FILED
LORAIN COUNTY COURT OF APPEALS
9TH APPELLATE DISTRICT
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4/15/2020
TOM ORLANDO, CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs-Appellees/Cross-Appellants,

-vs.-

OBERLIN COLLEGE, et al.,

Defendants-Appellants/Cross-Appellees.

Case No.: 19CA011563

Appeal from the Lorain County Court of Common Pleas, Case No. 17CV193761

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO EXCEED PAGE LIMITATIONS

While the tortious conduct of the billion-dollar institution and its vice-president in defaming, interfering with the business relationship and bullying a 134 year old small family business is shocking, the legal and factual issues presented in this appeal do not necessitate an extension of the page limit restrictions outlined in Ninth Dist. Loc. R. 7(E). Plaintiffs'[1] submit that Defendants'[2] motion for additional pages should be denied for the following reasons:

First, Defendants' again endeavor to inject substantive issues in procedural motions as they continue their spin campaign attempting to classify this matter as a "free speech case." Following the jury verdict, Defendants retained two additional law firms. Defendants' new counsel attempts to reframe this appeal in a manner that would be unrecognizable to anyone who participated in the trial court proceedings. Contrary to the 'messaging' efforts on this appeal, this was never a 'free speech' case. It is, and always has been, a tort case.

[1] "Plaintiffs" refers to Plaintiffs-Appellees/Cross-Appellants Gibson Bros., Inc. ("Gibson's Bakery"), Lorna Gibson, as Executor of the Estate of David R. Gibson, Deceased ("Dave Gibson"), and Allyn W. Gibson ("Grandpa Gibson").

[2] "Defendants" refers to Defendants-Appellants/Cross-Appellees Oberlin College & Conservatory and Meredith Raimondo.

In fact, after five (5) weeks of receiving evidence, a representative jury to which no objection was made unanimously found in favor of Plaintiffs on claims of not only defamation, but also intentional interference with business relationships, and intentional infliction of emotional distress.

Regardless of Defendants' continued improper interjection of "free speech" into procedural motions, the Court's decision in this case will not involve a sweeping review of first amendment case law or constitutional questions. Instead, this is a tort case that will be decided on longstanding Ohio tort law principles. Defendants' attempts to reclassify this tort case as one involving free speech is a smokescreen erected to divert attention away from Defendants' intentional tortious conduct. Additional pages for irrelevant first amendment arguments are not necessary and should not be provided.

Second, while this case involved numerous witnesses and documentary exhibits, it is not so complex that a page extension is necessary for Defendants to assert their various (incorrect) arguments. This Court routinely denies requests for page extensions in civil cases with complex trial records and even in criminal cases involving the death penalty and complex RICO trials. For example:

- *Gavin Ellis, etc., et al. v. Laura Kenny Fortner, M.D., et al.*, 9th Dist. Case No. CA-28992 (2018) involved complex medical malpractice issues and a jury verdict in excess of $11 million.[3] The record from the underlying trial was nearly three thousand (3,000) pages long and included several *Daubert* motions on complex medical issues. (See, Ex. 1). Recognizing that an extension was unnecessary to properly develop the arguments on appeal, this Court denied the request for a page extension. (See, Ex. 2).[4]
- *State ex rel. Cooey v. Judges of Court of Appeals for Ninth App. Dist.*, 66 Ohio St.3d

[3] For the Court's review, the motion requesting an extension of the page limits in the *Ellis* case is included in this response brief as **Exhibit 1**.

[4] A true and accurate copy of this Court's order denying the motion for extension of page limits in *Ellis* is included as **Exhibit 2**.

1436 (1993), involved a mandamus action brought before the Ohio Supreme Court after this Court limited a request to extend page limits initiated by a criminal defendant ***appealing a death penalty conviction***. (See, Ex. 3).[5] The Ohio Supreme Court dismissed the mandamus action, which affirmed this Court's decision to limit the request for a page extension. *See, Cooey*, 66 Ohio St.3d at 1436.

