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IN THE SUPREME COURT OF INDIANA

Cause No. 23S-OR-302

State of Indiana ex rel. Richard Allen, Relator, v. Carroll Circuit Court and The Honorable Frances C. Gull, Special Judge, Respondents.	)	Original Action from the Carroll Circuit Court Trial Court Cause No. 08C01-2210-MR-000001

RESPONDENT'S BRIEF IN OPPOSITION TO RELATOR'S VERIFIED PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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Respondent, the Honorable Frances C. Gull, Special Judge ("Respondent"), by counsel and pursuant to Rule 3(F) of the Indiana Rules of Procedure for Original Actions ("Original Actions Rules"), files her Brief in Opposition to Relator Richard Allen's Verified Petition for Writ of Mandamus and Prohibition ("Petition").

INTRODUCTION

Relator fails to satisfy either the conditions precedent or the mandatory requirements to even seek a writ. Nor does the Relator's Petition warrant relief on the merits. Relator asks this Court to order Respondent to unseal or to make available on the Chronological Case Summary ("CCS") certain documents in this case. This Court should deny the writ.

First, by his own admission, Relator has not filed a written motion seeking relief from Respondent. Original Actions Rules 2(A) and 3(A)(4). This failure alone warrants this Court to reject the Petition. Second, for almost all of documents at issue here, Relator has not acted expeditiously. Original Actions Rule 3(A)(2). Relator complains largely about events that occurred months ago. Third, Relator has not attempted to demonstrate that denial of the Petition will result in extreme hardship to himself. Relator has complete access to all documents filed in this case, sealed or unsealed. And Relator has not demonstrated extreme hardship to anyone else. Original Actions Rule 3(A)(5). Fourth, Relator's remedies available on appeal are wholly adequate. Original Actions Rule 3(A)(6). Disputes about public access to court records are governed by the normal rules of "procedure, evidence, and appeal," all of

which are available to Relator. Ind. Rule on Access to Court Records 1(D). For these reasons, the Petition fails procedurally.

On the merits, Relator's Petition also fails. Most of the relief Relator seeks is now moot. Relator has directed the Clerk to enter on the CCS and make publicly available all non-confidential documents that Relator requested to be made public. Moreover, Respondent is under no duty to maintain the CCS. That is the Clerk's responsibility. Ind. Trial Rule 77(A)(1) and 77(B). Nor does Relator identify an absolute duty Respondent violated. Relator is wrong when he suggests that the parties "agreed" that documents would be sealed without valid grounds to do so. Nothing of the sort happened here. Finally, it bears emphasis that this Court has never issued a writ granting the type of relief Relator seeks here. Writs are reserved to provide extraordinary relief, not to manage the CCS.

STANDARD OF REVIEW

The Supreme Court "has the power, by writ of mandate and prohibition, to confine a lower court within its lawful jurisdiction." *State ex rel. City of New Haven v. Allen Superior Court*, 699 N.E.2d 1134, 1135-36 (Ind. 1998). Writs of mandamus and prohibition are extraordinary remedies which "are viewed with disfavor and may not be used as substitutes for appeals." Original Actions Rule 1(C); *see also generally State ex rel. Goldsmith v. Superior Court of Marion Cnty., Criminal Div., etc.*, 463 N.E.2d 273 (Ind. 1984). This Court will not issue a writ unless the relator has a clear and unquestioned right to relief, and only where the trial court has an absolute duty to act or refrain from acting. *State ex rel. Woodford v. Marion Superior Court*, 655

N.E.2d 63, 65 (Ind. 1995); *State ex rel. Commons v. Pera*, 987 N.E.2d 1074, 1076 (Ind. 2013).

ARGUMENT

I. Relator Does Not Meet the Conditions Precedent or Mandatory Requirements to Seek a Writ.

Relator has failed to satisfy the conditions precedent or mandatory requirements for filing an original action. Based on its procedural deficiencies, the Petition should be denied.

A. Relator Admits that He Failed to Comply with Conditions Precedent for Original Actions to Seek Relief from the Trial Court.

Original Actions Rules 2(A) and 3(A)(4) required Relator, before filing his Petition, to first raise the issues presented here to the trial court in a written motion. Relator admits he did not do so. Petition at ¶¶ 18-20. He did not file a motion with the trial court seeking to unseal or make public any of the documents identified in his Petition. The Court should not entertain Relator's Petition for this reason alone. Original Actions Rule 2(A).

