# In the Supreme Court of the United States

Abdul-Hakiym Ismaiyl

v.

Fatima D. Brown Et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## APPENDIX

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**APPENDIX A12**, OHIO STATUTE R.C. 2921.12,

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Abdul-Hakiym Ismaiyl
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1 16 CV 1314

Case No:

Abdul-Hakiym Ismaiyl and Family.

Plaintiff,
VS.

Judge:

JUDGE NUGENT

MAG. JUDGE PARKER

Fatimah D. Brown individually, Rebecca Botchway Individually, Eleanor E. Hilow individually and as the Magistrate of the Court of Cuyahoga County Common Pleas, Juvenile Division; Stephen Dejohn Esq. individually and Official capacity as Court appointed Guardian Ad Litem; Donald L. Ramsey individually and official as visiting Judge of the Court of the Cuyahoga County Common Pleas, Juvenile Division; Sean C. Gallagher, Tim McCormack, Kenneth A. Rocco individually and official capacity as Judges of the Cuyahoga County Eighth District Court of Appeals and Rebecca Botchway individually; Joseph C. Young, individually and as Cuyahoga County Prosecutor Timothy J. McGinty, individually and as The Cuyahoga County Prosecutor . Assistant Cuyahoga County Prosecutor John Jackson

Defendants.

COMPLAINT FOR PRELIMINARY, INJUNCTION, DECLARATORY RELIEF, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, PUNITIVE DAMAGES

Title 42 §1983

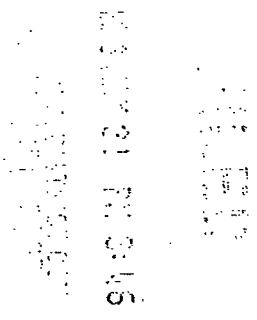

EXHIBIT
1
APPENDIX A1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

DECLARATION IN SUPPORT
FOR INJUNCTIVE RELIEF

## I JURISDICTION

1. This action arises under the Provisions found within the First, and Fourteenth Amendment of the United States Constitution and also arising under the law and statute of the state of Ohio; to redress violations thereof the Plaintiff's secured rights by the above mentioned defendants acting under the color of state law, 42 U.S.C. § 1983 is cognizable.

2. Subject matter jurisdiction conferred on this Court under 28 U.S.C. §§ 1343 (a) (3); 28 U.S.C. §1331; (federal question) 28 U.S.C. §1367 (Supplemental jurisdiction) ; 28 U.S.C. § 1332 (Diversity) ; 28 U.S.C. 2201,and 2202 (Declaratory Judgment)

3. All the claims arose within the jurisdiction of this judicial district and involve Defendants who reside within the jurisdictional boundaries. Venue is proper under 28 U.S.C. § 1391(a)(b)(e).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

I Abdul Hakiym Ismaiyl having firsthand knowledge declare under the pains of perjury that all herein is true and factual; hereafter referred to as Declarant or Affiant. This Declaration is in support of the motion for preliminary junction to obviate irreparable harm, where there is no available remedy before or after available to stop these egregious acts as set forth, except by this Courts intervention.

1. This action is brought against said Defendants in their individual and official capacity. Defendants at all times material to this action between the periods of 2009 until 2016 did commit fraud upon the court, agreeing to conspire to defraud tacitly or otherwise and did aid and abet fraud by fraudulent concealment, suppressing, or omitting material evidence , fabricating evidence or records by deceitful contrivance either illegal or legal, using their Legal positions in one way or another to obstruct justice and prevent the co conspirators, all being Officials of the State of Ohio in Cuyahoga County, those known and unknown at this time from prosecutor civil or criminal also using the judicial powers to punish and penalize attempting to chill the Plaintiff from presenting any facts of their illegal behavior that is shocking to the conscious of any rational minded individual, denying the Plaintiff of his day in Court violating the First Amendment of the U.S. Constitution, doing so knowingly or should have known that their actions were in direct violation of both federal and state laws such as R.C. 2913.42, R.C. 2921.12 and the Equal Treatment Under The Law Clause found within the Fourteenth Amendment of the U.S. Constitution. These actions, all, while being done under the color of state law by the Defendants.

2. Declarant states that, Delonda Brown, Rebecca Botchway, Attorney Stephon Dejohn, Magistrate Eleanore Hilow, Judge Donald L. Ramsey, Judge Thomas F. O'Malley, and Judge Kenneth A. Rocco. Assistant Cuyahoga County Prosecutor Joseph C. Young, and Assistant Cuyahoga County Prosecutor John Jackson acting in the stead of Cuyahoga County prosecutor Tim McGinty, did actively participate in a conspiracy to defraud, fraud upon the court, and or aiding in abetting fraud by fraudulent concealment and omitting of material facts, tampering with the record (Court records), by one deceitful contrivance or another, be it legal or illegal, causing injury to the Declarant by

deliberately and willfully denying the Declarant of substantive due process rights and equal treatment under the law; the Affiant is now being faced with the Deprivation of life and liberty unjustly by arbitrary and capricious action through state officers fraudulently under the color of state law. The Affiant states that this is an overt act in furtherance of a conspiracy to defraud, by the unconstitutional use of bringing a secret indictment filed on 5/19/2016 with the intent and purpose only to bury the facts that are found in the civil complaint before this Court and deny the Affiant of the exercise of a federally granted and protected rights provided by the U.S. Constitution and federal laws.

3. Declarant states that this Court is being moved to issue an injunctive order because there is a great and immediate harm from injurious actions that have been continuous since 2009 heretofore. Declarant appealed to the Eighth District Court of Appeals in 2013 after discovering the bad faith actions of a conspiracy to defraud and fraud upon the court committed by Defendants mentioned above and their accomplices, all acting in concert. The first grand stage of this conspiracy with all its actors came to light in the Cuyahoga County Juvenile Court during a custody proceeding, which resulted in removal of custody of the Affiants two daughters from his care in 2011, which one, Ai he had in his care some months after her birth in 2004 and received legal in 2005. The Declarant directed the Eighth District to the record that was tampered with to defraud and also reiterated it several times during oral argument in support of his Civ. R. 60(B) motion, for fraud upon the court inter alia; the Prosecutor did not deny it, whereby Judge Tim McCormack stated that the appellant is right then, which established the facts of a great unlawful design at play; statutorily violating R.C. 2913.42 and R.C. 2921.12. The Eighth District Court of Appeals verbally through its judicial officers altered the record in order to conceal the facts of the fraud upon the court to protect the other co conspirator's (Judicial officers) involved. This was done in its opinion (See exhibit A Motion for reconsideration C.N. 99808). Thereafter the Declarant appealed to the Ohio Supreme Court in 2014; Oh. Supreme Court declining jurisdiction in 2015; but, before the decline was done early on in the appeal the Eighth District allowed the juvenile Court to confiscate the record and place it under seal to prevent or spoil the evidence of County corruption inter alia. (See exhibit B of motion file in the Ohio Supreme Court).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

4. The Declarant has been denied the right to speak in the Cuyahoga County Courts by said defendants in one way or another, and has been told that he cannot object nor proffer. He was also threatened to be tazered, and was put in jail by the use of the Courts contempt powers erroneously, when there has been no actions on the part of the Declarant that would have remotely warranted this in his behavior, as the record reflects. From 2012 the Declarant has petitioned the Courts in Cuyahoga county, and from 2013 upon the discover of the conspiracy to defraud he has presented this to the Courts in Cuyahoga County only to be penalized and never afforded a day in court (due process) nor the right of redress, regardless if he has been the Movant or defendant. These tactics were done to prevent the Declarant from presenting the truth on the record. This is in contravention of the law, which establishes that,

> Under the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, and Ohio Const. art. I, § 16, parties are entitled to reasonable notice of judicial proceedings and a reasonable opportunity to be heard. An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Amir v. Werner*, 9th Dist. Summit County, C.A. No. 26174, 2012-Ohio-5863. ¶9. The constitution not only grants power but it limits the power of the state as well because, *[t]he Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law*;[...]. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. (Emphasis added)(Citation omitted) *State v. Warren*, 168 Ohio App. 3d 288, 2006-Ohio-4104, 859 N.E.2d 998 ¶12 (8th Dist.)