- In *State of Ohio v. David Willan*, 9th Dist. Case No. CA-24894 (2011), this Court denied a criminal defendant's request for a page extension related to the direct appeal of a ***one hundred and forty-seven (147) count RICO indictment*** that involved ***two trials*** and conviction on more than ***seventy (70) crimes***.[6] (See, Ex. 4).[7]

Clearly, if page extensions are unnecessary for death penalty cases and multi-defendant RICO trials, they are unnecessary in this appeal.

Third, one of Defendants' primary reasons for requesting a page extension is that, according to Defendants, this appeal involves several legal issues that will require the Court to explore the summary judgment record.[8] Even if this were true (and Plaintiffs contend that it is not), the record on summary judgment was not substantially different than the record created during trial. Plaintiffs estimate that the vast majority of documents utilized during summary judgment briefing were presented (or could have been presented) during trial. Further, while fewer witnesses testified during trial compared to those deposed during discovery, the discrepancy is directly attributable to Defendants' persistent discovery abuses which include (but by no means are limited to): (1) subpoenaing and deposing nearly every member of the Oberlin Police

[5] For the Court's review, a copy of the substantive portions of the criminal defendant's brief in support of mandamus is included with this responses brief as **Exhibit 3.**

[6] *See, State v. Willan*, 9th Dist. Summit No. 24894, 2011-Ohio-6603, ¶¶ 2-13, overturned on other grounds, 144 Ohio St.3d 94, 2015-Ohio-1475, 41 N.E. 366.

[7] A true and accurate copy of this Court's order denying the request for a page extension in *Willan* is included as **Exhibit 4**.

[8] As support for this assumption, Defendants cite to *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949 (1984). However, the application of *Bose* to this case is not entirely clear. *Bose* dealt with appellate review of factual decisions made by a judge during a bench trial. *Id.* at 487. However, this case was tried to a jury, not the trial court. Further, *Bose* dealt with a public figure defamation plaintiff. *Id.* at 489. As the trial court correctly ruled during summary judgment briefing, the Plaintiffs in this case are all *private figures*. (See, 4-22-2019 Entry, pp. 5-6).

Department; and (2) subjecting then ***90-year-old Grandpa Gibson to five (5) days of questioning lasting nearly nineteen (19) hours.***

Fourth, the other reasons identified by Defendants that supposedly necessitate a page extension should also be discarded. Defendants point to alleged evidentiary issues and unwarranted complaints about the jury instructions. But these are usual and customary issues appellants assert on appeal that do not require additional pages. While the facts of this case, including Defendants' libelous conduct, are unusual, the actual issues this Court will decide on appeal are not.

Plaintiffs submit that good cause does **not** exist in this case for an extension of the page limits outlined in Ninth Dist. Loc. R. 7(E). Therefore, Defendants' Motion to Exceed Page Limitations should be denied in its entirety.

DATED: April 15, 2020

Respectfully submitted,

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IN THE COURT OF APPEALS OF OHIO
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO

GAVIN ELLIS, etc., et al.	)	CASE NO. CA-28992
	)	
Plaintiffs-Appellees,	)	On Appeal from the Court of Common
	)	Pleas, Summit County, Ohio,
vs.	)	Case No. CV 2016-07-2898
	)	
LAURA KENNY FORTNER, M.D., et al.	)	**MOTION OF DEFENDANTS-**
	)	**APPELLANTS LAURA KENNY**
Defendants-Appellants.	)	**FORTNER, M.D. AND ATRIUM**
	)	**OB/GYN INC.'S FOR EXTENSION OF**
	)	**PAGE LIMIT**

Defendants-Appellants Laura Kenny Fortner, M.D. and Atrium OB/Gyn, Inc. move this Court for an additional ten (10) pages for its Appellate Brief. The legal and factual background relevant to this appeal is extensive due to the significant motion practice in the Trial Court, including two extremely in depth and comprehensive *Daubert* Motions, along with the extensive jury trial that resulted in a trial transcript of two thousand eight hundred fifty (2,850) pages. Additionally, as set forth in Defendants' Docketing Statement, Defendants have identified multiple probable issues for appellate review. Accordingly, it is anticipated that an extension of the page limit will be necessary for both the Statement of the Case and Facts and the Law and the Argument portions of the Brief. Appellants thus respectfully request a 10-page extension of their Brief's page limit.

