

NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

EZRA C. FOSTER Petitioner *pro-se*

v.

STEVEN REYNOLDS, WARDEN Respondent

Ohio Attorney General's Office Respondent's Counsel

ON PETITION FOR WRIT OF CERTIORARI

THE UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

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<b>SEEKING A CERTIFICATE OF APPEALABILITY</b>		



Ohio Department of Rehabilitation and Correction

# Revocation Order

PAGE 1

Offender Name: Ezra Foster		Number: A-213888
Unit: A0402	Where Confined: LORCI	Date of Birth: Nov 30, 1954
Reception Center: LORCI	Availability Date: Feb 1, 2021	Status: <input checked="" type="checkbox"/> Par <input type="checkbox"/> T. Control

Whereas, Ezra Foster No. A-213888, was serving a sentence of confinement in a state correctional institution operated by the Department of Rehabilitation and Correction and was released on May 4, 2016 to the supervision of the Adult Parole Authority. On Mar 24, 2021, a hearing was held pursuant to ORC Section 2967.15, at which it was found that violations of the Conditions of Release had been committed. The Ohio Parole Board has carefully considered all of the factors and circumstances brought to its attention. NOW, THEREFORE, by virtue of the authority vested in the Adult Parole Authority by law, the release is hereby revoked effective Mar 24, 2021.

The violator is ordered returned as soon as practical to the appropriate state correctional institution.

The Hearing officer recommends to the Parole Board Chair/Designee that the violator serve 36 months of the sentence from the availability date before again becoming eligible for parole release consideration. This recommendation is subject to the approval and/or modification of the Parole Board Chair/Designee. The violator will receive final notification of the time to be served before again becoming eligible for release consideration after return to the state correctional institution. Final notification will be provided to the violator on the DRC form 3313 Sanction Receipt within 45 days of return.

Hearing Officer: Lisa M. Hoying	<i>Lisa M Hoying</i>	3/24/2021
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STATE OF OHIO  
COUNTY OF LORAIN

FILED  
LORAIN COUNTY  
2022 JAN 10 P 4:08

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO EX REL. EZRA FOSTER  
FOSTER  
COURT OF COMMON PLEAS  
TOM ORLANDO

Petitioner

v.

KEITH FOLEY, WARDEN

Respondent

C.A. No. 21CA011812



ORIGINAL ACTION IN  
HABEAS CORPUS

Dated: January 10, 2022

PER CURIAM.

{¶1} Petitioner Ezra Foster has filed a petition for writ of habeas corpus asking this Court to order Respondent Keith Foley, Warden of Grafton Correctional Institution, to release him from prison. Because Mr. Foster's petition does not comply with the mandatory filing requirements of R.C. 2969.25, and the requirements of R.C. 2725.04, this Court must dismiss this action.

*Mandatory filing requirements*

{¶2} R.C. 2969.25 sets forth specific filing requirements for inmates who file a civil action against a government employee or entity. Warden Foley is a government employee and Mr. Foster, incarcerated in the Grafton Correctional Institution, is an inmate. R.C. 2969.21(C) and (D). A case must be dismissed if the inmate fails to comply with the mandatory requirements of R.C. 2969.25 in the commencement of the action. *State ex rel. Graham v. Findlay Mun. Court*,

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106 Ohio St.3d 63, 2005-Ohio-3671, ¶ 6 (“The requirements of R.C. 2969.25 are mandatory, a failure to comply with them subjects an inmate’s action to dismissal.”).

{¶3} Mr. Foster did not pay the cost deposit for filing this action. He did file with his petition an affidavit of prior actions and waiver of prepayment pursuant to R.C. 2969.25. R.C. 2969.25(C) applies when an inmate seeks a waiver of the prepayment of the filing fees, as Mr. Foster did here. This section requires the inmate to file an affidavit of indigency. The affidavit must include, among other things, “[a] statement that sets forth the balance in the inmate account of the inmate for each of the *preceding six months*, as certified by the institutional cashier[.]” (Emphasis added) R.C. 2969.25(C)(1). Mr. Foster included the form affidavit of indigency and statement of inmate account. That statement does not show the balance for each of the *preceding six months*, as required by R.C. 2969.25. Instead, the statement covers the period from March through August, but Mr. Foster did not file his complaint until November.

{¶4} As noted above, the requirements of R.C. 2969.25 are mandatory. *Boles v. Knab*, 129 Ohio St.3d 222, 2011-Ohio-2859, ¶ 1. The Supreme Court has “consistently held that “[t]he requirements of R.C. 2969.25 are mandatory and failure to comply with them requires dismissal of an inmate’s complaint.”” (citations omitted) *State ex rel. Sands v. Culotta*, 158 Ohio St.3d 238, 2019-Ohio-4741, ¶ 8. The Supreme Court has upheld the dismissal of an inmate’s action where the inmate statement covered a period ending in October, but the complaint was not filed until several months later. *Russell v. Duffey*, 142 Ohio St.3d 320, 2015-Ohio-1358, ¶ 12. Like the inmate in *Russell*, Mr. Foster’s statement of his inmate account covered the period ending in August, but he did not file his complaint until November. Therefore, Mr. Foster failed to comply with the mandatory requirements of R.C. 2969.25(C), requiring dismissal of this action.

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*Statutory Habeas Corpus requirements*

{¶5} Mr. Foster also failed to comply with the statutory requirements for filing a petition for habeas corpus. R.C. 2725.04 imposes requirements on a petition for habeas corpus including that the commitment papers be attached and that the petition be verified. In this case we focus on the verification requirement.

{¶6} The Ohio Supreme Court has held that a petition filed without any verification must be dismissed. *Chari v. Vore*, 91 Ohio St.3d 323, 328 (2001). "Verification" means: "formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document." *Id.* at 327. To meet the verification requirement, Mr. Foster must have expressly sworn to the truth of the facts contained in the petition. *Id.* at 328.

{¶7} Here, however, Mr. Foster simply signed the petition. This does not rise to the level of a "formal act or presence calculated to bring to bear upon the declarant's conscience the full meaning of what he does." *Id.* at 327, citing *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App.2d 277 (8th Dist. 1973). Mr. Foster did not make a formal declaration by which he swore to the truth of the statements in the document. See *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, ¶ 35. Because the petition is not verified, it is defective and must be dismissed.

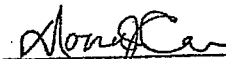
*Conclusion*

{¶8} Because Mr. Foster did not comply with the mandatory requirements of R.C. 2969.25, or the requirements of R.C. 2725.04, this case is dismissed. Costs are taxed to Mr.

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Foster. The clerk of courts is hereby directed to serve upon all parties not in default not this judgment and its date of entry upon the journal. See Civ.R. 58.


  
\_\_\_\_\_  
DONNA J. CARR  
FOR THE COURT

CALLAHAN, J.  
SUTTON, J.  
CONCUR.

APPEARANCES:

EZRA C. FOSTER, Pro se, Petitioner.

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IN THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
LORAIN COUNTY, OHIO

COURT OF APPEALS  
FILED  
LORAIN COUNTY

2022 FEB 22 10 12 AM

COURT OF  
TOM

9th APPELLA

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THE STATE OF OHIO  
IN THE RELATIONS OF EZRA C. FOSTER  
A#213-888  
Grafton Correctional Institution  
2500 South Avon Beldon Road  
Grafton, Ohio 44044

Petitioner

vs.

KEITH FOLEY, WARDEN  
Grafton Correctional Institution  
2500 South Avon Beldon Road  
Grafton, Ohio 44044

Respondent

CASE NO. 21CA011812

PURSUANT TO OHIO CIVIL  
RULE 60(B)(1) PETITIONER  
SEEKS RELIEF FROM THE  
JUDGMENT OF THE OHIO  
NINTH DISTRICT COURT OF  
APPELS

Petitioner filed a writ of habeas corpus to be released from prison with the Court of Appeals Ninth District Lorain County, Ohio. No determination is made whether writ ought to be issued, no hearing granted. For whatever reason the respondent does not answer in a timely fashion, fails to file for an extension of time, and does not appear, in other words the respondent is in default.

January 10<sup>th</sup>, 2022 the court renders a judgment to dismiss the petition because petitioner does not comply with the mandatory filing requirements of R.C. 2969.25 and R.C. 2725.04.

*State ex rel. Foster v. Foley, 2022-Ohio-35*

Ohio Civil Rule 60 (B) (1) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect;

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Petitioner now refers to the courts judgment [\*P2]

***Mandatory filing requirements***

While in fact R.C. 2969.25 does set forth specific requirements for inmates who file a civil action against a government employee or entity, Warden Foley is a government employee, and Mr. Foster is an inmate. [\*P3] R.C. 2969.25(C)(1) emphasizes that the affidavit of indigence requires a statement of the inmates account for the past six months. In the present case Mr. Foster did include a statement but the statement did not meet the requirement of the prior six months because the time frame of the statement was from March to August Mr. Foster filed his petition in November.

***Evidence of mistake, inadvertence, surprise or excusable neglect:***

The court points to the mandatory filing of the statute and refers to R.C. 2969.21 (C), (D), and (E):

(C) "Employee" means an official or employee of the state or of a political subdivision who is acting under color of state law.

(D) "Inmate" means a person who is in actual confinement in a state correctional institution or in a county, multicounty, municipal, municipal – county, or multicounty – municipal jail or workhouse or a release who is serving a sanction in a violation sanction center.

(E) "Inmate account" means an account maintained by the department of rehabilitation and correction under rules adopted by the director of rehabilitation and correction pursuant to section 5120.01 of the Revised Code or similar account maintained by a sheriff or any other administrator of a jail or workhouse or by the administrator of a violation sanction center.

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The court determines that the "Inmate" does not show the balance for each of the preceding six months as required by R.C. 2969.25, and further states the statement covers the period from March through August, but petitioner did not file his complaint until November. Petitioner presents a copy of the affidavit in question as evidence. After close examination of the affidavit it must be pointed out the government employee or entity has a requirement to record the balances and report those balances, allow for verification, and process for postage for the inmate to meet his requirement.

1. The cashier has control of entering the required six-month time frame and reporting that on the affidavit. As noted on the affidavit reported by the cashier the ending month of August the total balance was \$8.50, the cashier for whatever reason, does not affix their signature to the affidavit until September 23<sup>rd</sup>, 2021, twenty-three days after August 30<sup>th</sup>, 2021.
2. The notary public must complete verification of the affidavit and petitioner must now have the petition notarized at the institutional library. During the last week of September, while waiting for the affidavit to be returned to him through the institutional mailing system his housing unit is placed in quarantine because of covid-19 outbreak. Petitioner is unable to have his affidavit notarized until quarantine is lifted per institutional protocol. October 13<sup>th</sup>, 2021 quarantine is lifted and petitioner has his affidavit notarized at that time as evident per notary seal and affixed signature. (this is not just an inmate or employee-entity issue it is a universal issue for every human being).
3. Once petitioner receives affidavit from the cashier, obtains verification and ready to send the petition to the clerk of court he discovers that his inmate account cannot be debit for the cost of mailing because of insufficient funds and that he must wait until he has

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sufficient funds in his inmate account to pay for the postage. He must wait until his state pay is posted to his account to pay for postage. The posting of inmate state pay is the week of the 10<sup>th</sup> every month. State pay for the month of November was posted early because the week of the 10<sup>th</sup> was a holiday week, the 11<sup>th</sup> being Veterans' day and petitioner was able to pay for postage November 5<sup>th</sup>, 2021 as reflected by the personal a/c withdrawal slip placed here in. Noteworthy is the amount of state pay petitioner had received those past months. This goes directly to the reason why petitioner filed indigency, because he is indigent and includes the prior months of September, October, and November to confirm his indigency.

*In Larkins v. State Dep't. of Rehab. & Corr., 138 Ohio App. 3d 733*

The court addresses the second assignment of error first where inmates are attempting to represent themselves in important litigation, we, "the court", believe that they should be granted some leeway, as to compliance with strict pleading requirements. The trial court erred in dismissing plaintiff's *Pro Se* complaint for failure, through inadvertence, and excusable neglect oversight to comply with R.C. 2926.25(C) [sic] when plaintiffs made good faith effort to comply with the statute and cure the defect once the omission was brought to plaintiffs' attention. *Nunc Pro Tunc* in Latin, means simply "now for then." Included in this motion is a current copy of the inmate's affidavit as to prior action; review of multiple actions; waiver of prepayment pursuant to R.C. 2969.25(C), to cover those months complained of.

*Ex. Rel. Watley v. Ohio Bd. Of Nursing, 2007-Ohio-3295*

Overview: the magistrate who heard the matter recommended dismissal of the matter due to the inmate's failure to have provided the necessary affidavit pursuant to R.C. 2969.25(A). The

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inmate objected thereto and filed an affidavit that was dated prior to the magistrate's decision and which appeared to be in compliance with 2969.25(A) although the affidavit was not provided until after the magistrate's decision was issued, it was noted that the decision was only a recommendation to the court. Accordingly, the court found that due to the inmate's attempt to comply with the statutory requirements, dismissal of his action would be unjustified.

Petitioner now addresses the second requirement of R.C. 2725.04 where petitioner must have his petition verified.

State ex rel. Pajestka v. Faulhaber, 50 Ohio St. 2d 41, 362 N.E. 2d 263, 4 Ohio Op. 3d 113, 1977

Ohio LEXIS 371 (1977) Overview: Since the appellate rules are applicable to appeal from trial courts, a party whose original action in mandamus in the court of appeal is dismissed must seek relief through a Civ. R. 60 (B) (5) motion not a motion for reconsideration under App. R. 26.

In the present case the Ninth District Appellate Rule 41.1 Original Actions (A) Commence in original actions and proceed as a civil case under the Ohio Rules of Civil Procedure.

**OHIO NINETH DISTRICT APP. R. 41.1 ORIGINAL ACTIONS (A)**

Commencement of Action

Service in original actions shall be made and the action shall commence and proceed as a civil case under the Ohio Rules of Civil Procedure, unless those rules are clearly inapplicable, in the absence of extra ordinary circumstances, not alternative or preemptive writs will be issued, other than in a habeas corpus action.

Under Ohio Civil Rules of Procedure (7) (A) petitioner file a complaint which is a pleading.

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**Ohio Civil Rule 11 Signing of Pleadings, Motions, or other Documents:**

Halfway through the paragraph it does state, "Except when otherwise specifically provided by these rules, pleadings, as defined by Civ. R. 7(A), need not be verified or accompanied by affidavit. The signature of attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document, that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

**Relief Sought**

Petitioner does seek to have the decision reversed and the petition reinstated and adjudication of the issues rendered.

**PETITIONERS VERIFICATION**

Now comes the petitioner Ezra C. Foster, declaring that the information in this motion is truthful to the best of his knowledge.

Date: 7/11/2023

Respectfully Submitted,

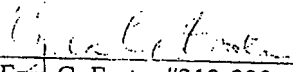
Ezra C. Foster  
Ezra C. Foster #213-888

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded by regular U. S. Mail to the Lorain County Clerk of Courts, 225 Court Street – First Floor Elyria, Ohio 44035-5512 and Warden Keith Foley, Grafton Correctional Institution, 2500 South Avon-Beldon Road, Grafton, Ohio 44044 this 1<sup>st</sup> day of DECEMBER, 2022.

  
\_\_\_\_\_  
Ezra C. Foster #213-888  
Grafton Correctional Institution  
2500 South Avon-Beldon Rd.  
Grafton, Ohio 44044

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Supreme Court of Ohio Clerk of Court - Filed September 13, 2022 - Case No. 2022-0186

# The Supreme Court of Ohio

State of Ohio ex rel. Ezra C. Foster

v.

Keith Foley, Warden

Case No. 2022-0186

JUDGMENT ENTRY

APPEAL FROM THE  
COURT

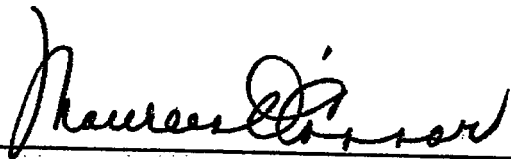
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This cause, here on appeal from the Court of Appeals for Lorain County, Ohio, is considered in the manner prescribed by law. On consideration thereof, the court of appeals is affirmed, consistent with the opinion rendered herein.

It is further ordered that appellant's motion seeking consequences of not filing a brief is denied.

It is further ordered that a mandate be sent to and filed with the clerk of the Court of Appeals for Lorain County.

(Lorain County Court of Appeals; No. 21CA011812)



Maureen O'Connor  
Chief Justice

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The official case announcement, and opinion if issued, can be found at  
<http://www.supremecourt.ohio.gov/ROD/docs/>

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Foster v. Foley*, Slip Opinion No. 2022-Ohio-3168.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

**SLIP OPINION NO. 2022-OHIO-3168**

**THE STATE EX REL. FOSTER, APPELLANT, v. FOLEY, WARDEN, APPELLEE.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it

may be cited as *State ex rel. Foster v. Foley*, Slip Opinion No.

**2022-Ohio-3168.]**

*Habeas corpus—Inmate account statement submitted with petition does not comply with R.C. 2969.25(C), and petition fails to comply with R.C. 2725.04's requirement that a habeas petition be verified—Court of appeals' dismissal of petition affirmed.*

(No. 2022-0186—Submitted July 12, 2022—Decided September 13, 2022.)

APPEAL from the Court of Appeals for Lorain County, No. 21-CA-011812,

2022-Ohio-35.

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**Per Curiam.**

{¶ 1} Appellant, Ezra C. Foster, appeals the Ninth District Court of Appeals' dismissal of his petition for a writ of habeas corpus. Foster has also filed

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a “motion seeking consequences” for appellee Keith Foley’s failure to file a brief in this appeal. We affirm the court of appeals’ judgment and deny Foster’s motion.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

{¶ 2} Foster is currently incarcerated at the Grafton Correctional Institution, where Foley is the warden. Foster was convicted in 1989 of five counts of aggravated rape and sentenced to an aggregate prison term of 20 years to life. He was released on parole in May 2016 after serving 27 years. One of the conditions of Foster’s parole was that he have “no unsupervised contact with minors [and] supervising adults [had to] be approved” by the Ohio Adult Parole Authority (“APA”).

{¶ 3} On February 1, 2021, Foster was arrested by his APA supervising officer for having unsupervised contact with a minor on two occasions in January 2021. A parole-revocation hearing was held on March 24, 2021. Foster was found guilty of the charged violations and ordered to serve 36 months in prison before again becoming eligible for parole.

{¶ 4} On November 9, 2021, Foster filed a petition for a writ of habeas corpus in the court of appeals. Foster sought immediate release from prison, alleging that his parole-revocation hearing had not been held within the time prescribed by an Ohio Department of Rehabilitation and Correction policy. Foster attached a signed verification to his petition, but his signature was not notarized. Foster also attached to his petition an affidavit of indigency and an inmate account statement, as required by R.C. 2969.25(C) for inmates who (like Foster) seek a waiver of filing fees. The inmate account statement filed by Foster covered the period of February 1 through August 26, 2021.

{¶ 5} The court of appeals sua sponte dismissed Foster’s petition, finding that it failed to comply with the requirements of R.C. 2969.25(C) and 2725.04, 2022-Ohio-35, ¶ 1. Foster’s inmate account statement failed to comply with R.C. 2969.25(C) because it did not cover the six-month period preceding the filing of

January Term, 2022

Foster's habeas petition. And Foster's petition was not verified under R.C. 2725.04, because it was unsworn.

{¶ 6} Foster appealed to this court as of right.

## II. ANALYSIS

### A. Foster's Motion

{¶ 7} Because Foley did not file a merit brief in this appeal, Foster has filed a "motion seeking consequences of not filing a brief." Foster asks that this court accept his statement of facts and issues as correct and reverse the court of appeals' judgment.

{¶ 8} Under S.Ct.Prac.R. 16.07(B), we may accept an appellant's statement of facts and issues as correct and reverse the judgment below *if* the appellant's merit brief reasonably appears to sustain reversal. *State ex rel. Davidson v. Beathard*, 165 Ohio St.3d 558, 2021-Ohio-3125, 180 N.E.3d 1105, ¶ 10. But even if we were to accept Foster's statement of facts and issues as correct, his brief does not provide a basis for reversal of the court of appeals' judgment. We therefore deny the motion.

### B. Dismissal of Foster's Petition

{¶ 9} This court reviews de novo a court of appeals' dismissal of a habeas corpus petition. *State ex rel. Steele v. Foley*, 164 Ohio St.3d 540, 2021-Ohio-2073, 173 N.E.3d 1209, ¶ 6.

{¶ 10} An inmate seeking a waiver of the court's filing fees when commencing a civil action against a governmental entity or employee in a court of common pleas, court of appeals, county court, or municipal court must file with his complaint an affidavit stating that he is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency. R.C. 2969.25(C). The affidavit must contain (1) a statement setting forth the balance of the inmate's institutional account for each of the preceding *six* months and (2) a statement that sets forth all other cash and things of value owned by the inmate. *Id.* Noncompliance with these

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requirements is a proper basis for dismissal of the action. *State ex rel. Evans v. McGrath*, 151 Ohio St.3d 345, 2017-Ohio-8290, 88 N.E.3d 957, ¶ 5.