5. Declarant states, it would be nine years that he has been caused injury by the said Defendants arbitrary and conscious shocking behavior, counting this last act done on their part in 2016, violating both state and federal law such as R.C. 2913.42 and the fourteenth amendment of the U.S. Constitution providing equal treatment under the law, and has repetitively committed fraud upon the Court. In 2013 the Cuyahoga County

Prosecutors office were made fully aware of the fraud upon the court and court tampered records. Upon the Declarant seeking the appropriate remedy or relief from the Cuyahoga County to rectify or reprimand its Officers from its illegal behavior, it has only continued the offenses and fraudulently concealed the facts or omitted them, and wishes- to- now – bring, this secret indictment in bad faith on the same issue for that which they are guilty, now, being nine years against the Declarant. The charge being brought is unconstitutionally sound and is a product of selective prosecution with the hopes only to harass and chill the Declarant in exercising his right of redress afforded to him in the Federal Constitution, and to silence and prevent him from bringing this to the federal jurisdiction to address constitutional violations which could only be remedied under title 42 § 1983. Prosecutions as such are dismissed for they are forbidden by the Constitutional directive. The law states that,

> The decision whether to prosecute a criminal offense is generally left to the discretion of the prosecutor. That discretion is, however, subject to constitutional equal-protection principles, which prohibit prosecutors from selectively prosecuting individuals based on "an unjustifiable standard [...].Although a selective-prosecution claim is not a defense on the merits
>
> to the criminal charge itself, a defendant may raise it as an "independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. To support a claim of selective prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, *while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution,* and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, *or the desire to prevent his exercise of constitutional rights.* (Citations omitted) (Emphasis added) *City of Olmsted Falls v. Bowman,* 8th Dist. Cuyahoga, No. 102129, 2015-Ohio-2858. ¶20

6. Furthermore, the Declarant does not have a criminal record at all, or any problems with the law. And has only tried to gain access to the Courts and be given the right of Due Process afforded to every person under the First and Fourteenth Amendment of the U.S. Constitution. But, with no avail has been denied. Affiant states that he has been met with hostility and malice for no legal or lawful reason but to silence the facts from leaking out. The bad faith actions are so egregious as it relates to the Constitution and its mandate

they are pulling out all stops to prevent these facts from surfacing; the County Prosecutor Tim McGinty has created a bad faith secret indictment for tampering with the records to only hush the Affiant and deprive him of redress and equal treatment under the law by the Fourteenth Amendment to protect State Officials, by putting the Declarant away for something that does not exist, with the intent of making this action cease to exist; if this Court does not intervene it would be allowing irreparable harm; Affiant would be left with no alternative remedy or recourse. This court granting the preliminary injunction would put no harm on a third party but it would only be acting in the manner it was created for by congress.

> that 42 U. S. C. § 1983 fulfilled this requirement—but wholly lacking here—was our recognition that one of the clear congressional concerns underlying the enactment of § 1983 was the possibility that state courts, as well as other branches of state government, might be used as instruments to deny citizens their rights under the Federal Constitution. *Vendo Co. v. Lektro-Vend Corp,* 433 US 623,633(1977)

7. Declarant states this indictment is as an overt act in furtherance of the County's conspiracy to prevent these matters reaching this Court's jurisdiction to prevent its rendition on the matter of constitutional violations, which is the only Court that could address these issues of federally protected rights, granted by the Constitution of these United States. Declarant states, that due to these facts, this Court should grant the Injunction and the matter moved out of that jurisdiction and enjoined here before it starts, this will ensure one if anything, an impartial trial based on the provision the sixth amendment by way of the Fourteenth Amendment of the U.S. Constitution and show that it is a product of selective prosecution; because it would be impossible to obtain or to

have a fair and impartial trial due to the prosecutor being a party defendant in a federal suit before this Court. And, it is the Said Defendants intention only to deprive the Declarant of the rightful exercise of a Constitutional right and to silence these facts by any deceitful artifice legal or illegal- for,

> It is well settled that a criminal trial before a biased judge [or prosecutor] is fundamentally unfair and denies a defendant due process of law." "Judicial bias has been described as 'a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.'" (Citations omitted) *State v. Jackson*, 141 Ohio St. 3d 171, 2014-Ohio-3707; 23 N.E.3d 1023 ¶78. A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 US 133, 136 (1955)

I declare that under penalty of perjury that all attached and written herein is true and correct. Executed on May 31, 2016.

Abdul-Hakiym

Pro per Abdul-Hakiym

**Eighth District Court of Appeals**
**Cuyahoga County**

**IN RE:**

**A.I., ET AL.**

**JUVENILE#**

**AD04902623**

**AD07900116**

**COA NO. 99808**

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# APPELLANTS MOTION FOR RECONSIDERATION

# AND MEMORANDUM IN SUPPORT

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Abdul-Hakiym: Ismaiyl (Appellant)
C/o 8209 Force Ave.
Cleveland Ohio, 44105

CSEA (Appellee Et El)
P.O. Box 93894
Cleveland Ohio, 44101-5984

Delonda Brown
15900 Arcade Ave., Up
Cleveland Ohio, 44110



**EXHIBIT**
**APPENDIX A2**

**Eighth District Court of Appeals**
**Cuyahoga County**

## STATEMENT OF ASSIGNMENT ERROR

I. This court has erred by inadvertently omitting words and distinguishable facts from the Appellant's motion filed on *3/14/2013 for* fraud upon the court inter alia, captioned "notice to dismiss due to lack of jurisdiction due to fraud" with that of words from motions which preceded it thereby erroneously applying the law of res judicata relating to issue preclusion, and this court's well settled *precedent on* what entitles relief from fraud upon the court.

II. This court has erred in its applying the law pertaining to R.C. 2913.42, R.C. 2921.12 (tampering with the record *& tampering* with evidence) related to the records which have been altered to defraud, and in addition an oral record fabricated in its place. Also ; why the violations were done, are immaterial to sustain the charge of their violation nor is res judicata an element to sustain the *violation*, which the elements to sustain these violations have been set forth by other panel members of this court.

III. This court has not considered the constitutional question pose to it surrounding the Parents having a "fundamental *liberty interest*" in the care, custody, and management of their child[ren] without government interference except by due process of law.

**Eighth District Court of Appeals**
**Cuyahoga County**

## STATEMENT OF THE CASE AND FACTS

On July 24, 2012 Appellee filed a complaint initiating a contempt action against the Appellant, found therein the averment and the motion to show cause, the Appellee states "As of April 28th of 2012 dad had started being inconsistent with showing up for visits with the children, putting them in a bad state of mind sitting in the police station- no phone call but only a text after visitation had started that day. On June 24, 2012 was last visit, Idad has not been in compliant with court order visitation. He have us sitting in the police station without a phone call or text that he will not be showing up. I live on the west side of Cleveland and the schedule place for drop off pick up is east side every other Saturday since June 23, 2012 I have been showing up but not dad I then have to take home in an emotional state of sadness explaining why dad couldn't show up. On Saturday July 21, 2012 we showed up waited till 10:32 and called dad and his response was he was on a delayed flight from Alabama all text are in my mobile phone. (R.883, 1-5)."On August 29,2012 the hearing was scheduled for the show of cause filed by the Appellee. On August 22, 2012 the Appellant files a motion mounting consolidated defenses captioned "motion to dismiss due to a lack of jurisdiction and reversal of trial hearing made by magistrate Hilow." Stating in short that he is a free born man in sound mind who had not entered into contract (agreement) with the court and that the court had violated his rights of due process by changing the visitation schedule to 6 months out of the year to 24 days out the year without findings of neglect or endangerment, so he motioned the court of that trial hearing of November 2011, but for dismissal of the show of cause scheduled for 8/29/2012. (R.883). On August 29, 2012 both parties were present, after the court heard the statements from the parties the court ruled that the Appellant was not in contempt of court or in violation of the court order, the court dismissed the motion of the Appellant, which he did not appeal due the judgment being rendered in his favored. (R.897-900,919-921). On September 14, 2012 Appellant files motion captioned "motion for rehearing or reversal of trial decision based on perjury, abuse of procedure and prejudice" in this motion the Appellant articulates that the motion is based on procedural equity being a fundamental base of establishing justice, also stating that the court overlooked the mother committing