Respectfully submitted:

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A copy of this document has been served by email only on October 25, 2018 to:

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<<HCP #1015426-v1>>

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
SANDRA KURT
2018 OCT 31 AM 10: 42
SUMMIT COUNTY
CLERK OF COURTS

GAVIN ELLIS, Etc.,

Appellees

v.

LAURA KENNY FORTNER, M.D., et al.

Appellants

C.A. No. 28992

MAGISTRATE'S ORDER

Appellants have moved this Court to extend the page limit for their appellate brief. Upon review, the motion is denied. Appellants' brief will now be due 20 days from journalization of this order.

C. Michael Walsh
Magistrate

EXHIBIT
2

1993 WL 13141257 (Ohio) (Appellate Brief)
Supreme Court of Ohio.

State of Ohio, ex rel., Richard Wade COOEY II, Relator,
v.
JUDGES OF THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT, and The Honorable William R. Baird, individually and in his official capacity, and The Honorable Mary Cacioppo, individually and in her official capacity, and The Honorable Deborah L. Cook, individually and in her official capacity, and the Honorable Daniel B. Quillin, individually and in his official capacity, and The Honorable John W. Reece, individually and in his official capacity, Respondents.

No. 93-94.
January 20, 1993.

Brief in Support of Relator's Motion for Peremptory Writ of Mandamus or, in the Alternative, an Alternative Writ of Mandamus

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*1 STATEMENT OF THE CASE

This is an original action for a writ of mandamus directing the Judges of the Court of Appeals for the Ninth Appellate District to permit Richard Wade Cooey II to file a brief in excess of forty-five (45) pages in his appeal involving the death penalty.

STATEMENT OF THE FACTS

Richard Wade Cooey II was sentenced to death in Ohio. *State v. Cooey,* Sum. C.P. No. CR 86-9-1109A, (Dec. 18, 1986), *affd.* Sum. C.A. No. 12943 (Dec. 23, 1987), *affd.* 46 Ohio St. 3d 20 (1989), *cert. denied,* ___ U.S. ___, 111 S. Ct. 1431

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(1991). Relator filed a petition seeking post-conviction relief pursuant to Ohio Rev. Code Ann. Section 2953.21 and, the relator's petition was denied by the trial court. Petitioner filed a Motion for Relief from Judgment Pursuant to Ohio Criminal Rule 60(B)(1) and (5). This Motion was also denied by the trial court. The relator filed notices of appeal with the Ninth District Court of Appeals appealing the decisions of the trial court to deny the post-conviction petition and Motion for Relief from Judgment. Relator filed a Motion to Consolidate his pending appeals, which was granted. *State v. Cooey,* Sum. C.A. Nos. 15895, 15996 (Dec. 2, 1992).

The transcript of relator's trial consists of 650 pages. The docket reflects a total of 118 entries and filings in the trial court.

In relator's direct appeal to the Ninth District Court of Appeals, he raised thirteen (13) assignments of error. The body of his merit brief consisted of thirty-four (34) pages. In relator's direct appeal to this Court, he raised thirty-three (33) propositions of law. No page limit was placed upon his merit brief and the body of his merit brief consisted of one hundred thirty-nine (139) pages.