{¶ 11} Foster's inmate account statement does not comply with the statute, because it does not cover the *six* months preceding the filing of his petition; the statement omits the two months immediately preceding the filing of the petition. This defect was a proper basis for dismissal. *See Russell v. Duffey*, 142 Ohio St.3d 320, 2015-Ohio-1358, 29 N.E.3d 978, ¶ 12.

{¶ 12} Likewise proper was dismissal of Foster's petition for failing to comply with R.C. 2725.04's requirement that a habeas petition be verified. To be properly verified, a declaration must be sworn in the presence of an authorized officer, such as a notary public. *See Chari v. Vore*, 91 Ohio St.3d 323, 327, 744 N.E.2d 763 (2001). Foster's declaration is unsworn, rendering his petition fatally defective. *See Hawkins v. S. Ohio Corr. Facility*, 102 Ohio St.3d 299, 2004-Ohio-2893, 809 N.E.2d 1145, ¶ 4.

{¶ 13} Foster challenges the verification requirement, arguing that it conflicts with Civ.R. 11, which states that pleadings need not be verified except when otherwise required by the Rules of Civil Procedure. This argument is without merit. Civ.R. 1(C) provides that the Rules of Civil Procedure "to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure \* \* \* in all other special statutory proceedings." R.C. Chapter 2725 prescribes a statutory proceeding for bringing a habeas action. *Pegan v. Crawmer*, 73 Ohio St.3d 607, 608-609, 653 N.E.2d 659 (1995). And though all civil rules are not "clearly inapplicable" in habeas actions, the verification requirement in R.C. 2725.04 takes precedence over the conflicting provision of Civ.R. 11. *See id.* at 609 (holding that court of appeals should have proceeded under R.C. Chapter 2725 procedure rather than dismissing action under the Rules of Appellate Procedure).

{¶ 14} Foster also relies on *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, in which we chose not to dismiss a habeas petition

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January Term, 2022

despite the petition's failure to comply with the verification requirement. *See id.* at ¶ 37-38. Because the petition in that case included "a stipulation of the parties agreeing to all the pertinent facts," we refrained from invoking the general rule requiring dismissal and reached the merits of the petition. *Id.* at ¶ 38. Foster says that a similar result is appropriate here because Foley failed to file an answer or otherwise appear and thereby admitted the facts alleged in the habeas petition.

{¶ 15} Foster's analogy to *Watkins* is without merit. In *Watkins*, we refrained from dismissing the petition because stipulated facts accompanied the petition filed in that case. *Id.* at ¶ 27, 38. In contrast, Foster did not attach to his petition any such substitute for the verification. Moreover, Foster's premise is incorrect: Foley could not be deemed to have admitted allegations in the petition, because the court of appeals never ordered a return of writ.

{¶ 16} For the foregoing reasons, the court of appeals correctly found Foster's petition to be procedurally defective under R.C. 2969.25(C) and 2725.04. Dismissal was therefore proper.

Judgment affirmed.

O'CONNOR, C.J., and KENNEDY, FISCHER, DEWINE, DONNELLY, STEWART,  
and BRUNNER, JJ., concur.

Ezra C. Foster, pro se.

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Supreme Court of Ohio Clerk of Court - Filed December 13, 2022 - Case No. 2022-1300

# The Supreme Court of Ohio

Ezra C. Foster

v.

Keith Foley, Warden

Case No. 2022-1300

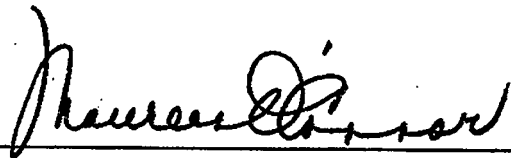
IN HABEAS CORPUS

ENTRY

This cause originated in this court on the filing of a petition for a writ of habeas corpus and was considered in a manner prescribed by law.

Upon consideration thereof, it is ordered by the court, sua sponte, ~~that this case~~ is dismissed.

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Maureen O'Connor  
Chief Justice

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**Foster v. Foley, 199 N.E.3d 553**

Copy Citation

Supreme Court of Ohio

December 13, 2022, Decided

2022-1300.

**Reporter**

**199 N.E.3d 553** \* | 2022 Ohio LEXIS 2522 \*\* | 168 Ohio St. 3d 1469 | 2022-Ohio-4380 | 2022 WL 17603679

**Foster v. Foley.**

**Notice:**

DECISION WITHOUT PUBLISHED OPINION

**Judges:** [\*\*1] O'Connor, C.J., and Kennedy, Fischer, DeWine, Donnelly, Stewart, and Brunner, JJ., concur.

Opinion

---

**[\*553] MERIT DECISION WITHOUT OPINION**

In Habeas Corpus. Sua sponte, cause dismissed.

**[\*554]** O'Connor, C.J., and Kennedy, Fischer, DeWine, Donnelly, Stewart, and Brunner, JJ., concur.

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IN THE UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF OHIO  
 EASTERN DIVISION

EZRA C. FOSTER

Petitioner,

v.

KEITH FOLEY, WARDEN, et al.,

Respondents.

) Case No. 1:23-cv-00139-JJH  
 )  
 ) JUDGE JEFFREY J. HELMICK  
 )  
 ) MAGISTRATE JUDGE  
 ) THOMAS M. PARKER  
 )  
 )  
 ) ORDER  
 )

A petition, pursuant to 28 U.S.C. § 2254, has been filed in this Court. The Court having examined the petition in accordance with Rule 4 of the Rules Governing § 2254 cases, cannot determine from the face of the petition that Petitioner is not entitled to

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- (1) Respondent shall file an answer ("Return of Writ") to the petition within sixty (60) days from the date of this order. The answer shall comply with Rule 5 of the Rules Governing §2254 cases, and shall address all legal issues raised in the petition.
- (2) Petitioner shall have thirty (30) days from the filing of Respondent's Return of Writ to file a reply thereto ("Traverse").
- (3) Respondent shall have fifteen (15) days from the filing of Petitioner's Traverse to respond thereto.

Briefs filed by the parties shall contain a summary of the facts and evidence upon which they rely and shall make specific reference to those portions of the record (Page or Exhibit Number) in support. Briefs shall also contain statements of the applicable law and citations to relevant case and statutory authorities, and a legal analysis of the claim in issue. Where applicable, multiple volumes of the record are preferred to a single, massive volume.

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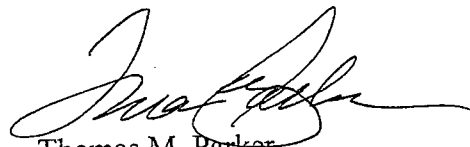
If a dispositive motion is filed raising a statute of limitations defense, the movant shall attach documentation in support of the motion, including, but not limited to a certified copy of the docket. If the respondent claims the petition is time-barred, he or she also shall brief the merits unless there is United States Supreme Court or Sixth Circuit precedent directly on point in support of his or her statute of limitations argument. However, if the petitioner argues that the filing deadline should be excused, the respondent shall file a sur-reply, including all documents in support, within fourteen (14) days of the filing of petitioner's traverse.

**If Respondent moves to dismiss a ground for relief on procedural default, he or she shall still brief the merits of the claim.**

When a party has a change of address, the party must immediately inform the Court of the new address or risk the waiver of his/her right to present arguments or the dismissal of his/her case.

**IT IS SO ORDERED.**

Dated: March 20, 2023

  
Thomas M. Parker  
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

EZRA C. FOSTER, ) Case No. 1:23-cv-00139  
)  
Petitioner, ) JUDGE JEFFREY J. HELMICK  
)  
v. ) MAGISTRATE JUDGE  
) THOMAS M. PARKER  
KEITH FOLEY, ET AL, )  
)  
Respondents. ) REPORT & RECOMMENDATION  
)

**I. Introduction**

Pro se habeas petitioner, Ezra Foster, filed a motion for summary judgment on October 12, 2023, arguing that he is entitled to summary judgment based on the record of filings before this court and respondent's failure to file a reply to his traverse, which Foster argued that the contents of his traverse being uncontested. ECF Doc. 19. Respondent's opposition to Foster's motion for summary judgment on October 26, 2023. ECF Doc. 20. Foster filed a reply to respondent's opposition on November 13, 2023. ECF Doc. 21.

I recommend that Foster's motion for summary judgment be DENIED as procedurally improper.

**II. Foster's Motion for Summary Judgment**

Foster's summary judgment motion offers eight enumerated reasons for the requested relief and record sources that Foster provides to support his motion:

1. Pursuant to the Court's initial order of a Differentiated Case Management to which this case was designated as an Administrative Track Case pursuant to the

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United States District Court for the Northern District of Ohio Local Rule 16.2(b).

2. This action is subject to the provisions of L.R. 16.1 of the Local Rules and that of the Federal Rules of Civil Procedure, as so ordered by the Court Chief Judge Patricia A. Gaughan on 01/24/2023.
3. A random assignment of Magistrate Judge Thomas M. Parker on 01/24/2023.
4. Magistrate Judge Thomas M. Parker's initial order of March 20, 2023, ordering Respondent file an answer (Return of Writ) to the petition within sixty (60) days from the date of the order; Petitioner shall have thirty (3) days from the filing of Respondent's Return of Writ to file a reply (Traverse); Respondent shall have fifteen (15) days from the filing of Petitioner's Traverse Reply to Respond thereto, so Ordered 03/20/2023.
5. Return of Writ filed by Respondent and Respondent's counsel with related documents, attachments, and State records 05/19/2023.
6. Petitioner files for extension of time to reply to the Return of Writ 05/25/2023. The motion for extension of time to file a reply is granted 05/31/2023.
7. A Traverse (Reply) to the Return of Writ is timely filed by Petitioner 06/30/2023.
8. Respondent and their Counsel were given fifteen (15) days to respond to Petitioner's (Traverse) Reply by the Magistrate Judge's order of 03/20/2023, and do not!

ECF Doc. 19 at p. 1-2.

Foster argues that the record, as outlined in his enumerated explanation, shows that there is no genuine dispute of material fact that he is entitled to habeas relief. ECF Doc. 19 at 3-4. Foster does not raise new or different arguments in support of summary judgment, rather he expresses that the filings in this matter show he should prevail. Specifically, it appears that Foster's motion is predicated on the passing of 15 days from the filing of his traverse, during which time no reply was filed by the warden. Foster argues that the pleadings are closed, since the time to file a reply has passed, and a motion for summary judgment may be filed under Rule 56 at this time.

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The gist of Foster's motion argues that, by failing to reply to his traverse, respondent has failed to dispute the arguments raised therein.

### III. Law and Analysis

Motions for summary judgment and default judgment are, generally, improper if raised by a habeas petitioner because the ordinary principles of Federal Rule of Civil Procedure 55 and 56 do not apply to a review of the merits of a federal habeas claim. *See Black v. Carpenter*, 866 F.3d 734, 742 (6th Cir. 2017). A federal habeas court cannot grant a habeas petitioner judgment in his favor without deciding the case on the merits. *See Brown v. United States*, No. 20-5090, 2020 U.S. App. LEXIS 37298 (6th Cir. Nov. 25, 2020) (explaining that a district court is obligated to decide the merits of a habeas case since "the burden to show that he is in custody in violation of the Constitution of the United States is on the prisoner."); *see also Means v. Phillips*, 136 F. Supp. 3d 872, 897 n.31 (W.D. Tenn. 2015) ("District courts may not enter default judgments in habeas cases without addressing the merits of a prisoner's claims." (citing *Allen*, 424 F.2d at 138)). Likewise, "default judgment is unavailable in a habeas corpus proceeding on the ground that state officials fail to file a timely response to the petition." *Mahaday v. Cason*, 222 F.Supp. 2d 918, 921 (E.D. Mich. 2002); *see also e.g., Harris v. Warden, London Corr. Ins.*, No. 17-3944, 2018 WL 1224456, at \*2 (6th Cir. Mar. 1, 2018) (citing *Allen v. Perini*, 424 F.2d 134, 138 (6th Cir. 1970); *Lemons v. O'Sullivan*, 54 F.3d 357, 364-65 (7th Cir. 1995)). As courts in the Sixth Circuit have consistently recognized, state prisoner's convictions are presumed valid until otherwise shown because it is the people of the state who obtained a habeas petitioner's conviction and whose interests are at stake. *See e.g., Brown v. Bradshaw*, 2017 U.S. Dist. LEXIS 41372, 4 (N.D. Ohio Feb. 22, 2017) (citing *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970)); *Mahaday*, 22 F. Supp. 2d at 922.

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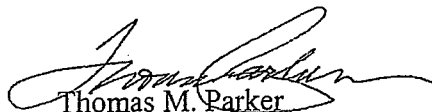
Foster's motion is misplaced regardless of whether it is considered a motion for summary judgment or for default judgment. Although Foster calls his filing a motion for summary judgment, it is tantamount to a motion for default judgement because it asks this court to make a ruling on the merits that would accept all of Foster's arguments as undisputed based on respondent's "failure" to file a reply to Foster's traverse. However, the lack of a reply to Foster's traverse does not translate to a default as contemplated by Federal Rule of Civil Procedure because the warden has not, by definition, defaulted when he has entered an appearance, filed briefs, and otherwise demonstrated every intention of disputing the merits of Foster's petition.

While the court's order, ECF Doc 6, provided that the warden could file a reply to Foster's traverse, the habeas rules do not require such a reply to be filed. The warden has done what was required to preserve his arguments. And, even if the respondent had not disputed the merits of Foster's petition, this court would be required to analyze Foster's petition and not summarily grant his requested relief. *See e.g., Brown*, 2020 U.S. App. LEXIS 37298 at \*14 (explaining that inadequate responses from a respondent are not grounds to "empty State prisoners without evidentiary hearings" when refusing to grant summary judgment and citing to default judgment analysis to support reasoning). In sum, the absence of a reply to Foster's traverse does not negate this court's obligation to consider Foster's habeas petition based on the full record before it.

#### IV. Recommendation

I recommend that Foster's motion for summary judgment be DENIED, and that Foster's habeas petition be determined in accordance with the contemporaneously filed report and recommendation.

Dated: December 27, 2023

  
Thomas M. Parker  
United States Magistrate Judge

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**Objections, Review, and Appeal**

Within 14 days after being served with a copy of this report & recommendation, a party may serve and file specific written objections to the proposed findings and recommendations of the magistrate judge. Fed. R. Civ. P. 72(b)(2); *see also* 28 U.S.C. § 636(b)(1); Local Rule 72.3(b). Properly asserted objections shall be reviewed de novo by the assigned district judge.

\* \* \*

Failure to file objections within the specified time may result in the forfeiture or waiver of the right to raise the issue on appeal either to the district judge or in a subsequent appeal to the United States Court of Appeals, depending on how or whether the party responds to the report and recommendation. *Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019). Objections must be specific and not merely indicate a general objection to the entirety of the report and recommendation; “a general objection has the same effect as would a failure to object.” *Howard v. Sec’y of Health and Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). Objections should focus on specific concerns and not merely restate the arguments in briefs submitted to the magistrate judge. “A reexamination of the exact same argument that was presented to the Magistrate Judge without specific objections ‘wastes judicial resources rather than saving them, and runs contrary to the purpose of the Magistrates Act.’” *Overholt v. Green*, No. 1:17-CV-00186, 2018 WL 301875, at \*2 (W.D. Ky. June 15, 2018) (quoting *Howard*). The failure to assert specific objections may in rare cases be excused in the interest of justice. *See United States v. Wandahsega*, 924 F.3d 868, 878–79 (6th Cir. 2019).

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

EZRA C. FOSTER,	)	Case No. 1:23-cv-00139
	)	
Petitioner,	)	JUDGE JEFFREY J. HELMICK
	)	
v.	)	MAGISTRATE JUDGE
	)	THOMAS M. PARKER
KEITH FOLEY, ET AL,	)	
	)	
Respondents.	)	<u>REPORT &amp; RECOMMENDATION</u>
	)	

**I. Introduction**

Ezra Foster, an Ohio prisoner, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. ECF Doc. 1.<sup>1</sup> Foster claims that the procedures under which the Ohio Adult Parole Authority (“APA”) revoked his parole violated his federal constitutional rights. Respondent filed a return of writ on May 19, 2023, (ECF Doc. 12), which contained over 200 pages of documents from Foster’s state court proceedings. On June 30, 2023 Foster (ECF Doc. 18). This matter is before me by an automatic order of referral under 28 U.S.C. § 72.2 for preparation of a report and recommendation on Foster’s petition.

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Because Foster’s claims are procedurally defaulted, non-cognizable, and/or meritless, I recommend that Foster’s petition for writ of habeas corpus be DENIED.

<sup>1</sup> Foster’s Writ, ECF Doc. 1, is captioned as an “Application/Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. 2254,” however, he later cites 28 U.S.C. § 2241 as the basis on which he seeks habeas relief. Respondent’s return of writ identified this discrepancy, and Foster’s Traverse clarified that he “does rely on 28 U.S.C. § 2254 and does not circumvent or evade the procedural restrictions of sect. 2254 to his petition.” ECF Doc. 18 at 4. Because it appears from Foster’s papers that he seeks relief based only on Section 2254, the undersigned will disregard any reference to § 2241.

**A. Background**

In August 1989, Foster was convicted of five counts of rape and sentenced to an aggregate prison term of 20 years to life. ECF Doc. 12-1 at 6-7; and Foster was later adjudicated a sexually oriented offender. When Foster was granted parole in May 2016, his conditions of parole provided: “[N]o unsupervised contact with minors, SUPERVISING ADULTS MUST BE APPROVED BY THE APA.” ECF Doc. 12-1 at 34 (caps in original). In January 2021, Foster was charged with violating the terms of his parole. On February 1, 2021, Foster was arrested by his supervising parole officer based on two reports of unsupervised contact with a minor in January 2021. ECF Doc. 12-1 at 25. Foster was provided notice of a parole violation hearing that was originally set occur on March 9, 2021, as the form Foster acknowledged receiving on February 8, 2021 indicated. ECF Doc. 12-1 at 26. After continuances – the propriety of which are the focus of Foster’s request for habeas relief – a parole revocation hearing occurred on March 24, 2021. *See, e.g.*, ECF Doc. 12-1 at 19–24. Foster “admitted with mitigation” that he’d had unsupervised contact with a minor on two occasions, as alleged, and was found guilty of the two charged parole violations. ECF Doc. 12-1 at 20. Foster was ordered to serve 36 months in prison before he could again become eligible for parole in early 2024. ECF Doc. 12-1 at 24.

**B. ODRC Policy**

Foster’s habeas claims challenge the timeliness of, and notices regarding, his parole revocation hearing. *See generally* ECF Doc. 1. Specifically, Foster raises issues arising out of the application of procedural policies for parole revocation hearings established by the Ohio Department of Rehabilitation and Correction (the “Department” or “ODRC”). ECF Doc. 1 at 4–6 (Exhibit B to Foster’s petition provides the policy from which his cited language originated). The Department’s policy “applies to all employees of the [ODRC, APA, and] all offenders under . . . parole[.]” ECF Doc. 1-2 at Exhibit B. The stated purpose of the ODRC policy is to


“promote fair, consistent, and objective decision making when violation behavior by offenders under adult parole authority (APA) supervision is addressed through a violation hearing.” *Id.*

The ODRC policy established scheduling “timeframes” for parole revocation hearings under which the Adult Parole Board was required to conduct a parole revocation hearing within 20 business days<sup>2</sup> from “the date the offender becomes available.” ECF Doc. 1-2 at 7. Later, an operation manual policy variance extended the hearing timeframe from 20 business days to 25 business days. ECF Doc. 1-3 at 1. Although the policy authorized a hearing officer to grant continuances with or without a request of a party, the policy provides that “a violation hearing shall be rescheduled for no more than ten (10) business days from the previously scheduled hearing date.” ECF Doc. 1-2 at 8. Under this policy, a hearing officer would have been able to grant a series of continuances, provided the next hearing date would be no more than ten business days following the “previously scheduled” hearing date.

Foster’s original hearing appears to have been scheduled for March 9, 2021. Thereafter, a “violation hearing continuance” form was created, two copies of which are appended to Foster’s petition. The upper portion of the form appears as follows:

---

<sup>2</sup> “Business days” is defined as “days of the week, excluding Saturday, Sunday, and any legal holiday.” ECF Doc. 1 at Exhibit C. “Available” is defined as “offender status as determined under ODRC Policy 100-APA-14.” *Id.* Under that policy, “[a] supervisee shall be considered available and time limitations for imposing sanctions shall be in effect in the following circumstances: (a) [t]he supervisee is under APA supervision and is being held in custody with an active APA hold order[.]” A “hold order” is an “order or act of a parole officer, unit supervisor, or other APA official that causes an offender under the jurisdiction of the APA to be detained or held in custody for alleged violations. The order or act may be placed into effect by use of an APA hold order, an APA arrest order, a teletype, fax, or a verbal order.”

