

ORIGINAL

IN THE SUPREME COURT OF OHIO

DONALD TURNER,

Relator-Appellant

VS.

BRIAN J. CORRIGAN, JUDGE,

Respondent-Appellee

Case No. 13-1811

ON APPEAL AS OF RIGHT FROM THE  
CUYAHOGA COUNTY COURT OF APPEALS,  
EIGHTH APPELLATE DISTRICT

Court Of Appeals  
Case No. 100102

MERIT BRIEF OF APPELLANT DONALD TURNER

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TABLE OF CONTENTS

	<u>Pages</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS .....	iii, iv, v
ARGUMENT .....	1 to 10
 <u>PROPOSITION OF LAW NO. 1</u>	
THE EIGHTH DISTRICT COURT OF APPEALS DID ERR IN DENYING MANDAMUS RELIEF AS TO APPELLANT'S CLAIM INVOLVING THE FAILURE OF THE TRIAL COURT JUDGE TO IMPOSE SENTENCE AS REQUIRED BY LAW BASED ON A FINDING THAT APPELLANT'S CLAIM WAS MOOT BECAUSE HE HAD ALREADY COMPLETED HIS SENTENCE.	1
 <u>PROPOSITION OF LAW NO. 2</u>	
THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN GRANTING RESPONDENT BRIAN J. CORRIGAN, JUDGE, REQUEST FOR SUMMARY JUDGMENT WHICH WAS CONTRARY TO LAW.	2
 <u>PROPOSITION OF LAW NO. 3</u>	
THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DISMISSING APPELLANT'S MANDAMUS ACTION BASED UPON A FINDING THAT APPELLANT FAIL TO PROVIDE AN AFFIDAVIT AS REQUIRED BY LOCAL APPELLATE RULE 45(B)(1)(a).	5
 <u>PROPOSITION OF LAW NO. 4</u>	
THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DISMISSING APPELLANT'S MANDAMUS PETITION BASED ON A FINDING THAT APPELLANT HAD ANOTHER ADEQUATE REMEDY BY MEANS OF DIRECT APPEAL AND HE HAD ALREADY UNSUCCESSFULLY SOUGHT THE SAME RELIEF THROUGH A MANDAMUS PETITION DISMISSED BY THE OHIO SUPREME COURT.	6
CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	11
APPENDIX .....	12
OPINION AND JUDGMENT ENTRY OF THE EIGHTH DISTRICT COURT OF APPEALS, CUYAHOGA COUNTY, OHIO, CASE NO. 100102 (Oct. 22, 2013) .	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Pages</u>
Citibank, N.A. v. Siciliano, 2004-Ohio-1528 .....	1
Cuyahoga County Board Of Elections, 150 Ohio App. 3d 61 (2002)...	1
Grava v. Parkman Twp., 93 Ohio St. 3d 379 (1995) .....	9
Progressive Max Insurance Co. v. Grange Mut. Case Co., 2003-Ohio-4564 .....	1
State v. Armstrong, 2008-Ohio-92184 .....	3
State v. Bolton, 173 Ohio App. 3d 185 (2001) .....	3
State v. Goudlock, 2008-Ohio-2938 .....	3
State v. Payne, 114 Ohio St. 3d 503 (2007) .....	2
State v. Simpkins, 117 Ohio St. 3d 420 .....	2
State v. Turner, 2007-Ohio-5732 .....	2
State v. Turner, 2008-Ohio-6648 .....	4,7,8
State v. Turner, 2009-Ohio-2045 .....	7
State v. Turner, 121 Ohio St. 3d 1476 .....	8
State ex rel. Madison v. Cotner, 66 Ohio St. 2d 448 (1981) .....	5,6
State ex rel. Millington v. Weir, 60 Ohio App. 2d 348 (1978) .....	5
State ex rel. Sharif v. McDonnell, 91 Ohio St. 3d 46 (2001) .....	2 &3,7
Turner v. Brunsman, 2009-Ohio-5588 .....	8