*2 Upon exhausting his direct appeals, relator filed a petition seeking post-conviction relief raising sixty-five (65) claims for relief which were supported by eleven (11) exhibits. On July 21, 1992, the trial court, through a nine (9) page entry, denied relator's petition seeking post-conviction relief. *State v. Cooey,* Sum. C.P. No. CR 86-09-1109A (July 21, 1992) unpublished. On August 20, 1992, relator timely filed a Notice of Appeal with the Court of Appeals for the Ninth Appellate District appealing the July 21, 1992 entry of the trial court. On August 20, 1992 relator also filed a Motion for Relief from Judgment pursuant to Ohio Criminal Rule 60(B)(1) and (5). On September 14, 1992, the trial court denied relator's Motion. On October 14, 1992, relator timely filed a Notice of Appeal with the Court of Appeals for the Ninth Appellate District appealing the September 14, 1992 entry of the trial court. On November 23, 1992, relator filed a Motion to consolidate his appeals. On December 2, 1992, the Ninth Appellate District filed a Journal Entry consolidating relator's pending appeals. *State v. Cooey,* Sum. C.A. Nos. 15895 and 15896 (Dec. 2, 1992).

The Ninth Appellate Judicial District adopted a local rule of court which limits the length of initial and answer briefs to thirty (30) pages. This maximum may only be exceeded by the permission of the court. Ninth Appellate District Local App. R. 13. On December 9, 1992, relator filed a motion with the Ninth District Court of Appeals requesting leave to file a brief in excess of thirty (30) pages, estimating that sixty (60) pages would be necessary to do adequate justice to this capital brief. On December 16, 1992, Respondent Judges granted relator's motion for leave to file a brief in excess of the page limitation in part, limiting the brief to forty-five (45) pages rather than the sixty (60) pages requested by relator. [Appendix 1.]

*3 ARGUMENT

PROPOSITION OF LAW NO. I

THE CLEAR LEGAL RIGHT AND CLEAR LEGAL DUTY REQUIRED FOR ISSUANCE OF A WRIT OF MANDAMUS ARE THOSE WHICH ARE INFERABLE FROM THE FACTS.

An applicant for a writ of mandamus must demonstrate a clear legal right to the relief sought and a concomitant clear legal duty on the part of the respondent to provide the relief sought. *See State, ex rel. Plain Dealer Publishing Co. v. Lesak,* 9 Ohio St. 3d 1, 3 (1984).

The terms 'clear legal right' and 'clear legal duty' are terms of art. The word 'clear' does not refer to the clarity of the law or the unanimity of controlling judicial decision. The terms 'clear legal right' and 'clear legal duty" refer only to those rights and duties which may be inferred from the facts, regardless of the difficulty of the legal question to be decided or whether a pre-existing body of controlling law exists. *State, ex rel. Maizels v. Juba,* 460 P. 2d 850, 852-53 (1969) (extensive discussion); *see, also,* Black's Law Dictionary (5th Ed. 1979). This Court has ruled:

> A doubt that may arise in the mind of the court in matter of law, as to the existence of the duty, will not *** require or justify the denial of the writ. It is the court's duty to solve all such doubts, and to declare

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> the duty as it finds it to be, after its misgiving as to the intent and meaning of the statute involved, or as to any other question of law, have been eliminated.

State, ex rel. Melvin v. Sweeney, 154 Ohio St. 223, 226 (1950); *accord State, ex rel. Canada v. Phillips,* 168 Ohio St. 191 (1958).

The facts in this case demonstrate without question that relator has a *clear legal right* to file a brief in the Ninth District Court of Appeals which exceeds forty-five (45) pages and that respondents have a *clear legal duty* to permit such filing.

***4 PROPOSITION OF LAW NO. II**

POLICY CONSIDERATIONS RECOGNIZE THE IMPORTANCE OF PERMITTING AN APPELLANT TO FILE A BRIEF WITHOUT A LIMITATION AS TO THE NUMBER OF PAGES IN A CASE INVOLVING THE DEATH PENALTY.

The relator has been sentenced to death in Ohio. Presently, he has an appeal pending in the Ninth District Court of Appeals challenging the denial of post-conviction relief in his death penalty case.

