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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

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October 11, 2005

Dale Wayne Mills
701 Summit Parkway
Borden IN 47106

RE: Money Order # 92835093576 2:04-23286

Mr Mills:

We are returning this check since you do not owe filing fees. Unlike State Court, United States District Court doesn't require a per pleading fee.

If you have any further questions please contact our office at (843)579-1401.

Thank you for your assistance with this matter.

Sincerely,

Larry W. Propes, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
for the
DISTRICT OF SOUTH CAROLINA

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Civil Action No. 2:04-23286-DCN-GCK

CONSTANCE MILLS HAEBSELEY,
Plaintiff

vs

DALE WAYNE MILLS,
Defendant, *pro se*

**DEFENDANT'S PETITION FOR
A WRIT OF MANDAMUS**

Comes now DALE W. MILLS, *pro se*, pursuant to the provisions of section 1651, Title 28, United States Code, to request this Court issue a Writ of Mandamus to the Judges of the Ninth Judicial Circuit Court of South Carolina, to quash their ultra vires ex parte proposed order based on ultra vires hearing of September 7, 2005. To also issue a Writ of Mandamus to the Judges of the Ninth Judicial Circuit Court of South Carolina for their ultra vires Rule to Show Cause order filed August 8, 2005. Both writs shall order both judges to vacate all actions and proceedings entertained and initiated after this case was properly removed to this district court and prior to this district court properly remanding. Further that both judges shall comply fully with 28 U.S.C. § 1446 (d).

In support he offers:

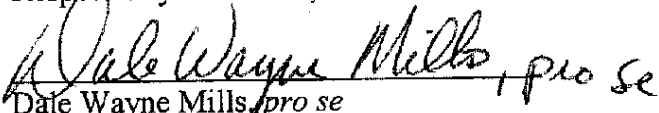
1. This United States District Court for South Carolina has jurisdiction to issue writs of mandamus pursuant to 28 U.S.C § 1651

2. The clerk of this court has untimely filed with the state court a magistrate's order remanding this case. Legal proceedings were incomplete as an objection to the magistrate's report was timely filed with this court. The magistrate lacks authority to direct the clerk of this court to send his remand order to the clerk of the state court. Such authority is vested in the district court judge. The Objection to the magistrate order of remand is currently under review by this court. Only a district court judge order of remand triggers the clerk to file the remand order with the state court.
3. After proper removal of In Re Marriage of Constance Mills Haeseley and Dale W. Mills Case Number 95-DR-10 -4755 from the Ninth Judicial Circuit Court of South Carolina to this United States District Court for South Carolina, the Plaintiff, her attorney and the Judges of the Ninth Judicial Circuit Court of South Carolina entertained an ultra vires ex parte motion, set and held an ultra vires ex parte hearing and are prepared to enter an ultra vires ex parte contempt and commitment order against Dale W. Mills.
4. On 16th of December 2004 Removal of Ninth Judicial Circuit Court of South Carolina Case No. 95-DR-10-4755 was effected with proper Notice of Removal and Notice of Filing Notice of Removal to the Clerk of the Ninth Judicial Circuit South Carolina. (Attached Notice of Removal and Notice of Filing of Removal)
5. After proper notice of removal of this action to this court pursuant to 28 U.S.C. §1446 the former wife Constance Mills Haeseley moved and attended an ultra vires ex parte hearing 7 September 2005 before the state Judge.

6. The ex parte ultra vires hearing is about to result in Constance Mills Haeseley and the state court judges together participating in the entry of a contempt and commitment order ultra vires to 28 U.S.C. § 1446 (d) (Proposed Order Attached)
7. Such ultra vires conduct by Constance Mills Haeseley, her attorney and the state court judges has resulted in a further loss of 14th Amendment Constitutional and 42 U.S.C. § 1983 civil rights to Dale W. Mills.
8. Dale W. Mills cannot effectively work nor be present in the state of South Carolina without risk of incarceration.
9. Dale W. Mills has no other legal recourse available to him to restore his rights and effected the ex parte ultra vires conduct of the Plaintiff, her attorney and the state court trial judges.
10. Dale W. Mills has been denied his property rights. Reed v Village of Shorewood, 704 F.2d 943, 949 (7th Cir. 1983).
11. Dale W. Mills is further stigmatized by the ultra vires conduct of the parties.

WHEREFORE Dale W. Mills, *pro se*, petitions this court to issue a Writ of Mandamus to the Judges of the Ninth Judicial Circuit Court of South Carolina to immediately vacate and quash their orders and all proceeding after 16 December 2004, cease all activity in this case until proper remand from this court.

Respectfully submitted,


Dale Wayne Mills, *pro se*
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Fax: 812-246-0652
Email: terratrq@aol.com

DATED this 5th Day of October 2005

MEMORANDUM OF LAW

Introduction

That a court operate solely within its statutory jurisdiction is one of the most fundamental premises of our judicial system. See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) (noting that "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction")

If Dale W. Mills cannot petition for mandamus, he "has no other avenue of relief; [he] will be prejudiced in a way not correctable on appeal since [he] will have been forced to endure proceedings in a court that lacks jurisdiction." Seedman v. United States Dist. Court, 837 F.2d 413, 414 (9th Cir. 1988) (per curiam)

Effect of Removal on State Jurisdiction

28 U.S.C. § 1446 governs the procedure for Removal of a state action to a federal court. The facts in the above motion demonstrate full compliance with the federal statute.