CONSTITUTIONAL PROVISIONS: STATUTES AND OTHER AUTHORITIES

R.C.2731.04 .....	6
R.C.2967.28 .....	2
Rules 11 of the Ohio Rules Of Civil Procedure .....	5
Rule 56 of the Ohio Rules Of Civil Procedure .....	1
Eighth District Court Of Appeals, Cuahoga County, Ohio, Local Appellate Rule 45 .....	5

## STATEMENT OF FACTS

Appellant, Donald Turner, was arrested on June 3, 2004. He was subsequently charged and indicted in a one (1) count Indictment for second degree felony robbery in violation of R.C.2911.02(A)(2). The Indictment was returned by the Cuyahoga County Common Pleas Court on June 15, 2004. Criminal Case No. CR-453056-A on the docket of the Cuyahoga County Common Pleas Court. The matter proceeded to jury trial on October 12, 2006, and on October 18, 2006, the jury returned a verdict finding Appellant Turner guilty as charged as to robbery as charged in the Indictment. The Cuyahoga County Common Pleas Court immediately imposed a definite five (5) year prison sentence on October 18, 2006. A timely appeal was filed in the Eighth District Court of Appeals, Cuyahoga County, Ohio, Case No. 88958, 2007-Ohio-5732. On October 25, 2007, the court of appeals affirmed the conviction entered in the court below but held the five (5) year definite prison sentence imposed by the lower court to be void and ordered it vacated. The cause was further remanded to the lower court for resentencing.

On May 29, 2008, Appellant Turner appeared before the Cuyahoga County Common Pleas Court for resentencing. However, the trial court failed to enter a final judgment and to impose any statutory sentence as mandated by R.C.2929.14; Ohio Criminal Rule 32(C); and as ordered on remand by the Eighth District Court of Appeals, Case No. 88958, 2007-Ohio-5732. Instead, the trial court treated the original sentence held to be void and ordered vacated by the court of appeals as still valid and simply "amended" the now void and vacated original sentence to include three (3) years of post release control (PRC). Appellant Turner was then ordered to be transported and conveyed into the custody of the Ohio Department of Rehabilitation and Correction (DRC).

The trial court failure to enter any valid final judgment of conviction and to impose a statutory sentence as mandated under Ohio law and as ordered on reversal and remand by the Eighth District Court Of Appeals. Further, the attempt to "amend" the now void and vacated original sentence to include three (3) years of postrelease control (PRC) in effect amounted to an attempt to amend nothing as that which no longer exist for having been held to be void and ordered vacated by the Eighth District Court Of Appeals. **State v. Turner, 2008-Ohio-6648.**

Appellant Turner in effect being unlawfully imprisoned with no valid final judgment entry which must by law include a sentence as mandated under Ohio law filed a petition for a writ of habeas corpus in the Twelfth District Court Of Appeals, Warren County, Ohio, Case No. CA2009-02-021, on February 17, 2009.

On or about March 10, 2009, Appellee Timothy Brunsman, Warden, filed a motion to dismiss the habeas corpus action which was granted by the Twelfth District Court Of Appeals on May 6, 2009.

Appellant Turner appealed the dismissal of the habeas corpus action to the Ohio Supreme Court. The appeal was subsequently dismissed by the Ohio Supreme Court in **Turner v. Brunsman, 2009-Ohio-5588**, where the Ohio Supreme Court held if Turner's claims were true and the trial court refuses to issue a revised sentencing entry [SIC], he may compel the court to act through an action for a writ of mandamus or a writ of procedendo.

On November 5, 2012, Appellant filed a petition for a writ of mandamus in the Ohio Supreme Court raising his unlawful sentencing claim (i.e., the lack thereof). Respondents filed a motion to dismiss which was granted by the Ohio Supreme Court on January 23, 2013, without addressing and ruling on the merits of his mandamus claims.