		<b>ADULT PAROLE AUTHORITY</b>	
<b>Violation Hearing Continuance</b>			
Name: Ezra Foster		Offender #/COTS #: A213888	
I hereby make application for continuance of the violation hearing originally scheduled for:			
Date: Mar 9, 2021		Time: 1:00 PM	
For the following reason(s): Hearing site unavailable			
Counsel for Offender:		Date:	
Unit Supervisor:		Date:	
1. Application for continuance APPROVED and rescheduled for:			
Date: Mar 23, 2021			
2. Application for continuance DISAPPROVED for the following reason(s):			
Hearing Officer: Michael E Anderson		Date: 2/2/2021	

ECF Doc. 1-4. The origin of this form is uncertain. But it appears to indicate that the originally scheduled hearing date was to occur on March 9, 2021. An indication "Hearing site unavailable" suggests a continuance of the hearing was necessary for that reason. And it appears that the continuance was approved by Hearing Officer Michael E. Anderson on the same date the form was created, February 2, 2021. The continuance moved the hearing date to March 23, 2021. The lower part of that form appears as follows:

Hearing Officer: Michael E Anderson <i>MEC</i>		Date: 2/2/2021
I certify that this response was hand-delivered to me on:		
Date:	Time:	
Offender Signature:	Date:	
Witness Signature:	Date:	
Violation Hearing Continued by the Hearing Officer and scheduled for:		
Date: Mar 24, 2021	Time: 1:00 PM	
For the following reason(s): Hearing site unavailable		
Hearing Officer: Michael E Anderson <i>MEC</i>		Date: 2/2/2021
I certify that this response was hand-delivered to me on:		
Date:	Time:	
Offender Signature:	Date:	
Witness Signature:	Date:	
DRC 3311 (Rev. 03/09) DISTRIBUTION: WHITE - VSP Officer CANARY - Unit <i>PPK</i> - Jail/Reception Center GOLDENROD - Offender		

This part of the form indicates that also on February 2, 2021, the same hearing officer appears to have continued the violation hearing by one more day, from March 23, 2021 to March 24, 2021, on his own initiative for the reason, "Hearing site unavailable." *Id.* Foster also produced another copy of this form as an exhibit to his petition. ECF Doc. 1-5. Foster's copy is the same as depicted above with the addition of the information that the form was hand delivered to Foster on February 8, 2021. A "Notice of Release Violation Hearing" form is included in the state record produced by the warden. ECF Doc. 12-1 at 26. That form indicated the original hearing date was March 9, 2021. And it was countersigned by Foster on February 8, 2021, the same day Foster acknowledged the continuances of the original hearing date first to March 23 and then to March 24, 2021, as indicated in ECF Doc. 1-5.

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**C. State Court Proceedings**

On November 9, 2021, Foster filed a petition for writ of habeas corpus in the Ohio Court of Appeals. ECF Doc. 12-1 at 36. Foster sought immediate release from prison, based on “extraordinary circumstances,” which he argued amounted to a violation of his minimal due process rights and rendered his “hearing invalid and void the sentence unlawful[.]” *Id.* at 40. He also argued that his immediate release was proper because the length of time between his date of availability and his final parole revocation hearing was impermissibly long, in violation of his right to equal protection. *Id.* at 45–47.

On January 10, 2022, the Ohio Court of Appeals dismissed Foster’s state habeas petition *sua sponte* because of his failure to comply with state procedural rules found in Ohio Rev. Code § 2969.25(C) and § 2725.04. ECF Doc. 12-1 at 106; *State ex rel. Foster v. Foley*, No. 21CA11812, 2022-Ohio-35 (Ninth Dist. App.). On February 18, 2022, Foster filed a notice of appeal in the Supreme Court of Ohio. ECF Doc. 12-1 at 110. Four days later, on February 22, 2022, Foster filed a motion based on Ohio Rule of Civil Procedure 60(b)(1) asking the Ohio Court of Appeals to reverse its decision and adjudicate the merits of his habeas claims. *Id.* at 168–174. On April 15, 2022, Foster filed his merits brief in the Ohio Supreme Court, asserting three propositions of law:

1. THE COURT’S JUDGMENT THAT APPELLANT FAILED TO COMPLY WITH THE STRICT FILING REQUIREMENTS OF O.R.C. 2969.25(C)(1) AND O.R.C. 2725.04, FAILS TO CONSIDER THE “EMPLOYEE’S,” “ENTITY’S” REQUIREMENTS IN THE FILING AND THAT RESPONDENT FAILED TO ANSWER OR APPEAR TO THE FILING AND AS A RESULT THE FACTS ARE DEEMED ADMITTED ALLOWING THE COURT’S DISCRETION TO ADJUDICATE A CONSTITUTIONAL QUESTION.
2. EXTRAORDINARY CIRCUMSTANCES OCCUR DURING THE HEARING PROCESS WHERE CERTAIN SPECIFIED MINIMAL DUE PROCESS REQUIREMENTS WERE NOT

OBSERVED AND THERE IS AN UNLAWFUL RESTRAINT OF APPELLANT'S LIBERTY[,] 14TH U.S. CONSTITUTIONAL AND ARTICLE 1 SECTION 2 OHIO CONSTITUTIONAL VIOLATIONS.

3. APPELLANT IS DENIED HIS AVAILABILITY DATE BY WHICH TO BE BROUGHT TO A HEARING AND OHIO CONSTITUTION ARTICLE IV SECTION (8) EIGHT AND U.S CONSTITUTIONAL (14) FOURTEEN AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAW.

See ECF 12-1 at 126, 129, 135. On September 13, 2022, the Supreme Court of Ohio affirmed the state appellate court's dismissal of Foster's petition based upon Foster's failure to comply with state procedural requirements. *Id.* at 195; *State ex rel. Foster v. Foley*, 170 Ohio St.3d 86, 2022-Ohio-3168.

On October 24, 2022, Foster filed an original action in the Supreme Court of Ohio seeking habeas corpus relief. ECF Doc. 12-1 at 201. In this second state habeas petition, Foster sought immediate release from prison, again based on the allegedly improper timing of his parole revocation hearing, and he argued that the APA Violation Hearing Continuance form that was used "to conduct and bring [Foster] to the March 24th, 2021, parole hearing" is false, misleading, and otherwise void, thus, there could be no "hearing and no subsequent sentence thereof." *Id.* at 204-205. In an entry dated December 13, 2022, the Supreme Court of Ohio dismissed Foster's petition on the merits after being "considered in a manner prescribed by law." *Id.* at 242.

**D. Federal Habeas Petition**

On January 24, 2023, Foster filed his federal habeas petition. See ECF Doc. 1.

Foster raises two claims for relief:

- 1) PETITIONER SEEKS A WRIT OF HABEAS CORPUS BECAUSE HE WAS DENIED HIS MINIMAL U.S. FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS DURING HIS PAROLE REVOCATION HEARING PROCESS AND AS A RESULT DEPRIVED OF HIS LIBERTY.

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- 2) AN INMATE IMPRISONED BY A REVOCATION OF HIS PAROLE IS NOT ENTITLED TO AN APPEAL; HE IS DENIED THE ONLY REMEDY TO INQUIRE INTO THE CAUSE OF HIS IMPRISONMENT THROUGH A WRIT OF HABEAS CORPUS; WHEN OHIO COURT'S [sic] INTERPOSE A FINANCIAL CONSIDERATION OF INDIGENCY AS A STATE PRISONER AND HIS EXERCISE OF A STATE RIGHT TO SUE FOR HIS LIBERTY IT DENIED HIS EQUAL PROTECTION OF THE LAW.

ECF Doc. 1 at 4. The warden filed a return of writ and the state court record on May 19, 2023. ECF Docs. 12, 12-1. Foster filed his traverse on June 30, 2023. ECF Doc. 18.

## II. The Parties' Arguments

### A. Ground One

Foster's Ground One claim argues that "there was no orderly process to the termination of his liberty when his parole was revoked. This deprivation of liberty is an issue of federal law because it fails to meet the minimum due process requirements for a parole revocation hearing as stated in *Morrissey v. Brewer*." ECF Doc. 18 at 8. Foster alleges that he was never given proper notice of his final revocation hearing, because the Violation Hearing Continuance forms ECF Docs. 1-4, 1-5, which changed the date of his final parole revocation, set a final hearing date that was two days later than the timeframe permitted under applicable ODRC policy. He further argues that the form (ECF Doc. 1-5) that he received and signed on February 8, 2021 was fraudulently created with dates that did not reflect his actual date of availability or otherwise show that two continuances were permitted, one of which alleges he did not receive notice for. ECF Docs 1 at 7-10; 18 at 8-9. It also appears that Foster argues the due process requirements for parole revocation hearings were violated based on an alleged fraudulent discrepancy between documents used during his hearing and information received in response to a request of the APA for hearing related documents. ECF Doc. 1 at 11 (asserting that "he was never afforded the transcripts to the hearing and the other Violation Hearing Continuance form

DRC 3311 cited in the DISAPPROVED section of his ‘evidence.’”). Based on the amount of time that passed before his final hearing was conducted and the discrepancy between what he received and what he alleged was used in and/or provided him notice of the hearing, he argues that the ECF Docs. 1-4 and 1-5 forms never provided him with valid notice; thus, they should be deemed void, entitling him to immediate release. *Id.* at 11; *see also* ECF Doc. 18 at 11.

The warden disagrees with Foster’s Ground One claim arguments. Specifically, the warden argues that Foster “did receive a parole revocation hearing that complied with the due process requirements of *Morrissey*.” ECF Doc. 12 at 16. Further, the warden argues that Foster has neither shown that a 37-business-day time in custody prior to his parole revocation hearing was unreasonable nor pointed to any controlling precedent that clearly establishes this was an unconstitutional delay. *Id.*

**B. Ground Two**

Foster’s Ground Two claim argues that the dismissal of his state appeals – because of his noncompliance with the Ohio filing requirements – imposed a “financial consideration” upon his court filings, with which he allegedly could not comply, and which “denied [him of] a state remedy to his filing because there is no appeal of a revocation of his parole.” ECF Doc 18 at 5. Specifically, Foster argues that the requirement of Ohio Rev. Code § 2969.25(c) that a prisoner seeking to proceed without paying filing costs must provide a “statement that sets for the balance in the inmate account of the inmate for each of the preceding six months as certified by the institutional cashier” is an unconstitutional financial consideration. *Id.* at 6. Foster admits that his “claims [were] never adjudicated in state courts” because he failed to comply with the filing requirements of Ohio Rev. Code §§ 2969.25(c) and 2725.04. ECF Doc. 18 at 5.

The warden argues that Foster has procedurally defaulted the Ground Two claim for failure to raise it during his state habeas actions and asserts that it is otherwise non-cognizable,

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because it alleges errors in the state court post-conviction process, which is based entirely on state statutes, procedural rules, and case law. *See* ECF Doc 12 at 6–10.

### III. Law & Analysis

#### A. Legal Standard

“Habeas corpus is the appropriate action for a person seeking immediate release from prison and challenging a parole board decision.” *Perotti v. Erdos*, 1:18-cv-446, 2019 U.S. Dist. LEXIS 92088, \*10 (S.D. Ohio Jun. 13, 2019) (citing *State ex rel. Lemmon v. Ohio Adult Parole Authority*, 78 Ohio St. 3d 186 (1997)). A state prisoner seeking a writ of habeas corpus must show that he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Additionally, the petitioner must meet all of the jurisdictional and procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) in order to obtain merits review by the federal habeas court. *See e.g.*, 28 U.S.C. § 2254(b) (exhaustion); 28 U.S.C. § 2244(d) (statute of limitations).

If the state court adjudicated the issues presently raised, AEDPA permits a federal court to grant relief only if the state court decision: (i) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (ii) was based on an unreasonable determination of the facts in light of the record before the state court. 28 U.S.C. 2254(d). “Unreasonable” does not simply mean that the state court got it wrong. *Chinn v. Warden, Chillicothe Corr. Inst.*, 24 F.4th 1096, 1101 (6th Cir. 2022). Only if no “fairminded jurist” could agree with the state court may we grant relief. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed. 2d 624 (2001). The petitioner must show that the state court’s “decision was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement.” *Id.* at 103.

## B. Procedural Default

“Before [a federal court may] reach the merits of a habeas petition, . . . [it must] review whether the petitioner has satisfied the procedural requirements for litigating his federal claim in state court.” *Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 826 (6th Cir. 2019) (citation omitted). There are two circumstances in which procedural default, generally, arises: (1) when a petitioner has failed to give state courts a “fair” opportunity to act on his federal constitutional claims, *O’Sullivan v. Boerckel*, 562 U.S. 838, 844, 119 S.Ct. 1728, 144 L.Ed. 2d 1 (1999), and (2) when a state court declines to decide the claims based upon the petitioner’s failure to comply with an “independent and adequate” state procedural requirement, *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L. Ed 2d 640 (1991).

In the first circumstance of procedural default, a petitioner procedurally defaults a claim by failing to “fairly present” the claim in state court and pursue that claim through the state’s “ordinary appellate review procedures,” if, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006); *see also Baston v. Bagley*, 282 F. Supp. 2d 655, 661 (N.D. Ohio 2003) (“Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition.”). In order to “fairly present” a claim to a state court, the petitioner must have asserted both the legal and factual basis of the claim. *Williams*, 460 F.3d at 806 (citing *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)). Most importantly, the “petitioner must present his claim to the state court as a federal constitutional issue – not merely as an issue arising under state law.” *Id.* (quoting *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984)).

In the second circumstance, if a state court declines to address a petitioner’s federal constitutional claims because the petitioner failed to meet a state procedural requirement, then federal habeas review is barred as long as the state judgment rested on an “independent and

adequate” state procedural ground. *Coleman*, 501 U.S. at 729. To be independent, a state procedural rule and the state court’s application of it may not involve any issue of federal law. *Id.* at 732–33. To be adequate, a state procedural rule must be “‘firmly established’ and ‘regularly followed’” by the state courts at the time it was applied. *Beard v. Kindler*, 558 U.S. 53, 60–61, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009).

But a petitioner’s procedural default can be excused if he demonstrates: (1) cause for the default and actual prejudice that resulted from the alleged violation of federal law, or (2) that there would be a “fundamental miscarriage of justice” if the petitioner’s claim is not considered. *Coleman*, 501 U.S. at 750. “[C]ause’ under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him.” *Id.* “[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Id.* “A fundamental miscarriage of justice results from the conviction of one who is ‘actually innocent.’” *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006) (citing *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L. Ed. 2d 397 (1986)). Actual innocence means “factual innocence, not mere legal insufficiency.” *Bousely v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 104 L. Ed. 2d 828 (1998). “To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new, reliable evidence . . . that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d. 808 (1995).

**C. The Ground One Claim is Procedurally Defaulted**

Foster raised his Ground One claim in his initial habeas corpus petition filed in the Ohio Court of Appeals. However, that court did not reach the merits of Foster's claim because of his noncompliance with two state procedural rules: (1) he failed to provide a financial affidavit that complied with Ohio Rev. Code § 2969.25(c); and (2) he failed to verify his state habeas petition as required by Ohio Rev. Code § 2725.04. The Ohio Court of Appeals dismissed Foster's state habeas petition because of these deficiencies and never reached the merits of Foster's claims. ECF Doc. 12-1 at 106–109. Foster appealed that decision to the Ohio Supreme Court, but after de novo review it unanimously affirmed the appellate court decision. ECF Doc. 12-1 at 195-199; *State ex rel. Foster v. Foley*, 2022-Ohio-3166. Thus, the Ohio courts were presented with Foster's Ground One claim but declined to rule on it because of his procedural default.

Foster then exhausted his state habeas remedies by filing an original action in the Ohio Supreme Court, which was denied on the merits without an opinion. Because the time for any requests for reconsideration has passed and available appeals of the state court decisions have been exhausted, no state court avenues for consideration of Foster's Ground One claim remain.

The dismissal of Foster's Ground One claim because of his failure to comply with the two procedural requirements was an independent and adequate basis for dismissal of the claim. The application of the state procedural rules at issue was independent because the statutory rules, and the state courts' enforcement of them, did not involve any issue of federal law. *Coleman*, 501 U.S. at 732–33. Additionally, the two statutory rules were adequate grounds for dismissal, because these rules supported the dismissal of Foster's claims and because the application of these rules were “firmly established” and “regularly followed” by the state courts. *See, e.g., State ex rel. Ellis v. Wainwright*, 157 Ohio St.3d 279, \*280 (Ohio 2019) (“R.C. 2969.25(c) demands strict compliance, so an inmate's explanation for noncompliance is not relevant”)

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(citing *State ex rel. Powe v. Lanzinger*, 159 Ohio St.3d 385 (Ohio 2019)); *Rogers v. Eppinger*, 2019 U.S. Dist. LEXIS 133638, \*16 (N.D. Ohio Aug. 8, 2019); see also *Larkins v. State Dep't of Rehab. & Corr.*, 138 Ohio App.3d 733, 736 (Ohio App. 10th Dist. 2000) (affirming the dismissal of one of the inmate's actions when he failed to comply with Ohio Rev Code § 2969.25) (cited by petitioner at ECF Doc. 18 at 7 for proposition that courts can use discretion to waive strict filing requirements, because the *Larkins* court accepted belated affidavits to overcome some inmates' filing failures). Thus, Foster's Ground One claim is procedurally defaulted.

In an apparent effort to show cause to excuse the procedural default of his Ground One claim, Foster argues that his financial affidavit failed to meet the Ohio procedural requirement – for six preceding months of financial account records – because of an unexplained delay between when he submitted his request to the institutional cashier and when it was certified. ECF Doc. 1 at 12. However, that delay did not excuse his obligations under Ohio statute. And it was Foster's obligation to obtain a sufficient financial affidavit, something he had to know that he had not done at the time he filed his state habeas petition. See ECF Doc. 12-1 at 59 (showing that Foster had filed a financial affidavit, indicating he knew this was a requirement; but that affidavit did not contain the required prisoner financial account reports); see also *Larkins*, 138 Ohio App. 3d at 736 (exercising discretion to excuse some pro se inmates' failure to file an itemized litigation history where the inmates immediately, upon becoming aware of the requirement, filed complete and accurate affidavits detailing the necessary litigation history, but dismissing action brought by another inmate for failure to accurately describe the necessary litigation history despite knowledge of the requirement).

Foster has failed to show cause to excuse his procedural default because he cannot show that his failure to file an appropriate financial affidavit was “external to the petitioner, something that cannot be fairly attributed to him.” *Coleman*, 501 U.S. at 750. Foster also has not argued

prejudice, that the outcome of his parole revocation proceeding would have been any different had it been held at an earlier date.

Likewise, Foster's procedural default of his Ground One claim cannot be excused on a potential fundamental miscarriage of justice contention, because Foster has neither argued the issue nor submitted any evidence to show his actual innocence. To the contrary, Foster appears to have admitted the substance of the parole violations with which he was charged. *See, e.g.*, ECF Doc. 12-1 at 20 (APA hearing summary report which indicates that Foster "admitted, with mitigation, to violating Ohio Parole Rule #8" when, on two occasions, he had unsupervised contact with minors); ECF Doc. 12-1 at 38 (Foster's state habeas petition).

I recommend that Foster's Ground One claim be dismissed as procedurally defaulted.

**D. The Ground One Claim Is Noncognizable**

Even if Foster's Ground One were not procedurally defaulted, it should be dismissed as noncognizable. Federal habeas relief is only available for federal constitutional violations. 28 U.S.C. § 2254(a). To the extent that a habeas petitioner's claim asserts only the violation of state law, it is said to be noncognizable and may not be reviewed in federal court, unless the challenged state court ruling violated a fundamental federal constitutional right. *See, e.g., Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("federal habeas corpus relief does not lie for errors of state law"); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."). "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed. 2d 385 (1991) (citing 28 U.S.C. § 2241).

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A petitioner may not convert a claim asserting state law error into a constitutional claim, merely by alleging that the failure to follow a state rule violated his general due process rights. *Rivera v. Illinois*, 556 U.S. 148, 158, 129 S.Ct. 1446, 173 L.Ed. 2d 320 (2009) (“The Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions but ‘the fundamental elements of fairness in a criminal trial.’”); *see also Engle v. Isaac*, 456 U.S. 107, 121 n.21, 102 S.Ct. 1558, 71 L.Ed. 2d 783 (1982) (“We have long recognized that a ‘mere error of state law’ is not a denial of due process.”) (citation omitted). A claim that alleges only errors of state law is cognizable only to the extent that the conduct is fundamentally unfair, meaning the “error amounts to a fundamental miscarriage of justice or a violation of the right to due process.” *Cristini v. McKee*, 526 F.3d 888, 897 (6th Cir. 2008). Fundamental fairness under the Due Process Clause is compromised when “the action complained of . . . violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ . . . and which define ‘the community’s sense of fair play and decency.’” *Dowling*, 493 U.S. at 352 (internal citations omitted). Courts, therefore, “have defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Id.*

Foster’s Ground One claim is noncognizable because it is based entirely on the application of state policies and procedures created by and applicable only to Ohio parolees. And Foster has failed to demonstrate that the application of state policy to him amounted to a violation of the federal constitution. Additionally, Foster has failed to argue or otherwise demonstrate that the alleged two-day delay in conducting his parole revocation hearing violated a fundamental right protected by the United States Constitution. Accordingly, the lack of cognizability of Foster’s Ground One claim provides an additional basis for its dismissal.