Relator requests that he be excused from this condition precedent due to "extraordinary circumstances" and a "practical impossibility." Petition at ¶¶ 19-20. Neither is an exception under Rule 2(A), and Relator cites no authority to support such an exception in original actions. Rather, Relator suggests that the Indiana Rules of Appellate Procedure allow for excuse of an "analogous" condition precedent under "extraordinary circumstances." The Rules of Appellate Procedure do not apply to

Original Actions, which are governed "exclusively" by their own rules. Original Actions Rule 1(B).

Moreover, Relator's claim that "there is an impossibility of performance of the condition precedent" is wrong. Petition at ¶ 20. Relator asserts that "the trial court refuses to accept any filings made by [Attorneys Rozzi and Baldwin] and orders the Clerk to 'remove' anything they file." *Relator's Brief in Support of Petition for Writs of Mandamus and Prohibition* ("Verified Petition Br.") at p. 14. But the trial court has not prohibited Relator from filing motions with the trial court via his current counsel or himself. Relator has highly competent counsel, including the attorneys who filed the Petition. In addition, the trial court has appointed new counsel for Relator in the trial court case, as Relator acknowledges. (Record, p. 31).[1] Nothing prohibits any of these lawyers from entering appearances with the trial court, including limited appearances on the issues presented in his Petition, for the narrow purpose of first requesting relief from Respondent.[2] Relator cannot claim "impossibility" because he directed his current counsel to file a premature and incomplete original action.

Finally, as discussed further in the next section, Relator seeks relief arising from the Respondent's actions as early as June 2023, including a trial court Order dated June 28, 2023. Petition at pp. 9-10. Between June 28, 2023, and October 27,

[1] Relator claims that he "does not accept this appointment and he has not authorized these new attorneys to act on his behalf in any manner." This is irrelevant, because he is not prohibited from filing a written motion with the trial court regardless of whether he accepts court-appointed counsel.
[2] In fact, one of Relator's attorneys has done just that. On November 2, 2023, Relator's attorney Cara Weineke filed a *Limited Appearance for the Purpose of Requesting Transcripts*, in which she advised the trial court that her "appearance is limited for the purpose of requesting transcripts necessary for an original action." Supp. Record, pp. 3-4. Ms. Weineke entered this appearance in connection with another original action Relator filed, *State of Indiana ex rel. Allen v. Carroll Circuit Court*, Case No. 23S-OR-311.

2023 (when Relator received notice that the trial court had stricken filings from Rozzi), Relator had ample opportunity to file written motions with the trial court challenging the court's decisions. But Relator never did. Relator's compliance with Rule 2(A) was not "an impossibility," factually, legally or practically. The Court should deny the Petition for this reason alone.

B. Relator Failed to File His Petition "Expeditiously."

"Original actions of mandate and prohibition must be expeditiously filed." *State ex rel. Hashfield v. Warrick Circuit Court*, 178 N.E.2d 734, 735 (Ind. 1961) (citations omitted); *State ex rel. Nineteenth Hole, Inc. v. Marion Superior Court*, 189 N.E.2d 421, 423 (Ind. 1963); Original Actions Rule 3(A)(2). "Although no specific statutory provision prescribes the time for judicial review . . . such action must be brought expeditiously and without unnecessary delay." *State ex rel. Marion v. Grant Circuit Court*, 239 Ind. 315, 320 (1959). For example, this Court has found that a delay of forty-two days was too long to seek a writ with this Court. *Nineteenth Hole, Inc.*, 189 N.E.2d at 425.

Relator baldly asserts that the "application has been made expeditiously." Petition at ¶ 15. But Relator seeks relief from actions that occurred on the following dates:

- June 20, 2023 (filing by Carroll County Sheriff);
- June 28, 2023 (trial court Order);
- July 5, 2023 (letter from a D.O.C. inmate);
- September 18, 2023 (Allen's *Franks* Memorandum); and

- October 25-26, 2023 (Allen's Verified Notice of Continuing Representation, Motion to Disqualify, Praecipe for Transcript, and Motion for Continuance).

Petition at pp. 9-10.

Relator filed his Petition on October 30, 2023. That was forty-two days after Relator filed the September 18 memorandum – the *exact same delay* that the Supreme Court found to be excessive in *Nineteenth Hole*. 189 N.E.2d at 423. The delays from the July 5 letter (117 days), June 28 Order (124 days), and the June 20 filing (132 days) are even longer. Relator has offered no justification for these delays in filing an original action.

