

**IN THE SUPREME COURT OF OHIO**

MARIO MONTGOMERY,

Relator,

Case No. 12-0886

v.

Original Action in Mandamus

STATE OF OHIO;  
FRANKLIN COUNTY  
COMMON PLEAS COURT

Respondent.

---

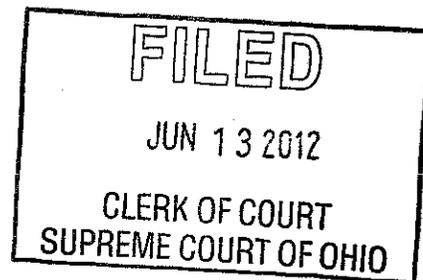
**RESPONDENT'S MOTION TO DISMISS**

---

Mario Montgomery, *Pro Se*  
Ross Correctional Institution  
P.O. Box 7010  
Chillicothe, Ohio 45601

Ron O'Brien (0017245)  
Prosecuting Attorney  
Franklin County, Ohio

Jeffrey Rogers (0069399)  
Assistant Prosecuting Attorney  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
614-525-3520 (Phone);  
614-525-6012 (Fax)  
[jcrogers@franklincountyohio.gov](mailto:jcrogers@franklincountyohio.gov)  
*Counsel for Respondent*

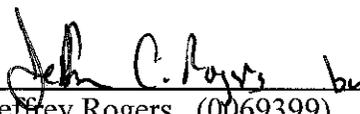
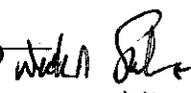


**RESPONDENT'S MOTION TO DISMISS PURSUANT TO CIV. R. 12(B)6**

Respondent, the Franklin County Court of Common Pleas, respectfully moves this Court to dismiss this claim under Civ. R. 12(B)(6). This motion is made upon the ground that Relator has not stated a claim upon which relief can be granted.

Respectfully submitted,

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

  
Jeffrey Rogers (0069399) *by*   
Assistant Prosecuting Attorney *per A.H. 6-15-02*  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
614-525-3520 (Phone);  
614-525-6012 (Fax)  
[jcrogers@franklincountyohio.gov](mailto:jcrogers@franklincountyohio.gov)  
*Counsel for Respondent*

## MEMORANDUM IN SUPPORT

### **I. Facts**

On July 24, 1996, Relator was sentenced for convictions on the following counts: three counts of Felonious Assault with firearm specifications, felonies of the second degree; one count of Aggravated Robbery with a firearm specification, a felony of the first degree; one count of Improperly Discharging a Firearm at or into a Habitation, a felony of the third degree; and one count of Having a Weapon while Under Disability, a felony of the fourth degree.

Over a year later, on July 29, 1997, Relator filed a Motion for Production of Trial Transcripts at the State's Expense, but did not file a Notice of Appeal in accordance with appellate procedure. Relator's motion was denied. On March 17, Relator filed another Motion for Production of Trial Transcripts at the State's Expense. On April 20, 1999, that motion was granted. Subsequently, Relator filed a Notice of Appeal and a Motion to File a Delayed Appeal in the Tenth District Court of Appeals. The motion was denied on August 12, 1999 due to Relator's inability to show just cause for the delay. Relator filed a Application for Reopening on October 10, 2000. That application was denied. On January 8, 2001, Relator filed a Notice of Appeal with the Supreme Court of Ohio. The Supreme Court of Ohio dismissed that appeal on February 14, 2001 for not involving any substantial constitutional question.

Now, Relator, over 13 years after his second Motion for Production of Trial Transcripts was granted, seeks to have the entry granting that motion carried out.

## **II. 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. In order for a 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; *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143.

## **III. Law and Argument**

### **A. Relator has not named a proper respondent.**

Relator has named as Respondent, "Franklin County Common Pleas Court," a non-entity which cannot provide the relief requested. A court is a place where a proper officer or officers administer justice through use of judicial power. *Malone v. Court of Common Pleas* (1975), 45 Ohio St.2d 245, citing *Todd v. United States* (1895), 158 U.S. 278, 284; *State ex rel. Cleveland Municipal Court v. Cleveland City Council* (1973), 34 Ohio St. 2d 120, 121. Absent express statutory authority, a court can neither sue nor be sued in its own right. *State ex rel. Cleveland Municipal Court v. Cleveland City Council* (1973), 34 Ohio St.2d 120, 296 N.E.2d 544. Relator does not name a "proper officer or officers" instead naming the entire "Franklin County Common Pleas Court". Thus, the action against Respondent "Franklin County Common Pleas Court" should be dismissed.

### **B. Relator's Action in Mandamus is unfounded.**

Issuance of Mandamus in this case is not proper. Mandamus should be only if Relator shows (1) that Relator has a clear legal right to the relief requested; (2) that

Respondent is under a clear legal duty to perform the requested act; and (3) that Relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Ney v. Niehaus*, 33 Ohio St. 3d 118, 118-19, 515 N.E.2d 914, 916 (1987).