**E. The Ground One Claim is Meritless**

Alternatively, even if Foster's Ground One claim had not been procedurally defaulted and if it were construed to raise a cognizable claim, it should nevertheless be denied for lack of merit. Foster has failed to demonstrate that the way in which his parole revocation matter proceeded was contrary to or involved an unreasonable application of clearly established federal law articulated by the United States Supreme Court. And, he has not contended that the Ohio Parole Board made an unreasonable determination of the facts in concluding that his hearing was timely. Thus, I would recommend that Foster's Ground One claim be denied for lack of merit.

The merits issue in Foster's Ground One claim is whether the Ohio Parole Board made a decision that was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court.<sup>3</sup> 28 U.S.C. § 2254(d)(1). The United States Supreme Court has articulated that there are only a few basic requirements that must be met by state parole boards during the parole revocation process in order to satisfy the due process requirements of the United States Constitution. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). In the parole revocation hearing setting, federal due process requires: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses. . . .; (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or

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<sup>3</sup> This court recognizes that the Ohio Supreme Court was presented with Foster's Ground One claim in Foster's original action for habeas relief initiated in that court. That court denied Foster relief through a merits decision without an opinion. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). There has been a state decision on the merits in this matter and we have no basis upon which to find that its decision to deny Foster relief was without a reasonable basis given what was presented to that court and to us.

lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.” *Id.* The Supreme Court has not created “an inflexible structure for parole revocation procedures” so as not to “impose a great burden on any State’s parole system.” *Id.* at 490. As to timing, under *Morrissey*, a final parole revocation hearing simply “must be tendered within a *reasonable time* after the parolee is taken into custody.” *Id.* at 488 (emphasis added). The Sixth Circuit has also ruled that parole revocation hearings must simply be held within a reasonable time after the parolee is taken into custody. *Bowen v. Jones*, 463 F. App’x 514, 518 (6th Cir. 2012) (citing *Morrissey*); *see also Bennet v. Bogan*, 66 F.3d 812, 819 (6th Cir. 1995) (explaining that “fully panoply of rights due a defendant in [formal criminal prosecutions] do not apply to parole revocation” in connection with an explanation that speedy trial rights were not violated in parole context).

Foster seems to be arguing two things in his Ground One claim: (1) that the timing of his hearing did not comply with ODRC policy; and (2) that the face of two ODRC Forms 3311 showed that his hearing was impermissibly continued.<sup>4</sup>

Foster’s first argument is that his “availability” date was inaccurately listed as February 2, 2021, when he was actually taken into custody for his parole violation on February 1, 2021. ECF Doc. 1 at 7–9. Under the ODRC policy, a parolee’s “availability” triggers the timeframe within which a parole revocation hearing must be conducted. *See* ECF Doc. 1-2 at 7. Under ODRC Policy, a supervisee under APA supervision is considered “available” when he is held in

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<sup>4</sup> To the extent that Foster also argues that he was not provided a transcript of the parole revocation hearing, that argument lacks merit because he was provided a summary of the hearing available in (at least) the form of the “Revocation Order” which was attached to his federal writ. ECF Doc. 1 at Exhibit A. This document provides a summary of the parole revocation hearing and states the reasons for revoking parole sufficient to satisfy that aspect of the minimum due process required for parole revocation proceedings.

custody with an active APA hold order. ODRC Policy 100-APA-14(VI)(H)(1)<sup>5</sup>. A hold order was issued by the APA on February 1, 2021. ECF Doc. 12 at 25. However, using an “availability” date of February 2, 2021, for purposes of counting time under the ODRC scheduling policy, is appropriate, because under Ohio law:

The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that, when the last day falls on Sunday or a legal holiday, the act may be done on the next succeeding day that is not Sunday or a legal holiday.

Ohio Rev. Code § 1.14.

Thus, with Foster having been arrested on February 1, 2021, it was proper to conclude that he was “available” on February 2, 2021 and to use that as the starting date for determining a hearing deadline. Foster’s original hearing date of March 9, 2021 was the 25th business day after he became available with the appropriate exclusion of weekend days and the President’s Day holiday. Thus, under a reasonable interpretation of the applicable policy, Foster’s originally scheduled hearing was not late.

The subsequent continuances approved by the hearing officer were expressly permitted under the scheduling policy. *See* ECF Doc. 1-2 at 7–8 (Sections F(3) and F(4)). Under that policy, the hearing officer “may continue, reschedule, or cancel a violation hearing without a request from any party. The hearing officer shall provide notice of any such change to all parties.” ECF Doc. 1-2 at 7 (APA policy Section F(3)). And “[a] violation hearing shall be rescheduled for no more than ten (10) business days from the previously scheduled hearing date.” ECF Doc. 1-2 at 8 (APA policy Section F(4)). The first continuance of the March 9, 2021 hearing was properly rescheduled to a time within 10 business days, when the hearing officer

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<sup>5</sup> <https://drc.ohio.gov/about/resource/policies-and-procedures/105-pbd-parole-board/violation-hearing-process> (last visited 12/21/23).

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continued it to March 23, 2021. And, the hearing officer then approved a one day continuance, as permitted under the ODRC policy, when the hearing was again continued to March 24, 2021 due to unavailability of the hearing site. Thus, both continuances complied with the APA policy. I find that there was no timing error.

In addition to the lack of any timing error, Foster has not cited any judicial decision, let alone precedent from the United States Supreme Court, which clearly established that a delay of one or two days beyond a timeframe established in a state parole board scheduling policy would escalate this issue to a federal constitutional violation. Absent such clearly established federal law federal habeas relief is unavailable. Foster does not argue that the alleged one- or two-day delay amounted to an *unreasonable* delay or that he was prejudiced in any way by the delay. Instead, his argument is simply that the Ohio Parole Board committed a violation of its own rules.

Even if Foster had been able to show such a policy “violation,” the Sixth Circuit has ruled that “[t]echnical errors in the parole revocation process do not rise to the level of a constitutional issue, and parolee must show prejudice before we will find a due process violation.” *Linton v. Walker*, 26 F. App’x 381, 383 (6th Cir. 2001) (holding that there was no prejudice, and thus no due process violation, based on a ministerial reporting error). Thus, even if Foster’s hearing had been conducted a day or two beyond the APA policy deadline, Foster’s claim would fail for lack of a constitutional issue because he cannot show prejudice. Foster has not argued that he suffered prejudice as a result of the contended delay in his hearing date. And he would be unable to demonstrate prejudice in any event because he *admitted* to violating the conditions of his parole. Foster’s claim is based on an alleged technical violation of an Ohio administrative rule; that is not sufficient to raise an issue on which we would be permitted to grant a writ of habeas corpus.

As to the second aspect of Foster's Ground One claim, related to the hearing continuance notification forms, Foster challenges the dates set forth on ECF Doc. 1-4 and ECF Doc. 1-5. As discussed above, he contends that he was available for purposes of a parole revocation hearing on the date of his arrest, February 1, 2021. As a result, he contends the latest possible date for a parole revocation hearing under the policy document set forth in ECF Doc. 1-2 would have been March 8. And, any continuances would have been limited, such that Foster's parole revocation hearing would have been required to be held by March 23, 2021.

I have already discussed the errors in Foster's analysis. First, under Ohio law, the date of arrest would have not been included in determining Foster's "available" date. Therefore, he was "available" for a parole revocation hearing on February 2, 2021. Twenty-five business days later was March 9, 2021. That was the date set for Foster's hearing. However, ECF Docs. 1-4 and 1-5 (two versions of the same document) demonstrate that the hearing was continued on February 2, 2021 initially to March 23, 2021, and, on the same form, continued one more day to March 24, 2021. These continuances were expressly permitted under Ohio Parole Board policy.

Foster claims that he was not properly informed of these continuance dates when he had his "preliminary" hearing on February 8, 2021. However, ECF Doc. 1-5 bears Foster's signature, thereby demonstrating he was advised of each of the foregoing dates at that time. Further, it was on February 8, 2021 when Foster indicated he intended to "admit with mitigation" the two parole violations with which he had been charged. *See* ECF Doc. 12-1 at 26-28. Thus, as of February 8, 2021 the record demonstrates that Foster had: (i) received notice of the violations he was being charged with; (ii) advised of the scheduled parole revocation hearing date; (iii) requested to be represented by counsel at the revocation hearing *See* ECF Doc. 12-1 at 29-30; and (iv) admitted with mitigation to the charged violations. Then, on March 24, 2021 at Foster's revocation hearing, he was advised of the evidence against him. *See* ECF Doc. 12-1 at

31–33. And this was done at a hearing before a neutral, detached body – the Ohio Parole Board. Finally, Foster was given a written statement by the factfinders as to the evidence relied on and reasons for revoking his parole. ECF Doc. 12-1 at 23–24.

Simply put, Foster’s arguments concerning alleged fraud or discrepancies in the parole revocation hearing documentation are belied by the content of the documents themselves. Although Foster predicates his claims on the due process regimen prescribed in *Morrissey v. Brewer*, 408 U.S. at 489, the record before us demonstrates quite clearly that Foster was provided with exactly the sort of due process contemplated by the Supreme Court in *Morrissey*. And Foster has not cited any other clearly established federal law that would demonstrate he has a colorable habeas claim.

In sum, even if Foster’s characterization of the record were accurate, the allegations in his Ground One claim do not rise to the type of conduct that could support a federal due process violation. The minimum due process requirements for parole revocation hearings – as clearly established by the Supreme Court – have been satisfied, and any alleged delay was not unreasonable. Finally, Foster had neither argued nor shown that that he was prejudiced in any way. Because Foster’s Ground One claim lacks merit, it would fail on that basis even if not procedurally defaulted and noncognizable.

**F. The Ground Two Claim is Procedurally Defaulted**

The warden argues that Foster’s Ground Two claim was procedurally defaulted. I agree. Before coming to federal court, a habeas petitioner must give the state courts a “fair” opportunity to act on his federal constitutional claims. *O’Sullivan*, 526 U.S. at 844 (emphasis in original). If the petitioner did not do so and has no legal mechanism by which to do so now, the claim is procedurally defaulted. *Williams*, 460 F.3d at 809. For a claim to have been fairly presented, the factual and legal basis of the claim asserted in the petition must have been raised at every

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available stage of state review. *Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009); *McMeans*, 228 F.3d at 681. The petitioner must have presented “his claim to the state courts as a federal constitutional issue – not merely as an issue arising under state law.” *Williams*, 460 F.3d at 807 (internal quotation marks omitted). In the Sixth Circuit, this can be done in one of four ways:

- (1) reliance upon federal cases employing constitutional analysis;
- (2) reliance upon state cases employing federal constitutional analysis;
- (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or
- (4) alleging facts well within the mainstream of constitutional law.

*McMeans*, 228 F.3d at 681 (paragraph breaks added).

Here, although the Ohio courts were fairly presented with the arguments contemplated in Foster’s Ground One claim, no state court was ever given the opportunity to consider Foster’s Ground Two claim. In that claim, Foster contends his federal constitutional rights were violated when the Ohio Court of Appeals enforced the Ohio statutory requirement that he file a suitable financial affidavit prior to permitting him to proceed *in forma pauperis*. This, he contends, amounted to the imposition of an improper “financial consideration” on his ability to obtain judicial review of the parole revocation decision of the Ohio Parole Board. *See supra* II(B) above.

That claim could have been presented to the Ohio courts as early as January 10, 2022, when the Ohio Court of Appeals dismissed his claims for failure to comply with state filing requirements. However, Foster never raised the Ground Two claim either on his direct appeal of that January 10, 2022 decision in the Ohio Supreme Court or in his second state habeas petition, also filed in the Ohio Supreme Court. *See* ECF Doc. 12-1 at 120, 201. Instead, Foster first raised that in his federal habeas petition. As a result, the Ground Two claim was never fairly

presented in the Ohio courts, and we may not consider it absent a showing of cause for Foster's failure to raise this issue during his two proceedings in the Ohio Supreme Court and a showing of actual prejudice that resulted from the alleged constitutional violation. *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977) (“[R]eview of [a claim raised for the first time on habeas review] should be barred on habeas, as on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.”); *Wagner*, 581 F.3d at 418 (requiring that claims be raised at every stage of state review).

Foster has not attempted to show cause. He has not made any argument about why he did not raise the Ground Two claim in the Ohio Supreme Court on the direct appeal of the dismissal of his first state habeas case by the Ohio Court of Appeals, or before the Ohio Supreme Court on his second state habeas petition. And Foster has not argued prejudice. In fact, the record is devoid of any argument that the outcome of his revocation proceedings would have been different but for the denial of his constitutional rights as alleged in the Ground Two claim. Moreover, the Ohio Court of Appeals also dismissed Foster's initial state habeas petition because it was not verified. That alone would have precluded him from proceeding, irrespective of Foster's arguments about the propriety of him being required to submit a sufficient financial affidavit. Foster cannot show prejudice. I recommend that Foster's Ground Two claim be DISMISSED as procedurally defaulted.

**G. The Ground Two Claim is Noncognizable**

Even if Foster's Ground Two were not procedurally defaulted, I recommend it be denied as noncognizable. A petitioner asserts a cognizable claim when the state-court ruling undermined the “‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ . . . and which define ‘the community’s sense of fair play and decency.’” *Dowling*, 493 U.S. at 352 (internal citations omitted). “The Supreme Court has

defined very narrowly the category of infractions that violates fundamental fairness.” *Bey*, 500 F.3d at 522 (citing *Dowling*, 493 U.S. at 352).

Foster’s argument that the state Court of Appeals’ dismissal of his initial state habeas petition based on his failure to include a financial affidavit compliant with Ohio statute is not cognizable. That dismissal was based on Foster’s failure to comply with a state procedural rule that is consistently and routinely applied by Ohio courts. *See supra* Section III(C). Further, Foster has not shown that the state Court of Appeals’ application of a state filing requirement falls within the narrowly defined realm of conduct that rises to “fundamental unfairness” as required to elevate this otherwise state law issue to a matter of federal constitutional concern, notwithstanding Foster’s use of terminology such as “equal protection.” A further ground for DISMISSAL of Foster’s Ground Two claim rests upon its noncognizability.

#### **H. The Ground Two Claim is Meritless**

Even if Foster’s Ground Two Claim were not procedurally defaulted and noncognizable, it would nevertheless be subject to denial for lack of merit.

Foster’s Ground Two claim alleges a denial of his equal protection rights arising from the requirement that he submit a sufficient financial affidavit. But Foster has not cited any clearly established federal law as decided by the United States Supreme Court decisions which held that a state violates the equal protection rights of a state habeas petitioner when it requires the person to file a financial affidavit demonstrating indigency prior to waiving filing fees. The United States Supreme Court *has* expressed that a state law requirement that *payment of a filing fee* be made by indigent prisoner prior to docketing a habeas petition violates the Equal Protection Clause of the Fourteenth Amendment, *Smith v. Bennet*, 365 U.S. 708, 713–14 (1961), but the Court has not established that it is a violation of equal protection for a state law to require that a prisoner *demonstrate indigency prior to waiving* a filing fee. In fact, a review of selected state

statutes and federal court local rules reveals that other jurisdictions commonly require individuals who wish to proceed *in forma pauperis* to make a sufficient showing of indigency by submitting either an application, motion, or affidavit prior to waiving fees. *See, e.g.*, N.D. Ohio L.R.Civ.P. 3.15 (permitting the submission of an application to proceed in forma pauperis); W.D. Pa. L.R.Civ.P. 2254(C) (requiring filing fee accompany a petition or that the filing include a motion for leave to proceed in forma pauperis); W.Va. Code § 59-2-1(a) (“A natural person who is financially unable to pay the fees or costs attendant to the commencement, prosecution or defense of any civil action or proceeding, or an appeal therein, is permitted to proceed without prepayment in any court of this State, after filing with the court an affidavit that he or she is financially unable to pay the fees or costs or give security therefore.”). Thus, Foster has failed to show, and this court’s independent investigation has not revealed, that the state court’s application of its own procedural requirements in this instance violated clearly established federal law. And Foster has not contended that the Ohio Court of Appeals made an unreasonable determination of the facts on the record before it. As a result, Foster cannot show that the rulings of the Ohio courts were contrary to or an unreasonable application of clearly established federal law or that they were predicated upon an unreasonable factual determination. Thus, even if not defaulted and noncognizable, Foster’s Ground Two claim would fail upon merits review.

#### **IV. Certificate of Appealability**

Under 28 U.S.C. §2253(c)(1)(A), this court will grant a certificate of appealability (“COA”) for an issue raised in a §2254 habeas petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. *Cunningham v. Shoop*, 817 F. App’x 223, 224 (6th Cir. 2020). A petitioner satisfies this standard by demonstrating that reasonable jurists “could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to


proceed further.” *Buck v. Davis*, 580 U.S. 100, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017) (quotation marks omitted); *see also Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When a claim is denied on procedural grounds, the petitioner must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

If the Court accepts my recommendations, Foster will not be able to show that the Court’s rulings on his claims are debatable among jurists of reason. Foster’s claim in Ground One is procedurally defaulted, non-cognizable and meritless and his claim in Ground Two is likewise procedurally defaulted, non-cognizable, and otherwise meritless. Because jurists of reason would not find these conclusions to be debatable, I recommend that no COA issue in this case.

**V. Recommendations**

I recommend that Foster’s Ground One and Ground Two claims be DISMISSED as procedurally defaulted and noncognizable. In the alternative, they may be DENIED for lack of merit. Foster’s petition for writ of habeas corpus should be DENIED. And I recommend Foster not be granted a COA.

Dated: December 27, 2023

  
Thomas M. Parker  
United States Magistrate Judge

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**Objections, Review, and Appeal**

Within 14 days after being served with a copy of this report & recommendation, a party may serve and file specific written objections to the proposed findings and recommendations of the

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magistrate judge. Fed. R. Civ. P. 72(b)(2); *see also* 28 U.S.C. § 636(b)(1); Local Rule 72.3(b). Properly asserted objections shall be reviewed de novo by the assigned district judge.

\* \* \*

Failure to file objections within the specified time may result in the forfeiture or waiver of the right to raise the issue on appeal either to the district judge or in a subsequent appeal to the United States Court of Appeals, depending on how or whether the party responds to the report and recommendation. *Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019). Objections must be specific and not merely indicate a general objection to the entirety of the report and recommendation; “a general objection has the same effect as would a failure to object.” *Howard v. Sec’y of Health and Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). Objections should focus on specific concerns and not merely restate the arguments in briefs submitted to the magistrate judge. “A reexamination of the exact same argument that was presented to the Magistrate Judge without specific objections ‘wastes judicial resources rather than saving them, and runs contrary to the purpose of the Magistrates Act.’” *Overholt v. Green*, No. 1:17-CV-00186, 2018 WL 301875, at \*2 (W.D. Ky. June 15, 2018) (quoting *Howard*). The failure to assert specific objections may in rare cases be excused in the interest of justice. *See United States v. Wandahsega*, 924 F.3d 868, 878–79 (6th Cir. 2019).

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Ezra Foster,

Case No. 1:23-cv-139

Petitioner,

v.

MEMORANDUM OPINION  
AND ORDER

Misty Mackey, Warden,

Respondent.

I. INTRODUCTION

Petitioner Ezra Foster<sup>1</sup> petitions for a writ of habeas corpus under 28 U.S.C. § 2254, concerning the revocation of his parole by the Ohio Adult Parole Authority (“APA”). (Doc. No. 1). Magistrate Judge Thomas M. Parker reviewed the petition as well as the related briefing pursuant to Local Rule 72.2(b)(2) and recommends I dismiss or, in the alternative, deny the petition. (Doc. No. 23). Foster filed objections to Judge Parker’s Report and Recommendation. (Doc. No. 24).

Judge Parker also recommends I deny Foster’s motion for summary judgment. (Doc. Nos. 19 and 22). Foster does not object to that recommendation. (*See* Doc. No. 24 at 1).

Foster subsequently filed a motion for leave to conduct discovery, record, and a motion for an evidentiary hearing. (Doc. Nos. 26, 27, and 28). All motions were fully briefed.

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<sup>1</sup> Foster currently is incarcerated at the Lake Erie Correctional Institution in Conneaut, Ohio, where Misty Mackey currently is the Warden. I hereby ordered that Mackey be substituted as the Respondent in this case. *See* Fed. R. Civ. P. 25(d).

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For the reasons stated below, I deny Foster's motions, overrule his objections, and adopt Judge Parker's Reports and Recommendations.

## II. BACKGROUND

Foster was convicted of five counts of rape in August 1989 and sentenced to an aggregate term of twenty years to life in prison. (Doc. No. 12-1 at 6-7). He was paroled in May 2016. One of the conditions of his parole precluded Foster from having unsupervised contact with minors. (*Id.* at 34). In February 2021, Foster was arrested for violating this parole condition in the preceding month. His parole violation hearing initially was scheduled for March 9, 2021. (*Id.* at 26). The APA subsequently continued the hearing until March 24, 2021. (Doc. No. 1-4 at 1). Foster "admitted with mitigation" that he had violated the conditions of his parole, and he was ordered to serve 36 months in prison before becoming eligible for parole again. (Doc. No. 12-1 at 20, 24).