Appellant relying in part upon the Ohio Supreme Court ruling in his habeas corpus action that his sentencing claim may be actionable via writ of mandamus so refiled his petition for a writ of mandamus in the Eighth District Court Of Appeals. *Turner v. Corrigan*, Judge, Case No. 100102. However, the court of appeals granted Respondent's request for summary judgment and dismissed Appellant's mandamus petition and denying him relief as to his mandamus claim on October 22, 2013.

Because Appellant disagrees with the Opinion and Judgment entered by the Eighth District Court Of Appeals granting Respondent Judge Corrigan's request for summary judgment and improperly dismissing his petition for a writ of mandamus he brings this appeal of right to the Ohio Supreme Court.

ARGUMENT

PROPOSITION OF LAW NO. 1

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN GRANTING RESPONDENT BRIAN J. CORRIGAN, JUDGE, REQUEST FOR SUMMARY JUDGMENT WHICH WAS CONTRARY TO LAW.

Although Respondent Judge Corrigan's request for summary judgment failed on its merits for reasons set forth by Appellant in his motion in opposition filed in the court of appeals, however, even more importantly the request for summary judgment fail to comply with the legal mandates as set forth under Rule 56(c) of the Ohio Rules Of Civil Procedure.

Specifically, Respondent Judge Corrigan's request for summary judgment did not include any evidentiary materials. No supporting affidavits. No claims that no genuine issue as to any material fact exist to be decided by the court of appeals and there was no claims that the moving party is entitled to judgment as a matter of law. *Citibank, N.A. v. Siciliano*, 2004-Ohio-1528 and *Cuyahoha County Board Of Elections*, 150 Ohio App. 3d 61 (2002).

The request for summary judgment was only supported with copies of Appellant's prior filings regarding a previously filed mandamus petition in the Ohio Supreme Court, which fails to satisfy the legal requirements set forth under Rule 56(c) of the Ohio Rules Of Civil Procedure.

Clearly, the request for summary judgment was deficient under the law and it should have therefore not been granted. *Progressive Max Insurance Co. v. Grange Mut. Case. Co.*, 2003-Ohio-4564. The Supreme Court Of Ohio should reverse the court of appeals decision granting the request for summary judgment as the request is not in accords with law.

PROPOSITION OF LAW NO. 2

THE EIGHTH DISTRICT COURT OF APPEALS DID ERR IN DENYING MANDAMUS RELIEF AS TO APPELLANT'S CLAIM INVOLVING THE FAILURE OF THE TRIAL COURT JUDGE TO IMPOSE SENTENCE AS REQUIRED BY LAW BASED ON A FINDING THAT APPELLANT'S CLAIM WAS MOOT BECAUSE HE HAD ALREADY COMPLETED HIS SENTENCE.

In Appellant's sole claim for mandamus relief filed in the Eighth District Court Of Appeals, Appellant sought enforcement of the court of appeals order handed down on direct appeal vacating Appellant's sentence as being void and further ordering the trial court or Respondent Brian J. Corrigan, Judge, to resentence Appellant *de novo* because he was not properly advised as to the particulars of post-release control (PRC) per R.C.2967.28 when the original sentence was imposed. *State v. Turner*, 2007-Ohio-5732 and *State v. Simpkins*, 117 Ohio St. 3d 420 (2008).

Upon the purported *de novo* resentencing no lawful or statutory sentence was imposed as required by law and by order of the court of appeals. Instead, the trial court or Respondent Judge Corrigan thought he would salvage the original sentence and to amend the now void and vacated nonexistent sentence to include three (3) years postrelease control (PRC). However, as Appellant pointed out in his mandamus petition filed in the court of appeals. A sentence held to be void by a reviewing court is void *ab initio*. *State v. Payne*, 114 Ohio St. 3d 503 (2007).