Relator's Petition is "expeditious" only to the extent that it seeks to "reinstate" the October 25-26, 2023, filings. However, Relator's request for this minor relief cannot save his otherwise untimely Petition. This Court should not issue an extraordinary writ on matters that the trial court decided months ago and that Relator never challenged before the trial court itself.

C. Relator Fails to Show that the Denial of the Petition Will Result in Extreme Hardship.

"All petitions . . . shall state facts showing clearly that . . . the denial of the petition will result in extreme hardship[.]" Original Actions Rule 3(A)(5). "Writs of mandamus and prohibition will not be used unless the relator can show a clear and obvious emergency where the failure of the Supreme Court to act will result in substantial injustice." *Commons*, 987 N.E.2d at 1076. "It is not the policy of the Supreme Court to issue these extraordinary writs against lower courts on slight

occasions, but only in special cases to prevent impending injury." *Nineteenth Hole, Inc.*, 189 N.E.2d at 423.

Relator's Petition claims, "[a]s explained below and in the accompanying brief, the denial of this application will result in extreme hardship[.]" Petition at ¶ 17. Yet Relator never states any facts, in either the Petition or Brief, showing clearly that he would suffer extreme hardship. The Petition is insufficient under Original Actions Rule 3(A)(5).

Instead, Relator argues that restricting access to the court records at issue generally harms the public, but stops well short of arguing that it causes the public "extreme hardship." More importantly, Relator *never* alleges that *he* would suffer "extreme hardship" if the documents at issue remain publicly inaccessible. Nor can he. As a party, Relator has complete access to *any* court documents, regardless of whether they are public or confidential. That documents are under seal does not hinder in any way Relator's defense of the criminal charges against him. Although Relator raises arguments about his Sixth Amendment right to counsel, these claims of harm have nothing to do with the relief he seeks in the Petition.[3]

D. Relator Fails to Show that the Remedies Available by Appeal Will Be Wholly Inadequate.

"All petitions . . . shall state facts showing clearly that . . . the remedy by appeal will be wholly inadequate." Original Actions Rule 3(A)(6). "If a court decides erroneously, the remedy is through an appeal." *Nineteenth Hole, Inc.*, 189 N.E.2d at

[3] Respondent will respond to these issues in the separate Original Action pending under case number 23S-OR-00311.

424. "Far too frequently writs of prohibition and mandate are sought to be used as a short-cut to an appeal on the merits[,]" which "cannot be done." *State ex rel. Durham v. Marion Circuit Court*, 162 N.E.2d 505, 508 (Ind. 1959).

Relator's Petition asserts that his "remedy available by appeal will be inadequate." But Relator again fails to demonstrate why appellate remedies would be inadequate, wholly or otherwise. The Indiana Access to Court Records Rules specifically contemplate parties must use the ordinary appeals process to resolve "[d]isputes arising under this rule." Access to Court Records Rule 1(D).

For that reason, this Court and the Indiana Court of Appeals regularly entertain appeals regarding access to court records. *See generally, e.g.*, *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 114, 114 (Ind. 2008) (addressing on "appeal from a judgment of the Marion Superior Court" whether trial court properly complied with Administrative Rule 9 when it ordered certain court records excluded from public access); *Bailey v. Ind. Newspapers, Inc. (In re T.B.)*, 895 N.E.2d 321, 329-31 (Ind. Ct. App. 2008) (citations omitted). Indeed, Indiana's appellate courts regularly decide the type of issues regarding access to court records that the Petition raises. *See, e.g.*, *WPTA-TV v. State*, 86 N.E.3d 442, 445-47 (Ind. Ct. App. 2017) (addressing application of Administrative Rule 9, predecessor to the Access to Court Records Rules, to trial court's "Order Limiting the Use of Court Record and Barring Its Broadcast or Dissemination" in appeal by intervenor media entity); *In re Name Change of A.L.*, 81 N.E.3d 283, 289-91 (Ind. Ct. App. 2017) (addressing application of Administrative Rule 9 in interlocutory appeal of trial court's denial to seal case

record); *Angelopoulos v. Angelopoulos*, 76 N.E.3d 852, 857-59 (Ind. Ct. App. 2017) (addressing issue of "whether the trial court erred under Administrative Rule 9 by excluding from the public record portions of [a party's] deposition testimony"); *Angelopoulos v. Angelopoulos*, 2 N.E.3d 688, 698-701 (Ind. Ct. App. 2013) (addressing "[w]hether the trial court erred by concluding that certain materials obtained by [appellant] during discovery and filed in court should remain confidential" under Administrative Rule 9); *H.M. v. State*, 993 N.E.2d 1162, 1165 (Ind. Ct. App. 2013) (addressing appeal of "trial court's summary denial of [appellant's] four petitions to restrict the disclosure of arrest records" under repealed statute and former Administrative Rule 9(G)(1)(g)); *In re Change Name of Jane Doe*, 988 N.E.2d 1264, 1267-69 (Ind. Ct. App. 2013) (addressing application of Administrative Rule 9 in context of appellant's request to anonymously pursue name change).