In November 2021, Foster filed a petition for a writ of habeas corpus in the Court of Appeals for the Ninth District of Ohio, seeking his immediate release from prison because the length of time between the date of his arrest and the date of his parole violation hearing exceeded the time period permitted under the policies of the Ohio Department of Rehabilitation and Correction. The Ninth District Court of Appeals dismissed his filing *sua sponte* because Foster did not pay the required filing fee or comply with the mandatory requirements of Ohio Revised Code § 2969.25(C), which governs motions for waiver of prepayment of filing fees. *State ex rel. Foster v. Foley*, 2022-Ohio-35, 2022 WL 97052, at \*1 (Ohio Ct. App. Jan. 10, 2022). Foster's appeal of that dismissal to the Supreme Court of Ohio was dismissed due to Foster's failure to comply with Ohio procedural requirements. *State ex rel. Foster v. Foley*, 209 N.E.3d 602 (Ohio 2022).

On October 24, 2022, Foster filed an original action in the Supreme Court of Ohio seeking a writ of habeas corpus. (Doc. No. 12-1 at 201-10). The Supreme Court of Ohio dismissed Foster's petition after considering it "in a manner prescribed by law." (*Id.* at 242).

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“In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.” 28 U.S.C. § 2254(e)(1). Foster must demonstrate, by clear and convincing evidence, that the state court’s factual findings were incorrect. *Id.* See also *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (“The prisoner bears the burden of rebutting the state court’s factual findings ‘by clear and convincing evidence.’”) (quoting 28 U.S.C. § 2254(e)(1)). He has not done so. Therefore, I adopt those sections of the Report and Recommendation in full. (Doc. No. 23 at 2-8).

### III. STANDARD

Once a magistrate judge has filed a report and recommendation, a party to the litigation may “serve and file written objections” to the magistrate judge’s proposed findings and recommendations, within 14 days of being served with a copy. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2). Written objections “provide the district court ‘with the opportunity to consider the specific contentions of the parties and to correct any errors immediately’ . . . [and] ‘to focus attention on those issues – factual and legal – that are at the heart of the parties’ dispute.’” *Kelly v. Withrow*, 25 F.3d 363, 365 (6th Cir. 1994) (quoting *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981) and *Thomas v. Arn*, 474 U.S. 140, 147 (1985)). A district court must conduct a *de novo* review only of the portions of the magistrate judge’s findings and recommendations to which a party has made a specific objection. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

### IV. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) prohibits the issuance of a writ of habeas corpus “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

28 U.S.C. § 2254(d).

Foster presents the following grounds for relief:

**Ground One:** Petitioner seeks a writ of habeas corpus because he was denied his minimal U.S. Fourteenth Amendment [constitutional right to due process] during his parole revocation hearing process and as a result deprived of his liberty.

**Ground Two:** An inmate imprisoned by a revocation of his parole is not entitled to an appeal; he is denied the only remedy to inquire into the cause of his imprisonment through a writ of habeas corpus; when Ohio court[s] interpose a financial consideration of indigency as a state prisoner and his exercise of a state right to sue for his liberty it denies him equal protection of the law.

(Doc. No. 1 at 4).

Judge Parker reviewed these grounds for relief and concluded they are procedurally defaulted, not cognizable in habeas proceedings, and meritless. (Doc. No. 23). Foster objects to these conclusions. (Doc. No. 24 at 5-6). But his objections are unpersuasive, and I overrule them.

**A. GROUND ONE**

In Ground One, Foster asserts his due process rights were violated when the APA failed to hold his parole revocation hearing within 25 business days of his arrest as required by ODRC policy. (Doc. No. 1 at 4-12).

A parolee has a liberty interest in “maintaining his conditional freedom so long as he abides by the conditions of his release” that is implicated by parole-revocation proceedings, and which is protected by due process. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 10 (1979).

The “minimum requirements of due process” for a parole revocation hearing include:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a ‘neutral and detached’ hearing body such as a traditional parole

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board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

*Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). “The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody.” *Id.* at 488.

The APA provided Foster with written notice of the alleged violations of the conditions of his parole – namely, that he had unsupervised contact with a minor. (Doc. No. 12-1 at 26-27). The notice informed Foster that: the hearing (initially) would take place on March 9, 2021; he could testify on his own behalf, present evidence, including mitigation evidence; he could subpoena witnesses; he could confront witnesses against him; he could receive a disclosure and a written statement of the evidence against him, including that relied upon to revoke his parole; and, he could request to be represented by counsel. (*Id.* at 26). Foster acknowledged receipt of this written notice on February 8, 2021, and he stated that he “admit[ted] with mitigation” the charges against him. (*Id.* at 27-28).

While Foster argues that due process requires some form of a preliminary hearing “to determine whether there is probable cause or reasonable ground to believe that the arrest parolee has committed acts that would constitute a violation of parole conditions,” he cites no caselaw in support and the Supreme Court has expressly held otherwise. The *Morrissey* Court “emphasize[d] there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense.” *Morrissey*, 408 U.S. at 489. Instead, due process in this circumstance requires that the parolee “have an opportunity to be held and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.” *Id.* at 488. Foster was afforded precisely this opportunity.

Moreover, Foster’s claim that his due process rights were violated by the two extensions of his hearing date, and the fact that it eventually was held beyond the time period called for by ODRC

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policy, also lacks merit. The Supreme Court held that a revocation hearing must occur “within a reasonable time after the parolee is taken into custody.” *Id.* The *Morrissey* Court held “[a] lapse of two months . . . would not appear to be unreasonable.” *Id.* Foster’s hearing occurred within this presumptively reasonable time frame, and he offers no basis to rebut that presumption in this case.

Because I conclude Foster’s claim is meritless, I need not consider the other bases for dismissing or denying Foster’s petition. *Cf. Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (noting “federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits”) (citations omitted). I overrule Foster’s objection and conclude Ground One lacks merit.

#### B. GROUND TWO

In Ground Two, Foster asserts his equal protection rights were violated when the Ninth District Court of Appeals dismissed his habeas petition because Foster failed to comply with the mandatory filing requirements for a waiver of prepayment of the filing fee. *See State ex rel. Foster v. Foley*, 2022 WL 97052 at \*1 (dismissing petition due to failure “to comply with the mandatory requirements of [Ohio Revised Code §] 2969.25(C)”). Judge Parker concluded this ground is procedurally defaulted because Foster never presented it to the state courts and because Foster failed to show cause and prejudice to excuse his procedural default. (Doc. No. 23 at 22-24)

The procedural default rule bars a federal habeas petitioner’s claims if (1) the state court declined to consider the merits of an issue because the habeas petitioner failed to comply with state procedural rules, or (2) if the petitioner failed to fully pursue a claim through the state’s “ordinary appellate review procedures” and now no longer is able to raise the claim, unless the petitioner establishes cause for the default and resulting prejudice, or that a fundamental miscarriage of justice would occur if the claim is not reviewed. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (quoting *O’Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999)).

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Foster did not object to Judge Parker's recommendation that I dismiss Ground Two as procedurally defaulted, and the failure to file written objections to the Magistrate Judge's Report and Recommendation constitutes a waiver of a determination by the district court of an issue covered in the report. *Thomas v. Arn*, 728 F.2d 813, 815 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); *see also Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987) (“[O]nly those specific objections to the magistrate’s report made to the district court will be preserved for appellate review”).

As Judge Parker noted, Foster did not present his equal protection claim during his state-court habeas proceedings, and he has not offered any explanation for his failure to raise this claim at that time. Therefore, I adopt Judge Parker's recommendation and dismiss Ground Two as procedurally defaulted.

### C. MISCELLANEOUS MOTIONS

Finally, Foster has filed four additional motions.

The first three motions – which seek leave to conduct discovery, to expand the record, and an evidentiary hearing – are related. (Doc. Nos. 26, 27, and 28). Foster asserts he needs discovery to obtain a document that the APA allegedly used to justify holding his parole revocation hearing beyond the 25-business day period provided for by ODRC policy. (*See* Doc. No. at 2). It is unclear what document Foster refers to, as he already filed a document approving two continuances of his revocation hearing. (Doc. No. 1-4); (*see also* Doc. No. 1-5). And there is no dispute that the revocation hearing occurred on March 24, 2021, as indicated in the violation hearing continuance form. Foster fails to show how additional discovery would have any impact on the resolution of his first ground for relief, and I deny these motions. *See Williams v. Bagley*, 380 F.3d 932, 975 (6th Cir. 2004) (denying petitioner’s motion to expand the record because petitioner failed to show the

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additional materials “could resolve any factual disputes that could entitle him to relief”) (citation and internal quotation marks omitted).

Foster’s fourth motion is for a control number to be assigned to mail related to this case, so that it will be treated as legal mail at the institution. (Doc. No. 34). But this Memorandum Opinion and Order resolves this case and Foster fails to show how a control number would have any effect at this time. Therefore, I deny this motion as well.

#### D. CERTIFICATE OF APPEALABILITY

A habeas corpus petitioner is not entitled to a certificate of appealability as a matter of right but must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The petitioner need not demonstrate he should prevail on the merits. Rather, a petitioner must demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Foster’s petition has not met this standard.

For the reasons set forth in this decision, I certify there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

#### V. CONCLUSION

For the reasons stated above, I overrule Foster’s objections, (Doc. No. 24), to Judge Parker’s second Report and Recommendation, (Doc. No. 23), and adopt the second Report and Recommendation. I conclude Foster’s first ground for relief is meritless and his second ground for relief is procedurally defaulted. I deny Foster’s petition as to Ground One and dismiss it as to Ground Two. I also adopt Judge Parker’s first Report and Recommendation and deny Foster’s motion for summary judgment. (Doc. No. 22).

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Further, I deny Foster's motions to conduct discovery, to expand the record, for an evidentiary hearing, for a control number, and for a status conference. (Doc. Nos. 26, 27, 29, 34, and 35).

Finally, I conclude Foster fails to make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(b)(2), and decline to issue a certificate of appealability.

So Ordered.

s/ Jeffrey J. Helmick  
United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Ezra Foster,

Case No. 1:23-cv-139

Petitioner,

v.

JUDGMENT ENTRY

Misty Mack, Warden,

Respondent.

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously, I overrule the objections filed by Petitioner Ezra Foster, (Doc. No. 24), to Magistrate Judge Parker's second Report and Recommendation, (Doc. No. 23), and adopt the second Report and Recommendation. I conclude Foster's first ground for relief is meritless and his second ground for relief is procedurally defaulted. I deny Foster's petition as to Ground One and dismiss it as to Ground Two. I also adopt Judge Parker's first Report and Recommendation and deny Foster's motion for summary judgment. (Doc. No. 22).

Further, I deny Foster's motions to conduct discovery, to expand the evidentiary hearing, for a control number, and for a status conference. (Doc. Nos. 26, 27, 29, 34, and 35).

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Finally, for the reasons set forth in that opinion, I conclude Foster has not made a substantial showing of the denial of a constitutional right and I certify there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

So Ordered.

s/ Jeffrey J. Helmick  
United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Ezra C. Foster,

Case No. 1:23-cv-2377

Petitioner,

v.

ORDER

Misty Mackey, Warden,

Respondent.

Petitioner Ezra Foster filed a motion for an extension of the deadline in which to file an appeal of my denial of his petition for a writ of habeas corpus. (Doc. No. 38).

Rule 4(a) required Foster to file his notice of appeal within 30 days following the entry of judgment against him. Fed. R. Civ. P. 4(a)(1)(A). The 30-day deadline expired on March 25, 2025, one day before Foster presumptively submitted his motion to the prison mail room. (*See* Doc. No. 38 at 3). But I may extend the appeal deadline if Foster can establish “excusable neglect or good cause” to explain why an extension is appropriate. Fed. R. Civ. P. 4(a)(5)(A)(ii).

Foster requested an extension of the appeal deadline because he had not yet received from the institution a requested financial statement for the previous six months that he was required to submit along with his appeal. (Doc. No. 38 at 2). Foster states he requested March 17, 2025, but he was unable to predict when he would receive it. (*Id.*) have received the statement the day after he placed his motion in the prison mail system, and he subsequently filed it with the Clerk’s office. (*See* Doc. No. 40-1). I conclude this explanation is

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sufficient to establish good cause for an extension. I grant Foster's motion and extend the appeal deadline to April 2, 2025, the date on which Foster filed his notice of appeal. (Doc. No. 38).

Foster also requests permission to proceed with an appeal without first paying the filing fee. (Doc. No. 40). I previously declined to issue a certificate of appealability. (Doc. No. 36).

Section 1915 provides "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). The standard for granting a motion to proceed in forma pauperis on appeal is lower than the standard for issuing a certificate of appealability. See *Foster v. Ludwick*, 208 F. Supp. 2d 750, 764 (E.D. Mich. 2002) (citing *United States v. Youngblood*, 116 F.3d 1113, 1115 (5th Cir. 1997)). A court may grant a motion to proceed in forma pauperis if the issues are arguable on their merits, even if the petitioner cannot show a probability of success on the merits. *Foster*, 208 F. Supp. 2d at 765.

I conclude the issues Foster raised in his petition are arguable on their merits, even if he is unlikely to succeed on the merits. Therefore, I grant his motion to proceed in forma pauperis on appeal. (Doc. No. 40).

So Ordered.

s/ Jeffrey J. Helmick  
United States District Judge

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Aug 1, 2025  
KELLY L. STEPHENS, Clerk

No. 25-3246

EZRA C. FOSTER,

Petitioner-Appellant,

v.

MISTY MACKEY, Warden,

Respondent-Appellee.

Before: COLE, Circuit Judge.

**JUDGMENT**

THIS MATTER came before the court upon the application by Ezra C. Foster for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

**ENTERED BY ORDER OF THE COURT**

*Kelly L. Stephens*  
Kelly L. Stephens, Clerk

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Ezra Foster,

Case No. 1:23-cv-139

Petitioner,

v.

JUDGMENT ENTRY

Misty Mack, Warden,

Respondent.

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously, I overrule the objections filed by Petitioner Ezra Foster, (Doc. No. 24), to Magistrate Judge Parker's second Report and Recommendation, (Doc. No. 23), and adopt the second Report and Recommendation. I conclude Foster's first ground for relief is meritless and his second ground for relief is procedurally defaulted. I deny Foster's petition as to Ground One and dismiss it as to Ground Two. I also adopt Judge Parker's first Report and Recommendation and deny Foster's motion for summary judgment. (Doc. No. 22).

Further, I deny Foster's motions to conduct discovery, to expand the record, for an evidentiary hearing, for a control number, and for a status conference. (Doc. Nos. 26, 27, 29, 34, and 35).

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Finally, for the reasons set forth in that opinion, I conclude Foster has not made a substantial showing of the denial of a constitutional right and I certify there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

So Ordered.

s/ Jeffrey J. Helmick  
United States District Judge

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Aug 1, 2025  
KELLY L. STEPHENS, Clerk

EZRA C. FOSTER,  
Petitioner-Appellant,  
v.  
MISTY MACKEY, Warden,  
Respondent-Appellee.

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ORDER

Before: COLE, Circuit Judge.

Ezra C. Foster, a pro se Ohio prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Foster moves for a certificate of appealability (COA). For the following reasons, Foster's COA application is denied.

In 1989, an Ohio jury convicted Foster of multiple rapes. *State v. Foster*, No. 14277, 1990 WL 72345, at \*1 (Ohio Ct. App. May 23, 1990). The trial court sentenced him to 20 years to life imprisonment and adjudicated him a sex offender. The Ohio Court of Appeals affirmed, *id.*, and the Ohio Supreme Court dismissed his appeal. *State v. Foster*, 566 N.E.2d 681 (Ohio 1991) (table).

In 2016, Foster received parole. One of his parole conditions prohibited unsupervised contact with minors. In 2021, Foster violated that condition. So Foster was arrested on February 1, 2021, and authorities hand delivered a violation-hearing notice on February 8, 2021. Foster's hearing was originally scheduled for March 9, 2021, but a hearing officer continued it to March 24, 2021. At the hearing, Foster "admitted with mitigation" to twice having unsupervised contact with a minor. The Ohio Parole Board revoked Foster's parole and sentenced him to serve at least 36 months in prison.

After Foster's parole revocation, he unsuccessfully sought habeas relief in the state courts. See *State ex rel. Foster v. Foley*, No. 21CA011812, 2022 WL 97052, at \*1 (Ohio Ct. App. Jan. 10,

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2022) (per curiam), *aff'd*, 209 N.E.3d 602 (Ohio 2022) (per curiam); *see also Foster v. Foley*, 199 N.E.3d 553 (Ohio 2022) (table). Foster next filed this § 2254 petition in the district court, raising two claims: (1) the state's parole revocation proceedings violated his due process rights, and (2) the state's procedure for appealing a parole revocation violates equal protection. A magistrate judge recommended dismissing Foster's claims as procedurally defaulted and, alternatively, as meritless. Foster objected to the magistrate judge's handling of claim one only. Over Foster's objection, the district court adopted the magistrate judge's recommendation and dismissed the petition. The court also denied Foster a COA.

Foster now seeks a COA as to his first claim. He forfeited appellate review of his second claim because he did not object to the magistrate judge's report and recommendation as to that claim. *See United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019) (“[T]he failure to object to a magistrate judge's Report and Recommendation results in a waiver of appeal on that issue as long as the magistrate judge informs the parties of the potential waiver.”).

A court may issue a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must show that “jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under the Antiterrorism and Effective Death Penalty Act, a district court may not grant a habeas petition on a claim adjudicated on the merits in the state courts unless the adjudication resulted in a decision that (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). If the state courts adjudicated the petitioner's claim on the merits, the relevant question at the COA stage is whether jurists of reason could debate the district court's application of § 2254(d) to that claim. *Miller-El*, 537 U.S. at 336. If “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner,” then the

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petitioner has met his burden to obtain a COA. *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Parole revocation “is not part of a criminal prosecution and thus the full panoply of rights . . . does not apply to parole revocations.” *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). But a parolee facing revocation is entitled to a preliminary inquiry and a revocation hearing. *Id.* at 485-89. The revocation hearing must occur “within a reasonable time after the parolee is taken into custody.” *Id.* at 488. In addition, the parolee must receive: (a) written notice of the alleged violations, (b) disclosure of the evidence against him, (c) an opportunity to be heard and present evidence, (d) the right to confront witnesses, (e) a “neutral and detached” decisionmaker, and (f) written disclosure of the evidence relied on and the reasons for revocation. *Id.* at 489.

Foster argues that the state violated his due process rights because it did not follow the procedures outlined in his parole revocation notice and the Adult Parole Authority continued his original hearing date beyond the allotted time.

Reasonable jurists would not debate the district court’s denial of this claim. The February 8, 2021, notice informed Foster of his violation hearing, outlined his rights, and summarized the alleged violations. *See id.* The March 24, 2021, hearing gave Foster the opportunity to be heard, confront witnesses, and have a neutral decisionmaker adjudicate his violations. Indeed, at that hearing, the Parole Authority presented evidence of Foster’s violations, and he admitted to them. And his hearing occurred within a reasonable time—less than two months after his arrest. *See id.* at 488 (noting that a two-month delay is not unreasonable). So reasonable jurists would not debate the district court’s conclusion that the state court did not unreasonably apply clearly established federal law in rejecting this claim.

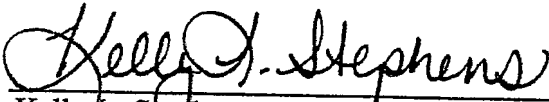
If Foster is arguing that the Parole Authority failed to follow state procedures in continuing and holding his hearing, reasonable jurists would agree that that is not a cognizable claim. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (“[F]ederal habeas corpus relief does not lie for errors of state law.” (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990))).

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For these reasons, Foster's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

  
\_\_\_\_\_  
Kelly L. Stephens, Clerk

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# Amendment 14

**Sec. 1. [Citizens of the United States.]** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## § 1.14 Excluding first and including last day - legal holidays.

The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that, when the last day falls on Sunday or a legal holiday, the act may be done on the next succeeding day that is not Sunday or a legal holiday.

When a public office in which an act, required by law, is to be performed is closed to the public for the entire day that constitutes the last day for doing the act or before its usual closing time on that day, the act may be performed on the next succeeding day that is not a Sunday or a legal holiday as defined in this section.

"Legal holiday" as used in this section means the following days:

- (A) The first day of January, known as New Year's day;
- (B) The third Monday in January, known as Martin Luther King day;
- (C) The third Monday in February, known as Washington-Lincoln day;
- (D) The day designated in the "Act of June 28, 1968," 82 Stat. 250, 5 U.S.C. 6103, as amended, for the commemoration of Memorial day;
- (E) The nineteenth day of June, known as Juneteenth day;
- (F) The fourth day of July, known as Independence day;
- (G) The first Monday in September, known as Labor day;
- (H) The second Monday in October, known as Columbus day;
- (I) The eleventh day of November, known as Veterans' day;
- (J) The fourth Thursday in November, known as Thanksgiving day;
- (K) The twenty-fifth day of December, known as Christmas day;
- (L) Any day appointed and recommended by the governor of this state or the president of the United States as a holiday.

