

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0051p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL K. BAILEY,

Petitioner-Appellant,

v.

No. 18-3581

LYNEAL WAINWRIGHT, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.

No. 3:18-cv-00881—Dan A. Polster, District Judge.

Argued: October 22, 2019

Decided and Filed: February 20, 2020

Before: SUTTON, KETHLEDGE, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Erin E. Cady, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellant. Jerri Fosnaught, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON BRIEF: Erin E. Cady, Erin E. Murphy, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellant. Jerri Fosnaught, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

SUTTON, J., delivered the opinion of the court in which KETHLEDGE, J., joined. STRANCH, J. (pp. 6–8), delivered a separate dissenting opinion.

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OPINION

SUTTON, Circuit Judge. Michael Bailey petitioned a federal district court for a writ of habeas corpus because he believes the Ohio Parole Board violated his right to due process by relying on inaccurate records about the nature of his underlying murder conviction. The district court dismissed the § 2254 petition because it did not state a plausible claim for habeas relief. We affirm.

I.

We may never know exactly what happened in the Dutch Village Carryout, a roadside store near Toledo, Ohio, on December 14, 1974. But we do know that an Ohio jury believed (beyond a reasonable doubt) that Bailey murdered Thomas Cannon, the Carryout's clerk. Bailey does not dispute his conviction for Cannon's murder, but he does dispute how Ohio's parole board has described his crime. As Bailey tells it, he entered the store at his accomplice's behest, robbed the cash register at gunpoint, then shot Cannon twice—once in the neck, once in the head. As the Ohio Parole Board tells it, Bailey entered the store, robbed Cannon, forced him to the ground, "told him . . . exactly what he was planning on doing," placed the gun to the back of his head and shot him "execution style." R.1 at 18. The Board also ascribes to Bailey motives he believes inaccurate: "[H]e was in need of money and planned on performing robberies until he had the amount needed and he stated the only way he was going to be successful was to kill all witnesses." *Id.*

Bailey first learned about the Board's description in 2016. Two years before, the Ohio Supreme Court had ruled that Ohio prisoners had a right under Ohio law to a factually accurate parole record. *State ex rel. Keith v. Ohio Adult Parole Auth.*, 24 N.E.3d 1132, 1137 (Ohio 2014). To vindicate this right, several Ohio prisoners, including Bailey, successfully petitioned the Board for their parole candidate information sheets, which include a description of the prisoner's offense. Bailey reviewed his sheet and discovered that the Board's version of events did not

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match his recollection. He asked the agency, as a result, to edit the sheet's description. Bailey and the Board corresponded about the alleged inaccuracies for the next several months.

The Board eventually sent him a letter containing an updated sheet. Except for changing the date of his offense (the sheet initially listed it as December 14, 1971), the description of Bailey's crime remained the same. The letter explained that the Board had reviewed Bailey's pre-sentence investigation report and modified his sheet accordingly. This struck Bailey as odd, because the trial court had sentenced him minutes after his conviction, suggesting the State never created a *pre*-sentence investigation report. When Bailey pointed out this discrepancy, the Board admitted that it had inadvertently described Bailey's *post*-sentence investigation report as his *pre*-sentence investigation report. But the letter offered no other explanation about why the description of Bailey's crime remained the same. Convinced the Board had gotten it wrong, Bailey ordered his trial transcript and sent the Board another letter offering to meet with a representative to show them that testimony at the trial contradicted the description in his sheet. Bailey also filed a motion with the Lucas County Court of Common Pleas to correct his parole record. The Board and the court denied his request.

Bailey appealed the court's decision. An Ohio appellate court affirmed, noting that the lower court lacked jurisdiction to hear Bailey's motion. The Ohio Supreme Court denied Bailey's request for a discretionary appeal.