In the case *sub judice*, Respondent is under no legal duty to perform the act requested by Relator. The Franklin County Court of Common Pleas is under no obligation to provide trial transcripts to Relator. As mentioned above, the court is a place where justice is administered judicially, and therefore lacks the capacity to comply with a court order. Judge Miller, as an officer of the court, fulfilled her duty by ruling on Relator's motion. Relator has provided no support for the argument that he has named a Respondent who is under a clear legal duty to perform the requested act.

Furthermore, Relator has not exhausted all plain and adequate remedies in the ordinary course of law. On May 12, 2008, Relator filed a motion in the criminal trial court seeking to have the order for trial transcripts enforced. Judge Frye has not yet ruled on that motion. Ohio courts have recognized the trial court's ability to provide a remedy in this sort of situation. "To the extent that the court reporter has willfully not fulfilled his obligations, [Relator] may file a motion to show cause with the trial court." *State ex rel. Hall v. Watkins*, 126 Ohio App. 3d 389, 391, 710 N.E.2d 723, 724 (1998). Until and unless Judge Frye makes a ruling that's not in Relator's favor on that motion, Relator has not exhausted all plain remedies of law.

A Writ of Mandamus is only proper in a limited set of circumstances. As Relator has failed to fulfill two of the three requirements for such a writ to be issued. Therefore, Respondent respectfully requests that this action be dismissed as it lacks the proper support for an Action in Mandamus.

**C. This action is time-barred.**

Relator is bringing this Action in Mandamus outside of the time allowed to bring such an action under the relevant statute of limitations. “Mandamus is now held to be a civil action and may therefore be subject to the statute of limitations, if there be facts to show that the statute operates.” *State ex rel. Delaney v. Holmes*, 5 Ohio App. 1 aff’d, 93 Ohio St. 480, 113 N.E. 1070 (1915). The facts of this case, which stretch over a time span of approximately fifteen years, give credence to the statute’s application.

Since an Action in Mandamus does not have a specific applicable statute of limitations, the underlying substance of the action needs to be examined to determine the appropriate statute.

Unless a particular statute contains a limitation, a civil action must be commenced within a period prescribed in R.C. 2305.03 to 2305.22. R.C. 2305.03. Neither R.C. Chapter 163 nor Chapter 2731 (mandamus) contains a statute of limitations. Therefore, we must examine R.C. 2305.03 to 2305.22 to determine the most appropriate limitation to apply in this case.

*State ex rel. R.T.G., Inc. v. State*, 2002-Ohio-6716, 98 Ohio St. 3d 1, 6, 780 N.E.2d 998, 1004.

Since Relator’s action does not fit into any of the action-specific sections, R.C. § 2305.14 is the applicable section, as it is geared towards actions seeking “other relief”. That section states that such an action must be brought “within ten years after the cause thereof accrued.” R.C. § 2305.14. The cause of Relator’s action is the alleged failure to carry out Judge Miller’s court order. Judge Miller’s entry was filed on April 20, 1999. The failure to execute that order, the cause of this action, could fairly be deemed to have accrued shortly thereafter. Even with being lenient in considering when the failure to execute that court order occurred, such as allowing a year for the order to be carried out,

the cause still would have accrued more than ten years prior to the institution of the action *sub judice*. Therefore, this action is time-barred pursuant to R.C. § 2305.14.

**D. Relator is not in compliance with Ohio Rev. Code § 2969.25.**

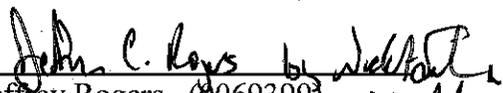
R.C. § 2969.25(C) requires an inmate who files a civil action seeking waiver of fees to provide an affidavit of indigency. R.C. § 2969.25. Although Relator has provided an affidavit, it is incomplete and not in accordance with the requirements of R.C. § 2969.25(C)(1). That subsection requires a statement that sets forth the balance in the inmate's account for the last six months, as certified by the institutional cashier. R.C. § 2969.25. Relator has failed to provide that information, and thus is not in compliance with R.C. § 2969.25.

**IV. Conclusion**

For all the foregoing reasons, Relator has failed to state a claim upon which relief can be granted. Therefore, Relator's Complaint for a Writ of Mandamus should be denied, and this matter should be dismissed.

Respectfully submitted,

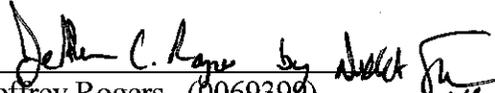
**RON O'BRIEN  
PROSECUTING ATTORNEY  
FRANKLIN COUNTY, OHIO**

  
Jeffrey Rogers (0069399) *per Adv. 6-13-12*  
Assistant Prosecuting Attorney  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
614-525-3520 (Phone);  
614-525-6012 (Fax)  
[jcrogers@franklincountyohio.gov](mailto:jcrogers@franklincountyohio.gov)  
*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via Regular U.S. mail on June 13, 2012, upon the following:

Mario Montgomery  
Ross Correctional Institution  
P.O. Box 7010  
Chillicothe, Ohio 45601

  
Jeffrey Rogers (0069399)  
Assistant Prosecuting Attorney  
per A.M.  
6-13-12