

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	:	

RELATOR’S BRIEF IN SUPPORT OF ISSUANCE OF PEREMPTORY WRIT OF
MANDAMUS, OR ALTERNATIVE WRIT OF MANDAMUS – EMERGENCY
CONSIDERATION REQUESTED

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COUNSEL FOR JAMES MALCOLM IRVINE

Now comes Relator, by and through undersigned counsel, and submits this Memorandum in Support of the issuance of a peremptory writ of mandamus. In the event this Court does not grant Relator a peremptory writ, it is requested this Court immediately grant an alternative writ, Ordering Respondent to perform the acts prayed for in Plaintiff's Complaint, or appear and show cause as to why Respondent is not required to perform the requested acts.

For cause, Relator states that his right to the performance requested is clear, he has no alternate legal remedy, time is of the essence and Respondent has no valid excuse for refusing to perform his official duties.

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Ohio Revised Code Section 2731.06 provides that this Court may issue a peremptory writ of mandamus in the first instance. Specifically, said section provides, "When the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may allow a peremptory mandamus."

Relator's case clearly falls within this guideline. Relator's complaint pertains entirely to Respondent abrogating his statutory duties under Revised Code Section 2923.125 and Section 2923.1213. (See Relator's Complaint for a quotation of the applicable statutory language.) These duties, established under Amended Substitute House Bill Number 12, effective April 8, 2004, are not discretionary in nature; rather, they are mandatory. Nowhere within the enabling legislation is there a provision allowing Respondent to pick and choose which duties Respondent will perform, or when Respondent will begin to perform them. Under the statutes creating the duty which Relator seeks to compel Respondent to perform, there can be no valid excuse given for Respondent refusing to perform said duties, as none are statutorily provided. The second prong of Revised Code Section 2731.06, the requirement that Respondent can give no valid excuse for not doing the act, is met by the plain language of the statute. No further evidence or admission of facts is required.

Similarly, Relator's right to require performance is established by the plain language of the statutes and the fact that he is a resident of Cuyahoga County. The statutes provide that, for either application, upon receipt of the application materials Respondent "shall" begin the processing. Under the plain language of the statutes, it cannot be disputed that Relator has the right to have Respondent compelled to accept the tendered application materials for further processing. No further evidence or admission of facts is required.

Finally, Relator has no alternate legal remedy to redress his grievance. Respondent has not denied Relator's applications; rather, Respondent has refused to even accept the applications for further processing. The administrative appeals provided for in HB 12 do not apply to a Sheriff refusing to accept the applications, but only with appealing the denial of an application. Realtor has no alternate legal remedy to exhaust before requesting mandamus.

In simplest form, this case is not about material facts, evidence, or an interpretation of the law. No facts need be admitted or proven to establish that Respondent is required to abide by his duties under Revised Code Section 2923.125 and Revised Code Section 2923.1213, and the scope of these duties requires no interpretation or application of law.

This case is about the plain language of statutes and an elected official's decision not to abide by the statutes.

Due to HB 12 eliminating the prior affirmative defenses to a charge of carrying a concealed handgun under Revised Code Section 2923.12, and the patchwork of municipal ordinances in Cuyahoga County purporting to prohibit the open carrying of a handgun, residents of Cuyahoga County are currently left with no legal means to carry a handgun for their own lawful self defense. Respondent, by the operative provisions of Revised Code Section 2923.1213, is their only source for a Temporary Emergency License to carry a concealed handgun, and by the operative provisions of Revised Code

Section 2923.125, is one of the sources for a Concealed Handgun License. Respondent has arbitrarily decided not to comply with his obligations under the law until late May or June, 2004, leaving the residents of Cuyahoga County without recourse. Time is absolutely critical to Relator and these other defenseless people in the consideration of this request for a peremptory writ of mandamus, as, in the interim, they have no legal way to carry a handgun for self defense.

It is, therefore, respectfully requested that this Court grant Relator the peremptory writ prayed for in Relator's Complaint immediately upon consideration of this memorandum. Due to the timeliness involved, the clear right to the relief requested, and the complete lack of justification for Respondent refusing to perform the acts requested, if this Court does not grant a peremptory writ, it is requested this Court grant an alternative writ of mandamus as prayed for in the complaint, Ordering Respondent to perform the requested acts, or appear and show cause as to why Respondent is not required to perform the requested acts.

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