Bailey took his case to federal court, filing this habeas petition under 28 U.S.C. § 2254. The Board violated his Fourteenth Amendment right to due process, he alleged, when it refused to investigate his record and correct inaccuracies in its description of his crime. The district court dismissed his petition and his motion for reconsideration on the ground that he failed to state a plausible claim for habeas corpus relief. We granted Bailey a certificate of appealability.

II.

Section 2254(a) permits courts to "entertain an application for a writ of habeas corpus . . . only on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Most habeas cases implicate the "in custody" or "in violation of" federal law requirement by themselves. We face a different

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problem—a prisoner who does not purport to be in custody in violation of federal law, but who is in custody, complains of an unconnected violation of federal law, and claims a right to proceed all the same under § 2254(a).

The words “in custody” convey any conditions that “significantly restrain” a petitioner’s “liberty,” *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), such as imprisonment, parole restrictions, or consecutive sentences. *Peyton v. Rowe*, 391 U.S. 54, 64–65 (1968) (physical restraint and consecutive sentences); *Jones*, 371 U.S. at 242–43 (parole). The phrase “in violation of the Constitution or laws or treaties of the United States” has an equally straightforward meaning. A petitioner must claim that his custody violates federal law, not state law, not some other source of law. *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam).

Bailey satisfies each of these requirements in isolation. He is “in custody” because he is serving a life sentence. And his petition rests on a violation of federal law because he claims that Ohio violated his Fourteenth Amendment due process rights. But he has not tied the two together. Bailey does not contend that he is in custody in violation of federal law—in other words, that he is in custody due to a violation of federal law. At its core, Bailey’s petition alleges only that he has been deprived of an accurate parole record in violation of federal law. That kind of claim falls outside § 2254(a)’s domain.

Consider Bailey’s complaints. He argues, first, that Ohio created a protected liberty interest in an accurate parole record and deprived him of that interest without due process when the Board failed to correct the alleged inaccuracies in the file. He argues, second, that due process independently prevents the Board from making arbitrary decisions, such as refusing to correct a flawed parole record. The problem with both theories is the same: Bailey does not explain how either of them would cause him to obtain parole or otherwise change his custody status.

He does not make this argument because he cannot make this argument. Ohio does not give inmates a right to parole; the Board has authority to grant or deny a candidate’s application at its discretion. *Keith*, 24 N.E.3d at 1135–36. As a result, Bailey cannot argue that, but for the allegedly inaccurate description, the Board would grant him parole.

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Bailey claims that two of our cases, *Adams v. Bradshaw* and *Terrell v. United States*, make his application cognizable. Not so.

Adams treated a state prisoner's attack on Ohio's lethal-injection procedures as a claim that, "if successful, could render his death sentence effectively invalid." 644 F.3d 481, 483 (6th Cir. 2011) (per curiam). That case supports our conclusion, not Bailey's. A challenge to a judgment, including one based on the method of implementing the sentence, challenges the extent of an inmate's custody. See *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) ("[A] constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself.").

Terrell involved two federal prisoners using a § 2241 petition to allege that the federal government violated their due process rights because it did not provide them in-person parole hearings. 564 F.3d 442, 445 (6th Cir. 2009). We held that the district court had jurisdiction over their petition, even though the prisoners did not challenge their custody. *Id.* But our interpretation of § 2241 does not control our interpretation of § 2254. See *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 235 (6th Cir. 2003). On top of that, § 2241 creates a broader set of avenues for relief. It permits relief if the claimant shows any of the following: he or she (1) is in the United States' custody or "committed for trial before some court thereof," (2) is in custody for following a federal law or judicial order, (3) is in custody in violation of federal law, (4) is a foreign national who claims his or her custody violates international law, or (5) the writ is needed to bring the claimant to court to testify or for trial. 28 U.S.C. § 2241(c). By contrast, § 2254 permits relief only if the petitioner "is in custody in violation of" federal law. *Id.* § 2254(a). Nothing in *Terrell* shows that it granted relief on the grounds permitted by § 2254.