If any day designated in this section as a legal holiday falls on Sunday, the next succeeding day is a legal holiday.

## § 1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

## § 2969.21 Definitions.

As used in sections 2969.21 to 2969.27 of the Revised Code:

(A) "Clerk" means the elected or appointed clerk of any court in this state, except the court of claims or the supreme court, in which an inmate has commenced a civil action against a government entity or employee or has filed an appeal of the judgment or order in a civil action of that nature.

(B)

(1) "Civil action or appeal against a government entity or employee" means any of the following:

(a) A civil action that an inmate commences against the state, a political subdivision, or an employee of the state or a political subdivision in a court of common pleas, court of appeals, county court, or municipal court;

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(b) An appeal of the judgment or order in a civil action of the type described in division (B) (1)(a) of this section that an inmate files in a court of appeals.

(2) "Civil action or appeal against a governmental entity or employee" does not include any civil action that an inmate commences against the state, a political subdivision, or an employee of the state or a political subdivision in the court of claims or the supreme court or an appeal of the judgment or order entered by the court of claims in a civil action of that nature, that an inmate files in a court of appeals or the supreme court.

## § 2969.25 Inmate's affidavit as to prior actions; review of multiple actions; waiver of prepayment.

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(A) At the time that an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court an affidavit that contains a description of each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court. The affidavit shall include all of the following for each of those civil actions or appeals:

- (1) A brief description of the nature of the civil action or appeal;
- (2) The case name, case number, and the court in which the civil action or appeal was brought;
- (3) The name of each party to the civil action or appeal;
- (4) The outcome of the civil action or appeal, including whether the court dismissed the civil action or appeal as frivolous or malicious under state or federal law or rule of court, whether the court made an award against the inmate or the inmate's counsel of record for frivolous conduct under section 2323.51 of the Revised Code, another statute, or a rule of court, and, if the court so dismissed the action or appeal or made an award of that nature, the date of the final order affirming the dismissal or award.

(B) If an inmate who files a civil action in a court of common pleas, court of appeals, county court, or municipal court or an inmate who files an appeal from a judgment or order in a civil action in any of those courts has filed three or more civil actions or appeals of civil actions in a court of record in this state in the preceding twelve months or previously has been subject to the review procedure described in this division, the court may appoint a member of the bar to review the claim that is the basis of the civil action or the issues of law that are the basis of the appeal and to make a recommendation regarding whether the claim asserted in the action or the issues of law raised in the appeal are frivolous or malicious under section 2969.24 of the Revised Code, any other provision of law, or rule of court.

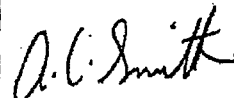
(C) If an inmate who files a civil action or appeal against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency. The affidavit of waiver and the affidavit of indigency shall contain all of the following:

- (1) A statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months, as certified by the institutional cashier;
- (2) A statement that sets forth all other cash and things of value owned by the inmate at that time

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**Ohio** | Department of  
Rehabilitation & Correction

<b>SUBJECT:</b> Violation Hearing Process	<b>PAC:</b>
	NUMBER: 105-PBD-09
<b>RULE/CODE REFERENCE:</b> AR 5120:1-1-17, 18, 41; ORC 2967.15, 2967.16, 2967.26, 2967.28	<b>SUPERSEDES:</b> 105-PBD-09 dated 12-17-18
<b>RELATED ACA STANDARDS:</b> 4-APPFS-2B-06 thru 2B-10; 2-1003, 2-1109, 2-1110, 2-1111, 2-1115 thr 1120, 2-1122, 2-1123	<b>EFFECTIVE DATE:</b> December 2, 2019
	<b>APPROVED:</b> 

**I. AUTHORITY**

Ohio Revised Code 5120.01 authorizes the Director of the Department of Rehabilitation and Correction, as the executive head of the department, to direct the total operations and management of the department by establishing procedures as set forth in this policy.

**II. PURPOSE**

The purpose of this policy is to promote fair, consistent, and objective decision making when violation behavior by offenders under Adult Parole Authority (APA) supervision is addressed through a violation hearing. This policy describes only those policies and procedures that govern the violation hearing process. Unit level sanctioning and other events that occur prior to, or in lieu of, violation hearings are governed by ODRC Policy 100-APA-14, Sanctions for Violations of Conditions of Supervision.

**III. APPLICABILITY**

This policy applies to all employees of the Ohio Department of Rehabilitation and Correction (ODRC) Adult Parole Authority (APA) and all offenders under court, parole, post-release control (PRC), transitional control (TRC), and interstate compact supervision.

**IV. DEFINITIONS**

**Available** - An offender status as determined under ODRC Policy 100-APA-14, Sanctions for Violations of Conditions of Supervision.

**Bodily Injury** - Physical harm of a type that normally requires professional medical attention (e.g., a laceration requiring stitches). Minor physical harm (e.g., minor bruises, a sprained wrist, a black eye, or a minor cut) does not constitute bodily injury.

**Business Days** - The days of the week, excluding Saturday, Sunday, and any legal holiday.

**Community Corrections Information System (CCIS)** - A computerized information system used to track the criminal history and progress of offenders under the supervision of the APA. Access to CCIS is restricted to essential users only.

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**Conditions of Supervision** - Those general and special rules and regulations with which offenders are expected to comply as a requirement of community supervision.

**Departmental Offender Tracking System (DOTS Portal)** - The web-based information platform that serves as the primary information system for information on all offenders under ODRC supervision. The system contains information regarding an offender from reception to final release under supervision. The system is updated throughout each day. Access to DOTS Portal is restricted to essential users only.

**Discretionary Post-Release Control (PRC)** - A form of PRC assessed at the discretion of the Parole Board pursuant to ODRC Policy 105-PBD-08, Post-Release Control Screening and Assessment.

**Field Officer Tablet (FOT)** - Computerized data maintained by the parole officer assigned to supervise an offender that contains the chronological details involving contact with the offender, social services agencies, law enforcement, etc. The tablets also contain all demographic information pertaining to the offender and documentation of staffing decisions.

**Gagnon Criteria** - Those considerations set forth by the United States Supreme Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), for determining when an indigent person on supervised release should be represented by counsel at a revocation hearing.

**Halfway House (HWH)** - A facility licensed by the ODRC pursuant to Ohio Revised Code (ORC) section 2967.14 as a suitable facility for the care and treatment of adult offenders.

**Hearing Officer Review Process** - An administrative hearing conducted by a representative of the Parole Board when an offender on PRC has waived his/her appearance at a violation hearing. The purpose of the review is to determine whether an offender has violated one (1) or more conditions of supervision and, if so, the specific sanction that should be imposed upon the offender.

**Hold Order** - The order or act of a parole officer, unit supervisor, or other APA official that causes an offender under the jurisdiction of the APA to be detained or held in custody for alleged violations. The order or act may be placed into effect by use of an APA hold order, an APA arrest order, a teletype, fax, or a verbal order.

**In-Custody Hearing** - A violation hearing conducted on an offender under the supervision of the APA who is being held in a jail, prison, or similar detention facility.

**NOTEC** - A section in the CCIS to record information regarding an offender's activity while under supervision.

**Ohio Interstate Compact Office** - Unit of the APA responsible for administering the Interstate Compact for Adult Offender Supervision.

**Out-of-Custody Hearing** - A violation hearing conducted on an offender under the supervision of the APA who is not being held in a jail, prison, or similar detention facility.

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**Parole** - The release from confinement in any state penal or reformatory institution by the APA that is created by ORC 5149.02 and under any terms and for any period of time that is prescribed by the APA in its published rules and official minutes. A parolee so released shall be supervised by the APA pursuant to ORC section 2967.16. The above applies to all persons who have committed felonies prior to July 1, 1996.

**Post-Release Control (PRC)** - A period of supervision for an offender by the APA following release from imprisonment that includes one (1) or more PRC sanctions imposed by the Parole Board pursuant to ORC section 2967.28.

**Prison Sanction Time** - The total number of days that an offender under PRC may be returned to prison as a sanction for violation behavior.

**Sanction** - Any penalty imposed upon an offender who is found guilty of a violation of one (1) or more conditions of supervision.

**Supervising Officer** - The parole officer responsible for supervising the offender who is subject to the violation hearing process.

**Supervising Unit** - That unit of the APA's field services that is responsible for supervising the offender who is subject to the violation hearing process.

**Transitional Control (TRC)** - A program to closely monitor a prisoner's adjustment to community supervision under which eligible prisoners may be confined in a suitable facility that is licensed pursuant to ORC section 2967.14 (C) or a department-approved residence with electronic monitoring during the final one hundred eighty days of his/her confinement, under the terms and conditions established by the department, and supervised under one or more community control sanctions.

**Violator-at-Large (VAL)** - An offender who absconds the supervision of the APA as set forth in ORC section 2967.15 (C)(1).

## V. POLICY

It is the policy of the Ohio Department of Rehabilitation and Correction (ODRC) to respond to any violation behavior committed by offenders during their period of supervision and to afford those offenders a hearing prior to revoking a parole release or imposing prison sanction time upon an offender who is on post-release control (PRC).

## VI. PROCEDURES

### A. Service of Violation Notice Forms

1. If the unit supervisor/designee determines that an offender will be scheduled for a violation hearing, the violation hearing packet shall be created in the electronic forms catalog. Thereafter, all the following shall occur:

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- a. The unit supervisor/designee shall contact the scheduler to schedule the hearing. The unit supervisor/designee shall notify the supervising officer of the hearing's date and time.
  - b. The supervising officer shall complete the Notification of Release Violation Hearing and Request for Witness/Notice of Counsel (DRC3304/3309) by initiating the appropriate packet within electronic forms and routing it to the unit supervisor, who shall review the forms for completeness and accuracy. If complete and accurate, the unit supervisor/designee shall approve and sign the forms and route them back to the designated supervising officer. Forms shall be legible and contain all the necessary information, including the specific conditions of supervision the offender is alleged to have violated; a plain statement of the facts constituting the violations; and the date, location, and time of the scheduled hearing.
  - c. The supervising officer shall complete the Violation Hearing Grid (DRC3458) to determine if the hearing should be an in-custody hearing or an out-of-custody hearing. This form shall be staffed with the unit supervisor and, if appropriate, the regional administrator/designee.
2. The supervising officer or other APA staff member shall serve the Notification of Release Violation Hearing and Request for Witness/Notice of Counsel (DRC3304/3309) upon the offender. If the offender cannot read the notice forms, the information shall be read to the offender.
  3. At the time of service, an attempt shall be made to determine whether the offender is contesting any or all the alleged charges.
    - a. Unit staff shall refrain from unduly influencing, pressuring, or coercing the offender into making any statement against the offender's interest.
    - b. The supervising officer or other APA staff member serving the forms shall attempt to obtain all the appropriate signatures, initials, and dates on the forms at the time of service.
    - c. If an offender refuses to sign, initial, or date the forms, then a notation shall be made to that effect, such as "Refused to Sign," and the notation shall be initialed by a witness. No form of threat, promise, or duress shall be used to persuade an unwilling offender to sign, initial, or date the forms.
    - d. In all service, the offender shall review and sign the Offender Statement (DRC3086). The offender may refuse to give a statement but must acknowledge such on the form. If the offender has requested an attorney or denies the violations, he/she may refuse to provide a statement and indicate such on the Offender Statement (DRC3086).
  4. At the time of service, the offender shall be asked to identify witnesses, documents, or other materials he/she may want subpoenaed for the violation hearing; the nature of the information to be presented by any witnesses, documents, or materials; and the addresses of any witnesses. If the offender requests a witness and the unit supervisor/designee

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denies the request pursuant to section VI.H of this policy, the offender shall be notified of that denial within five (5) business days of the hearing using the Notification of Denial of Request for Witness (DRC3310).

5. The offender shall be asked for the name, address, and telephone number of any private counsel that may represent the offender at the hearing. If the offender does not have private counsel and requests representation by the Ohio public defender, the offender shall indicate that request by checking the appropriate box on the Request for Representation (DRC3466).
6. At the time of service, an attempt shall be made to identify any special communication needs that the offender might have in relation to the hearing, such as interpreters or sign language specialists. An attempt also shall be made to identify any need for audio/visual equipment at the hearing. Any extraordinary needs shall be immediately communicated to the unit supervisor.
7. The offender shall be provided copies of the Notification of Release Violation Hearing and the Request for Witness/Notice of Counsel (DRC3304/3309).
8. Copies of the Notification of Release Violation Hearing and Request for Witness/Notice of Counsel (DRC3304/3309) and any offender statements shall be returned to the supervising unit, halfway house, or Ohio Interstate Compact Office, as applicable.

#### B. Waiver

1. An offender may waive an in-custody hearing prior to the scheduled date of the hearing. Offenders scheduled for out-of-custody hearings must be present for the hearing to proceed. An offender shall be provided an opportunity to waive at the out-of-custody hearing.
2. If the hearing will be an in-custody hearing, then, along with the Notification of Release Violation Hearing and Request for Witness/Notice of Counsel (DRC3304/3309), the supervising officer also shall serve upon the offender a Waiver of Appearance at Release Violation Sanction Hearing (DRC3362), unless the offender is an offender being supervised on parole and/or the offender requests representation of counsel at the time of service. The supervising officer shall review the waiver form with the offender.
3. The supervising officer shall advise the offender of all the following in relation to waiver:
  - a. If the offender is being supervised on PRC, the amount of prison sanction time that will be available including jail time credit, up to the date of the hearing;
  - b. The supervising unit's sanction recommendation including jail time credit;
  - c. Other sanctions available to the hearing officer;
  - d. That there is a hearing officer review that will occur on or before the hearing date specified on the Notification of Release Violation Hearing (DRC3304).
4. If an offender elects to waive appearance at the hearing, the supervising officer shall request that the offender provide a statement of mitigation. The statement may be

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handwritten by the offender or may be provided orally by the offender to the supervising officer, who shall transcribe the oral statement. In all cases, the statement shall be captured on the Offender Statement (DRC3086). If the officer writes the offender's statement on his/her behalf, the Offender Statement (DRC3086) must be reviewed and signed by the offender.

5. No form of threat, duress, or promise shall be used to persuade an offender to waive a hearing.
6. If an offender waives appearance at the hearing, the supervising officer shall immediately advise the officer's supervisor and the hearing officer scheduler of the waiver. The scheduler shall then note on the schedule that the case is a "hearing officer review."

**C. Waiver of Interstate Compact Probable Cause Hearings**

A violation sanction hearing is conducted upon offenders supervised under the Interstate Compact for Adult Offender Supervision ("Compact") for the purpose of determining whether there exists probable cause to believe the offender engaged in violation behavior that might cause the sending state to retake the offender. Pursuant to Compact rules, the offender may waive the probable cause hearing by admitting to one or more significant violations on the ODRC Waiver of Probable Cause Hearing for Interstate Compact Offenders (DRC3547). Upon receiving the waiver, the scheduler shall be notified that the hearing needs to be removed from the schedule. The supervising unit shall then immediately forward the waiver and probable cause hearing packet to the Ohio Interstate Compact Office.

**D. Hearing Officer Review Following Waiver**

1. Following a waiver of an in-custody hearing, the supervising unit shall electronically forward the hearing officer review packet, including the violation hearing report, to the hearing officer at least two (2) business days prior to the originally scheduled hearing. The hearing officer shall conduct a review on or before the scheduled date of the hearing. During the review, the hearing officer may contact the supervising unit, the offender's counsel, or others for additional information.
2. If, during the review, the hearing officer determines the offender may not have been capable of making an informed decision to waive appearance, the hearing officer shall continue the hearing and complete the Request for Representation (DRC3466). The supervising unit shall forward the completed request, the APA Pre-Hearing Staffing for Representation (DRC3084), and the hearing packet information to the Ohio Public Defender's Office.
3. The hearing officer may determine a more restrictive sanction than that which was recommended by the unit is warranted. A more restrictive sanction includes, but is not limited to, more prison sanction time than was recommended. If the hearing officer determines a more restrictive sanction is warranted, the hearing officer shall reject the waiver, meet with the offender to explain the waiver was rejected, and schedule a hearing. The offender shall be given the option of contacting private counsel for representation, referred to the Ohio Public Defender's Office, or going forward with the hearing without

counsel. The hearing shall be scheduled as soon as feasible notwithstanding the twenty (20) business day limitation specified in paragraph VI.E of this policy.

4. If the hearing officer determines the offender should receive a less restrictive sanction than what was recommended by the supervising unit, the offender may agree to that less restrictive sanction.
5. The hearing officer shall ensure the Notification of Findings of Release Violation Hearing (DRC3326) and the Sanction Receipt (DRC3313/DRC3325) are delivered to the offender and the supervising unit within five (5) business days after the date of the scheduled hearing. Upon receiving those documents, the supervising unit shall make the necessary arrangements for imposing sanctions as ordered by the hearing officer.
6. In determining the appropriate prison sanction time to be imposed following a waiver, the hearing officer shall be guided by the prison sanction time limitations imposed under sections VII.4.a-d of this policy.

#### E. Violation Hearing Timeframe

1. A violation hearing shall be conducted no later than twenty (20) business days from the date the offender becomes available, unless the offender thereafter becomes unavailable as described in section VI.F.5 of this policy or a continuance is granted by the hearing officer. In the case of a violator at large who has left the state, the violation hearing shall be conducted no later than twenty (20) business days from the date of the offender's arrival in the state of Ohio.
2. A violation hearing shall be conducted no earlier than ten (10) business days from the date on which the offender is served with notice of the hearing and its date.
3. Out-of-custody hearings shall adhere to timeframes like those specified above.

#### F. Continuances

1. The supervising unit or the offender's counsel may request a violation hearing be continued. A request for continuance shall be made in writing and shall state, specifically, the reasons for the request and, if appropriate, the date to which the requester would like the hearing rescheduled. The request shall be provided to the hearing officer in the most expedient manner possible. The hearing officer shall immediately respond to the request in writing. The hearing officer shall provide a copy of the request to the unit supervisor and the offender's counsel.
2. If an offender fails to appear for a hearing, the supervising unit may request the hearing officer issue a continuance.
3. A hearing officer may continue, reschedule, or cancel a violation hearing without a request from any party. The hearing officer shall provide notice of any such change to all parties.

- 4. A violation hearing shall be rescheduled for no more than ten (10) business days from the previously scheduled hearing date.
- 5. If after the offender is served with notice of the hearing the offender becomes unavailable, the hearing shall be continued until the offender once again becomes available. Immediately upon receiving notification of the offender's change in status from available to unavailable, the supervising unit shall contact the hearing officer to request the continuance. Once the offender again becomes available, the hearing shall be set for a date that is no more than ten (10) business days from the date on which the offender became available, provided that the hearing shall be conducted no earlier than five (5) business days from the date on which the offender is served with notice of the hearing and its date.
- 6. If an offender fails to appear for an out-of-custody hearing and subsequently picks up new violations, the unit shall serve the to-be-determined continuance, as well as any new violation within ten (10) business days of availability.
- 7. All other continuances shall be served upon the offender no later than the expiration of three (3) business days from the date the continuance is issued or by the originally scheduled hearing date, whichever occurs first.

**G. Requests for Counsel and Notifications to Counsel**

- 1. Ohio public defender representation is not available for any TRC to parole offender or offender being supervised under the Interstate Compact for Adult Offender Supervision. Those offenders shall be advised of that fact.
- 2. Offenders who are on parole shall be referred for Ohio public defender representation. Offenders on PRC supervision may be eligible for Ohio public defender representation. Those offenders shall be advised that a decision on Ohio public defender representation will be made after the matter is staffed between the supervising unit and the hearing officer.
- 3. The supervising unit shall staff the APA Pre-Hearing Staffing for Representation (DRC3084) with a hearing officer within three (3) business days after serving the Notification of Release Violation Hearing form (DRC3304).
- 4. If the hearing officer determines the offender is not eligible for Ohio public defender representation, the unit shall serve the offender with the Notice of Denial located at the bottom of the APA Pre-Hearing Staffing for Representation (DRC3084) immediately after the staffing and no later than five (5) business days prior to the scheduled hearing date. The form shall be included in the hearing officer packet.
- 5. If an offender qualifies for Ohio public defender representation or retains private counsel, all the following apply:
  - a. The offender's attorney shall be contacted and advised of the offender's location; all information in the Notification of Release Violation Hearing (DRC3304); and the

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- probable witnesses and relevant testimony to be offered by the supervising unit and offender.
- b. Documents or materials that will be presented at the hearing by the supervising unit shall be provided to the offender's attorney at least two (2) business days prior to the originally scheduled hearing date. No later than two (2) business days prior to the originally scheduled hearing, both the supervising unit and the offender's attorney shall have disclosed to one another and the hearing officer every witness and the relevant testimony to be offered at the violation hearing.
  - c. The supervising officer or unit supervisor shall answer any procedural questions the offender's attorney has about the hearing.
  - d. The offender's attorney shall be provided with a copy of the Notification of Release Violation Hearing (DRC3304) and, if applicable, the Notification of Denial of Request for Witnesses (DRC3310) on the same day as service, if practicable. In no case shall copies of those forms be provided later than the next business day following service.
  - e. If the Ohio public defender is providing representation, the supervising unit shall provide the public defender with copies of the hearing officer packet, including the violation report as provided in section VI.G.6 of this policy. The unit shall likewise provide privately retained counsel with a copy of the hearing officer packet, including the violation report.
  - f. In those cases where offender representation is required under the *Gagnon* criteria, if a conflict arises between the offender and the offender's privately retained counsel, the Ohio public defender shall determine whether it will provide substitute counsel at the APA's request.
  - g. The staff of the supervising unit shall not engage in any form of negotiation with the offender's attorney unless the agreement is completely disclosed on the record and is approved by the hearing officer.
6. If an offender satisfies the criteria for Ohio public defender representation, all the following apply:
- a. Unit staff shall complete the Request for Representation (DRC3466) and then submit it to the Ohio Public Defender's Office along with copies of the hearing officer packet, including the violation report. The unit supervisor shall attach confirmation of the sent Request for Representation (DRC3466) and packet information, documenting the date and time the information was sent to the public defender.
  - b. Within two (2) business days after receiving the information described in section VI.G.6.a of this policy, the Ohio Public Defender's Office shall respond with documentation of its decision on representation.