Not only is there no basis in law for a trial court to salvage a sentence which has been vacated as void by the reviewing court on direct appeal but the trial court may not disobey nor refuse to adhere to the appellate mandate on remand from the court of appeals. *State*

ex rel. Sharif v. McDonnell, 91 Ohio St. 3d 46, 47-48 (2001). Further, when a sentence is reversed on appeal the entire sentence is reversed, not just a portion thereof. State v. Bolton, 173 Ohio App. 3d 185 (2001).

Again, the original sentence imposed by the trial court was vacated as void on appeal and therefore nonexistent for being held to be void -- meaning it cannot by law be salvaged or amended to include PRC. Nor is it possible for Appellant to have completed serving the purported sentence. Appellant asserts he cannot complete or serve that which is nonexistent for voidness and because the trial court never imposed any sentence during the purported de novo resentencing he is without any lawful sentence to serve and complete. So the court of appeals did err in finding Appellant was not entitled to mandamus relief because he was suppose to have completed his sentence.

The only thing imposed upon Appellant during the purported de novo resentencing was three (3) years PRC. No sentence was imposed whatsoever. The Eighth District Court Of Appeals having held when a sentence is vacated as void on appeal and upon remand for de novo resentencing the trial court only imposes PRC then the purported PRC sentence is also void. State v. Armstrong, 2008-Ohio-92184 and State v. Goudlock, 2008-Ohio-2938.

Here Appellant never did receive the relief ordered by the court of appeals -- meaning that justice have not been served as ordered by the court of appeals. Though Appellant attempted an appeal to the Eighth District Court Of Appeals concerning the trial court failure

to impose sentence and then amending the void and nonexistent original sentence to include three (3) years postrelease control, the appeal was dismissed for failure to transmit a transcript. *State v. Turner*, 2008-Ohio-6648. Because Appellant has now been foreclosed to taking appeal he submits that his sentencing claim is appropriate to be raised by means of a petition for the extraordinary writ of mandamus as justice and the relief as ordered by the court of appeals demands.

The court of appeals did err in ¶. 4, of its judgment denying Appellant 's request based on a finding that Appellant's request for mandamus relief was moot because he had already completed his sentence. The Ohio Supreme Court should reverse as to this finding and the dismissal of Appellant's mandamus action and grant him the mandamus relief which he sought in the Eighth District Court Of Appeals.

PROPOSITION OF LAW NO. 3

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DISMISSING APPELLANT'S MANDAMUS ACTION BASED UPON A FINDING THAT APPELLANT FAIL TO PROVIDE AN AFFIDAVIT AS REQUIRED BY LOCAL APPELLANT RULE 45(B)(1)(a).

First of all, Appellant states when he drafted and filed his petition for a writ of mandamus in the Eighth District Court Of Appeals he verified his entire complaint by affidavit. That is his complaint for a writ of mandamus containing the statements of fact and specifying the details of his claim. Contrary to the court of appeals erroneous findings there is nothing within the court of appeals Local Appellate Rule 45(B)(1)(a) prohibiting a single affidavit verifying both the statements of fact and specifying the details of his claims. The statements of fact and specifying the details of the claims are not required by the aforesaid Local Rule to be set forth separately and for each to be separately verified by affidavit. Further, an affidavit verifying the contents of a mandamus petition (i.e., complaint containing the statements of fact and specifying the details of the claims) comports with the requirements of the court of appeals' Local Appellate Rule 45(B)(1)(a).

In any event, such verification by means of affidavit specifying the details of the claims and/or complaint is contrary to the ruling handed down by the Ohio Supreme Court and other reviewing appellate courts. *State ex rel. Madison v. Cotner*, 66 Ohio St. 2d 448 (1981) and *State ex rel. Millington v. Weir*, 60 Ohio App. 2d 348 (1978) cited within. It should be noted that in *Millington v. Weir*, the reviewing court held that a reviewing court (i.e., court of appeals) vested with constitutional authority must adhere to the legal dictates of Ohio Civil Rule 11 and not require that pleadings be verified or