This conclusion, it is true, takes Bailey to the end of one road for relief. But it does not foreclose another. Nothing prevents Bailey from using § 1983 to raise these or similar claims. See, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998); *Nettles v. Grounds*, 830 F.3d 922, 935–36 (9th Cir. 2016) (en banc). While we affirm the dismissal of Bailey's petition, we do so without prejudice to his filing a new claim under § 1983.

We affirm.

DISSENT

JANE B. STRANCH, Circuit Judge, dissenting. Because the majority misapplies binding circuit precedent, I respectfully dissent.

The majority holds that relief pursuant to 28 U.S.C. § 2254 is unavailable to a state prisoner who cannot show that “but for” an alleged constitutional violation, there “would” be a change in custody status. *Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011), says otherwise. There, a capital habeas petitioner proceeding under § 2254 challenged a specific lethal-injection protocol under the Eighth Amendment: we held that “[w]hereas it is true that certain claims that can be raised in a federal habeas petition cannot be raised in a § 1983 action, it does not necessarily follow that any claim that can be raised in a § 1983 action cannot be raised in a habeas petition.” *Id.* (citations omitted). More critically, we explained that Adams’s lethal-injection claim was cognizable in habeas because “if successful, [it] *could* render his death sentence effectively invalid.” *Id.* (emphasis added). We did not require Adams to show that he *would* incur a change in custody status should he prevail. Indeed, we rejected the imposition of such a burden. *Id.* The relief that Adams requested would not have guaranteed a change to his sentence; it would have made a change to his sentence more likely, which was sufficient to make his claims cognizable in habeas.

Michael Bailey’s case involves just the kind of probabilistic change to custody that was at issue in *Adams*. He was convicted in 1975 and became eligible for parole after 15 years in jail. He applied for parole 8 times over the following 30 years and was denied each time. Bailey first became aware in 2015 that his parole record contained an incorrect and inflammatory description of his crime. He sought to correct his parole records to accurately reflect the testimony at trial, which would have increased his chances of parole. Ohio authorities could deny Bailey parole despite accurate records. But because relief would make a change in custody more likely, Bailey has sufficiently claimed to be in custody in violation of federal law. § 2254(a). The majority’s attempt to distinguish *Adams* misses the critical point that Adams’s collateral attack sought only a probabilistic change in custody. Its citation in the same paragraph to *Nelson v. Campbell*, a

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case about the breadth of § 1983, not § 2254, further reveals this error. 541 U.S. 637, 644 (2004). The majority invokes *Nelson* for the proposition that “a constitutional challenge seeking to permanently enjoin the use of lethal injection *may* amount to a challenge to the fact of the sentence itself.”¹ *Id.* (emphasis added). But that is exactly my point. Here too, Bailey’s challenge *may* amount to a challenge to the duration of his sentence.

In *Terrell v. United States*, moreover, we expressly rejected the proposition that habeas and § 1983 are mutually exclusive remedies. 564 F.3d 442, 448-49 (6th Cir. 2009). *Terrell* involved a challenge to parole procedures that, like Bailey’s claim, would not have guaranteed a change in his sentence. *Id.* at 445-46. We reasoned: “[o]ur cases have held that [such challenges] can both be brought under habeas and the equivalent civil action.” *Id.* at 448. The majority attempts to distinguish *Terrell* on the grounds that Terrell was a federal prisoner proceeding under § 2241, whereas Bailey is a state prisoner seeking relief through § 2254. The majority declares, “our interpretation of § 2241 does not control our interpretation of § 2254.” To support this proposition, it cites to *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 235 (6th Cir. 2003), a case distinguishing the requirements for injunctive relief under the National Labor Relations Act from those in § 706(f)(2) of Title VII of the Civil Rights Act of 1964. *Ahearn* provides no foundation for the majority’s conclusion. Section 2241 and § 2254 are separate statutes. But they are intertwined statutes. They provide parallel avenues for state and federal prisoners to seek habeas relief, they share key language, and innumerable opinions of this court are devoted to defining their precise relationship. *See, e.g., Allen v. White*, 185 F. App’x 487, 490 (6th Cir. 2006) (“Federal prisoners who wish to collaterally challenge the execution of their sentences must petition for relief under § 2241. The same is not true of state prisoners who proceed under § 2254, because § 2254 allows state prisoners to collaterally attack either the imposition *or* the execution of their sentences.”). Our *Terrell* opinion establishes that in the Sixth Circuit some claims can be cognizable both in habeas and § 1983. The majority’s citation to the Ninth Circuit’s decision in *Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016) does nothing to defeat the binding nature of our precedent.