- c. If the Ohio public defender indicates it will not represent the offender, then at least five (5) business days prior to the scheduled hearing, the supervising officer or other APA staff member shall serve the offender with notice of the Ohio public defender's denial of representation, which is included on the Request for Representation (DRC3466). The offender shall then be afforded the opportunity to retain private counsel for the hearing.

#### H. Hearing Preparation

1. If the supervising unit intends to recommend the offender be placed in a HWH or other facility, the unit shall refer the offender to that facility prior to the hearing so the offender's placement can be processed, and the unit advised of the placement's status on or before the date of the hearing. If the supervising unit intends to recommend a Community Based Correctional Facility (CBCF) placement, the unit shall staff the CBCF referral with the hearing officer at or around the same time the offender is served with the Notification of Hearing paperwork.
2. The supervising unit shall complete, issue, and serve subpoenas for any witnesses, documents, or other materials needed for the hearing.
3. Subpoenas for APA witnesses, documents, or other materials shall be approved by the unit supervisor and served by the APA between 5-7 business days prior to the hearing.
4. Subpoena requests from the offender for witnesses, documents, or other materials shall be made between 5-7 business days prior to the hearing and shall be approved by the unit supervisor. The offender's requests should be granted unless the unit supervisor deems the witnesses, documents, or other materials to be irrelevant, immaterial, cumulative, privileged, or beyond the subpoena power of the ODRC. An offender's request may also be denied for good cause, which includes, but is not limited to, risk of harm to a witness or confidential informant.
5. If an offender's request for witnesses, documents or other materials is denied in whole or in part, the unit supervisor shall document the basis for such denial on the Notice of Denial of Request for Witness (DRC3310), which shall be provided to the hearing officer and which shall become part of the violation hearing record.
6. Offenders may subpoena a limited number of witnesses to speak on their behalf. The unit supervisor shall determine the number and identities of those witnesses who will be permitted to speak based on the type of mitigation that will be offered by each witness.
7. The supervising unit shall be responsible for ensuring the necessary materials for the hearing are submitted through electronic forms to the hearing officer at least two (2) business days prior to the original hearing, unless the hearing officer gives written approval for the materials to be submitted on the day of the hearing.
8. The supervising unit shall provide to the hearing officer documentation of the offender's date of availability in the form of a journal entry, jail sheet or other appropriate document.

**I. Violation Hearing: Location and Attendees**

1. Violation hearings shall be conducted at or near the site of the alleged violation or violations. Appropriate sites include the local county jail, a secure APA office, an ODRC institution, or other locations designated by the unit supervisor. If an emergency or other circumstance occurs that is beyond the APA's control, the hearing officer may reschedule the hearing.
2. The supervising unit shall verify the availability of the violation hearing site. At least two (2) business days prior to the hearing, the unit shall contact the appropriate official at the jail, institution or other facility where the hearing is to be held to verify the hearing location will be available and that adequate security will be on hand. If the hearing is to be held at a local county jail and the jail is unable to provide adequate security, after considering the offender's background, the nature of the alleged violations, and the physical plant of the jail, the regional supervisor or designee may assign to one (1) or more APA parole officers or unit supervisors the responsibility of providing security at the hearing.
3. Violation hearings are not open to the public. Only the following individuals are authorized to attend a violation hearing:
  - a. APA staff necessary to conduct the hearing;
  - b. The offender, unless excused by the hearing officer prior to the hearing or removed by the hearing officer during the hearing;
  - c. The offender's attorney;
  - d. Jail facility staff or institution correctional officers providing security;
  - e. Witnesses subpoenaed on behalf of the APA or the offender;
  - f. Miscellaneous persons necessary for the orderly presentation of the evidence, including, but not limited to, interpreters and audio-visual facilitators;
  - g. ODRC employees who are attending the hearing for purposes of training or evaluation and who received prior approval to attend from the unit supervisor or the hearing officer;
  - h. Approved advocates by the Office of Victim Services (OVS);
  - i. Any other person whose attendance is approved by the chief of the APA or the Parole Board chair.
4. Whenever feasible, witnesses shall be separated from one another.

**J. Violation Hearing Process: Preliminary Matters**

Prior to the hearing, the hearing officer shall do all the following:

1. Ensure there is adequate security to conduct the hearing;
2. Verify all available days in custody on an active hold order, up to and including the date of the violation hearing, have been credited in DOTS Portal, using the JLS screen;
3. Ensure all applicable timeframes have been adhered to;
4. Ensure the notice and service are in order, the proper forms were used, and that proper procedures have been followed, including the Ohio public defender referral process.

SUBJECT: Violation Hearing Process

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**K. Violation Hearing Process: Guilt/Innocence Phase**

1. During the hearing, the hearing officer shall do all the following:
  - a. Maintain an official record of the hearing;
  - b. Describe the hearing procedures and process to everyone in attendance;
  - c. Read into the record an application of the *Gagnon* criteria;
  - d. Facilitate a proper identification of the offender;
  - e. Read the alleged violations;
  - f. Determine to which of the alleged violations the offender admits and which of the alleged violations the offender denies;
  - g. Hear and resolve all questions related to the denial of witnesses, documents, or other materials;
  - h. Permit the APA or the offender to proffer the testimony of absent witnesses;
  - i. If the hearing needs to be rescheduled for good cause, hear the testimony of any witnesses present prior to rescheduling;
  - j. Separate witnesses, excuse witnesses, and approve witness fees;
  - k. Hear testimony from witnesses, including hearsay evidence, and place documents, statements, affidavits, reports, and other materials into the record;
  - l. Maintain order during the hearing, including, but not limited to, ordering the removal of any individual who is disruptive to the proceedings, including the offender, with chief hearing officer approval;
  - m. Review the supervising unit's violation report and any other relevant information pertaining to the offender or the offender's background;
  - n. Permit the offender to confront and, through counsel, if present, cross-examine witnesses and to present testimony, documents, or other materials;
  - o. Permit the offender to examine documents, reports, and other materials presented at the hearing;
  - p. Ensure the offender's right to remain silent is safeguarded;
  - q. Make a finding of guilt or innocence on each of the alleged violations based upon a "preponderance of the evidence considering the record as a whole" for all offenders other than offenders being supervised under the Interstate Compact for Adult Offender Supervision with respect to whom a finding of probable cause is sufficient. In the case of an offender who has been sentenced in criminal proceedings involving the same conduct that is the subject of the violation hearing, all the following apply:
    - i. If the offender has been found "guilty" in those court proceedings, sufficient evidence of that conviction is conclusive proof of identical violation behavior. "Sufficient evidence of that conviction" includes a certified copy of the court journal entry from a court of competent jurisdiction or other reliable sources such as photocopied or faxed copies of the journal entry or the offender's own admission of the authenticity of the conviction.
    - ii. If the offender is found guilty at the violation hearing solely based on a certified journal entry, no immediate effect shall be given to the existence of pending appellate or post-conviction proceedings. If a court of competent jurisdiction subsequently voids, nullifies, remands or amends the underlying criminal

conviction on other than purely procedural grounds, the offender may petition the Parole Board chair for a rehearing of the underlying substantive charges. Any action taken by the APA in response to such a petition shall be taken on a case-by-case basis and is not subject to appeal.

- iii. An acquittal or dismissal of criminal charges shall not bar further revocation proceedings.
  - r. Order the offender continued under supervision if the violation or violations are not proven.
2. When rescheduling a hearing for good cause, if the offender's placement in a HWH is anticipated, the hearing officer shall reschedule the hearing to allow sufficient time for the supervising unit to refer the offender to residential placement if such referral has not previously been initiated.

**L. Violation Hearing Process: Procedures Following the Guilt or Innocence Determination**

- 1. If one (1) or more violations are proven, the hearing officer shall hear the offender's mitigation evidence, the supervising authority's rebuttal, and the supervising authority's recommended sanction. Following that, the hearing officer shall impose an appropriate sanction.
- 2. If a violation hearing is conducted, in addition to the standard sanctions available to the unit at the unit level, the hearing officer has the following sanctions available:
  - a. If the offender is under PRC, an increase in the term of the supervision;
  - b. Electronic monitoring;
  - c. Revocation of release;
  - d. If the offender is under PRC, a prison term sanction;
  - e. If the offender is under PRC, monitored time if all available prison sanction time has been exhausted;
  - f. Placement in a halfway house if the offender's assessed risk is moderate, high or very high;
  - g. Placement in a CBCF;
  - h. A no contact order;
  - i. Continuing the offender under supervision.
- 3. If an offender is found guilty of engaging in one (1) or more of the following, it is presumed that a prison sanction or revocation of release is necessary in order to punish the offender and to adequately protect the public:
  - a. Any unprivileged sexual conduct or contact;
  - b. Any sexual misconduct involving a minor;
  - c. Possession, use or control of a firearm;
  - d. Brandishing a weapon;
  - e. Assaultive misconduct resulting in bodily injury;

- f. Psychological trauma or threats of death to an individual;
  - g. Financial loss of \$10,000 or more attributable to the offender's misconduct;
  - h. Felonious conduct of the first, second, or third degree;
  - i. Continued involvement in organized crime, a security threat group, or sophisticated criminal behaviors;
  - j. Being involved in, operating, or overseeing the bulk distribution of illegal drugs.
4. Prison term sanctions imposed by hearing officers in response to PRC violations shall be commensurate to the seriousness of the violation behavior and the threat posed to public safety by that behavior, as follows:
- a. If the most serious violation for which the offender has been found guilty involves any of the following, the prison term sanction shall not exceed forty-five (45) days.
    - i. Substance abuse/illegal drug use violations;
    - ii. WUVL;
    - iii. Unsuccessful termination from programming (non-sex);
    - iv. All other technical violations.
  - b. If the most serious violation for which the offender has been found guilty involves any of the following, the prison term sanction shall not exceed sixty (60) days.
    - i. Violation of all other Parole Board Special Conditions;
    - ii. Failure to appear for a Parole Board Summons;
    - iii. Unsuccessful termination from a halfway house;
    - iv. Declared VAL;
    - v. Violation of two (2) or more unit level sanctions;
    - vi. Unsuccessful termination of two (2) or more outpatient programs;
    - vii. All other non-violent misdemeanor convictions/behavior;
    - viii. Unsuccessful termination from SOP.
  - c. If the most serious violation for which the offender has been found guilty involves any of the following, the prison term sanction shall not exceed ninety (90) days.
    - i. All non-violent felony behavior;
    - ii. DUI;
    - iii. Failed to appear for an Out-of-Custody hearing;
    - iv. Violation of a Hearing Officer Sanction;
    - v. Violation of Parole Board conditions regarding contact with minors/Internet/Social Media restrictions;
    - vi. Out-of-State/Not VAL or PVIC;
    - vii. EM/GPS Violation (being untraceable for 4 hours or more).
  - d. If the most serious violation for which the offender has been found guilty involves any behavior not specifically identified in sections VLL.4.a-c of this policy, the prison term sanction may be for any duration of time not to exceed 270 days, provided that any prison term sanction that exceeds 180 days requires the approval of a chief hearing officer unless imposed in accordance with section VLL.4.f of this policy.

- e. Any prison term sanction other than one approved by a chief hearing officer pursuant to section VI.4.d of this policy or imposed in accordance with section VII.4.f of this policy that exceeds the applicable limit specified in section VII.4 of this policy requires approval of the Parole Board chair/designee.
  - f. A hearing officer may impose up to ten (10) additional days of prison term sanction beyond the applicable limit specified in sections VII.4.a-c of this policy or beyond the applicable 180 day limit specified in section VI.4.d of this policy if the offender would, after serving the maximum sanction specified in those sections, have ten (10) or fewer days of prison sanction time remaining with which to address future violation behaviors.
5. After determining the appropriate sanction, the hearing officer shall state, on the record, the reasons for imposing the sanction; shall complete the Notice of Findings of Release Violation Hearing (DRC3326); the Sanction Receipt (DRC3313/DRC3325); the Revocation Order (DRC3314), if applicable; and shall provide copies of those forms to the supervising authority and the offender. A Hearing Summary Report (DRC3234) shall also be completed at the conclusion of the hearing. The hearing officer shall forward the hearing packet electronically to the Parole Board, which shall forward the hearing packet to the Bureau of Records Management (BORM) Document Imaging Group. The supervising officer shall document the date of the hearing and provide a summary of the sanction. If a community sanction is imposed, the sanction's start date and projected completion date shall be documented in the field officer tablet (FOT). The unit supervisor shall document the sanction in NOTEC.
6. If the hearing officer's sanction includes a no contact order, the supervising unit shall forward the sanction receipt to the institution managing officer/designee.
7. If the sanction imposed at the violation hearing is a revocation of release or imposition of a prison term, then all the following apply:
- a. For in-custody hearings, the hearing officer shall issue an order revoking the release or imposing the prison term and shall provide the revocation order or sanction receipt to the appropriate supervising authority. The hearing officer shall email the sanction receipt to the Bureau of Sentence Computation (BOSC) at [drc.bosc@odrc.state.oh.us](mailto:drc.bosc@odrc.state.oh.us). Copies of the revocation order or sanction receipt shall be provided to the ODRC Record Office by the hearing officer when the hearing is conducted in an ODRC institution.
    - i. If imposing a prison term on an offender under PRC, the hearing officer shall indicate on the sanction receipt the sanction/s that will be in effect upon expiration of the prison term.
    - ii. If revoking parole, after the hearing officer's recommendation has been approved or modified by the Parole Board, the hearing officer or designated Operation Support Center (OSC) Parole Board staff shall provide a copy of the sanction receipt to the supervising authority and ensure a copy is provided to the offender.

- b. If the hearing officer exhausts the remaining prison sanction time available on an offender who is subject to discretionary PRC, the hearing officer shall terminate PRC supervision effective on the date that the sanction expires. The hearing officer shall indicate on the sanction receipt that the termination is unfavorable.
  - c. If parole is revoked or a prison sanction ordered, the APA shall return the offender to the appropriate ODRC institution as soon as feasible. Barring an emergency, APA staff or jail staff shall not transport the offender until the Revocation Order (DRC3314) or sanction receipt is forwarded to OSC for processing. The transportation officer shall provide the revocation order or sanction receipt to the reception center when transporting the offender. The offender's supervising officer shall email a copy of the sanction receipt to the email account of the reception center's records office.
  - d. The hearing officer shall complete the Hearing Summary Report (DRC3234) within twenty (20) business days after the hearing. The hearing officer shall then forward it electronically to the Parole Board. Additionally, the hearing officer will forward a hard copy to the BORM Document Imaging Group. The Hearing Summary Report (DRC3234), which is a Parole Board document, shall, at a minimum, contain the following:
    - i. Information about the hearing, including the offender's name; the offender's institution number; the offender's supervision type; the offender's arrest date; the offender's availability date; the service of notice date; the hold order date; the hearing date; the hearing type; the hearing officer's name; the supervising unit or representative; counsel's name, where applicable; and any additional information deemed necessary by the Parole Board;
    - ii. The hearing officer's summary of the offender's criminal history, including the offender's prior adjustments to supervision;
    - iii. The hearing officer's recommendation;
    - iv. Any additional materials or documents that supplement or clarify the report.
  - e. If the hearing results in a parole revocation, the Parole Board shall process the official minutes of the action after receiving the hearing packet and shall forward it to the BORM Document Imaging Group. The BOSC Earned Credit Section shall schedule a subsequent release consideration hearing, if applicable, upon receipt of the official minutes.
8. When determining the appropriate amount of prison sanction time to impose upon an offender, hearing officers may consider the total amount of prison sanction time that is available for the offender relative to the amount of time the offender has remaining on supervision.

9. If the sanction imposed includes an order to reimburse the State of Ohio for cost of extradition, the supervising unit shall forward the revocation order or sanction receipt to the Fugitive section.

**M. Violation Hearing Process: Review and Modification**

1. All violation hearing results shall be reviewed by a chief hearing officer and are subject to modification by the Parole Board chair/designee.
2. If the hearing officer who conducts the hearing discovers that, during the hearing process, the supervising unit committed procedural errors, failed to provide critical documentation, or failed to provide necessary supporting information, the hearing officer shall complete a Violation Hearing Review (DRC3541), which shall note any issues and shall make a recommendation to address them. The Violation Hearing Review (DRC3541) shall be sent to the regional administrator and the chief hearing officer. A Violation Hearing Review (DRC3541) may also be completed by a hearing officer for the purpose of noting observations of a positive nature.

**Related Department Forms:**

APA Pre-Hearing Staffing for Representation	DRC3084
Offender Statement	DRC3086
Hearing Summary Report	DRC3234
Notification of Release Violation Hearing	DRC3304
Request for Witness/Notice of Counsel	DRC3309
Notification of Denial of Request for Witness	DRC3310
Sanction Receipt (TC/Parole/Compact)	DRC3313
Revocation Order	DRC3314
Sanction Receipt and Prison Term Order (PRC)	DRC3325
Notice of Findings of Release Violation Sanction Hearing	DRC3326
Waiver of Appearance at Release Violation Sanction Hearing Form	DRC3362
Violation Hearing Grid	DRC3458
Request for Representation	DRC3466
Violation Hearing Review	DRC3541
Waiver of Probable Cause Hearing for Interstate Compact Offenders	DRC3547

# ODRC Policy/Operation Manual Variance Request

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Variance to ODRC Policy/Operation Manual #: 105-PBD-09		Section(s): VIE 1	
Policy/Operation Manual Name: Violation Hearing Process			
Managing Officer or designee Submitting the Request: Cynthia Mausser		Signature: Cynthia Mausser Date: 12/30/2020	
Policy Owner Signature: Cynthia Mausser		Date: 12/30/2020	
Date of Request: Dec 30, 2020	Length of Request: <input type="checkbox"/> 90 days <input type="checkbox"/> 120 days <input type="checkbox"/> 180 days <input checked="" type="checkbox"/> other	Effective Date of Variance: December 31, 2020	Applicable to: DPCS

Please provide a full explanation of the requested variance including the justification for the request. Please be specific as to exactly what sections and language are being revised. Explain revision necessary prior to routine revision of the policy. (Attach additional sheets if necessary):  
 VIE 1: Violation hearing time frames are extended from twenty (20) business days to twenty-five (25) business days.

**Comments:**

Defer to C. Mausser.

<input checked="" type="checkbox"/> Recommended <input type="checkbox"/> Not Recommended	Central Office Policy Review Chairperson: Jondrea K Parrish	Signature: <i>Jondrea Parrish</i> Date: 12/30/2020
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**Comments:**

<input checked="" type="checkbox"/> Recommended <input type="checkbox"/> Not Recommended	Deputy Director or Regional Director: Cynthia Mausser	Signature: <i>Cynthia Mausser</i> Date: 12/30/2020
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**Comments:**

Approved by Ashley Parriman during Director's briefing on 12/30/2020. J. Parrish

<input checked="" type="checkbox"/> Recommended <input type="checkbox"/> Not Recommended	Legal Signature: <i>Ashley Parriman/jpp</i>	Date: 12/30/2020
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**Decision/Comments:**

<input checked="" type="checkbox"/> Approved <input type="checkbox"/> Disapproved	Director: <i>A.C. Smith</i>	Date: 12/30/2020
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Expiration of Variance: <input type="checkbox"/> 90 days <input type="checkbox"/> 120 days <input type="checkbox"/> 180 days <input checked="" type="checkbox"/> Next Revision
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# ODRC Policy/Operation Manual Variance Request

Variance to ODRC Policy/Operation Manual #: 105-PBD-09		Section(s): VI A 2-7; VI E 1	
Policy/Operation Manual Name: Violation Hearing Process			
Managing Officer or designee Submitting the Request: C. Mausser		Signature: Cynthia Mausser	Date: 12/30/2020
Policy Owner Signature: Cynthia Mausser		Date: 12/30/2020	
Date of Request: Dec 30, 2020	Length of Request: June 30, 2021 <input type="checkbox"/> 90 days <input type="checkbox"/> 120 days <input type="checkbox"/> 180 days <input checked="" type="checkbox"/> other	Effective Date of Variance: 12/31/2020	Applicable to: APA staff

**Please provide a full explanation of the requested variance including the justification for the request. Please be specific as to exactly what sections and language are being revised. Explain revision necessary prior to routine revision of the policy. (Attach additional sheets if necessary):**

This variance will allow for notice of the hearing to be provided without obtaining required signatures and for an extension of hearing time frames as follows:

VI A 2-8: When jail rules limit contact in a manner that does not allow the signature of the offender to be obtained on the hearing notice form, the APA staff member shall verbally review the Notification of Hearing and Request of Witness/Notice of Counsel (DRC 3304/3309) with the offender. The APA staff member shall review the charges alleged, obtain a plea verbally from the offender and initial next to the corresponding plea on the form. The APA staff member shall note at the end of the form that the content was reviewed verbally with the offender in lieu of obtaining the offender's signature due to jail protocol. If the offender waives his/her appearance at the hearing, the APA staff member shall note that the waiver was discussed and that the offender chose to waive his/her hearing on DRC Form 3362. If the offender elects to have a hearing, the APA staff member will document requested witnesses and/or OPD representation on DRC Form 3309. The APA staff member shall provide a copy of the applicable forms to jail staff and request that they be provided to the offender.

