursuant to Revised Code Section 2731.01 et seq., Revised Code Section 2503.40, Section 2, Article IV of the Ohio Constitution, and Rule X of the Rules of Practice for the Supreme Court of Ohio, and applies for a Writ of Mandamus directed to Respondent Cuyahoga County Sheriff Gerald T. McFaul. For cause, Relator states:

1. Respondent Gerald T. McFaul is the duly elected and acting Sheriff of Cuyahoga County.
2. Relator is a resident and taxpayer of Cuyahoga County.
3. On January 8, 2004, Governor Bob Taft signed Amended Substitute House Bill Number 12, (“HB12”) with the effective date of said legislation being April 8, 2004.
4. HB12 provides for sweeping changes to Ohio’s laws on the carrying of concealed handguns and further requires the Sheriff of each county to accept applications for and issue Concealed Handgun Licenses (“CHL”) and Temporary Emergency Licenses (“TEL”) for the carrying of a concealed handgun.
5. HB12 eliminates the prior affirmative defenses to a charge of carrying a concealed handgun under Revised Code Section 2923.12.
6. As enacted, Revised Code Section 2923.1213 provides, in pertinent part, that:

(B)(1) A person seeking a temporary emergency license to carry a concealed handgun shall submit to the sheriff of the county in which the person resides all of the following:

(a) Evidence of imminent danger to the person or a member of the person's family;

(b) A sworn affidavit that contains all of the information required to be on the license and attesting that the person is at least twenty-one years of age; is not a fugitive from justice; is not under indictment for or otherwise charged with an offense identified in division (D)(1)(d) of section 2923.125 of the Revised Code; has not been convicted of or pleaded guilty to an offense, and has not been adjudicated a delinquent child for committing an act, identified in division (D)(1)(e) of that section; within three years of the date of the submission, has not been convicted of or pleaded guilty to an offense, and has not been adjudicated a delinquent child for committing an act, identified in division (D)(1)(f) of that section; within five years of the date of the submission, has not been convicted of, pleaded guilty, or adjudicated a delinquent child for committing two or more violations identified in division (D)(1)(g) of that section; within ten years of the date of the submission, has not been convicted of, pleaded guilty, or adjudicated a delinquent child for committing a violation identified in division (D)(1)(h) of that section; has not been adjudicated as a mental defective, has not been committed to any mental institution, is not under adjudication of mental incompetence, has not been found by a court to be a mentally ill person subject to hospitalization by court order, and is not an involuntary patient other than one who is a patient only for purposes of observation, as described in division (D)(1)(i) of that section; and is not currently subject to a civil protection order, a temporary protection order, or a protection order issued by a court of another state, as described in division (D)(1)(j) of that section;

(c) A temporary emergency license fee established by the Ohio peace officer training commission for an amount that does not exceed the actual cost of conducting the criminal background check or thirty dollars;

(d) A set of fingerprints of the applicant provided as described in section 311.41 of the Revised Code through use of an electronic fingerprint reading device or, if the sheriff to whom the application is submitted does not possess and does not have ready access to the use of an electronic fingerprint reading device, on a standard impression sheet prescribed pursuant to division (C)(2) of section 109.572 of the Revised Code. If the fingerprints are provided on a standard impression sheet, the person also shall provide the person's social security number to the sheriff.

**(2) Upon receipt of the evidence of imminent danger, the sworn affidavit, the fee, and the set of fingerprints required under division (B)(1) of this section, the sheriff immediately shall conduct or cause to**

**be conducted the criminal records check and the incompetency records check described in section 311.41 of the Revised Code. Immediately upon receipt of the results of the records checks, the sheriff shall review the information and shall determine whether the criteria set forth in divisions (D)(1)(a) to (j) of section 2923.125 of the Revised Code apply regarding the person. If the sheriff determines that all of criteria set forth in divisions (D)(1)(a) to (j) of section 2923.125 of the Revised Code apply regarding the person, the sheriff shall immediately make available through the law enforcement automated data system all information that will be contained on the temporary emergency license for the person if one is issued, and the superintendent of the state highway patrol shall ensure that the system is so configured as to permit the transmission through the system of that information. Upon making that information available through the law enforcement automated data system, the sheriff shall immediately issue to the person a temporary emergency license to carry a concealed handgun.** (emphasis added).