¹Challenges to the “fact of” and “duration of” a sentence both equally sound in habeas. *Nelson v. Campbell*, 541 U.S. 637, 643 (2004).

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Because the majority forecloses an avenue of relief that our binding precedent expressly holds open, I respectfully dissent.

FILED

18 MAY - 1 AM 9:59

CLARK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MICHAEL KEVIN BAILEY,	)	CASE NO. 3:18 CV 881
)	
Petitioner,	)	JUDGE DAN AARON POLSTER
)	
v.)	
)	
LYNEAL WAINWRIGHT,	)	<u>MEMORANDUM OF OPINION</u>
	)	<u>AND ORDER</u>
Respondent.)	

Introduction

Pro se Petitioner Michael Kevin Bailey has filed a Petition seeking a Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) His Petition indicates he was convicted of aggravated murder in 1975 and sentenced to a life term of imprisonment, with a mandatory sentence of 15 years. He contends a post-sentence investigation report was secretly compiled at the request of the Ohio Parole Board in 1986 to be used in assessing his parole eligibility and that the report contains substantive factual inaccuracies contrary to the evidence and testimony presented at his 1975 state trial. The basis for his Petition is that the inaccurate report has been used to justify his continued incarceration and deny him parole after the term of his mandatory sentence in violation of his constitutional rights. He seeks immediate release from the

remainder of his sentence.

Discussion

Pursuant to Rule 4 of the Rules Governing *Habeas Corpus* Cases under §2254, a federal district court is required to examine a *habeas* petition and determine whether “it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” If so, the district court must summarily dismiss the petition. *See Rule 4; Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face).

The Petition must be summarily dismissed. *Habeas corpus* relief under § 2254 is available only to prisoners who are in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). It is well-established that there is “no inherent constitutional right to parole” and that “Ohio inmates have no state-created liberty interest in parole.” *Allen v. Stepp*, 27 F. App’x 521, 523 (6th Cir. Nov. 30, 2001). *See also Wright v. Trammell*, 810 F.2d 589, 590 (6th Cir. 1987) (citing *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 11 (1979)) (due process not required in connection with a parole board determination and the expectancy of release upon parole is not a constitutionally protected interest). Therefore, the Petition on its face fails to raise any federal constitutional claim that might warrant *habeas corpus* relief. *See Walton v. Michigan*, 115 F. App’x 786, 787 (6th Cir. Sept. 23, 2004).

Conclusion

Accordingly, the Petition is dismissed pursuant to Rule 4 of the Rules Governing § 2254 Cases. The Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this

decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. Fed. R. App. P. 22(b); 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.



DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

FILED

18 MAY - 1 AM 9:59

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MICHAEL KEVIN BAILEY,	)	CASE NO. 3:18 CV 881
)	
Petitioner,	)	JUDGE DAN AARON POLSTER
)	
v.)	
)	
LYNEAL WAINWRIGHT,	)	<u>JUDGMENT ENTRY</u>
)	
Respondent.)	

In accordance with the Court's accompanying Memorandum of Opinion and Order, this action is dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases. The Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. Fed. R. App. P. 22(b); 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.



DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

FILED

4:08 pm May 16 2018

**Clerk U.S. District Court
Northern District of Ohio
Cleveland**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

MICHAEL KEVIN BAILEY,	)	CASE NO. 3:18 CV 881
)	
Petitioner,	)	JUDGE DAN AARON POLSTER
)	
v.)	
)	
LYNEAL WAINWRIGHT,	)	<u>ORDER DENYING MOTION</u>
)	
Respondent.)	

