

Cuyahoga C.P. No. CR-91-275129-ZA. On June 25, 2019, the Cuyahoga County Prosecutor, on behalf of the respondent, moved for summary judgment on the grounds of mootness and procedural defects. Davis never filed a response. For the following reasons, this court grants the motion for summary judgment and denies the application for a writ of mandamus.

{¶ 2} In the underlying case, in May 1992, a jury convicted Davis of two counts of aggravated murder with three felony-murder specifications and a three-year firearm specification, as well as four counts of kidnapping and aggravated robbery with three-year firearm specifications. Accepting the jury's recommendation, the trial court imposed the death penalty for the aggravated murder charges and 15 to 25 years consecutively for the kidnapping and aggravated robbery charges plus three years for the firearm specifications.

{¶ 3} In *Davis v. Mitchell*, 318 F.3d 682 (6th Cir.2003), the United States Court of Appeals for the Sixth Circuit granted Davis habeas corpus relief by ruling that the trial court had given the jury unconstitutional unanimity instructions during the sentencing phase of the trial. The Sixth Circuit ordered the state of Ohio to conduct a new penalty phase. In early December 2004, the trial court issued a journal entry that provided in pertinent part as follows: "Re-sentencing hearing held 12/08/2004. Pursuant to the order of federal court, parties agree to 30 years actual to life plus 3 years actual on firearm specification on Count 1 to run consecutive to Counts 3 and 4. All other conditions of original sentence to remain." In May 2011, the trial court issued a sentencing order incorporating the 2004 sentence in an entry

compliant with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. Now Davis seeks a writ of mandamus to compel a ruling on his request to effect the Sixth Circuit mandate.

{¶ 4} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

{¶ 5} Attached to the respondent's dispositive motion is a June 25, 2019 journal entry that denies Davis's request to initiate the Sixth Circuit's mandate. The entry explains the trial court effected that mandate by conducting the resentencing hearing in December 2004 and issuing the corrected journal entry in 2011. Thus, Davis has received his requested relief, a ruling on motion. This matter is moot.

{¶ 6} The relator has also failed to comply with R.C. 2969.25, which requires an affidavit that describes each civil action or appeal filed by the relator within the previous five years in any state or federal court. The relator's failure to comply with R.C. 2969.25 warrants dismissal of the complaint for a writ of mandamus. *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 1998-Ohio-218, 696 N.E.2d 594, and *State ex rel. Alford v. Winters*, 80 Ohio St.3d 285, 1997-Ohio-117, 685 N.E.2d 1242. Relator also did not comply with R.C. 2969.25(C), which

requires that an inmate file a certified statement from his prison cashier setting forth the balance in his private account for each of the preceding six months. This also is sufficient reason to deny the mandamus, deny indigency status, and assess costs against the relator. *State ex rel. Pamer v. Collier*, 108 Ohio St.3d 492, 2006-Ohio-1507, 844 N.E.2d 842; *State ex rel. Hunter v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 176, 2000-Ohio-285, 724 N.E.2d 420; and *Hazel v. Knab*, 130 Ohio St.3d 22, 2011-Ohio-4608, 955 N.E.2d 378 — the defect may not be cured by subsequent filings.

{¶ 7} The court also notes that Davis improperly captioned his mandamus complaint as “*State of Ohio ex. rel v. Wiley Davis.*” This caption identified Davis as the respondent, not the relator. Thus, it did not identify the real respondent, which could cause confusion as to whether the respondent actually has a duty to fulfill. Nor did Davis provide the addresses of the parties as required by Civ.R. 10. Such deficiencies provide further reasons for denying the writ. R.C. 2731.04; *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, 841 N.E.2d 766; and *State ex rel. Tate v. Callahan*, 8th Dist. Cuyahoga No. 85615, 2005-Ohio-1202.

{¶ 8} Accordingly, this court grants the respondent’s motion for summary judgment and denies the application for a writ of mandamus. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶ 9} Writ denied.

SEAN C. GALLAGHER, JUDGE

**MARY EILEEN KILBANE, A.J., and
RAYMOND C. HEADEN, J., CONCUR**