accompanied by affidavit. The requirement that pleadings be verified by affidavit per R.C.2731.04 was struck down by the Ohio Supreme Court in *State ex rel. Madison v. Cotner*, 66 Ohio St. 2d 448 (1981). The Eighth District Court of Appeals an inferior and subordinate authority cannot implement a Local Rule which in effect countermand and supercedes the controlling decisions of the Ohio Supreme Court. In effect requiring that Appellant's pleadings be verified by affidavit despite any ruling made to the contrary by the Ohio Supreme Court. See ¶6., of the court of appeals' decision dismissing Appellant's mandamus petition for failure to verify his pleading by affidavit. The Ohio Supreme Court should therefore reverse as this finding made by the court of appeals and set it aside.

PROPOSITION OF LAW NO. 4

THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DISMISSING APPELLANT'S MANDAMUS PETITION BASED ON A FINDING THAT APPELLANT HAD ANOTHER ADEQUATE REMEDY BY MEANS OF DIRECT APPEAL AND THAT HE HAD ALREADY UNSUCCESSFULLY SOUGHT RELIEF THROUGH A MANDAMUS PETITION DISMISSED BY THE OHIO SUPREME COURT.

Contrary to the court of appeals finding in ¶8., of the court of appeals' Opinion and Judgment dismissing Appellant's mandamus petition, Appellant submits that his mandamus petition should not have been dismissed by the court of appeals because he had already attempted to pursue a direct appeal and he is now foreclosed to pursuing this remedy for a second time. Appellant having attempted to pursue a direct appeal which was dismissed by the court of appeals for failure to transmit a transcript. *State v. Turner*, 2008-Ohio-6648 and *State v. Turner*, 2009-Ohio-2045. Appellant was not able to obtain a copy of the transcript until two (2) years later.

In any event, under Ohio law Appellant is afforded only one (1) appeal of right. Further, any attempt to pursue a second direct appeal would be subject to bar under the doctrine of *res judicata*. *State ex rel. Sharif v. McDonnell*, 91 Ohio St. 3d 46 (2001). So, clearly, the court of appeals has erred in finding that Appellant had another legal remedy by way of direct appeal. The Ohio Supreme Court should therefore reverse the court of appeals' decision finding that Appellant had another legal remedy by way of direct appeal.

Next, the court of appeals compounded its' error and decision to dismiss Appellant's mandamus petition based on a finding that he had previously sought the same relief in a complaint (for a writ of mandamus) that had been dismissed by the Ohio Supreme Court.

Appellee Brian J. Corrigan, Judge, contends in his request for summary judgment filed in the court of appeals that because Appellant had attempted to file a duplicate action seeking the same relief in the Ohio Supreme Court as he was seeking in the court of appeals then the court of appeals should dismiss the duplicate mandamus petition as being barred under the doctrine of res judicata. The court of appeals has evidently dismissed the mandamus petition based thereupon.

However, contrary to the above Appellant states he has unsuccessfully pursued relief for his mandamus claim by way of direct appeal. *State v. Turner*, 2008-Ohio-6648 and *State v. Turner*, 121 Ohio St. 3d 1476. That he has also sought to no avail habeas corpus relief. *Turner v. Brunsman, Warden*, 2009-Ohio-5588, where the Ohio Supreme Court stated in dismissing his habeas corpus action "If as Turner claims, the trial court refuses to issue a revised sentencing entry, he may compel the court to act through an action for a writ of mandamus or a writ of procedendo".

Appellant having pursued relief for his unlawful sentencing claim by way of direct appeal and habeas corpus and then being advised by the Ohio Supreme Court that he may pursue relief by means of a writ of mandamus or a writ of procedendo. However, it now appears that none of these legal remedies are practicable nor accessible as a means of seeking redress concerning his unlawful sentencing claim. By definition mandamus relief is suppose to be available where no adequate legal remedy is available for seeking redress concerning a valid legal claim for relief. Thus, if Appellant is to be foreclosed from seeking mandamus relief then he is virtually without

any legal remedy in which he may avail himself.