Article IV, Section 5(B) of the Ohio Constitution permit courts of appeals to adopt local rules of practice in their respective courts. Specifically, "[c]ourts may adopt additional rules concerning local practice *** which are not inconsistent with the rules promulgated by the supreme court." *Id.* App. R. 31 permits courts of appeals to "*** adopt rules concerning local practice in their respective courts which are not inconsistent with ***" the appellate rules.

The Ninth District Court of Appeals adopted a local rule of court which provides:

> The initial and answer briefs of parties shall not exceed thirty (30) pages, exclusive of the appendix, summary of argument, and index. No brief may be filed which exceeds such limitation except by prior permission of the Court. Application for such permission shall be by motion specifying the number of extra pages requested and specifying reasons why extra pages are required. And, except by permission of the court, reply briefs shall be restricted to matters in rebuttal of the answer brief. Proper rebuttal is confined to new matters in the answer brief.

Loc. R. 13.

Although the Rules of Appellate Procedure are silent as to page limitations for briefs, this Court has recognized the importance of imposing no page limitation for briefs in "*** cases involving the death penalty." Sup. Ct. R. V, Sec. 1. In all other cases, the parties are permitted to file a *5 brief "*** not to exceed fifty pages." *Id.* By drawing a line of demarcation between death penalty cases and non-death penalty cases, this Court has recognized the necessity and importance of allowing the relator, and those similarly situated, the opportunity to raise, brief and argue every conceivable issue in death penalty cases.

The local rule of the Ninth District Court of Appeals and the denial by the court of Mr. Cooey's request to extend the page limitation to an adequate length, preclude the relator from being able to raise, brief and argue issues in the court of appeals and in this Court as well. By imposing and enforcing such a limitation, the court of appeals is forcing the relator to choose between reducing the number of assignments he may raise in the court of appeals or reducing the length of the assignments. Neither alternative is a viable option especially when sixty-five claims were raised before the trial court.

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The page limitation imposed by the court of appeals denies Richard W. Cooey the opportunity to raise issues in this Court. If the relator reduces the number of assignments of error raised in the court of appeals, he will not be able to preserve issues for review by this Court and the federal courts.

The clear intent and purpose of Sup. Ct. R. V, Sec. 1, is to permit appellants in cases involving the death penalty to submit briefs with no limitation as to the number of pages. Loc. R. 13 of the Ninth District Court of Appeals is inconsistent with the expressed recognition by this Court of the necessity and importance of raising every conceivable issue in cases involving the death penalty.

***6 PROPOSITION OF LAW NO. III**

A CAPITAL APPELLANT IS DENIED DUE PROCESS, EQUAL PROTECTION, AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN UNREASONABLE PAGE LIMITATIONS ARE IMPOSED UPON THE RELATOR IN THE FILING OF HIS MERIT BRIEF.

Respondent Judges have refused to permit relator to file a brief in excess of forty-five (45) pages despite the fact that; 1) the appellate record in the appeal is massive, 2) the numerous issues cannot be adequately briefed in such limited space and 3) Respondent Judges have granted another individual seeking post-conviction relief in cases involving the death penalty, leave of court to file a brief in excess of forty-five (45) pages. Respondent Judge's failure to grant relator such leave violates relator's state and federal constitutional and statutory rights, as well as those rights secured by state rules of procedure.

The United States Supreme Court recognized that a prison inmate has a constitutional right of access to the courts to assert such procedural and substantive rights as may be available to him under state and federal law. *Bounds v. Smith,* 430 U.S. 817, 821 (1977). The court concluded that it was not enough that there was a procedure for filing the claims but that the prisoner must be granted a meaningful opportunity to be heard on the claims. *Id.* An unrealistic page limitation that does not take into account the size of the appellant record or the severity of the sentence, violates relator's fundamental right of access to the courts.