fraud, breaching of visitation contract, and that he demands that the court issue a reversal (R.918). December 18, 2012 Appellant filed a notice of special appearance (R.600)[1]. During the proceedings he was not allowed to speak and was informed that if he spoke he would be held in contempt of court. The court on Dec.18, 2012 mentions in its journal that the mother filed a motion during that hearing and the court dismissed the motion without any additional facts (R.1067-1070). On January 28, 2013 Appellant filed a motion to vacate judgment and reversal of the hearing of November 2011 for reasons that an error committed in the proceeding before us. That included perjury, abuse of procedure, and prejudice citing title 18 U.S.C. 241, Title 18 U.S.C. 242, O.R.C 124.58 which is not applicable at all and Title 42 U.S.C 1983(R.1075). On March 14, 2013 Appellant filed motion due to fraud upon the court and a jurisdictional defense captioned "notice to dismiss due to lack of jurisdiction due to fraud" pursuant to Fed.R. Civ. P. 60(d)(3), Ohio Civ.R.60(B)(5), and R.C. 2901.13(B)(1)(R.699). In his affidavit he mounted several defenses tied into one and stated after invoking constitutional rights that Delonda Brown, CCDCFS Worker Rebecca Botchway, and GAL Stephon [Dejohn] committed fraud upon the court by acting in concert and falsely representing the facts(false facts) which resulted in the Appellant loosing custody of his children. First defense raised being that he was a non resident (citizen) of the state of Ohio due to him being a resident of Alabama; Second that the court would not have authority to enforce a support without violating his 14th amendment right when they lack jurisdiction in personam. Also due to the support order being founded in a judgment procured by fraud and that any judgment procured by fraud is void. Appellant explained to the court it must prove on the record all jurisdictional facts related to the jurisdiction asserted. Also explaining from lines 3-6 of his motion what due process is as it relates to a guardian ad litem and from lines 7, 8 how the guardian ad litem defrauded the court with operative facts to support (R. 699). On March 15, 2013 the Appellant appeared before the court and asserted his objections to the jurisdiction of the court over him and that when there has been fraud upon the court you are afforded a right to a collateral attack on a judgment pursuant to Civ. R. 60(B)(T.6 L.18-T.7 L. 1-5) the Appellant never consented to the jurisdiction and informed the court that he was not a part of the

[1] C.N. AD04902623 P.600

hearing(T.22 L.22-25) the court orders that he be taking into custody(T.23L.22-23). Afterwards the court addressed the Appellee about a pending motion, which she knew nothing about but agrees, Appellant timely appeals.

The test generally applied to a motion for reconsideration in the court of appeals is whether the motion calls to attention of the court an obvious error in its decision or raises an issue for consideration that was not considered at all or was not fully considered by the court when it should have been. Cunningham v. *St. Alexis Hosp. Med. Ctr.*, 8th Dist. Cuyahoga 143 Ohio App. 3d 384,( April 12, 2001)

1. **This court has erred by inadvertently omitting words and distinguishable facts from the Appellant's motion filed on 3/14/2013 for fraud upon the court inter alia, captioned "notice to dismiss due to lack of jurisdiction due to fraud" with that of words from motions which preceded it thereby erroneously applying the law of res judicata relating to issue preclusion, and this court's well settled precedent on what entitles relief from fraud upon the court.**

In ¶ 35 of the court opinion it likened the Appellant's motion filed on March 14, 2013(R. 699) to four other *motions* filed by the Appellant to wit, the motion of August 28, 2012, the motion of September 14, 2012, Dec. 18, 2012 and January 28, 2012. By the court inadvertently omitting words and distinguishable facts gives a false impression that the motions were one in the same. However; the motion in question is entirely different, stating different claims and issues as the record shows. On March 14, 2013 the Appellant filed a Civ. R. 60 (B)(5) motion to collaterally attack a judgment due to fraud upon the court, along with a lack of jurisdiction in Personam defense captioned Notice to dismiss due to lack of jurisdiction due to fraud pursuant Fed. R. Civ.P. 60(d)(3) which is for fraud upon the court. Ohio Civ. R.60(B)(5) which is any other reason justifying relief from the judgment(including fraud upon the court). And R.C. 2901.13(B)(1) pertaining to the statute of limitation to prosecute any public official that has committed fraud or one who has breached a fiduciary duty. However, the court omitted this in its opinion. The Appellant stated in his averment that Delonda Brown, CCDCFS Worker Rebecca Botchway, and

GAL Stephon [Dejohn] committed fraud upon the court by acting in concert falsely representing the facts(false facts), making Delonda Brown and Rebecca Botchway actors in defrauding the court only through Mr. Dejohn being an officer of the court by way of collusion. In ¶ 20 of the court's opinion, it misquoted the Appellant by saying "in his affidavit in support of his motion, the Appellant asserted that the persons who testified at the change of custody hearing had committed fraud upon the court and falsely represented facts." This is an error in fact, and implies the fraud on the court was based on perjury, which is not found in the Appellants brief. GAL Mr. Dejohn was not sworn in nor was he a party to the case, but actively participated in defrauding the court by presenting to the court fraudulent evidence in behalf of Miss Brown violating R.C. 2921.12 (A) (2), the court acknowledged on the record that it received his "physical reports" which entailed "the records from the school" alleging the children being dirty inter alia (R. 699 P.14). These false facts resulted in a change in circumstance. All of the operative facts were attached to the Appellant's brief, along with the self authenticating records from the school which contains no reference to the children being dirty or reports from teachers to the contrary of the reports "allegedly" given to the court and a certified copy of all of Mr. Dejohn's reports submitted to the clerk with nothing from the school found therein (R.699 P.1-109). Furthermore, the court asks him to orally elaborate on what he found (R.699 P.14). Afterwards, having him to affirm his statements, where at one point he attempts to remain silent, but the court acknowledged his silence as affirmation and used the false facts presented by him in making her decision (R.699 P.13). The decision of this court conflicts with that of its earlier decision as recent as 2013 in *Hill v. Ross* this court held that, Pursuant to Civ.R. 60(B)(5), a court in appropriate circumstances may vacate a judgment vitiated by a fraud upon the court. A "fraud upon the court" is any fraud connected with the presentation of a case to a court. Where an officer of the court, e.g., an attorney, actively participates in defrauding the court, then the court may entertain a Civ.R. 60(B)(5) motion for relief from judgment.(Citation omitted) *Hill v. Ross*, 2013-Ohio-1903; 2013 Ohio App. LEXIS 1791¶ 18 (8th Dist.). Changing the words gives a false representation of the

claim for fraud upon the court being based on perjury, the Appellant never said GAL Stephon Dejohn committed perjury. By this court inadvertently altering the words of the motion filed on March 14, 2013 to the words of other motions where the Appellant stated perjury and abuse of procedure as the base claims that impaired procedural equity (due process) is delusive, as an example in ¶8,10,16, and 20 of its opinion . Furthermore, Fraud on the court which justifies vacating a judgment is narrowly defined as fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. The Second matter that distinguishes this motion falls Under Civ.R.12(B) the defense or objection that the court lacks jurisdiction over the person of the defendant may be made in the required responsive pleading or by motion and no defense or objection is waived by being joined with more objections or defenses in the same responsive pleading or motion. However the defense is waived of lack of jurisdiction of the person if not included in the responsive pleading or motion pursuant to Civ. R. 12(G). This court has held that, a Civ. R. 60(B) motion acted as a collateral attack on the judgment, whereas the motion to set aside a void judgment was based upon the jurisdictional defects in the case. A motion to vacate judgment pursuant to Civ. R. 60(B) alleges that the judgment is voidable, unlike a motion to vacate judgment on jurisdictional grounds which alleges that the judgment is void.(Citation omitted) *Dairyland Ins. Co. v. Forgus,* 8th Dist. *Cuyahoga* 58 Ohio App. 3d 79; 568 N.E.2d 1233; 1989 Ohio App. LEXIS 2693 (July 10, 1989). On the Appellants averment, line one, Appellant raises the lack of jurisdiction in personam claim by not being a resident. Which is a matter of record, further, the requirements of Civ. R. 60(B) do not apply where a party attacks a judgment for want of personal jurisdiction. *Id 79,80.* Not only did the court not consider the common law motion to dismiss or whether or not jurisdiction was established on the record when it was challenged, the Appellant never consented or willfully participated in waiving his defense. In addition the court has not considered the GTE three prong analysis correctly. This poses a major problem. For one, it would be perpetuating an abuse of discretion and injustice due to fraud on the court. Secondly, by disregarding the jurisdiction in

personam claim it is allowing the violation of the Appellants 14th amendment right. It is the Appellant's contention that this court should reconsider for the above mentioned reasons.

