

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2009-1335

Original Action In Prohibition And Mandamus

Kirk D. Turns
608 East Jenkins Ave
Columbus, Ohio 43207

RELATOR,

V.

Judge Daniel T. Hogan – Franklin County Common Pleas Court
369 South High Street
Columbus, Ohio 43215

Thomas K. Cheney – Court Stenographer, Franklin County Common Pleas Court
369 South High Street.
Columbus, Ohio 43215

RESPONDENTS

Relator's Memorandum in Opposition to Motion to Dismiss

Kirk D. Turns Pro Se
608 East Jenkins Ave.
Columbus, Ohio 43207
614-607-5158

COUNSEL FOR RELATOR

FILED
AUG 20 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Patrick J. Piccininni (0055324)
Asst. Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520

COUNSEL FOR JUDGE DANIEL T. HOGAN, ET AL.

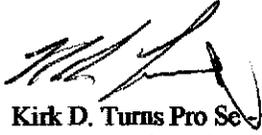
Now comes Kirk D. Turns, Relator, moves that this Honorable Court grant this Action in Prohibition and Mandamus on the grounds that the Relator did not receive proper notification on the Respondents, Motion to Dismiss which was filed on August 10, 2009. The attached supporting memorandum will state the reasons and authorities for this Motion.

MEMORANDUM IN SUPPORT

On July 23, 2009 the Relator, Kirk D. Turns filed an Original Mandamus Action against the Respondents named in this action. (Exhibit 1). On August 10, 2009 the Respondents filed a Motion to Dismiss (Exhibit 2). On August 11, 2009, the Relator receives a copy of the said Motion by U.S. Mail, filed by the Respondents and the Respondents Counsel. The Relator states that the the copy of the said Motion was not properly addressed to the Relator. The Relator further states that the documents in question are addressed to a "fictitious" person, not living at the Relator's Address. The Relator further states that the Respondents and the Respondent's Counsel are attempting to avoid responsibility in providing a copy of the transcripts, involving case no. 04 JU 06 8340. The Respondents under the "color" of their perspective offices, are using their positions of authority to circumvent the due process law that is equally afforded to the Relator and every Citizen of this great State of Ohio. At the time of this request, the Respondents had custody and control of these transcripts and these transcripts and the transcripts in question, are a public record, pursuant to section 149.43 of the Ohio Revised Code. The Respondents and the Respondents Counsel have no authority to keep these records from the Relator (State ex rel. Highlander v. Rudduck 103 Ohio St. 3d 370, 2004-Ohio-4952, 816 N. E. 2d 213 (2004)). The Respondents received a copy of the public records request by hand delivery and a copy of this request was filed in the Franklin County Common Pleas Court involving case no. 04 JU 06 8340 (Exhibit 3). The Respondents Claims are warrantless, baseless, without merit and the actions of the Respondents are with malice and intent.

Accordingly, for these reasons the Relator humbly asks this Honorable Court to grant this Motion, based on the information contained in this Memorandum

Respectfully Submitted,



Kirk D. Turns Pro Se Relator
608 East Jenkins Ave
Columbus, Ohio 43207
614-607-5158

Sworn to, or affirmed and subscribed in my presence this 20 day of Aug, 2009.


Notary Public

My Commission Expires 11-7, 2009



RONNIE L. WINEKA
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 11/7/2012

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served by hand delivery upon the Franklin County Court of Common Pleas, 369 South High Street Columbus, Ohio 43215 and the Franklin County Prosecutor's Office, 375 South High Street Columbus, Ohio 43215, this ___ day of _____ 2009.

EXHIBIT 2
IN THE SUPREME COURT OF OHIO

ORIGINAL

[State ex. rel.] Kirk D. Toms,

Relator,

Case No. 09-1335

v.