7. As enacted, Revised Code Section 2923.125 provides, in pertinent part, that:

(B) An applicant for a license to carry a concealed handgun shall submit a completed application form and all of the following to the sheriff of the county in which the applicant resides or to the sheriff of any county adjacent to the county in which the applicant resides:

(1) A nonrefundable license fee prescribed by the Ohio peace officer training commission pursuant to division (C) of section 109.731 of the Revised Code, except that the sheriff shall waive the payment of the license fee in connection with an initial or renewal application for a license that is submitted by an applicant who is a retired peace officer, a retired person described in division (B)(1)(b) of section 109.77 of the Revised Code, or a retired federal law enforcement officer who, prior to retirement, was authorized under federal law to carry a firearm in the course of duty, unless the retired peace officer, person, or federal law enforcement officer retired as the result of a mental disability;

(2) A color photograph of the applicant that was taken within thirty days prior to the date of the application;

(3) One or more of the following competency certifications, each of which shall reflect that, regarding a certification described in division (B)(3)(a), (b), (c), (e), or (f) of this section, within the three years immediately preceding the application the applicant has performed that to which the competency certification relates and that, regarding a certification described in division (B)(3)(d) of this section, the applicant currently is an

active or reserve member of the armed forces of the United States or within the six years immediately preceding the application the honorable discharge or retirement to which the competency certification relates occurred:

....

(4) A certification by the applicant that the applicant has read the pamphlet prepared by the Ohio peace officer training commission pursuant to section 109.731 of the Revised Code that reviews firearms, dispute resolution, and use of deadly force matters.

(5) A set of fingerprints of the applicant provided as described in section 311.41 of the Revised Code through use of an electronic fingerprint reading device or, if the sheriff to whom the application is submitted does not possess and does not have ready access to the use of such a reading device, on a standard impression sheet prescribed pursuant to division (C)(2) of section 109.572 of the Revised Code.

**(C) Upon receipt of an applicant's completed application form, supporting documentation, and, if not waived, license fee, a sheriff shall conduct or cause to be conducted the criminal records check and the incompetency records check described in section 311.41 of the Revised Code.** (emphasis added).

8. On April 8, 2004, Relator appeared at the office of Respondent during regular business hours with his application for a CHL, together with the required fee and all other required supporting materials. Respondent refused to accept said application for processing, despite being regular and proper in all forms. (Note: It is not Relator's statement that Respondent DENIED the application; rather, Respondent would not even accept the proffered application materials for further processing.) Respondent stated that Respondent is not going to accept applications for CHL until new office space becomes available sometime in late May 2004, or new software becomes available in June 2004.

9. On April 8, 2004, Relator appeared at the office of Respondent during regular business hours with his application for a TEL, together with the required fee and all other required supporting materials. Respondent refused to accept said application for processing, despite being regular and proper in all forms. (Note: It is not Relator's statement that Respondent DENIED the application; rather, Respondent would not even accept the proffered application materials for further processing.) Respondent stated that Respondent is not going to accept applications for TEL until new office space becomes available sometime in late May 2004, or new software becomes available in June 2004.

“However, eager Cuyahoga County residents will have to apply in a neighboring county until the renovation of the Justice Center is complete, said Cuyahoga County Sheriff Gerald McFaul.

He predicted the work could be done by the end of May.

In the meantime, residents can pick up an application and a booklet about the law from McFaul's office, but no license requests will be processed.”<sup>1</sup>

10. Relator has no other adequate remedy at law. HB 12 makes no provision to appeal the refusal of a Sheriff to accept an application for further processing, and no other statutory or legal remedy is available to Relator.
11. Respondent is the only person under HB 12 who is empowered and required to process the application of Relator or any other resident of Cuyahoga County for a TEL.

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<sup>1</sup> Brown, T.C., *Ohioans Under the Gun*, Cleveland Plain Dealer, April 4, 2004.

12. Respondent is one of the persons under HB12 who is empowered and required to process the application of Relator or any other resident of Cuyahoga or any adjacent county for a CHL.
13. Respondent is without authority to refuse to perform the actions imposed upon him under HB 12, and his refusal to accept applications for processing is not a permitted exercise of discretion.
14. Relator is in all ways qualified as an applicant under Revised Code Section 2923.125 and 2923.1213, is a beneficially interested party under said statutes, and is clearly entitled to have his application materials accepted by Respondent for further processing.
15. HB 12 eliminates the prior legal manner in which a citizen may carry a concealed handgun in Ohio, leaving a CHL or TEL as the only legal method of concealed carry of a handgun in Ohio.
16. A patchwork of local municipal ordinances in Cuyahoga County purport to ban the open carrying of firearms.
17. Without an Order to the contrary, Respondent will continue to violate his duties under HB12 to the detriment of Relator and all similarly situated residents of Cuyahoga and adjacent counties.

Wherefore, Relator demands this Court issue a peremptory writ of mandamus in the first instance to Respondent, finding that time is of the essence and Ordering Respondent to accept and process applications for CHL and TEL under Revised Code

Sections 2923.125 and 2923.1213 during normal business hours; Issue an alternative writ of mandamus to Respondent, Ordering said Respondent to accept and process applications for CHL and TEL under Revised Code Sections 2923.125 and 2923.1213 during normal business hours; an award of Relator's reasonable attorney's fees in bringing this action, together with all costs of Prosecution; and for all other relief deemed necessary to a just and equitable resolution to Relator's Complaint.

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