**2 This court has erred in its applying the law pertaining to R.C. 2913.42 and R.C. 2921.12 (tampering with the record & tampering with evidence) related to the records which have been altered to defraud, and in addition an oral record fabricated in its place. Also ; why the violations were done, are immaterial to sustain the charge of their violation nor is res judicata an element to sustain the violation, which the elements to sustain these violations have been set forth by other panel members of this court.**

R.C.2921.12 states in part:

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;
(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

R.C. 2913.42 states in part:

(A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:
(1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record;
(2) Utter any writing or record, knowing it to have been tampered with as provided in division (A)(1) of this section.
(B)
(1) Whoever violates this section is guilty of tampering with records.
(4) If the writing, data, computer software, or record is kept by or belongs to a local, state, or federal governmental entity, a felony of the third degree.

On Dec.18, 2013 and March 15, 2013 the Cuyahoga County Juvenile court through Judge Donald Ramsey presented a fabricated motion during the proceedings conspiring with Magistrate E. Hilow and the Appellee to defraud seemingly. The journal for the Dec. pre-trial of 2012 reflects the motion was mentioned which was filed on July 24, 2012 and dismissed that day with no

additional facts added (R.1067-1070). On March 15th the court presented the same motion during the proceedings using the Appellee as a "straw man" uttering the fabricated allegations leading her in what to say, when the record will reflect that she had no idea what he was talking about but agreed. Further the real complaint was completely about a specific incident and adjudged on its merits on August 29, 2012. Also the judgment entry of the true show of cause name has been altered in the record to reflect a custody decision (R.919-921). This fabricated motion was used in a subsequent hearing to deny the Appellant a modification of custody (R.1259-1266). Although the court dismissed it for the second time it added false facts and made them a part of the record as if they were found to be true (R.1135). This court has held, R.C. 2921.12 prohibits "tampering with evidence" and provides in pertinent part:"(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation." "Tampering with records" is proscribed by R.C. 2913.42, which states in relevant part :( A) No person, knowing he has no privilege to do so, and with purpose to defraud or knowing that he is facilitating a fraud, shall do any of the following :(1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, data, or record. R.C. 2913.01(B) defines "defraud" as " to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." *State v. McNeeley,* 48 8th Dist. Cuyahoga Ohio App. 3d 73; 548 N.E.2d 961; 1988 Ohio App. LEXIS 1709 ***9 (May 5, 1988). Further this court has stated that: omissions can serve as a basis for criminal liability if a person has a duty to act. See R.C. 2901.21(A). *Id.* ***11. It is the Appellants contention that the judiciary has a duty to comply with the law and shun impropriety pursuant to Jud. Cond. Rule 1, 1.1, 1.2. This court should reconsider and acknowledge that these actions are in excess of one's

jurisdiction as a judiciary, while reestablishing the precedent of a fair and impartial trial found in the constitution.

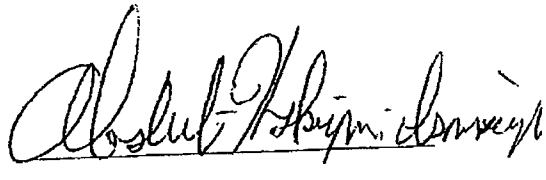
3 **This court has not considered the constitutional question pose to it surrounding the Parents having a "fundamental liberty interest" in the care, custody, and management of their child[ren] without government interference except by due process of law.**

The Supreme Court of Ohio recognized that parents have a liberty interest in their child. The court stated: Parents have a "fundamental liberty interest" in the care, custody, and management of the child. *In re Murray,* 52 Ohio St. 3d 155 (1990). This constitutional question surrounds the appellants 4th argument. Do parents have a right to take care and provide the necessaries of their children without being compelled to receive a benefit from a governmental agency? Absent neglect or abuse of their children, do they have the right to assent or not?

## CONCLUSION

Appellant humbly request that this court reconsiders this appeal so that these issues can be resolved on their merits. Thank you!

Respectfully submitted



Appellant

# Cuyahoga County Court of Common Pleas
## Criminal Court Division

| State of Ohio, Plaintiff vs. Hakim A. Ismaiyl, Defendant | A True Bill Indictment For **Tampering with Records - F3** §2913.42(A)(1) |
|---|---|

| Dates of Offense (on or about) | The Term Of | Case Number |
|---|---|---|
| January 18, 2011 | May of 2016 | 605792-16-CR |

The State of Ohio, Cuyahoga County } SS.

CR16605792-A 94188975

| | |
|---|---|
| **Count One** | **Tampering with Records - F3** §2913.42(A)(1) |
| **Defendants** | Hakim A. Ismaiyl |
| **Date of Offense** | On or about January 18, 2011 |

*The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully*

did, knowing he had no privilege to do so, and with purpose to defraud or knowing he was facilitating a fraud on Ohio BMV, falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record, to wit: application for Ohio driver's license, and the writing, data, computer software, or record was kept by or belonged to a local, state, or federal governmental entity.

*The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.*

RECEIVED FOR FILING

MAY 17 2016

CUYAHOGA COUNTY CLERK OF THE COURT OF COMMON PLEAS

By _____ Deputy

Foreperson of the Grand Jury

Prosecuting Attorney



**EXHIBIT**

**APPENDIX A3**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Abdul-Hakiym Ismaiyl
c/o8209 Force Ave.
Cleveland Oh. 44105
Wethepeople1851@yahoo.com

2016 JUN -2 PM 3:58

Case No: 1 16 CV 1314

Abdul-Hakiym Ismaiyl and Family.

Plaintiff,
VS.

Judge: NUGENT

Fatimah D. Brown Et Al.

Defendant.

MOTION FOR EXTENSION OF TIME, LEAVE TO AMEND COMPLAINT UNDER

Title 42 §1983

Now comes Abdul-Hakiym , the plaintiff in the above listed action, who moves this honorable court for leave to amend complaint filed on May 31, 2016. Plaintiff filed a Title 42 action in this court on various matters, also seeking an emergency injunction. However, the complaint/ motion only presented matters surrounding the injunction which is incomplete . The plaintiff request that he be granted leave and time to amend the complaint; in that the complaint is incomplete and if not allowed to be amended may serve to be unfavorable in preventing an unwarranted dismissal in the plaintiff's action. Thank you.

Sincerely,

Abdul-Hakiym Ismaiyl

Pro per

EXHIBIT 1
APPENDIX A4

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **ABDUL-HAKIYM ISMAIYL,** | ) | **CASE NO. 1:16 CV 1314** |
| | ) | |
| **Plaintiff,** | ) | **JUDGE DONALD C. NUGENT** |
| | ) | |
| **v.** | ) | |
| | ) | **JUDGMENT ENTRY** |
| **FATIMAH D. BROWN, *et al.*,** | ) | |
| | ) | |
| **Defendants.** | ) | |

For the reasons stated in the Court's Memorandum of Opinion, this action is dismissed pursuant to 28 U.S.C. §1915(e). Further, the Court CERTIFIES pursuant to 28 U.S.C. §1915(a)(3) that an appeal from this decision could not be taken in good faith.

Donald C. Nugent
DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE

Dated: August 31, 2016

**EXHIBIT**
**APPENDIX A5**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **ABDUL-HAKIYM ISMAIYL,** | ) | **CASE NO. 1:16 CV 1314** |
| | ) | |
| **Plaintiff,** | ) | **JUDGE DONALD C. NUGENT** |
| | ) | |
| **v.** | ) | |
| | ) | **MEMORANDUM OF OPINION** |
| **FATIMAH D. BROWN, *et al.*,** | ) | |
| | ) | |
| **Defendants.** | ) | |

*Pro se* Plaintiff Abdul-Hakiym Ismaiyl filed the above-captioned civil rights action under 42 U.S.C. § 1983 against his child's mother Fatimah D. Brown, Cuyahoga County Department of Children and Family Services Employee Rebecca Botchway, Cuyahoga County Juvenile Court Magistrate Eleanor E. Hilow, Court-Appointed Guardian Ad Litem Steven DeJohn, Esq., Cuyahoga County Juvenile Court Judge Donald L. Ramsey, Ohio Eighth District Court of Appeals Judge Sean C. Gallagher, Ohio Eighth District Court of Appeals Judge Timothy McCormack, Ohio Eighth District Court of Appeals Judge Kenneth A. Rocco, Cuyahoga County Assistant Prosecutor Joseph C. Young, Cuyahoga County Prosecutor Timothy McGinty, and Cuyahoga County Assistant Prosecutor John Jackson. In the Complaint, he alleges the Defendants conspired against him in the course of a prior child custody case, and a current criminal prosecution pending against him in the Cuyahoga County Court of Common Pleas. He asks this Court to enjoin the pending criminal case, and award him punitive damages.