Petitioner Michael Kevin Bailey has filed a motion for reconsideration of this Court's May 1, 2018 Order dismissing his petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. (Doc. No. 5.) The Court dismissed the Petition because in it, Petitioner sought immediate release from the remainder of his 1975 life sentence for aggravated murder on the basis that an inaccurate report has been used to deny him parole. As the Court stated in its order dismissing his petition, it is well-established that there is "no inherent constitutional right to parole" and "Ohio inmates have no state-created liberty interest in parole." *Allen v. Stepp*, 27 F. App'x 521, 523 (6th Cir. Nov. 30, 2001); *Walton v. Michigan*, 115 F. App'x 786, 787 (6th Cir. Sept. 23, 2004) (affirming dismissal of federal *habeas corpus* petition challenging a decision denying parole). For the reasons stated below, the motion for reconsideration is denied.

Reconsideration of a judgment is warranted only if there has been: (1) a clear error of law; (2) an intervening change in the law; (3) newly discovered evidence; or (4) a showing of manifest injustice. *Jones v. Gobbs*, 21 F. App'x 322, 323 (6th Cir. 2001), *citing GenCorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 832 (6th Cir. 1999). The Court does not find reconsideration of its order warranted under any of these factors.

Petitioner seeks reconsideration of the Court's order on the basis of the Ohio Supreme Court's decision in *State ex rel. Keith v. Ohio Adult Parole Auth.*, 141 Ohio St.3d 375, 380 (2014). In that decision, the Ohio Supreme Court reiterated settled law that "Ohio's system of parole is entirely discretionary and creates no expectation of parole and no due-process right to parole itself," but it also held that in making parole determinations, the parole board "must yield to statutory or regulatory requirements" and, therefore, the State of Ohio created a "minimal due-process expectation" that the parole board "may not rely on information that it knows or has reason to know is inaccurate." *Id.* Under *Keith*, "where there are credible allegations, supported by evidence, that the materials relied on at a parole hearing were substantively inaccurate, the [parole board] has an obligation to investigate and correct any significant errors in the record of the prisoner." *Id.*

The Court does not find that Petitioner has stated a plausible claim for *habeas corpus* relief under *Keith*. First, the Court does not find that the petition and the materials attach to it support a plausible conclusion that the Ohio Parole Board committed a due process violation under *Keith*. Rather, the petition and materials indicate the Ohio Parole Board discharged the duties *Keith* imposes. It considered the objections Petitioner had to information in his parole file and corrected errors it found to have merit. (See, e.g., Doc. No. 1 at 14, 22, 23.) In addition, the

Board stopped relying on information the Petitioner found objectionable in denying him parole. He was told in 2014 that the Board no longer believed the Prosecutor's "version of the offense," but decided to continue to deny him parole anyway based on the nature of his crime. (Doc. No. 1 at 9.)

Second, *Keith* does not support granting the *habeas corpus* relief Petitioner seeks, which is immediate release from the remainder of his sentence. *Keith* expressly upheld long-standing law that inmates do not have a constitutional right to release on parole, which is a matter entirely within the discretion of the Ohio Parole Board.

Accordingly, Petitioner's motion for reconsideration of the Court's order dismissing his petition is denied. The Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. Fed. R. App. P. 22(b); 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.



DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

No. 18-3581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Mar 24, 2020

DEBORAH S. HUNT, Clerk

MICHAEL K. BAILEY,

Petitioner-Appellant,

v.

LYNEAL WAINWRIGHT, WARDEN,

Respondent-Appellee.

O R D E R

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BEFORE: SUTTON, KETHLEDGE, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Stranch would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

*Judge Murphy recused himself from participation in this ruling.