Indiana's Rules of Appellate Procedure reinforce that that Relator may request the relief he seeks from the trial court and, if the trial court disagrees, seek a remedy through the normal appellate process. *See* Ind. R. App. P. 32. Specifically,

> [i]f any disagreement arises as to whether the Clerk's Record or Transcript accurately discloses what occurred in the trial court or the Administrative Agency, any party may move the trial court or the Administrative Agency to resolve the disagreement. The trial court retains jurisdiction to correct or modify the Clerk's Record or Transcript at any time before the [appellate] reply brief is due to be filed. After that time, the movant must request leave of the Court on Appeal to correct or modify the Clerk's Record or Transcript. The trial court or Administrative Agency shall issue an order, which shall become part of the Clerk's Record, that either: (1) confirms that the Clerk's Record or Transcript reflects what actually occurred; or (2) corrects the Clerk's Record or Transcript, including the chronological case summary if necessary, to reflect what actually occurred.

Id. If Relator believes that CCS is inaccurate or incomplete, or that documents should not be sealed, Rule 32 of the Indiana Rules of Appellate Procedure provides still another avenue for addressing any such concerns.

Due to the Petition's multiple procedural defects, the Court should decline to issue a writ and need not consider the Petition's merits.

II. The Petition Fails on the Merits.

Even if Relator had satisfied the conditions precedent and mandatory procedural requirements for an original action, which he has not, the Petition fails on the merits. At the outset, most of the relief Relator seeks is now moot. Respondent has issued an order directing the Clerk to make available to the public on the CCS all non-confidential documents Relator requests be made public. In any event, Respondent has no absolute duty to maintain the CCS. That is the Clerk's responsibility, not Respondent's. Nor does Respondent have an absolute duty to "reinstate" documents filed by attorneys after they no longer represented Relator. Respondent also has no absolute duty to provide the public with remote access to records, much less the particular form of remote access that Relator requests. This Court should deny the Petition.

A. Most of the Relief Relator Seeks Is Moot.

On November 14, 2023, the trial court issued an Order that resolves most of the public access issues raised in the Petition. Supp. Record, pp. 5-6. First, Respondent has ordered the Carroll Circuit Court Clerk to put the 118 documents

previously made remotely accessible by Court Order of June 28, 2023, on the CCS. *Id.* at 5.

Second, Respondent has ordered the Clerk to unseal the June 20, 2023, filing by the Carroll County Sheriff and the July 5, 2023, letter from a D.O.C. inmate and place them on the CCS. *Id.*

Third, Respondent has ordered the Clerk to place and make accessible on the CCS the October 25-26, 2023, filings by Rozzi to the CCS. *Id.* at 6. These filings remain stricken from the record, and will not be considered because they were filed by an attorney who was not an attorney of record for Relator on the date of filing. *Id.*; Record, p. 237.

The trial court's November 14, 2023, Order renders most of the issues in the Petition relating to these documents moot.

B. The Clerk, Not Respondent, Is Required to Maintain the CCS.

Respondent has no absolute duty to maintain the CCS. The Clerk of the Carroll Circuit Court, not Respondent, is responsible for maintaining the CCS. *See* Ind. Tr. R. 77(A)(2) ("The clerk of the circuit court shall also maintain the following records as specified under this rule: (a) Chronological Case Summary (CCS); (b) Case file [.]"); Ind. Tr. R. 77(B) ("the clerk of the circuit court shall maintain a sequential record of the judicial events in such proceeding").

Indeed, Relator concedes that the "trial court clerk" is to maintain the trial court case records. Verified Petition Br. at p. 15. Similarly, Relator repeatedly refers to the person who allegedly violated the duty to provide public access to certain

records as "someone." *See* Petition at ¶¶ 2 ("someone within the court system *sua sponte* changed all of Allen's filings to 'confidential'"), 11 ("someone within the court has since removed/excluded the *Franks* Memorandum from the CCS altogether"). Relator's allegations against "someone" are no basis for a writ against Respondent.