**EXHIBIT**
**APPENDIX A6**

Plaintiff also filed an Application to Proceed *In Forma Pauperis* (ECF No. 7). That Application is granted.

**Factual and Procedural Background**

Plaintiff's Complaint contains very few factual allegations. He references a child custody case filed in the Cuyahoga County Juvenile Court in 2011. Defendant Brown claimed Plaintiff was not complying with the terms of the custody order. He indicates his custody rights were terminated in 2012. He filed appeals of the Juvenile Court decisions from 2012 to 2013 but was not successful in obtaining the relief he sought.

In addition, Plaintiff was indicted in the Cuyahoga County Court of Common Pleas on May 17, 2016 on charges of tampering with records. Plaintiff did not appear for the arraignment on June 1, 2016 and instead filed a Notice of Special Appearance and indicated he would not enter a plea. The court issued a capias for his arrest.

Plaintiff contends the Defendants conspired against him. He also asserts violations of his First and Fourteenth Amendment rights. He asks this Court to enjoin the pending state court criminal proceedings. In the case caption on his Complaint, he also indicates he is seeking punitive damages.

**Standard of Review**

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the Court is required to dismiss an *in forma pauperis* action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d

194, 197 (6th Cir. 1996). A claim lacks an arguable basis in law or fact when it is premised on an indisputably meritless legal theory or when the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327.

A cause of action fails to state a claim upon which relief may be granted when it lacks "plausibility in the Complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007). A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal* , 556 U.S. 662, 677-78 (2009). The factual allegations in the pleading must be sufficient to raise the right to relief above the speculative level on the assumption that all the allegations in the Complaint are true. *Twombly*, 550 U.S. at 555. The Plaintiff is not required to include detailed factual allegations, but must provide more than "an unadorned, the Defendant unlawfully harmed me accusation." *Iqbal*, 556 U.S. at 678. A pleading that offers legal conclusions or a simple recitation of the elements of a cause of action will not meet this pleading standard. *Id.* In reviewing a Complaint, the Court must construe the pleading in the light most favorable to the Plaintiff. *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir. 1998)

**Discussion**

As an initial matter, this Court cannot enjoin a pending state court criminal proceeding. A federal court must decline to interfere with pending state proceedings involving important state interests unless extraordinary circumstances are present. *See Younger v. Harris*, 401 U.S. 37, 44-45 (1971). When a person is the target of an ongoing state action involving important state matters, he or she cannot interfere with the pending state action by maintaining a parallel federal action involving claims that could have been raised in the state case. *Watts v. Burkhart*, 854 F.2d 839, 844-48 (6th Cir. 1988). If the state Defendant files such a case, *Younger* abstention requires the

federal court to defer to the state proceeding. *Id*; *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). Based on these principles, abstention is appropriate if: (1) state proceedings are on-going; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal questions. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Abstention is mandated whether the state court proceeding is criminal, quasi-criminal, or civil in nature as long as federal court intervention "unduly interferes with the legitimate activities of the state." *Younger*, 401 U.S. at 44.

All three factors supporting abstention are present. The criminal case is still pending against Plaintiff. State court criminal matters are of paramount state interest. *See Younger*, 401 U.S. at 44-45. Plaintiff has an opportunity to assert his federal challenges in the state court proceeding. The pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the federal claims. *Moore v. Sims*, 442 U.S. 415, 430 (1979). The burden at this point rests on the Plaintiff to demonstrate that state procedural law bars presentation of his claims. *Pennzoil Co.*, 481 U.S. at 14. When a Plaintiff has not attempted to present his federal claims in the state court proceedings, the federal court should assume that state procedures will afford an adequate remedy, in the absence of "unambiguous authority to the contrary." *Pennzoil*, 481 U.S. at 15. Here, Plaintiff has not shown that the claims he asserted in this federal lawsuit are barred in the state action. The requirements of *Younger* are satisfied and this Court must abstain from interfering in any pending state court criminal action against the Plaintiff.

Furthermore, Plaintiff cannot obtain damages against these Defendants. To establish a *prima facie* case under 42 U.S.C. § 1983, Plaintiff must assert that a person acting under color of state law deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United

States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Generally to be considered to have acted "under color of state law," the person must be a state or local government official or employee. Section 1983 does not address merely private conduct, even if the conduct is discriminatory or wrongful. *Mineo v. Transp. Management of Tenn., Inc.*, 694 F.Supp. 417, 423 (M.D. Tenn. 1988); *Perdue v. Quorum, Inc.*, 934 F.Supp. 919, 922 (M.D. Tenn. 1996). A private party may be found to have acted under color of state law to establish the first element of this cause of action only when the party "acted together with or ... obtained significant aid from state officials" and did so to such a degree that its actions may properly be characterized as "state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). An individual may also be considered a state actor if he or she exercises powers traditionally reserved to a state. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

Fatimah Brown is a private party, not a state government official. Merely being a participant in litigation does not make a private party a co-conspirator or joint actor with the state. *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). She is not subject to suit under 42 U.S.C. § 1983.

Attorney Steven DeJohn was the court-appointed Guardian Ad Litem in the child custody case. Where the Guardian reports to the court as an independent investigator, or acts as an advocate of the child, he or she is not a state actor for purposes of § 1983. *Reguli v. Guffee*, 371 F. App'x 590, 601 (6th Cir. 2010); *Kirtley v. Rainey*, 326 F.3d 1088, 1095 (9th Cir. 2003). *See also Holley v. Deal*, 948 F. Supp. 711, 715 (M.D. Tenn. 1996) (Guardian Ad Litem is not a state actor where the state did not exercise power over the Guardian's independent judgment).

Alternatively, even if Steven DeJohn were found to be acting "under color of law," he would be absolutely immune from civil rights actions. *See Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th

Cir. 1984)(Guardian Ad Litem, like witnesses and other persons who are integral parts of the judicial process, is entitled to absolute immunity); *Holley*, 948 F. Supp. at 715 (Guardian Ad Litem, if found to be a state actor, would be absolutely immune from damages). Steven DeJohn is not subject to suit under § 1983.

Magistrate Hilow, and Judges Ramsey, Gallagher, McCormack, and Rocco are absolutely immune from suits for damages. Judicial officers are absolutely immune from civil suits for money damages. *Mireles v. Waco*, 502 U.S. 9, 9 (1991); *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997). They are accorded this broad protection to ensure that the independent and impartial exercise of their judgment in a case is not impaired by the exposure to damages by dissatisfied litigants. *Barnes*, 105 F.3d at 1115. For this reason, absolute immunity is overcome only in two situations: (1) when the conduct alleged is performed at a time when the Defendant is not acting as a judge; or (2) when the conduct alleged, although judicial in nature, is taken in complete absence of all subject matter jurisdiction of the court over which he or she presides. *Mireles*, 502 U.S. at 11-12; *Barnes*, 105 F.3d at 1116. *Stump*, 435 U.S. at 356-57. A judge will be not deprived of immunity even if the action he or she took was performed in error, done maliciously, or was in excess of his or her authority. From the limited facts presented in Plaintiff's Complaint, it appears Plaintiff is claiming the Judges conspired against him by not ruling in his favor. He has not presented factual allegations to suggest that either exception to absolute immunity applies in this case. Magistrate Hilow, and Judges Ramsey, Gallagher, McCormack, and Rocco are entitled to absolute immunity from suit.