Original Action in Mandamus

The Honorable Daniel T. Hogan,
et al.,

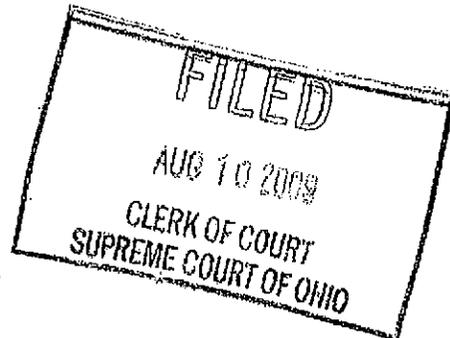
Respondents.

**RESPONDENTS JUDGE DANIEL T. HOGAN, ET AL.'S
MOTION TO DISMISS**

Kirk D. Toms
608 East Jenkins Ave.
Columbus, Ohio 43207
Relator
PRO SE

RON O'BRIEN (0017245)
Prosecuting Attorney
Franklin County, Ohio

Patrick J. Piccininni (0055324)
Asst. Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520
FAX (614) 462-6012
ppiccin@franklincountyohio.gov
COUNSEL FOR JUDGE DANIEL T. HOGAN, ET AL.



RESPONDENT'S MOTION TO DISMISS

Now comes Respondents Judge Daniel T. Hogan, *et al.* (hereinafter "Respondents"), by and through undersigned counsel, and move this Court to dismiss Relator's writ of mandamus for failure to comply with Sup. Ct. R. X(4)(B) or in the alternative under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted. Respondents respectfully request that this Motion to Dismiss be granted in their favor and Relator's writ of mandamus be denied. Respondents' position is more fully set forth in the attached Memorandum in Support and is incorporated herein by reference.

Respectfully submitted,

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



PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
P: (614) 462-3520
F: (614) 462-6012
ppiccin@franklincountyohio.gov
Counsel for Respondents

MEMORANDUM IN SUPPORT

I. Introduction

This action is before the Court on Relator's Petition for a Writ of Mandamus filed July 29, 2009. Relator asks this Court to compel Respondents Judge Daniel T. Hogan and court reporter Thomas K. Cheney to provide a free transcript of proceedings of a July 20, 2009 in which Relator was a criminal defendant. On July 21, 2009, Relator made a public records request for the transcript pursuant to Ohio Rev. Code § 149.43. Respondents denied Relator's request for a free copy of the transcript.

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 Failed to Comply with Supreme Court Practice Rule X(4)(B).

Supreme Court Practice Rule X(4)(B) requires that a complaint be accompanied by a sworn affidavit that attests the Relator has personal knowledge of facts that the Relator could competently testify to that entitle the Relator to the relief sought in the Complaint. Failure to comply with the sworn affidavit requirement of Rule X(4)(B) warrants dismissal

of the action. *State ex rel. Evans v. Blackwell* (2006), 111 Ohio St.3d 437, 2006-Ohio-5439, at ¶31, *State ex rel. Esarco v. Youngstown City Council* (2007), 116 Ohio St.3d 131, 2007-Ohio-5699, at ¶14. A review of the complaint indicates that Relator has failed to attach an affidavit that complies with Rule X(4)(B), therefore a dismissal of Relator's Complaint is warranted.

C. Relator Has No Right to the Relief Prayed For.

In the alternative, Relator has no right to the relief prayed for in his Complaint. 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 Relator has no right to a free copy of a court transcript. Relator made a request for the transcript under the public records statute, Ohio Rev. Code § 149.43. But, "R.C. 149.43 does not require a public-records custodian to provide copies of records free of charge; instead, the Public Records Act requires only that copies of public records be made available at cost." *State ex rel. Call v. Fragale* (2004), 104 Ohio St.3d 276, 2004-Ohio-6589, at ¶6, accord *State ex rel. Call v. Zimmers* (1999), 85 Ohio St.3d 367, 708 N.E.2d 711 (holding that twenty dollar fee to cover the cost of blank cassette tapes allowable under R.C. 149.43)

Pursuant to Ohio Rev. Code § 2301.24, the Franklin County Court of Common Pleas has set a fee for the transcription of a shorthand record. Appellant's public record request may be an attempt at an end-run around paying the court reporter fee; but a public

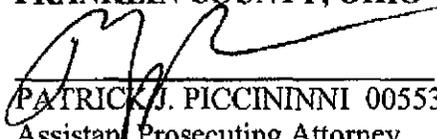
records request for a transcript requires the requestor to pay the full fee of the court reporter, not the cost of photocopies. 2002 Ohio Att.Gen.Ops. No. 02-014. Furthermore, Relator has not alleged that his case is currently pending appellate review which may warrant his receiving a free copy of the transcript. *State ex rel. Call v. Zimmers*, 85 Ohio St. 3d at 368.