FILED
COURT OF APPEALS
2017 AUG 25 AM 8:11

COMMON PLEAS COURT
BERT R. BUMTER
CLERK OF COURT

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio Court of Appeals No. L-16-1278

Appellee Trial Court No. CR0197407065

v.

Michael Kevin Bailey DECISION AND JUDGMENT

Appellant Decided: AUG 25 2017

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Michael Kevin Bailey, pro se.

PIETRYKOWSKI, J.

{¶ 1} Appellant, Michael Bailey, appeals from the October 18, 2016 judgment of the Lucas County Court of Common Pleas denying his motion to correct a postsentencing investigation report. Because we find the trial court lacked jurisdiction over this matter, we affirm.

E-JOURNALIZED

AUG 25 2017

1.

APPENDIX "D"

{¶ 2} On appeal, appellant asserts the following assignments of error:

ASSIGNMENT OF ERROR NUMBER ONE:

The Trial Court committed prejudicial error by failing to comply with O.R.C. Sections 2951.03(B)(1&5) when it dismissed the "Motion To Correct Inaccuracies In Post-Sentence Investigation Report" without addressing the merits of the factual inaccuracies alleged.

ASSIGNMENT OF ERROR NUMBER TWO:

The Trial Court committed prejudicial error by failing to correct past, present, future, and on-going acts of Falsification prohibited under O.R.C. Sections 2951.13(A)(1, 2, 3, 7& 11) when it dismissed the "Motion To Correct Inaccuracies In Post-Sentence Investigation Report" without addressing the merits of the violations of law alleged.

ASSIGNMENT OF ERROR NUMBER THREE:

The Trial Court committed prejudicial error by failing to comply with the Due Process of Law guaranteed (sic) under the 14th Amendment to the United States Constitution when it dismissed the "Motion To Correct Inaccuracies In Post-Sentence Investigation Report" without addressing the merits of the factual inaccuracies alleged.

{¶ 3} Appellant was convicted by a jury of aggravated murder in 1975 and sentenced to a life term of imprisonment, with a mandatory sentence of 15 years. The

sentence was affirmed on appeal to this court and the Ohio Supreme Court declined to accept a discretionary appeal.

{¶ 4} Appellant alleges that in 1986, a postsentence investigation report was prepared for the Ohio Parole Board for purposes of creating a candidate information sheet for the Ohio Parole Board in October 1999 and has been used by the Ohio Parole Board thereafter at every parole hearing to assess his parole suitability. Appellant first learned of the report on August 3, 2016. He contends that the report contains substantive inaccuracies directly contradicted by trial testimony and evidence. Furthermore, in 2011, appellant learned that his Lucas County Court of Common Pleas file was lost and the prosecutor supplied a statement of the facts of the case, which appellant asserts is incorrect.

{¶ 5} Appellant filed a post-trial motion to correct the inaccuracies in the postsentence investigation report. His motion was denied October 18, 2016, without explanation. Appellant appealed from that judgment and we have consolidated appellant's three assignments of error for review.

{¶ 6} Where no presentence investigation report was prepared before sentencing, the director of rehabilitation and correction or a designee may order a postsentence investigation report to be prepared by the department field staff and the report shall contain the same information as a presentence investigation report. R.C. 2951.03(A)(2) and 5120.16(A).

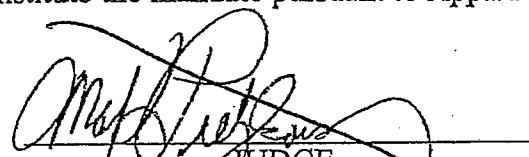
{¶ 7} Appellant's post-trial motion to correct the report prepared under R.C. 2951.03 did not invoke the continuing subject-matter jurisdiction of the Lucas County Court of Common Pleas following conviction. *Compare State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 37. Without subject-matter jurisdiction, the trial court could not adjudicate whether the report was accurately prepared and, if incorrect, order a correction. Therefore, we find the trial court properly dismissed appellant's motion. Appellant's three assignments of error are found not well-taken.