Prosecutors are also entitled to absolute immunity for claims stemming from their initiation of criminal proceedings or their presentation of the state's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); *Pusey v. Youngstown*, 11 F.3d 652, 658 (6th Cir. 1993). A prosecutor must exercise his

or her best professional judgment both in deciding which suits to bring and in conducting them in court. *Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006). This duty could not be properly performed if the prosecutor is constrained in making every decision by the potential consequences of personal liability in a suit for damages. *Id.* These suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the attribution of improper and malicious actions to the state's attorney. *Imbler*, 424 U.S. at 424-25; *Skinner*, 463 F.3d at 525. Absolute immunity is therefore extended to prosecuting attorneys when the actions in question are those of an advocate. *Spurlock v. Thompson*, 330 F.3d 791, 798 (6th Cir.2003). Immunity is granted not only for actions directly related to initiating a prosecution and presenting the state's case, but also to activities undertaken "in connection with [the] duties in functioning as a prosecutor." *Imbler*, 424 U.S. at 431; *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002). Immunity also reaches beyond the criminal process to conduct in civil proceedings where a government attorney is operating in an enforcement role in "initiating ... judicial proceedings," *Cooper v. Parrish*, 203 F.3d 937, 947 (6th Cir. 2000), or "undertak[ing] the defense of a civil suit," *Al-Bari v. Winn*, No. 89-5150, 1990 WL 94229, at *1 (6th Cir. July 9, 1990).

It appears from references in the attachments to Plaintiff's Complaint that Mr. Young may have represented the state in a child support enforcement action. Mr. McGinty, as the Cuyahoga County Prosecutor, brought charges against Plaintiff for tampering with records. Both attorneys were acting as the state's advocate to initiate criminal charges and present the state's case against the Plaintiff. They are entitled to absolute immunity from suit.

Plaintiff does not mention Mr. Jackson in his pleading and the Court cannot locate his name in the attachments to the Complaint. Plaintiff refers to him as an Assistant Cuyahoga County

Prosecutor in the case caption. To the extent he is sued for his role in prosecuting Plaintiff, he is absolutely immune from suit.

To the extent Mr. Jackson performed some other role, Plaintiff fails to state a claims upon which relief may be granted against him. Although the basic pleading standard is liberal for *pro se* litigants, it requires more than bare assertions of legal conclusions. *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726-27 (6th Cir. 1996). The Complaint must contain enough facts to give the Defendants fair notice of what the Plaintiff's claims are and the grounds upon which they rest. *Bassett v. National Collegiate Athletic Ass'n*, 528 F.3d 426, 437 (6th Cir. 2008). Plaintiff fails to allege sufficient facts regarding this Defendant to meet the basic pleading requirement under Federal Civil Procedure Rule 8.

**Conclusion**

Accordingly, Plaintiff's Application to Proceed *In Forma Pauperis* (ECF No. 7) is granted and this action is dismissed pursuant to 28 U.S.C. §1915(e). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[1]

IT IS SO ORDERED.

Donald C. Nugent

DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE

Dated: _____

---

[1] 28 U.S.C. § 1915(a)(3) provides:

> An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| ABDUL-HAKIYM ISMAIYL, | ) | CASE NO. 1:16 CV 1314 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | JUDGE DONALD C. NUGENT |
| | ) | |
| FATIMAH BROWN, *et al.*, | ) | |
| | ) | |
| Defendant. | ) | MEMORANDUM OPINION |
| | ) | AND ORDER |

The Petitioner, Mr. Ismaiyl, has filed a motion to Alter and Amend Judgment, (ECF #10), seeking to change the judgment entered by the Court on August 31, 2016, (ECF #9), which dismissed this action. Mr. Ismaiyl seeks relief pursuant to Fed.R.Civ.P. 59(e). Having reviewed Mr. Ismaiyl's motion, as well as the prior proceedings and orders, the Court has determined that nothing in the motion alters that legal conclusions that led to the dismissal of this action.

This is not the proper forum for settling the Plaintiff's allegations because, as set forth in the Court's prior order, the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 44-45 applies in this situation. Further, Mr. Ismaiyl's attempt to provide additional factual details and clarification of his allegations does nothing to undermine the Court's prior decision. For the reasons set forth in the prior opinion, Ms. Brown is not a state actor for purposes of liability under 42 U.S.C. §1983, and the state actors at issue are all protected by absolute immunity

Following a full review of the arguments presented, for the reasons set forth above, this Court denies Mr. Ismaiyl's Motion to Alter and Amend Judgment (ECF #10). The Court's Judgment Order issued on August 31, 2016 dismissing Plaintiff's claims remains in full effect.

IT IS SO ORDERED.

Donald C. Nugent

DONALD C. NUGENT
United States District Judge

DATED: October 13, 2016

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **ABDUL-HAKIYM ISMAIYL,** | ) | **CASE NO. 1:16 CV 1314** |
| | ) | |
| **Plaintiff,** | ) | **JUDGE DONALD C. NUGENT** |
| | ) | |
| **v.** | ) | |
| | ) | **MEMORANDUM OF OPINION** |
| **FATIMAH D. BROWN, *et al.*,** | ) | |
| | ) | |
| **Defendants.** | ) | |

Before the Court is *pro se* Plaintiff Abdul-Hakiym Ismaiyl's Motion for Relief and Recusal (ECF No. 13) and his Motion to Appeal *In Forma Pauperis* (ECF No. 15). In his Motion for Relief and Recusal, he argues his case had merit and challenges this Court's denial of his Motion for Preliminary Injunction and dismissal of this case. He asks this Judge to reopen his case and recuse himself from further proceedings. He also filed an Appeal of the dismissal of his case and seeks permission to proceed *in forma pauperis* on appeal. For the reasons stated below, both Motions are denied.

Plaintiff brought this civil rights action under 42 U.S.C. § 1983 against his child's mother, a Cuyahoga County Department of Children and Family Services Employee, a Cuyahoga County Juvenile Court Judge and Magistrate, the Court-Appointed Guardian Ad Litem, three Ohio Eighth District Court of Appeals Judges, and three Cuyahoga County Prosecutors. He alleged the Defendants conspired against him in the course of a prior child custody case, and a current criminal prosecution pending in the Cuyahoga County Court of Common Pleas. He asked this Court to

**EXHIBIT**
**APPENDIX A8**

enjoin the pending criminal case, and award him punitive damages. This Court indicated it could not enjoin or intervene in a pending state criminal case, and could not award damages to Plaintiff because the child's mother was not subject to suit in a § 1983 action, and the remaining Defendants were immune from suit. He filed a Motion to Alter or Amend that Judgment under Rule 59(e) (ECF No. 10) claiming his case had merit and challenging the Court's dismissal of his case. This Court denied that Motion on October 13, 2016 (ECF No. 12).

Undeterred, Plaintiff has now filed this Motion for Relief from Judgment under Rule 60(b)(6) and Rule 60(d)(3) claiming his claims had merit and should not have been dismissed. He also asks this Judge to recuse himself from the case. Rule 60(b) permits a district court to grant a Motion for Relief from Judgment for any of the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b). "As a prerequisite to relief under Rule 60(b), a party must establish that the facts of its case are within one of the enumerated reasons contained in Rule 60(b) that warrant relief from judgment." *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993). Rule 60(b) does not permit parties to relitigate the merits of claims, or to raise new claims that could have been raised during the litigation of the case or in the initial Complaint. *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385

(6th Cir. 2001). Rule 60(d)(3) allows claimants to escape Rule 60(c)(1)'s one-year statute of limitations imposed on 60(b)(3) Motions for fraud, and allege fraud on the court regardless of the passage of time. *See Maloof v. Level Propane, Inc.*, 429 F. App'x 462, 467 (6th Cir. 2011).

Plaintiff has not established entitlement to relief under Rule 60(b). Relief from judgment under Rule 60(b)(6) is available only in exceptional or extraordinary circumstances. *McCurry ex. rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 596 (6th Cir. 2002); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). The Plaintiff has not presented evidence of "exceptional or extraordinary circumstances" that would justify relief from the Court's judgment under Rule 60(b)(6). Instead, Plaintiff restates arguments he previously raised in his Complaint and in his prior Motion to Alter or Amend Judgment. That is not a proper basis for relief under Rule 60(b). Similarly, Plaintiff has not alleged that the Defendants committed fraud on the Court as described in 60(b)(3), or that this Court was deceived by the actions of any of the Defendants in the course of this litigation. He is not entitled to relief from judgment.

Plaintiff asks the undersigned Judge to recuse himself from this case. It is clear that the Motion is based upon Plaintiff's disagreement with the Court's prior rulings. Disqualification must be predicated on "extrajudicial conduct rather than on judicial conduct." *Green v. Nevers*, 111 F.3d 1295, 1303 (6th Cir. 1997)(quoting *United States v, Story*, 716 F.2d 1088, 1091 (6th Cir. 1983)). There is nothing in the record of this case that would reasonably suggest that recusal is warranted. Plaintiff's Motion for Relief and Recusal is denied. (ECF No. 13).