As to Appellee Judge Corrigan's false contention in the court of appeals claiming that Appellant's mandamus petition represent a duplicate complaint previously filed in the Ohio Supreme Court and the cause is therefore barred under the doctrine of *res judicata* is devoid of merit and the aforesaid finding should therefore be reversed and set aside for reasons as follow:

Although Appellant did attempt to raise his mandamus claim in the Ohio Supreme Court prior to seeking such relief in the court of appeals, the Ohio Supreme Court dismissed his mandamus petition without hearing and without rendering an Opinion and final judgment as to the merits of his mandamus claim. The Ohio Supreme Court has been clear and unequivocal in stating that only a valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was subject matter of previous action. *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379,381-382 (1995). The Grava Court further indicated that such claims where no valid final judgment has been rendered are not subject to bar under the doctrine of *res judicata*. Grava at 382.

Accordingly, the court of appeals' finding and decision that Appellant's mandamus petition and claim represent a duplicate complaint previously filed in the Ohio Supreme Court and the cause is therefore barred under the doctrine of *res judicata* must be reversed and set aside by the Ohio Supreme Court.

CONCLUSION

Based on the foregoing reasons and legal authorities cited Appellant Turner respectfully request that the court of appeals' decision to dismiss his mandamus petition and grant Respondent's Judge Corrigan's request for summary judgment be reversed and set aside. It is further requested that the Ohio Supreme Court grant the requested relief as to each of the four (4) proposition of law raised herein.

It is so prayed.

Respectfully Submitted



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing merit brief of Appellant Donald Turner has been forwarded to Timothy J. McGinty, Cuyahoga County Prosecutor, c/o James E. Moss, Assistant County Prosecutor, Justice Center Complex, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113. attorney for Respondent-Appellee Brian J. Corrigan, Judge, this 12<sup>th</sup> day of December, 2013.



DONALD TURNER

#514-553

PRO SE

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A P P E N D I X

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OCT 22 2013

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 100102

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STATE OF OHIO, EX REL.  
DONALD TURNER

RELATOR

vs.

BRIAN J. CORRIGAN, JUDGE

RESPONDENT

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**JUDGMENT:  
WRIT DENIED**

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Writ of Mandamus  
Motion No. 467276  
Order No. 468813

RELEASE DATE: October 22, 2013



{¶1} Relator, Donald Turner, commenced this mandamus action against the respondent, Judge Brian J. Corrigan, seeking to compel him to conduct a de novo resentencing hearing in *State v. Turner*, Cuyahoga C.P. No. CR-453056-A, pursuant to *State v. Turner*, 8th Dist. Cuyahoga No. 88958, 2007-Ohio-5732 ("*Turner I*"). Respondent has moved for summary judgment based on a pleading defect and pursuant to the doctrine of res judicata and mootness. Respondent submitted copies of relator's petition for writ of mandamus that was filed in the Ohio Supreme Court on November 5, 2012, respondent's motion to dismiss that action, and the Ohio Supreme Court's entry of dismissal filed January 23, 2013. Turner has opposed the summary judgment motion. For the reasons that follow, we grant respondent's motion for summary judgment and deny Turner's petition for a writ of mandamus.

{¶2} Turner was convicted of robbery in 2006, and the trial court's original sentencing entry was journalized on October 20, 2006. Turner appealed and this court affirmed his conviction but remanded the matter for a new sentencing hearing because the trial court had not properly advised him of postrelease control. *Turner I*, 2007-Ohio-5732, ¶ 57.