The removal of a case from state court to federal court effects a transfer of the entire action, including all the parties and all the claims, to the federal court. City of Gainesville v. Brown-Crummer Investment Co., 277 U.S. 54, 60 (1928); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1376 (5th Cir. 1980); Murphy v. Kodz, 351 F.2d 163, 167 (9th Cir. 1965); Hartlein v. Illinois Power Co., 601 N.E.2d 720, 726 (Ill. 1992). A defendant, upon filing a notice of removal, "shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk" of the state court, which effects the removal. 28 U.S.C. § 1446(d). At that point, "the [state] court shall proceed no further unless and until the case is remanded." *Id.*

“After compliance with the removal statute[,] the jurisdiction of the [] state court is suspended until there has been a remand.” Levine v. Lacy, 204 Va. 297, 300, 130 S.E.2d 443, 445 (1963); accord Yannovic v. Brink, [redacted], 102 F.3d 753, 754 (4th Cir. 1996); Maseda v. Honda Motor Co., 861 F.2d 1248, 1254 (11th Cir. 1988); Allman v. Hanley, 302 F.2d 559, 562 (5th Cir. 1962). “Any subsequent proceedings in state court on the case are void ab initio.” Maseda, 861 F.2d at 1254-55 (citing Steamship Co. v. Tugman, 106 U.S. 118, 122 (1882)); accord South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971). A later determination that the removal petition was not proper does not change that outcome. See Maseda, 861 F.2d at 1254 n.11; Moore, 447 F.2d at 1073; United States v. Silberglitt, 441 F.2d 225, 227 (2d Cir. 1971); Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir. 1957).

A proper filing of a notice of removal immediately strips the state court of its jurisdiction. 28 U.S.C. § 1446(d), State of South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971).

The Ultra Vires Conduct

An official act does not become ultra vires if the officer was statutorily empowered to act but may have acted erroneously. Wyoming v. United States, 279 F.3d 1214, 1229-30 (10th Cir. 2002). Here the Plaintiff, her attorney, and the state court judges were not statutorily empowered to act. On the contrary, they were explicitly prohibited from acting pursuant to 28 U. S.C. §1446 (d)

The conduct of the Plaintiff, her attorney, and the state court judges in state court after proper removal 16th December 2004 was ultra vires. 28 U.S.C. § 1446 transferred all jurisdiction to the federal district court if proper notice of removal was performed. It was.

Even more egregious than the ultra vires conduct of the Plaintiff, her attorney and the state court judges was that they all were fully aware and cognizant of 28 U.S.C. § 1446 as

evidenced by the this legal argument raised in state court and noted by them in their proposed order. (Attached Motion to Dismiss).

They further compounded the egregious conduct by engaging in these proceedings ex parte the Defendant.

Writ of Mandamus

Authority

It is well-established that mandamus is appropriate to correct and vacate actions that are not authorized by law. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997); In re Excel Corp., 106 F.3d 1197, 1200-01 (5th Cir.), cert. denied, 118 S. Ct. 159 (1997)

In this case, the Defendants disregarded the plain language of 28 U.S.C. § 1446. Mandamus thus is plainly an appropriate remedy. In re Burlington Northern, 822 F.2d 518 (5th Cir. 1987); In re M.P.W. Stone, 986 F.2d 898 (5th Cir. 1993).

This case presents precisely the sort of exceptional circumstances that warrant the exercise of this Court's mandamus jurisdiction.

Conclusion

“ [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682,
690 (1949)

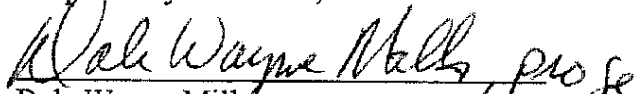
For the above stated reasons a Writ of Mandamus to the Judges of the Ninth Judicial Circuit Court of South Carolina to immediately vacate and quash all proceeding after the Notice of Removal of 16th December 2004 must be granted. Further, it is proper for this court to instruct the Plaintiff, her attorney and the state court judges to proceed no further in this case until it is properly remanded from the federal court.

Prayer for Relief

"...probably in the words of Chief Baron Gilbert, that, 'if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., Hab. Corp., B. 10." Ex Parte Siebold, 100 U.S. 371 (1879)

WHEREFORE the Defendant prays this court issue a Writ of Mandamus to the Judges of the Ninth Judicial Circuit Court to vacate all its ultra vires orders after removal of this case to federal court (16 December 2004) and to proceed no further until properly remanded to state court.

Respectfully submitted,


Dale Wayne Mills, *pro se*

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Email: terratra@aol.com

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion has been served via U.S. mail this 5th day of October 2005

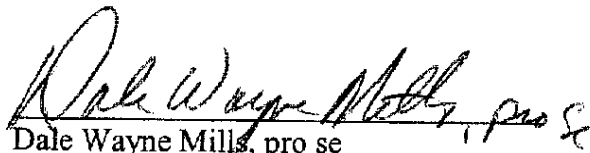
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