III. Conclusion

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

Respectfully submitted,

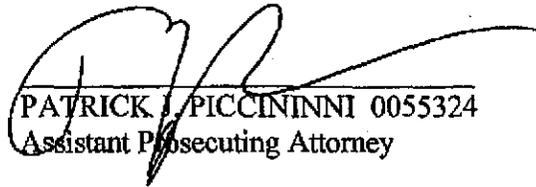
RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO



PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney
ppiccin@franklincountyohio.gov
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520
Fax: (614) 462-6013

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded by regular U.S. mail, postage prepaid, to Kirk D. Toms, Relator *pro se*, at 608 East Jenkins Ave., Columbus, Ohio, 43207, this 10th day of August, 2009.



PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney

57307 - K57

Franklin County Common Pleas Court - Criminal Division
369 South High Street
Columbus Ohio 43215

July 21, 2009

Attn: Honorable Judge Daniel Hogan, Court Stenographer

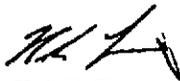
FILED
COMMON PLEAS COURT
FRANKLIN CO OHIO
2009 JUL 21 AM 9:50
CLERK OF COURTS

Dear Sirs,

I send you this letter to serve as a formal request, pursuant to section 149.43 of the Ohio Revised Code, in which I hereby request a copy of the transcripts involving case no. 04 - CR - 5023, dated 7-20-09 in it's entirety.

I thank you for your time and attention in this matter.

Respectfully,



Kirk D. Turns

EXHIBIT I
IN THE SUPREME COURT OF OHIO

Kirk D. Turns
608 East Jenkins Ave
Columbus, Ohio 43207

09-1335

RELATOR,

V.

Judge Daniel T. Hogan – Franklin County Common Pleas Court
369 South High Street
Columbus, Ohio 43215

Thomas K. Cheney – Court Stenographer, Franklin County Common Pleas Court
369 South High Street
Columbus, Ohio 43215

RESPONDENTS

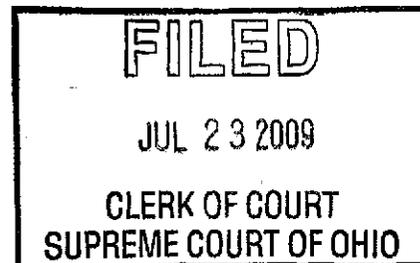
COMPLAINT FOR WRIT OF MANDAMUS

Kirk D. Turns – pro se
608 East Jenkins Ave
Columbus, Ohio 43207
614-607-5158

COUNSEL FOR RELATOR

UNKNOWN

COUNSEL FOR RESPONDENTS



I. STATEMENT OF ISSUES PRESENTED

A. Introduction

1. This is an original action in mandamus
2. Relator **Kirk D. Turns** seeks relief in the form of:
 - a) A Writ of Mandamus compelling respondent, Judge Daniel T. Hogan to honor a formal request to receive a copy of the transcripts in it's entirety, as previously requested. The transcripts in question are dated 7-20-09, involving case no. 04 CR 5023 and,
 - b) A Writ of Mandamus compelling respondent, Thomas K. Cheney to honor a formal request to receive a copy of the transcripts in it's entirety, as previously requested. The transcripts in question are dated 7-20-09, involving case no. 04 CR 5023 and,
 - c) An award of costs and compensation for the Respondent's refusal to comply with a public records request, in violation of the Ohio Public Records Act section 149.43 of the Ohio Revised Code.