{¶3} On remand, the trial court conducted further proceedings and issued an entry that was journalized on May 30, 2008. Turner again appealed. *State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648 ("*Turner II*"). During

the pendency of the appeal in *Turner II*, this court issued a limited remand order  
directing the trial court to execute a sentencing entry that disposed of all of the counts in the indictment and included a sentence and the means of conviction. The court issued a new sentencing entry on November 11, 2012, which was made part of the appellate record in *Turner II*. In his second assignment of error in *Turner II*, Turner alleged that the trial court had failed to impose any statutorily mandated sentence. That assignment of error was overruled because Turner had failed to include a copy of the sentencing transcript in the record, and the trial court's judgment was accordingly affirmed. A discretionary appeal of *Turner II* was disallowed by the Ohio Supreme Court. *State v. Turner*, 121 Ohio St.3d 1476, 2009-Ohio-2045, 905 N.E.2d 655.

{¶4} On November 5, 2012, Turner filed a petition for a writ of mandamus in the Ohio Supreme Court. *State ex rel. Turner v. Stewart*, 134 Ohio St.3d 1413, 2013-Ohio-158, 981 N.E.2d 881. In his third ground for mandamus relief, Turner sought the same relief he is seeking in this action — an order compelling the trial court to enter a judgment pursuant to *Turner I*. Respondent judge moved for dismissal of Turner's petition on multiple grounds, including that the third request for relief was moot because Turner had already completed his sentence. The Ohio Supreme Court granted the motion and dismissed Turner's petition for a writ of mandamus. *Id.*

{¶5} Respondent moves for summary judgment in this original action

arguing that Turner's petition is defective for failure to comply with Loc.App.R. 45(B)(1)(a). Turner maintains that his affidavit is in compliance with the rule.

{¶6} Loc.App.R. 45(B)(1)(a) provides that a complaint for an extraordinary writ must be supported by a sworn affidavit that specifies the details of relator's claim. A simple statement that verifies that relator has reviewed the complaint and that the contents are true and accurate does not satisfy the mandatory requirement under Loc.App.R. 45(B)(1)(a). *State ex rel. Jones v. McGinty*, 8th Dist. Cuyahoga No. 92602, 2009-Ohio-1258; *State ex rel. Mayes v. Ambrose*, 8th Dist. Cuyahoga No. 91980, 2009-Ohio-25; *James v. Callahan*, 8th Dist. Cuyahoga No. 89654, 2007-Ohio-2237.

{¶7} The Supreme Court of Ohio upheld this court's ruling that merely stating in an affidavit that the complaint was true and correct was insufficient to comply with the local rule. *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas*, 123 Ohio St.3d 124, 2009-Ohio-4688, 914 N.E.2d 402. On that basis, Turner has failed to support his complaint with an affidavit "specifying the details of the claim" as required by Loc.App.R. 45(B)(1)(a). *Id.*; *State ex rel. Wilson v. Calabrese*, 8th Dist. Cuyahoga No. 70077, 1996 Ohio App. LEXIS 6213 (Jan. 18, 1996). This is grounds for dismissing the petition.

{¶8} Further, Turner had an adequate remedy at law through a direct appeal, and he has already unsuccessfully sought to obtain the same relief

through his petition for a writ of mandamus that has been dismissed by the Ohio Supreme Court. Therefore, his petition for a writ of mandamus must be denied.

*State ex rel. Voleck v. Powhatan Point*, 127 Ohio St.3d 299, 2010-Ohio-5679, 939 N.E.2d 819, ¶ 7 (“Mandamus will not issue when the relators have an adequate remedy in the ordinary course of law”); *State ex rel. Hondo v. McGinty*, 8th Dist. Cuyahoga No. 94915, 2010-Ohio-2900, ¶ 4 (holding that the appellate court must grant the motion for summary judgment and deny relief in an original action where the relator had previously sought the same relief in a complaint that has been dismissed by the Ohio Supreme Court).

{¶9} Respondent’s motion for summary judgment is granted, and the petition for writ of mandamus is denied. Relator to pay costs. The court directs the clerk of court to serve all parties with notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶10} Writ denied.

  
FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and  
SEAN C. GALLAGHER, J., CONCUR