{¶ 8} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

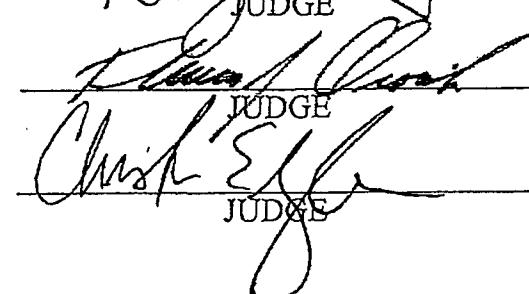
Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist. Loc. App.R. 4.

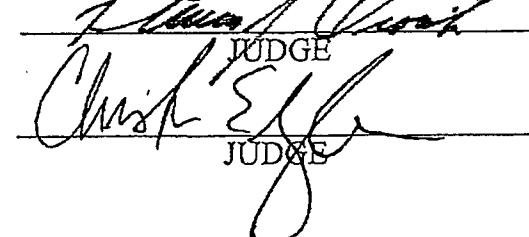
Mark L. Pietrykowski, J.


Mark L. Pietrykowski
JUDGE

Thomas J. Osowik, J.


Thomas J. Osowik
JUDGE

Christine E. Mayle, J.


Christine E. Mayle
JUDGE

CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.supremecourt.ohio.gov/ROD/docs/>

FILED
LUCAS COUNTY

2016 OCT 18 AM 9:50

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

STATE OF OHIO

Plaintiff,

v.

MICHAEL KEVIN BAILEY

Defendant.

* CASE NO:

G-4801-CR-0197407065-000

*

* JUDGMENT ENTRY

*

* JUDGE IAN B ENGLISH

*

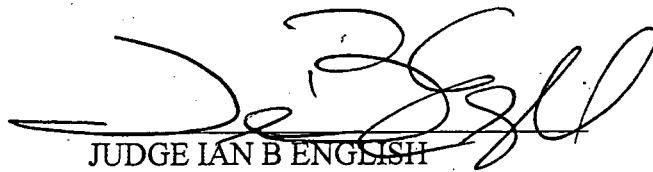
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* * * * *

This matter came on to be heard upon the Motion To Correct Inaccuracies In Post-Sentence Investigation Report filed Pro Se by the defendant, MICHAEL KEVIN BAILEY. Upon the consideration of the motion filed October 12, 2016, the Court denies the same.

It is therefore ORDERED, that the motion is denied.

Dated: 10/18/16



JUDGE IAN B ENGLISH

APPENDIX "E"

-36-

Case Number: G-4801-CR-0197407065-000
STATE OF OHIO V. MICHAEL KEVIN BAILEY

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

Dated: 10/18/16



JUDGE IAN B ENGLISH

MICHAEL KEVIN BAILEY
Inmate A141-957/MCCC
Marion Correctional Institution
P. O. Box 57
Marion, OH 43301-0057

LOUIS E. KOUNTOURIS
Lucas County Prosecutors Office
700 Adams Street
Toledo, OH 43604

KHALED ELWARDANY
Lucas County Prosecutors Office
700 Adams Street
Toledo, OH 43604

The Supreme Court of Ohio

FILED

DEC 20 2017

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

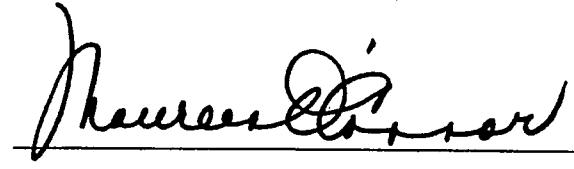
Michael Kevin Bailey

Case No. 2017-1397

ENTR Y

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Lucas County Court of Appeals; No. L-16-1278)



Maureen O'Connor

Chief Justice

APPENDIX "F"

The Official Case Announcement can be found at <http://www.supremecourt.ohio.gov/ROD/docs/>