

IN THE SUPREME COURT OF OHIO

Original Action in Mandamus

Case No. 07-0925

Richard Clark Sr.,

Relator,

v.

JUDGE KRICHBAUM ET. AL.,

Respondents.

**RESPONDENT OHIO PUBLIC DEFENDER'S MOTION TO DISMISS
RELATOR'S PETITION FOR WRIT OF MANDAMUS**

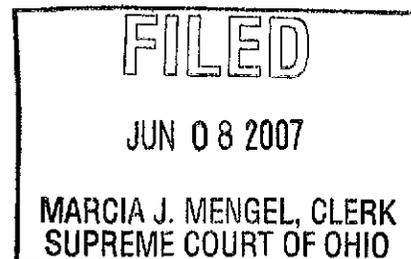
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Relator

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Ohio Public Defender



MEMORANDUM IN SUPPORT

A. INTRODUCTION

Relator Richard Clark Sr. ("Clark") filed a petition for a writ of mandamus with this Court. Clark named as Respondents William Mooney and Robert Lane, attorneys and employees of the office of the Ohio Public Defender, ("O.P.D.") who had formerly represented Clark.

~~This Court has held that a writ of mandamus will not be issued where a relator has an adequate remedy at law. Every argument Clark raises in his petition can be raised in an appeal to the Seventh District Court of Appeals. Clark fails to demonstrate any clear duty for the respondents to act and any legal right to the relief which Clark requests.~~

B. FACTS

In 2004 Clark was convicted of Rape pursuant to R.C. 2907.02(A)(1)(b)(B) and Gross Sexual Imposition pursuant to R.C. 2907.05(A)(4). He was sentenced to life imprisonment for the Rape conviction and 5 years for the Gross Sexual Imposition conviction to be served consecutively.

Clark was later represented by other counsel who filed a direct appeal on his behalf under case number 04 MA 246. In March of 2006 the Seventh District Court of Appeals issued a decision under 04 MA 246 and the Ohio Public Defender was appointed to represent Clark in a discretionary appeal to this Court. The discretionary appeal was not allowed under *State v. Clark*, 110 Ohio St.3d 1412, 2006-Ohio-3306.

Robert Lane filed a motion pursuant to App R. 26(B) to reopen Clark's direct appeal. The Seventh District granted that appeal and permitted the parties to brief the issue on Clark's sentence as it applied to a sentencing hearing under *Blakely v. Washington* (2004), 542 U.S. 296. In March 2006, the Seventh District Court of Appeals granted the appeal remanding Clark's case for re-sentencing. William Mooney represented Clark at the re-sentencing hearing. Mr. Mooney reviewed the file and met with Clark before the hearing. William Mooney represented Clark in the re-sentencing hearing and conferred with him after the hearing.

~~Clark was appointed counsel who timely filed a notice of appeal, appealing the re-sentencing hearing with the Seventh District Court of Appeals on May 18, 2007, which is currently pending under case number 2007 MA 87.~~

C. LAW AND ARGUMENT

1. Clark Is Not Entitled To A Writ Of Mandamus.

In order for a writ of mandamus to issue this Court has held the relator must demonstrate all of the following three factors: (1) the relator has no plain and adequate remedy at law, (2) the respondents are under a clear legal duty to perform the acts, and (3) the relator has a clear legal right to the relief prayed for. *Berger v. McMonagle* (1983), 6 Ohio St. 3d 28. The failure of Clark to demonstrate any of these factors requires that his complaint for mandamus be dismissed.

a. Clark has a plain and adequate remedy at law.

It is well settled that a writ of mandamus will not lie where there is an adequate remedy at law. Here, Clark has an adequate remedy at law. This Court can take judicial notice that Clark has filed a notice of appeal with the Seventh District Court of Appeals under Case Number 07 MA 87. Clark's appeal concerns the very same set of circumstances which Clark is requesting

this Court to review in Mandamus. This Court has held: “Mandamus will not issue if there is a plain and adequate remedy in the ordinary course of law”. *State ex. rel. Ullman v. Hayes*, 103 Ohio St. 3d 405, 2004-Ohio-5469. Furthermore, R.C. 2731.05 states:

The Writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law.

Not only does Clark have a plain and adequate remedy at law, he is currently exercising that right in his appeal pending before the Seventh District Court of Appeals.

b. Clark fails to allege a clear duty to act.

Clark fails to allege that O.P.D. has a clear duty to perform an act. The Ohio Public Defender represented Clark in the appellate process and the re-sentencing hearing. In the course of representing Clark, Mr. Mooney reviewed the file, met with Clark before the hearing, and represented Clark at the hearing. Robert Lane and William Mooney fulfilled their obligation in representing Clark and there is no other duty to act otherwise.

c. Clark fails to demonstrate a clear legal right to the relief prayed for.

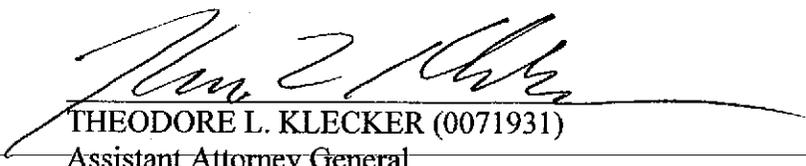
Clark’s petition does not demonstrate a clear legal right to relief. Clark fails to cite any legal authority supporting the notion that he has a right by a writ of mandamus to the actions sought in his petition. Clark requests this court to grant a writ of mandamus to compel an act that the O.P.D. has already performed.

CONCLUSION

For the above stated reasons, the Ohio Public Defender respectfully requests this Court to grant its motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

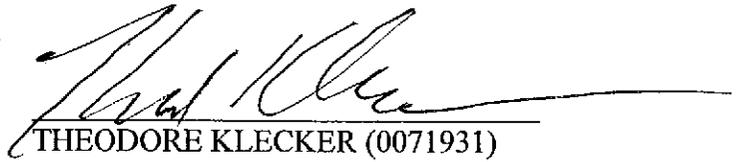
I hereby certify that a true copy of the foregoing Motion to dismiss has been served, via regular U.S. mail, postage prepaid, this 8th day of June, upon the following:

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