Finally, Plaintiff filed a Motion to Proceed *In Forma Pauperis* on Appeal. The Court determined in its Memorandum of Opinion dismissing this case that an appeal could not be taken in good faith. The Motion to Proceed *In Forma Pauperis* on Appeal (ECF No. 15) is denied.

*Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999).

Accordingly, Plaintiff's Motion for Relief and Recusal (ECF No. 13) and Motion to Proceed *In Forma Pauperis* on Appeal (ECF No. 15) are denied. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[1]

IT IS SO ORDERED.

/s/Donald C. Nugent
DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE

Dated: March 17, 2017

[1] 28 U.S.C. § 1915(a)(3) provides:

> An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 16-4308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



| | | |
|---|---|---|
| ABDUL HAKIYM ISMAIYL, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | ON APPEAL FROM THE UNITED |
| | ) | STATES DISTRICT COURT FOR |
| FATIMAH D. BROWN, et al., | ) | THE NORTHERN DISTRICT OF |
| | ) | OHIO |
| Defendants-Appellees. | ) | |

ORDER

Before: GILMAN and DONALD, Circuit Judges; HOOD, District Judge.*

Abdul Hakiym Ismaiyl, a pro se Ohio litigant, appeals the district court's judgment dismissing his complaint, filed pursuant to 42 U.S.C. § 1983 and state law, and the district court's orders denying his motions to alter or amend and for relief from judgment. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Ismaiyl filed his complaint against the mother of his children, a Cuyahoga County Department of Children and Family Services case worker, a Cuyahoga County Juvenile Court Judge, a Cuyahoga County Juvenile Court Magistrate, a court-appointed guardian ad litem, three Ohio Court of Appeals judges, and three Cuyahoga County prosecutors. Ismaiyl alleged that the

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

defendants conspired against him in a prior child custody-case and a pending criminal prosecution in the Cuyahoga County Court of Common Pleas. He sought declaratory, injunctive, and monetary relief. He also filed a contemporaneous "Notice of Complaint for Preliminary Injunction and Affidavit in Support," in which he asked the district court to enjoin his pending state prosecution. Days later, Ismaiyl moved for leave to file an amended complaint without specifying any proposed amendments.

The district court denied Ismaiyl's motion for a preliminary injunction, dismissed his action pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), and certified that an appeal could not be taken in good faith. The district court explained that it was precluded from interfering with Ismaiyl's pending state prosecution, that the mother of Ismaiyl's children was not a state actor, and that the remaining defendants were immune from suit. The district court did not rule on Ismaiyl's motion to amend.

Relying on Federal Rule of Civil Procedure 59(e), Ismaiyl filed a motion to alter or amend the district court's judgment. The district court denied the motion. Ismaiyl thereafter filed a Federal Rule of Civil Procedure 60(b)(6) and (d)(3) motion for relief from the district court's judgment and asked that the district judge recuse himself. The district court denied the motion and request. Ismaiyl then filed an amended notice of appeal from the district court's judgment and orders denying his motions to alter or amend and for relief from judgment.

On appeal, Ismaiyl argues that the district court erred in: (1) converting his "Action in Equity . . . into a legal action seeking damages"; (2) refraining from hearing his claims and denying his motion for a preliminary injunction under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971); (3) denying him leave to amend his complaint; and (4) denying his Rule 60 motion and recusal request. Ismaiyl has waived review of any further issues by failing to argue them on appeal. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005).

We review de novo a district court's judgment dismissing a complaint under § 1915(e)(2)(B)(ii) for failure to state a claim. *Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010). "[T]o survive scrutiny under . . . [§] 1915(e)(2)(B)(ii), 'a complaint must contain sufficient

factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* at 471 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A district court's grant or denial of a motion for a preliminary injunction is reviewed for under the abuse-of-discretion standard. *See Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717 (6th Cir. 2003).

Whether brought for declaratory, injunctive, or monetary relief, Ismaiyl's claims were properly dismissed for failure to state a claim. His § 1983 claims against the mother of his children were subject to dismissal because she is not a state actor. *See Polk County v. Dodson*, 454 U.S. 312, 318, 325 (1981). And, although private citizens acting in concert with state officials may be subject to liability under § 1983, *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980), Ismaiyl's conspiracy allegations against the mother of his children were at best conclusory. *See Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 368 (6th Cir. 2012) ("[C]onspiracy claims must be pled with some degree of specificity and ... vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim." (quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1538-39 (6th Cir. 1987))).

As to Ismaiyl's § 1983 claims against the remaining defendants arising from his pending state prosecution, the district court properly held that it was precluded from interfering with this ongoing proceeding pursuant to the *Younger* abstention doctrine. In order for a federal district court to abstain from hearing a claim pursuant to *Younger*, the court must find that three requirements are satisfied: (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; and (3) there is an adequate opportunity in the state proceeding to raise constitutional challenges. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). If these prerequisites are satisfied and "so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain." *Id.* at 435. Ismaiyl argues that *Younger* is inapposite because his child-custody proceeding had concluded at the time he filed his complaint. But he does not dispute that his state criminal prosecution was ongoing at that time. Ismaiyl also implies that his indictment was returned in bad faith, but he fails to offer any

meaningful support for that assertion. The district court therefore properly refrained, based on his pending state prosecution, from hearing Ismaiyl's claims and, for the same reason, did not abuse its discretion in denying his motion for a preliminary injunction.

As to Ismaiyl's § 1983 claims against the remaining defendants arising from his prior child-custody proceeding, the district court's finding that the defendants were immune from suit was proper, but only insofar as Ismaiyl sought monetary relief. *See Ernst v. Rising*, 427 F.3d 351, 358-59 (6th Cir. 2005); *S.J. v. Hamilton County*, 374 F.3d 416, 419-20 (6th Cir. 2004). Nevertheless, Ismaiyl's claims for declaratory and injunctive relief were properly dismissed based on their conclusory nature. His allegations pertaining to his prior child-custody proceeding consisted of "conspiracy to defraud," "fraud upon the court," "bad faith actions," "den[ial of] the right to speak," "arbitrary and conscious shocking behavior," and "tampering with the record." Ismaiyl provided no specific factual allegations to support these contentions. "It is not enough for a complaint under § 1983 to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings." *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986). And because all of Ismaiyl's federal claims were dismissed, the district court properly declined to exercise supplemental jurisdiction over hiss state-law claims. *See Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 210 (6th Cir. 2004). Accordingly, Ismaiyl's first two appellate arguments are unavailing.

Ismaiyl also argues that the district court erred in denying him leave to amend his complaint. Although the district court should have ruled on this motion, its failure to do so was harmless error. A motion for leave to file an amended complaint must "state with particularity the grounds for seeking the order." Fed. R. Civ. P. 7(b)(1)(B); *see also Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App'x 281, 289-90 (6th Cir. 2017). Because Ismaiyl failed to do so, he was not entitled to the requested relief.

Finally, Ismaiyl argues that the district court erred in denying his Rule 60 motion and recusal request. This court reviews the denial of a Rule 60 under the abuse-of-discretion standard. *Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014). Rule 60(b) permits a district

court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for any of six reasons, including "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). A motion filed under Rule 60(b)(6) must demonstrate "extraordinary circumstances" that would justify "the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Ismaiyl did not demonstrate the requisite "extraordinary circumstances" to justify relief pursuant to Rule 60(b)(6). Rather, as the district court concluded, he merely reiterated the arguments presented in his complaint and Rule 59(e) motion. Rule 60(d)(3) allows a court to set aside a judgment for fraud on the court, but Ismaiyl presented no evidence showing that fraud occurred. Fed. R. Civ. P. 60(d)(3). And, because Ismaiyl's recusal request rather than extrajudicial conduct, was based on judicial conduct, the district court properly denied that request. *See Green v. Nevers*, 111 F.3d 1295, 1303 (6th Cir. 1997).

For these reasons, we **AFFIRM** the district court's orders and judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 16-4308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
May 03, 2018
DEBORAH S. HUNT, Clerk

ABDUL HAKIYM ISMAIYL,

Plaintiff-Appellant,

v.

FATIMAH D. BROWN, ET AL.,

Defendants-Appellees.

