

IN THE SUPREME COURT OF OHIO

[State ex. rel.] William Anthony Cook,

Relator,

Case No. 09-0065.

v.

Original Action in Mandamus

The Honorable Judge Patrick E. Sheeran,

Respondent.

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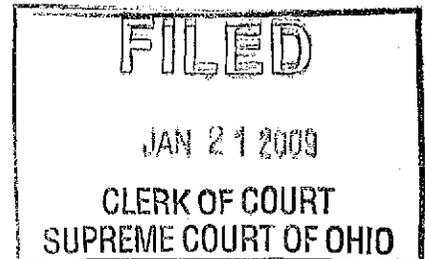
**RESPONDENT JUDGE PATRICK E. SHEERAN'S  
MOTION TO DISMISS**

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Ross Correctional Institute  
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Relator  
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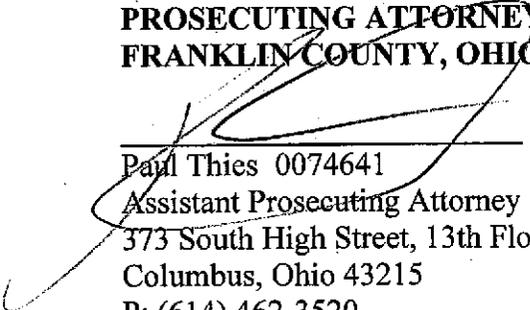
Original Action for Writ of  
Mandamus

**RESPONDENT'S MOTION TO DISMISS**

Now comes Respondent Judge Patrick E. Sheeran (hereinafter "Respondent"), by and through undersigned counsel, and moves this Court to dismiss Relator's writ of mandamus for mootness. Respondent respectfully requests that this Motion to Dismiss be granted in his favor and Relator's writ of mandamus be denied. Respondent's position is more fully set forth in the attached Memorandum in Support and is incorporated herein by reference.

Respectfully submitted,

**RON O'BRIEN**  
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## MEMORANDUM IN SUPPORT

### **I. Introduction**

This action is before the Court on Relator's Petition for a Writ of Mandamus filed January 8, 2009. Relator asks this Court to compel Judge Patrick E. Sheeran to rule on a Motion to Void Judgment that Relator filed June 25, 2008 in the Franklin County Court of Common Pleas. A memorandum contra was filed by the Prosecuting Attorney on June 30, 2008. Relator filed a response to the memorandum contra on August 7, 2008. The respondent overruled the Relator's June 25, 2008 motion on January 14, 2009. A copy of the respondent's decision is attached as Exhibit A.

### **II. Law and Argument**

#### **A. Standard of Review**

In considering a motion to dismiss for failure to state a claim, the Court must construe all material allegations in the Complaint and all inferences that may be reasonably drawn there from in favor of the nonmoving party. *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186. In order for a trial court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that plaintiff can prove no set of facts warranting relief. *State ex rel. Jennings v. Nurre* (1995), 72 Ohio St.3d 596, 651 N.E.2d 1006.

#### **B. Relator Has No Right to the Relief Requested**

For a writ of mandamus to issue, a relator must show that they have a clear legal right to the relief prayed for, the respondent is under a clear legal duty to perform the requested act, and the relator has no plain and adequate remedy in the ordinary course of the

law. *State, ex rel. Olander, v. Ohio Environmental Protection Agency* (1989), 45 Ohio St.3d 196, 197, citing *State, ex rel. Berger, v. McMonagle* (1983), 6 Ohio St. 3d 28.

Relator cannot meet the requirements for a writ of mandamus because the relief prayed for has occurred and this action is consequently moot. A writ of mandamus will not issue to compel an act already performed. *State ex rel. Gantt v. Coleman* (1983), 6 Ohio St.3d 5.

Respondent issued a decision overruling Relator's Motion to Void Judgment on January 14, 2009. (Attached as Exhibit A) Because Respondent has performed the act prayed for in the petition for the issuance of a writ of mandamus, the petition should be dismissed.

### **III. Conclusion**

For the foregoing reasons Relator's instant Complaint for Writ of Mandamus should be denied and this matter be dismissed.