C. Respondent Did Not Abuse Her Discretion in Managing the Docket, Much Less Violate an Absolute Duty.

"The trial court has broad discretion in managing its docket." *Storey v. Leonas*, 904 N.E.2d 229, 238 n.5 (Ind. Ct. App. 2009) (declining "to second-guess the trial court for allowing one motion to be filed but not another."). Respondent has no "absolute duty" to manage its docket in the manner sought by Relator.

Nor does Respondent have an absolute duty to provide a particular type of remote access. *See* Petition at ¶¶ 16, 21, 30. Indiana law does not require court records to be remotely accessible. *See* Ind. Admin. R. 9, *Commentary* ("While this section encourages courts to make the designated information available to the public through remote access, this is not required, even if the information already exists in an electronic format."). Respondent has ensured that the 118 documents on the Zip drive have been and remain publicly available online since June 28, 2023. Record, p. 42. The June 20 and July 5 documents appear on the CCS. Record, pp. 22-23. Even if they are not accessible online via the CCS, this does not mean they have been otherwise excluded from public access. A court record may be publicly available even if the public is unable to download it from the CCS. A court record is excluded from public access only if the record is not "available for Public Access in the courthouse

during regular business hours established by the court." Ind. Admin. R. 9(H)(1). In any event, this request is moot, for the reasons discussed above. Supp. Record, p. 5.

Relator further asserts that Respondent wrongly allowed the parties to "agree" to exclude certain records from the court's CCS. *See* Petition at ¶¶ 4, 36. Nothing like that happened. In the trial court's June 28, 2023, Order, Respondent explained that the court had an undisputed legal basis for sealing certain records, including the unredacted Affidavit for Probable Cause (listing "names of juvenile witnesses"), the Transport Orders ("security purposes"), and Defense Ex Parte Motions and related Orders ("pursuant to long established case law"). Record, p. 42. The parties did not "agree" among themselves to exclude these records without valid legal grounds, nor did Respondent rely on a Trial Rule 26(C) protective order to justify exclusion. Respondent harmlessly noted that the parties agreed with the court's stated legal bases for sealing the records.

Relator also seeks to unseal or restore public access to the *Franks* Memorandum. The *Franks* Memorandum contains the full first and last names of the deceased minor children who are the crime victims in this case. *See, e.g.*, Record, pp. 57, 70, 106. Names of minor children are required to be redacted from court filings in federal courts. Fed. R. Civ. P. 5.2(a). Indiana, in turn, excludes "Case Records declared confidential or excluded from Public Access pursuant to federal law." Ind. Access to Court Records R. 5(B)(1). Therefore, the *Franks* Memorandum is "marked as confidential . . . because counsel failed to supply a redacted version at the time of filing." Supp. Record, p. 5. Respondent has ordered Relator's "new defense counsel to

review the pleadings . . . and either adopt them or make their own." *Id.* If counsel adopts them, "they are ordered to file a redacted version." *Id.*

Finally, Relator has not cited a single case where the Indiana Supreme Court has issued a writ of mandamus or prohibition to grant the type of relief Relator seeks here. This Court has never mandated that a trial court (i) "reinstate" documents filed by attorneys who no longer represent a party; (ii) make documents available to the public on the CCS, when the trial court had already made those documents publicly available; or (iii) comply with certain Access to Court Record rules or statutes. Relator's Petition does not seek the extraordinary relief reserved for an original action. Should this Court grant a writ to Relator, the Court will become inundated with petitions alleging that trial courts across the state committed a technical violation of the Access to Court Records Rules. Disputes of the type Relator raises are best resolved by the ordinary appellate process. *See* Ind. Access to Court Records R. 1(D). The Court should decline to grant the relief requested.

CONCLUSION

Respondent the Honorable Frances C. Gull respectfully requests that this Court deny Relator's Verified Petition for Writs of Mandamus and Prohibition.

Respectfully submitted,

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VERIFIED STATEMENT OF WORD COUNT

Pursuant to Rule 3(B) of the Indiana Rules of Procedure for Original Actions, undersigned counsel certifies that the foregoing contains fewer than 4,200 words, as counted by the word processing system used to prepare the Brief (MS Word). Undersigned counsel verifies that this brief contains 3,752 words.

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CERTIFICATE OF SERVICE

I certify that on November 16, 2023, I electronically filed the foregoing document using the Indiana Electronic Filing Service ("IEFS"). I further certify that on November 16, 2023, the foregoing document was served on the following persons using the IEFS:

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