B. Parties

3. Relator Kirk D. Turns is a citizen of Ohio and of the United States.
4. Respondents are Judge Daniel T. Hogan, Franklin County Common Pleas Court and Mr. Thomas K. Cheney, Court Stenographer, Franklin County Common Pleas Court.

II. STATEMENT OF THE CASE

Relator filed a written request in the Franklin County Common Pleas Court, for a copy of the Transcripts involving case no. 04 CR 5023. This request was made on or about 7-21-09. This request was made pursuant to section 149.43 of the Ohio Revised Code. (Exhibit 1).

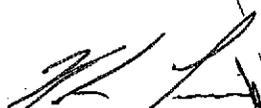
Relator states that the Respondents are attempting to violate the Relators right to access documents involving case no. 04 CR 5023. According to section 149.43 of the Ohio Revised Code, the Respondents have a responsibility to make these and any other documents that are public record, available to anyone who applies by formal request. The Respondents are attempting, under the color of the office in which both Respondent's hold, are denying the Relator, the necessary documents in which the Relator will need to prepare and defend against the criminal charge involving case no. 04 CR 5023.

MEMORANDUM IN SUPPORT

On 7-20-09 at or about 9:00a.m., the Relator, Kirk D. Turns, appeared in the Franklin County Common Pleas Court involving case no. 04 CR 5023, in which Respondent 1, Judge Daniel T. Hogan is presiding and Respondent 2, Thomas K. Cheney is assigned as a Court Stenographer. On 7-21-09 at or about 9:45 a.m., the Relator made a formal request to receive a copy of the transcripts in writing with the Franklin County Common Pleas Court. The request was filed with the Clerk of Courts and the request was properly served upon Respondents 1 & 2. On 7-22-09, at or about 1:35 p.m., Respondent received a telephone call from Respondent 2 stating that the Relator's request would not be honored and that the Relator would have to make this request through defense counsel. Section 149.43 of the Ohio Revised Code allows for any citizen or person to access public records and these records are to be made available upon request. Respondents 1 & 2, under the color of the offices in which both Respondents are sworn to discharge their duties as public servants are attempting to deny the Relator access to the above listed transcripts involving case no. 04 CR 5023.

Accordingly, the Relator prays that this Honorable Court, grant this Writ of Mandamus, based on the information contained in this Statement. The Relator also asks that this Honorable Court award the Relator compensation for the Respondents refusal to comply with a public records request.

Respectfully Submitted,



Kirk D. Turns Pro Se - Relator
608 East Jenkins Ave
Columbus, Ohio 43207
614-607-5158

Sworn to, or affirmed and subscribed in my presence this 23 day of JULY, 2009.



Notary Public



JOEL M. COOPER
Notary Public, State of Ohio
My Commission Expires 07-13-2011

My Commission Expires 7/13, 2011

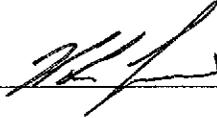
IN THE SUPREME COURT OF OHIO

Affidavit of Indigency

I, Kirk D. Turns, do hereby state that I am without the necessary funds to pay the costs of this request/action for the following reason(s):

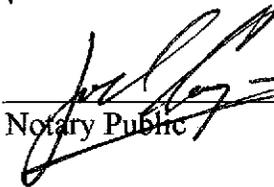
I am unable to pay the costs of the filing of this request/action due to being unemployed.

Pursuant to Rule XV, section 3, of the rules of practice of the Supreme Court of Ohio and pursuant to section 2503.17 of the Ohio Revised Code. I am requesting that the filing fees, security deposit and other fees if applicable, be waived.

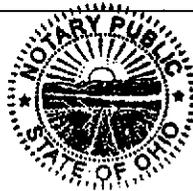


Affiant

Sworn to, or affirmed and subscribed in my presence this 23 day of JULY, 2009



Notary Public



JOEL M. COOPER
Notary Public, State of Ohio
My Commission Expires 07-13-2011

My Commission Expires: 7/13/11

ORIGINAL

IN THE SUPREME COURT OF OHIO

[State ex. rel.] Kirk D. Toms,

Relator,

Case No. 09-1335

v.