Ohio Rev. Code Ann. Section 2953.21 grants a convicted individual in the State of Ohio the right to file a petition seeking post-conviction relief in order to have a court determine whether his conviction is void or voidable. O.R.C. Section 2953.23 grants an individual who has been denied post-conviction relief an appeal of right to the court of appeals. When a state has created an *7 appellate system of right, such as the State of Ohio has pursuant to O.R.C. Section 2953.23, the appellate system must act within the dictates of the Fourteenth Amendment to the United States Constitution. *Evitts v. Lucey,* 469 U.S. 387, 401 (1985). Respondent Judge's page limitation violates relator's right to due process. The page limitation removes all opportunity for relator to meaningfully present his position or to be heard.

App. R. 12(A) grants an appellant the right to have all errors that are assigned and briefed to "be passed upon by the court (of appeals) in writing". Implicit within this rule is the right to assign and brief all necessary errors which occurred below. Relator has been denied the protections of App. R. 12 by the page limitation imposed by Respondent Judges. This action prevents relator from assigning and briefing all errors which occurred in his post-conviction proceeding.

Ohio Supreme Court Rules of Practice I and II grant an individual whose appeal is denied in the court of appeals, the right to petition this Court for discretionary review. However, this Court has repeatedly held that it will not consider errors that are neither raised nor briefed in the court of appeals. *State v. Greer,* 39 Ohio St. 3d 236, 247 (1988); *State v. Broom,* 40 Ohio St. 3d 277 (1988); *State v. Coleman,* 37 Ohio St. 3d 286, 294 (1988). Therefore any errors not raised in the court of appeals will be waived for purposes of appeal to this Court. Respondent Judge's page limitations will limit relator's appeal to this Court.

The state and its officers may not abridge or impair a prisoner's right to apply to a federal court for a writ of habeas corpus. 28 U.S.C. 2254. *Ex Parte Hull,* 312 U.S. 546, 549 (1941); *Cochran v. Korsas,* 316 U.S. 255 (1942). As a precondition to seeking relief pursuant to 28 U.S.C. 2254, each alleged claim for relief must be presented to the state trial courts and appellate *8 courts. A failure to present each claim will result in the claim being both unexhausted under 28 U.S.C. 2254(b)

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and (c), and waived. *McClesky v. Zant,* 499 U.S. 467, 111 S. Ct. 1454 (1991).

Respondent Judge's page limitation will insure that many of relator's claims will be waived and unexhausted. The issues omitted because of waiver or nonexhaustion due to the page limitation, will not be subject to federal review.

In appeals involving the imposition of the death penalty, the United States Supreme Court has consistently emphasized the need for thorough appellate review. *Parker v. Dugger,* ___ U.S. ____ 111, S. Ct. 731, 739 (1991); *Clemmons v. Mississippi,* 494 U.S. ____, 110 S. Ct. 144, 1448 (1990); *Gregg v. Georgia,* 428 U.S. 153 (1976). This Court has also reached the same conclusions. In *State v. Maurer,* 15 Ohio St. 3d 239, 246 (1984), this Court acknowledged the importance of appellate review in a capital case. In an effort to heighten this review, the Supreme Court of Ohio has exempted briefs from the page limitations imposed in other cases. Sup. Ct. R. V. Sec. 1. The forty-five (45) page limitation imposed by the Respondent Judges does not reflect the same judicial concern for thorough appellate review in death penalty cases as has been voiced by the United States Supreme Court and this Court.