ORDER

**BEFORE:** GILMAN and DONALD, Circuit Judges; HOOD, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**

*The Honorable Joseph M. Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

**EXHIBIT**
**APPENDIX A10**

*** Current through PL 115-64, approved 9/29/17 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 123. FEES AND COSTS

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28 USCS § 1915

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 1915. Proceedings in forma pauperis

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3)

**EXHIBIT**
**APPENDIX A11**

printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title [28 USCS § 636(c)]. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

**HISTORY:**

(June 25, 1948, ch 646, 62 Stat. 954; May 24, 1949, ch 139, § 98, 63 Stat. 104; Oct. 31, 1951, ch 655, § 51 (b), (c), 65 Stat. 727; Sept. 21, 1959, P.L. 86-320, 73 Stat. 590; Oct. 10, 1979, P.L. 96-82, § 6, 93 Stat. 645; April 26, 1996, P.L. 104-134, Title I [Title VIII, § 804(a), (c)-(e)], 110 Stat. 1321-73, 1321-74; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327.)

*** Current through PL 115-64, approved 9/29/17 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
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28 USCS § 1915

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THIS IS PART 1.
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§ 1915. Proceedings in forma pauperis

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3)

**EXHIBIT**
**APPENDIX A11**

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(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

**HISTORY:**

(June 25, 1948, ch 646, 62 Stat. 954; May 24, 1949, ch 139, § 98, 63 Stat. 104; Oct. 31, 1951, ch 655, § 51 (b), (c), 65 Stat. 727; Sept. 21, 1959, P.L. 86-320, 73 Stat. 590; Oct. 10, 1979, P.L. 96-82, § 6, 93 Stat. 645; April 26, 1996, P.L. 104-134, Title I [Title VIII, § 804(a), (c)-(e)], 110 Stat. 1321-73, 1321-74; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327.)

# *ORC Ann. 2913.42*

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 59 (HB 1).

***Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2913: Theft and Fraud (§§ 2913.01 — 2913.82) > Frauds (§§ 2913.40 — 2913.49)***

## § 2913.42 Tampering with records.

**(A)** No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:

**(1)** Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record;

**(2)** Utter any writing or record, knowing it to have been tampered with as provided in division (A)(1) of this section.

**(B)**

**(1)** Whoever violates this section is guilty of tampering with records.

**(2)** Except as provided in division (B)(4) of this section, if the offense does not involve data or computer software, tampering with records is whichever of the following is applicable:

**(a)** If division (B)(2)(b) of this section does not apply, a misdemeanor of the first degree;

**(b)** If the writing or record is a will unrevoked at the time of the offense, a felony of the fifth degree.

**(3)** Except as provided in division (B)(4) of this section, if the offense involves a violation of division (A) of this section involving data or computer software, tampering with records is whichever of the following is applicable:

**(a)** Except as otherwise provided in division (B)(3)(b), (c), or (d) of this section, a misdemeanor of the first degree;

**(b)** If the value of the data or computer software involved in the offense or the loss to the victim is one thousand dollars or more and is less than seven thousand five hundred dollars, a felony of the fifth degree;

**(c)** If the value of the data or computer software involved in the offense or the loss to the victim is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, a felony of the fourth degree;

**(d)** If the value of the data or computer software involved in the offense or the loss to the victim is one hundred fifty thousand dollars or more or if the offense is committed for the purpose of devising or executing a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim is seven thousand five hundred dollars or more, a felony of the third degree.

**(4)** If the writing, data, computer software, or record is kept by or belongs to a local, state, or federal governmental entity, a felony of the third degree.

## History

**EXHIBIT**
**APPENDIX A12**

134 v H 511 (Eff 1-1-74); 141 v H 49 (Eff 6-26-86); 141 v H 428 (Eff 12-23-86); *146 v S 2* (Eff 7-1-96); *147 v H 565*. Eff 3-30-99; *2011 HB 86*, § 1, eff. Sept. 30, 2011.

Annotations

## Notes

### Editor's Notes

The provisions of § 4 of HB 86 read as follows:

"SECTION 4. The amendments to *sections 926.99*, *1333.99*, *1707.99*, *1716.99*, *2909.03*, *2909.05*, *2909.11*, *2913.02*, *2913.03*, *2913.04*, *2913.11*, *2913.21*, *2913.31*, *2913.32*, *2913.34*, *2913.40*, *2913.401*, ***2913.42***, *2913.421*, *2913.43*, *2913.45*, *2913.46*, *2913.47*, *2913.48*, *2913.49*, *2913.51*, *2913.61*, *2915.05*, *2917.21*, *2917.31*, *2917.32*, *2921.13*, *2921.41*, *2923.31*, and *2981.07*, division (B) of *section 2929.13*, and division (A) of *section 2929.14 of the Revised Code* that are made in this act apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of *section 1.58 of the Revised Code* makes the amendments applicable.

"The provisions of *sections 926.99*, *1333.99*, *1707.99*, *1716.99*, *2909.03*, *2909.05*, *2909.11*, *2913.02*, *2913.03*, *2913.04*, *2913.11*, *2913.21*, *2913.31*, *2913.32*, *2913.34*, *2913.40*, *2913.401*, ***2913.42***, *2913.421*, *2913.43*, *2913.45*, *2913.46*, *2913.47*, *2913.48*, *2913.49*, *2913.51*, *2913.61*, *2915.05*, *2917.21*, *2917.31*, *2917.32*, *2921.13*, *2921.41*, *2923.31*, and *2981.07 of the Revised Code* in existence prior to the effective date of this section shall apply to a person upon whom a court imposed sentence prior to the effective date of this section for an offense specified or penalized under those sections. The amendments to *sections 926.99*, *1333.99*, *1707.99*, *1716.99*, *2909.03*, *2909.05*, *2909.11*, *2913.02*, *2913.03*, *2913.04*, *2913.11*, *2913.21*, *2913.31*, *2913.32*, *2913.34*, *2913.40*, *2913.401*, ***2913.42***, *2913.421*, *2913.43*, *2913.45*, *2913.46*, *2913.47*, *2913.48*, *2913.49*, *2913.51*, *2913.61*, *2915.05*, *2917.21*, *2917.31*, *2917.32*, *2921.13*, *2921.41*, *2923.31*, and *2981.07 of the Revised Code* that are made in this act do not apply to a person who upon whom a court imposed sentence prior to the effective date of this section for an offense specified or penalized under those sections."

### Amendment Notes

The 2011 amendment substituted "seven thousand five hundred dollars" for "five thousand dollars" throughout (B)(3); substituted "one thousand dollars" for "five hundred dollars" in (B)(3)(b); and substituted "one hundred fifty thousand dollars" for "one hundred thousand dollars" in (B)(3)(c) and (B)(3)(d).

## Commentary

**1974 Committee Comment to H 511** This section prohibits tampering with all private as well as public records, for fraudulent purposes, and thus expands upon former law which prohibited such conduct only with respect to public documents, wills, animal pedigrees, herd registers, and dairy cattle milk production. In general, the rationale for the section is that substantial harm can, in a given case, result from tampering with a personal letter file, bank statement, or other private document, as well as from tampering with the correspondence files or records in a public office. The section recognizes, however, that substantial harm is more likely to result from tampering with wills or public records, and such conduct thus carries a more severe penalty. Any writing or record kept by or belonging to a governmental agency can be the subject of an offense under this section, and the document involved need not necessarily be a "public record" as defined in *section 149.43 of the Revised Code*.

# ORC Ann. 2921.12

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 59 (HB 1).

***Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2921: Offenses Against Justice and Public Administration (§§ 2921.01 — 2921.52) > Perjury (§§ 2921.11 — 2921.18)***

## § 2921.12 Tampering with evidence.

**(A)** No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

**(3)** Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

**(4)** Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

**(B)** Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

## History

134 v H 511. Eff 1-1-74.

Annotations

## Commentary

**1974 Committee Comment to H 511**

In some respects, this section complements the section on perjury, in that it deals with the falsification of physical evidence while perjury deals with the falsification of testimony. The purview of this section is broader than that of perjury, however, since it includes not only falsification but removal, concealment, or destruction as well, and also includes tampering with evidence not only in an official proceeding, but also when the offender knows that such a proceeding is about to be or is likely to be instituted, and also when he knows that an official investigation is being, or is about to be, or is likely to be made.

Tampering with evidence is a felony of the third degree.

## Notes to Decisions

**EXHIBIT**
**APPENDIX A12**