Original Action in Mandamus

The Honorable Daniel T. Hogan,
et al,

Respondents.

**RESPONDENTS JUDGE DANIEL T. HOGAN, ET AL.'S
MOTION TO DISMISS**

Kirk D. Toms
608 East Jenkins Ave.
Columbus, Ohio 43207
Relator
PRO SE

RON O'BRIEN (0017245)
Prosecuting Attorney
Franklin County, Ohio

Patrick J. Piccininni (0055324)
Asst. Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520
FAX (614) 462-6012
ppiccin@franklincountyohio.gov
COUNSEL FOR JUDGE DANIEL T. HOGAN, ET AL.

FILED
AUG 10 2009
CLERK OF COURT
SUPREME COURT OF OHIO

RESPONDENT'S MOTION TO DISMISS

Now comes Respondents Judge Daniel T. Hogan, *et al.* (hereinafter "Respondents"), by and through undersigned counsel, and move this Court to dismiss Relator's writ of mandamus for failure to comply with Sup. Ct. R. X(4)(B) or in the alternative under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted. Respondents respectfully request that this Motion to Dismiss be granted in their favor and Relator's writ of mandamus be denied. Respondents' position is more fully set forth in the attached Memorandum in Support and is incorporated herein by reference.

Respectfully submitted,

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



PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
P: (614) 462-3520
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Counsel for Respondents

MEMORANDUM IN SUPPORT

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Supreme Court Practice Rule X(4)(B) requires that a complaint be accompanied by a sworn affidavit that attests the Relator has personal knowledge of facts that the Relator could competently testify to that entitle the Relator to the relief sought in the Complaint. Failure to comply with the sworn affidavit requirement of Rule X(4)(B) warrants dismissal

of the action. *State ex rel. Evans v. Blackwell* (2006), 111 Ohio St.3d 437, 2006-Ohio-5439, at ¶31, *State ex rel. Esarco v. Youngstown City Council* (2007), 116 Ohio St.3d 131, 2007-Ohio-5699, at ¶14. A review of the complaint indicates that Relator has failed to attach an affidavit that complies with Rule X(4)(B), therefore a dismissal of Relator's Complaint is warranted.

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In the alternative, Relator has no right to the relief prayed for in his Complaint. 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.

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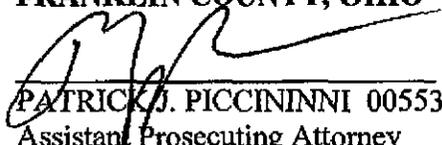
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III. Conclusion

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**


PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney
ppiccin@franklincountyohio.gov
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520
Fax: (614) 462-6013

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded by regular U.S. mail, postage prepaid, to Kirk D. Toms, Relator *pro se*, at 608 East Jenkins Ave., Columbus, Ohio, 43207, this 10th day of August, 2009.

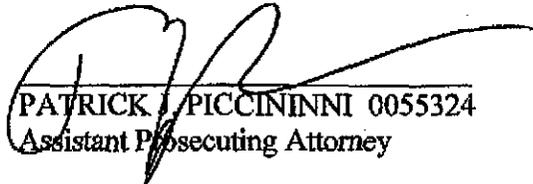

PATRICK J. PICCININNI 0055324
Assistant Prosecuting Attorney

EXHIBIT 3

57307 - K57

Franklin County Common Pleas Court - Criminal Division
369 South High Street
Columbus Ohio 43215

July 21, 2009

Attn: Honorable Judge Daniel Hogan, Court Stenographer

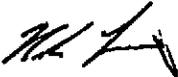
FILED
COMMON PLEAS COURT
FRANKLIN CO OHIO
2009 JUL 21 AM 9:50
CLERK OF COURTS

Dear Sirs,

I send you this letter to serve as a formal request, pursuant to section 149.43 of the Ohio Revised Code, in which I hereby request a copy of the transcripts involving case no. 04 - CR - 5023, dated 7-20-09 in it's entirety.

I thank you for your time and attention in this matter.

Respectfully,


Kirk D. Turns

cvb