Richard Wade Cooey II was sentenced to death in Ohio. *State v. Cooey,* Sum. C.P. No. CR 86-9-1109A, (Dec. 18, 1986), *affd.* Sum. C.A. No. 12943 (Dec. 23, 1987), *affd.* 46 Ohio St. 3d 20 (1989), *cert. denied,* ___ U.S. ___, 111 S. Ct. 1431 (1991). Relator filed a petition seeking post-conviction relief pursuant to Ohio Rev. Code Ann. Section 2953.21 and, the relator's petition was denied by the trial court. Petitioner filed a Motion for Relief from Judgment Pursuant to Ohio Civil Rule 60(B)(1) and (5). This Motion was also *9 also denied by the trial court. The relator filed notices of appeal with the Ninth District Court of Appeals appealing the decisions of the trial court to deny the post-conviction petition and Motion for Relief from Judgment. Relator filed a Motion to Consolidate his pending appeals which was granted. *State v. Cooey,* Sum. C.A. Nos. 15895, 15996 (Dec. 2, 1992).

This Court has required appointment of counsel in death penalty cases in which a petitioner seeks post-conviction relief. C.P. Sup. R. 65(I)(B). Respondent Judge's page limitation has the effect of removing much of the protection afforded under C.P. Sup. R. 65(I)(B).

Counsel must act in the role of advocate, rather than amicus curiae. *Ellis v. United States,* 356 U.S. 674 (1958). Counsel's role as an advocate must support his client's appeal to the best of his ability. *Penson v. Ohio,* 488 U.S. 75 (1988). In this case, the local appellate rule and rulings of court of appeals limiting the relator's brief to forty-five (45) pages, conflicts with the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10 and 16 of the Ohio Constitution which guarantee an appellant the right to appeal and to have effective assistance of counsel for that appeal.

Richard Wade Cooey II is battling for his life. Both constitutional concerns and fundamental fairness dictate that he be permitted to *fully* brief all matters raised by his capital trial, his direct appeals and his post-conviction proceedings. The forty-five (45) page limitation imposed by the Respondent Judges in Richard W. Cooey's death penalty case, curtails relator's right to have his cases fully and meaningfully reviewed.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution prevent the state from treating individuals differently whose situations are arguably *10 distinguishable. Once a state has created on appeal of right, the state must treat all similarly situated appellants equally. *Griffin v. Illinois,* 351 U.S. 12 (1956); *Douglas v. California,* 372 U.S. 353 (1963). Relator Cooey, as outlined in his Complaint for Writ of Mandamus, is being treated differently than all other individuals sentenced to death in Summit County and the State of Ohio.

***11 PROPOSITION OF LAW NO. IV**

A WRIT OF MANDAMUS IS THE APPROPRIATE REMEDY TO ENFORCE THE RELATOR'S RIGHT TO FILE A BRIEF IN EXCESS OF FORTY-FIVE PAGES.

The remedy of mandamus lies only where there is no adequate remedy in the ordinary course of the law. *See State, ex rel. Plain Dealer Publishing Co. v. Lesak,* 9 Ohio St. 3d 1 (1984). Richard W. Cooey has no adequate remedy in the ordinary course of the law.

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The local rule of practice for the Ninth District Court of Appeals provides:

> "The initial and answer briefs of parties shall not exceed thirty (30) pages, exclusive of the appendix, summary of argument, and index. No brief may be filed which exceeds such limitation except by prior permission of the Court. Application for such permission shall be by motion specifying the number of extra pages requested and specifying reasons why extra pages are required. ..."

Loc. R. 13.

Here, the court of appeals authorized a total of forty-five (45) pages. In so doing, it specifically denied relator's request that he be permitted to file a brief of sixty (60) pages in his death penalty case. [Appendix 1.]

CONCLUSION

For the foregoing reasons, Richard W. Cooey respectfully requests this Court to grant his Motion For Peremptory Writ of Mandamus, or in the alternative, his Alternative Writ of Mandamus.

Appendix not available.

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STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. HORRIGAN

2010 JAN 29 AM 8: 42

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO

Appellee

v.

DAVID WILLAN

Appellant

C.A. No. 24894

MAGISTRATE'S ORDER

Appellant has moved for leave to file a brief of 22,729 words, or in the alternative 19,000 words. The motion is denied.

C. Michael Walsh
Magistrate

EXHIBIT
4