Respectfully submitted,

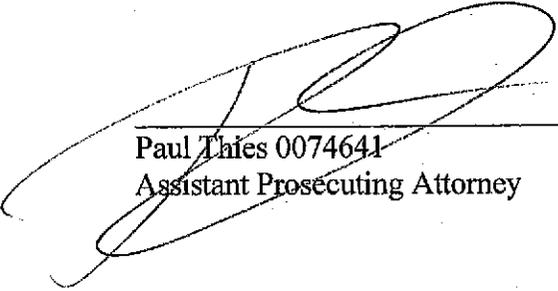
**RON O'BRIEN  
PROSECUTING ATTORNEY  
FRANKLIN COUNTY, OHIO**

~~Paul Thies 0074641~~

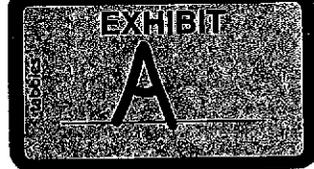
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been forwarded by regular U.S. mail, postage prepaid, to William Anthony Cook, pro se, Inmate # 428-862, Ross Correctional Institute, P.O. Box 7010, 16149 State Rt. 104, Chillicothe, Ohio 45601, this 21<sup>th</sup> day of January, 2009



Paul Thies 0074641  
Assistant Prosecuting Attorney



IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
GENERAL DIVISION

FILED COURT  
COMMON PLEAS CO. OHIO  
FRANKLIN CO. OHIO  
2009 JAN 14 AM 9:50  
CLERK OF COURTS

State of Ohio, :  
 :  
 Plaintiff, : Case No. 01 CR 6776  
 :  
 vs. : Case No. 01 CR 5022  
 :  
 William Anthony Cook, :  
 :  
 Defendant. :

**DECISION AND ENTRY OVERRULING DEFENDANT’S MOTION TO VOID  
JUDGMENT PURSUANT TO CIV. R. 60(B), (4), (5), AND (6)**

Rendered this 13<sup>th</sup> day of January 2009

Sheeran, J.

Defendant in his motion seeks to vacate his convictions and sentence for robbery as being unconstitutional. Defendant has chosen to pursue this action under the claimed authority of Civ.R. 60(B).

Civ.R. 60(B) cannot be used to challenge a criminal conviction. *State v. Schlee* (2008), 117 Ohio St. 3d 153. Thus, Defendant’s Motion is without merit on this basis alone. However, the Motion can be considered as if it were a petition for post-conviction relief. The Court will proceed under that consideration. The Court will note that, under that circumstance, the petition has not been timely filed, pursuant to R.C. 2953.21(A)(2).

On the merits, however, Defendant, without citing the case, presumably invokes *State v. Colon I* (2008), 118 Ohio St. 3d 26, as he argues that the *mens rea* of the offense of robbery was not stated in his indictments. Given the timing of Defendant’s filing, he could not have known about the Supreme Court’s later decision in *State v. Colon II* (2008), 119 Ohio St. 3d 204. In *Colon II*, the Supreme Court held that

Our holding in *Colon I* is only prospective in nature, in accordance with our general policy that newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively.

*Id.*, at ¶3.

In addition to the foregoing, the Supreme Court also noted the rarity of cases like

*Colon I*.

Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. In *Colon I*, the error in the indictment led to errors that "permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence." *Id.* at P23, citing *State v. Perry*, 101 Ohio St. 3d 118, 2004 Ohio 297, 802 N.E. 2d 643, at P. 17. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim R. 52 (B) plain-error analysis. **Consistent with our discussion herein, we emphasize that the syllabus in *Colon I* is confined to the facts in that case.**

*Id.*, at ¶8. (Emphasis added).

The Defendant herein has not advanced any reason, nor cited "multiple errors at the trial" as to why his case would fall under the very narrow holding of *Colon I*, and it is likewise very apparent that pursuant to the non-retroactivity holding of *Colon II* that this Defendant simply cannot, under any circumstances, advance an argument that would affect his convictions.

Based on the foregoing, the Motion before the Court is without merit, and is OVERRULED.

It is so ordered.

 1/13/09.  
Patrick E. Sheeran, Judge