**Comments:**

Defer to Cynthia Mausser.

- Recommended  
 Not Recommended

Central Office Policy Review Chairperson: Jondrea K Parrish	Signature: <i>Jondrea Parrish</i>	Date: 12/30/2020
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**Comments:**

- Recommended  
 Not Recommended

Deputy Director or Regional Director: Cynthia Mausser	Signature: <i>Cynthia Mausser</i>	Date: 12/30/2020
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**Comments:**

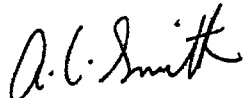
Approved by Ashley Parriman during Director's briefing on 12/30/2020. J. Parrish

- Recommended  
 Not Recommended

Legal Signature: <i>Ashley Parriman/jpp</i>	Date: 12/30/2020
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**Decision/Comments:**

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<b>SUBJECT:</b> <b>Sanctions for Violations of Conditions of Supervision</b>	PAGE <u>1</u> OF <u>7</u>
	NUMBER: <b>100-APA-14</b>
<b>ORC/OAC REFERENCE:</b> ORC 2929, 2967.01, 2967.14, 2967.15, 2967.26, 2967.28, 5120.01 OAC 5120: 1-1-17, 1-1-18, 1-1-41, 1-1-43	<b>SUPERCEDES:</b> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 5px auto;">                 PAGE 97             </div>
<b>RELATED ACA STANDARDS:</b> 2-1003, 2-1092-1, 2-1106 to 2-1111, 2-1114 to 2-1120, 2-1122, 2-1123; 4-APPFS-2B-02 to 2B-12, 2E-01	
	<b>APPROVED:</b> 

**I. AUTHORITY**

Ohio Revised Code 5120.01 authorizes the Director of the Department of Rehabilitation and Correction, as the executive head of the department, to direct the total operations and management of the department by establishing procedures as set forth in this policy.

**II. PURPOSE**

The purpose of this policy is to promote fair, consistent, and objective decision making when addressing violation behavior.

**III. APPLICABILITY**

This policy applies to all employees of the Adult Parole Authority (APA) and the Bureau of Community Sanctions (BCS) and all supervisees under Parole, Post Release Control (PRC), Transitional Control (TRC), and Interstate Compact supervision.

**IV. DEFINITIONS**

The definitions for the below listed terms can be found at the top of the policies page on the Ohio Department of Rehabilitation and Correction (ODRC) Intranet at the following:

**Definitions Link**

- **Bodily Injury**
- **Business Day**
- **Community Corrections Information System (CCIS)**
- **Conditions of Supervision**
- **Day Reporting**
- **Departmental Offender Tracking System (DOTS)**
- **Halfway House (HWH)**
- **Hold Order**
- **In-Custody**
- **Parole**
- **Post Release Control (PRC)**

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- Prison Sanction Time
- Sanction
- Transitional Control (TRC)
- Violator at Large (VAL)

## V. POLICY

It is the policy of the ODRC to respond to any violation behavior committed by supervisees during the period of supervision.

## VI. PROCEDURES

### A. Addressing Violation Behavior

1. Whenever a supervisee under APA-supervision violates one (1) or more Conditions of Supervision (DRC3019), the APA shall take appropriate steps to respond to the behavior.
2. When there is reason to believe a supervisee has violated a Condition of Supervision (DRC3019) or a previously imposed sanction, the parole officer shall:
  - a. Investigate the suspected violation behavior.
  - b. If witnesses are interviewed, complete a Witness Form (DRC3057).
  - c. Document investigative efforts in the violation tab in OCSS.
  - d. Staff the violation behavior with the unit supervisor/designee.
3. The parole officer and unit supervisor/designee shall determine the appropriate response to violation behavior and shall consider:
  - a. Supervision adjustment, any prior sanctions and available prison sanction time,
  - b. Victim impact,
  - c. The risk of the supervisee harming themselves or others, and
  - d. The seriousness of allegations.
4. If the supervisee cannot be located, the parole officer shall complete a whereabouts unknown and follow the procedures set forth in ODRC Policy 102-FUG-02, Violator at Large.
5. If a parole supervisee has violation behavior that rises to a unit sanction or above or is a violation of a parole board special condition, the violation behavior must be staffed with a designated Parole Board member.

### B. Mandatory Arrest/Hearing

1. An In-Custody violation hearing is required if violation behavior involves one (1) or more of the following:
  - a. A deadly weapon or dangerous ordinances, or
  - b. Physical harm, causing, threatening, or attempted serious physical harm to a person,

- sexual misconduct, or
- c. Violation of a protection order, or
- d. Intentional contact with victim, or
- e. Violation of No Unsupervised Contact with Minors (Supervising Adult Must be approved by the APA) special condition.

2. A violation hearing is not mandatory if the supervisee never becomes available on the pending charges and is sentenced to prison. The outcome of the pending charges shall be staffed to determine if a hearing is necessary. The unit should take into consideration the extent of injuries to the victim, available prison sanction time and prior violation behavior.

#### C. Overriding the Violation Hearing Grid

The regional administrator/designee and superintendent/designee may override the Violation Hearing Grid (DRC3458) for an In-Custody hearing. The criteria for regional override is located on the Violation Hearing Grid.

#### D. Interstate Compact

1. Incoming interstate compact supervisees shall have a probable cause hearing if requested by the sending state, regardless of availability. If a probable cause hearing is not requested, the violation behavior shall be addressed in accordance with this policy.
2. The compact analyst shall respond to violation behavior, which could include a violation hearing or ordering the supervisee to return to Ohio. If the supervisee is ordered to return, an APA unit will be assigned the case for supervision.

#### E. Transitional Control (TRC)

1. If a supervisee under transitional control (TRC) for an offense committed on or after July 1, 1996, violates any condition of TRC, it shall be the responsibility of the halfway house (HWH) or the Bureau of Community Sanctions (BCS) to respond to that behavior pursuant to ODRC Policy 108-ABC-01, Transitional Control Supervision.
2. The APA shall arrest, transport, and issue hold orders on TRC supervisees. The hold orders will be replaced with the Acknowledgment of Requirement to Retain Inmate in Custody until Expiration of Sentence or Return to Prison (DRC2560).

#### F. Responsibilities Relative to Victims

1. The unit supervisors/designee shall contact the Office of Victim Services (OVS) whenever the violation behavior involves corroborated violence or a corroborated threat of violence. The APA may contact OVS on any other case as deemed necessary. OVS may be contacted by email at [drc.victim.services@odrc.state.oh.us](mailto:drc.victim.services@odrc.state.oh.us) or by telephone at 614-728-1551 or toll free at 1-888-842-8464.
2. If a supervisee has violation behavior for an offense of violence that is a 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> degree felony, as defined in ORC section 2901.01 (A) (9), where prison time is imposed,

a copy of the police report shall be labeled with the supervisee's name and incarceration number and sent to the [DRC.CoVictimNotices@odrc.state.oh.us](mailto:DRC.CoVictimNotices@odrc.state.oh.us) email account.

#### G. Active and Inactive Hold Orders

1. A hold order is only considered active if it is the sole reason for a supervisee's detention. A supervisee held on an inactive hold order shall be considered unavailable and time limitations for sanctioning the supervisee's violation behavior shall be tolled for the duration of the inactive hold. Once an inactive hold order becomes active, the timeframe starts over for addressing the violation behavior. Any supervisee with an APA hold order shall have their custody status verified weekly regardless of availability. The status check shall include verification that the supervisee is being held on APA hold only and/or status of pending charges/bond.
2. A hold order shall be placed when the unit supervisor/ designee intends to proceed with an in-custody violation hearing. The hold order may be placed when the unit supervisor/ designee intends to sanction the supervisee, investigate alleged violation behavior, or proceed with an out of custody hearing. If the supervisee is unavailable and will not have a hearing, the unit should sanction and remove the hold order. Some factors to consider when placing an inactive hold order:
  - a. Seriousness of pending charges,
  - b. Felonious behavior,
  - c. Victim impact,
  - d. Supervisee's risk score,
  - e. Prior violation behavior,
  - f. Instant offense.
3. The unit supervisor/designee may issue an active hold order for up to five (5) business days on supervisees who are available. That active hold order may be extended for five (5) business days for a total of ten (10) business days. The unit should make every effort to release supervisees within five (5) business days. The approval of extensions should be reserved for supervisees that need to be transported to a HWH or investigated for alleged violation behavior.
4. No hold order shall be lodged against a supervisee who has exhausted all available prison sanction time.

#### H. Availability of Supervisees

1. A supervisee shall be considered available and time limitations for imposing sanctions shall be in effect in the following circumstances:
  - a. The supervisee is under APA supervision and is being held in custody with an active APA hold order,
  - b. The supervisee is being held in an ODRC institution,
  - c. The supervisee is under TRC,
  - d. The supervisee has posted bond,
  - e. The supervisee has pending charges and has been released to electronic monitoring

- status,
- f. The supervisee was sentenced to a period of incarceration in the local jail, CBCF, or other locked facility and has served that period of local incarceration.
  2. When a supervisee is available and an active hold order is in place, any days held in custody in Ohio on that active hold order up to and including the date of the violation sanction hearing (including continued hearings), shall be credited in JLS by the unit supervisor/designee.
  3. Jail time shall be credited in JLS for any days a supervisee is in custody in Ohio as a result of being arrested on a VAL warrant unless the supervisee is arrested with new charges.
  4. If a supervisee is found to be incompetent by court or medically unstable, the supervisee shall be considered unavailable, and timeframes stop. The timeframes shall resume once the supervisee is deemed competent, medically stable or is released from the hospital.
  5. Permission shall be obtained from the chief hearing officer when a unit is requesting to proceed with a violation hearing for a supervisee who is unavailable. E-mails approving an unavailable supervisee to move forward with a hearing shall be included in the violation packet.
  6. If the unit supervisor/designee determines a supervisee will be scheduled for a violation hearing, the procedures in ODRC Policy 105-PBD-09, Violation Hearing Process, shall be followed.

#### I. Utilization of a Unit Level Sanction

1. A unit level sanction shall be imposed no later than ten (10) business days after the parole officer has knowledge of the violation behavior or if the supervisee is incarcerated in a local jail, ten (10) business days after the supervisee becomes available. If the violation behavior is for failing to report, the unit has five (5) business days to impose a sanction on the following supervisees:
  - a. Felony 1 or felony 2 (very high and high risk) supervisees with more than thirty (30) days of available prison sanction time,
  - b. Sex offenders,
  - c. Parole supervisees.

A written violation sanction shall be documented by completing a Sanction Receipt (DRC3361). A copy of the sanction receipt shall be provided to the supervisee with a copy being retained in the unit file. All sanctions, including but not limited to verbal reprimands, shall be documented in the sanctions tab in OCSS.

2. Parole officers, unit supervisors, and TRC facility staff shall make every effort to ensure local sanctions are identified and used appropriately. The following sanctions may be imposed at the unit level:
  - a. Day Reporting,

- b. Upgrades in supervision levels (must be staffed with supervisor/designee),
- c. Mandatory employment,
- d. Structured supervision activities,
- e. Summons before a unit supervisor (must be staffed with supervisor/designee),
- f. Substance abuse testing,
- g. Residential curfew,
- h. Formal written reprimand,
- i. Modified reporting instructions,
- j. HWH (must be staffed with supervisor/designee) or non-residential program placement,
- k. Electronic Monitoring (must be staffed with supervisor/designee),
- l. Community Service (must be staffed with supervisor/designee),
- m. Summons to Parole Board hearing officer (must be staffed with supervisor/designee)
- n. CBCF referral (non-mandatory behavior must be approved by regional administrator/designee).

#### J. Sentencing Enhancement

1. When a supervisee under PRC is convicted of a new felony offense that occurred while under supervision, the court, in addition to any sentence imposed as a result of the new felony conviction, may impose the greater of twelve (12) months or the remainder of the offender's period of PRC. This time shall be reduced by the amount of time the supervisee has been incarcerated by and available to the APA for the same violation.
2. When a supervisee under PRC is indicted for a new felony, which occurred while under supervision, the unit supervisor/designee shall notify the prosecutor's office in the county of the new charge utilizing the PRC Violator Notification (DRC3463). A copy of the PRC reporting order shall also be sent to the prosecutor's office within ten (10) business days of indictment.
3. The accuracy of the remaining PRC supervision time available shall be verified prior to the PRC Violator Notification (DRC3463) being completed and forwarded to the prosecutor's office.

#### K. Exceptions

##### Waiver PRC Violator Notification (DRC3463)

The requirement to forward the PRC Violator Notification (DRC3463) and a copy of the Post Release Control Reporting Order to the prosecutor's office and/or the court within ten (10) business days of indictment may be waived in those counties where the local prosecutor and court have agreed in writing that they do not require a notice be sent on all felonies.

1. The regional administrator and/or designee shall meet with local prosecutors and court in each of the counties in their region to determine the local practice for the county and/or establish select felonies for which notification is required.
2. The specifics of the agreement worked out with the local prosecutor and court shall be included in the county agreement.

- 3. For those counties where there is no county agreement, the waiver shall be reviewed on a bi-annual basis with the local prosecutor and court to ensure local needs are being met.

**Referenced ODRC Policies:**

- 102-FUG-02 Violator at Large
- 105-PBD-09 Violation Hearing Process
- 108-ABC-01 Transitional Control Supervision

**Referenced Forms:**

- Acknowledgement of Requirement to Retain Inmate in Custody until Expiration of Sentence or Return to Prison DRC2560
- Conditions of Supervision DRC3019
- Witness Form DRC3057
- Sanction Receipt/Parole Officer DRC3361
- Violation Hearing Grid DRC3458
- PRC Violator Notification DRC3463

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# ADULT PAROLE AUTHORITY Violation Hearing Continuance

Name: Ezra Foster	Offender #/ID: A213888	PAGE 10
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I hereby make application for continuance of the violation hearing originally scheduled for:

Date: Mar 9, 2021	Time: 1:00 PM
----------------------	------------------

For the following reason(s): Hearing site unavailable

Counsel for Offender:	Date:
Unit Supervisor:	Date:

1. Application for continuance APPROVED and rescheduled for:

Date: Mar 23, 2021	Time: 1:00 PM
-----------------------	------------------

2. Application for continuance DISAPPROVED for the following reason(s):

Hearing Officer: Michael E Anderson	Date: 2/2/2021
--	-------------------

I certify that this response was hand-delivered to me on:

Date:	Time:
-------	-------

Offender Signature:	Date:
Witness Signature:	Date:

Violation Hearing Continued by the Hearing Officer and scheduled for:

Date: Mar 24, 2021	Time: 1:00 PM
-----------------------	------------------

For the following reason(s): Hearing site unavailable

Hearing Officer: Michael E Anderson	Date: 2/2/2021
--	-------------------

I certify that this response was hand-delivered to me on:

Date:	Time:
-------	-------

Offender Signature:	Date:
Witness Signature:	Date:

**Ohio** | Department of  
Rehabilitation & Correction

Mike DeWine, Governor  
Annette Chambers-Smith, Director

Date: 6-22-21

RE: VIOLATION HEARING

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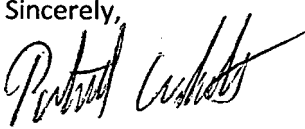
Dear MR. FOSTER A-213888

Thank you for your correspondence received in this office on 6-17-21. I have been asked to respond to your inquiry.

\_\_\_ The hearing officer's decision is final unless there is a case dispositive or prejudicial error. I have reviewed this hearing packet and materials and find no such error exists. The hearing officer's decision will remain in effect.

\_\_\_ The time you spent in jail prior to becoming available to the APA is not given as a credit toward your overall available prison sanction. Questions concerning the amount of time issued as credit while in the county jail should be addressed with the APA.

Other:  
THERE IS NO APPEAL PROCESS.

Sincerely,  
  
Patrick Webster  
Parole Board Hearing Officer  
Ohio Parole Board

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

EZRA C. FOSTER

Petitioner,

v.

KEITH FOLEY, WARDEN, et al.,

Respondents.

) Case No. 1:23-cv-00139-JJH

) JUDGE JEFFREY J. HELMICK

) MAGISTRATE JUDGE

) THOMAS M. PALMER

) **ORDER**

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A petition, pursuant to 28 U.S.C. § 2254, has been filed in this Court. The Court, having examined the petition in accordance with Rule 4 of the Rules Governing § 2254 Proceedings, cannot determine from the face of the petition that Petitioner is not entitled to relief. THEREFORE,

- (1) Respondent shall file an answer ("Return of Writ") to the petition within sixty (60) days from the date of this order. The answer shall comply with Rule 5 of the Rules Governing §2254 cases, and shall address all legal issues raised in the petition.
- (2) Petitioner shall have thirty (30) days from the filing of Respondent's Return of Writ to file a reply thereto ("Traverse").
- (3) Respondent shall have fifteen (15) days from the filing of Petitioner's Traverse to respond thereto.

Briefs filed by the parties shall contain a summary of the facts and evidence upon which they rely and shall make specific reference to those portions of the record (Page or Exhibit Number) in support. Briefs shall also contain statements of the applicable law and citations to relevant case and statutory authorities, and a legal analysis of the claim in issue. Where applicable, multiple volumes of the record are preferred to a single, massive volume.

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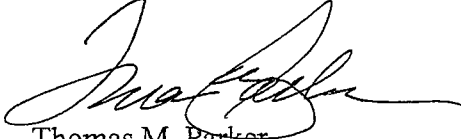
If a dispositive motion is filed raising a statute of limitations defense, the movant shall attach documentation in support of the motion, including, but not limited to a certified copy of the docket. If the respondent claims the petition is time-barred, he or she also shall brief the merits unless there is United States Supreme Court or Sixth Circuit precedent directly on point in support of his or her statute of limitations argument. However, if the petitioner argues that the filing deadline should be excused, the respondent shall file a sur-reply, including all documents in support, within fourteen (14) days of the filing of petitioner's traverse.

**If Respondent moves to dismiss a ground for relief on procedural default, he or she shall still brief the merits of the claim.**

When a party has a change of address, the party must immediately inform the Court of the new address or risk the waiver of his/her right to present arguments or the dismissal of his/her case.

**IT IS SO ORDERED.**

Dated: March 20, 2023

  
Thomas M. Parker  
United States Magistrate Judge

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Petitioner Objects to the Magistrate Judge's Report and Recommendation because he is not given an Evidentiary Hearing and his motion for Discovery never granted to which there is no development of the record for an evidentiary proceeding so there could be a fair finding of fact.

Material and relevant to Petitioner's claim and whether he is entitled to relief is that of the Document of the record labeled "Petitioner's Evidence," also known as Violation Hearing Continuance Form 3311.

It is Petitioner's claim that the Ohio Adult Parole Authority utilized this document in a fraudulent and unauthorized manner outside the prescribed Director's Policy of the Violation Hearing Process. If proven it would entitle Petitioner to relief, because without the document there could be no Parole Revocation Hearing and subsequently no Sentence thereof, resulting in "Plain Error."

Ohio Courts and Respondent Never Dispute Petitioner's claim to this Document in that:

1. Ohio Courts Dismiss the Petition/Application because of a strict mandatory filing requirement that interposes a financial consideration to his filing and never adjudicate the claim or determine the merits to that claim and Petitioner is not entitled to an appeal to a Parole Revocation hearing.
2. Respondent's never file a Return of the Writ in State Courts but are ordered to do so with this Court.
3. With their answer of the Return of Writ to this Court they exclude from the State Records the document and never address its validity. (See Doc #12-1 Page ID #97 - 131)

It is the Magistrate Judge Disputing the validity of the Document but does so erroneously and without the finding of facts or an evidentiary hearing. Theriot v. Whitley, 18 F.3d 311 Hn5

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A defendant is entitled to an evidentiary hearing if he alleges facts, that, if proved, would entitle him to relief, and the record reveals a genuine factual dispute as to the alleged facts.

### FACTS

Petitioner, Ezra Foster, was paroled May 4<sup>th</sup>, 2016 and arrested February 1<sup>st</sup>, 2021 for a violation of the terms of his parole.

February 2<sup>nd</sup>, 2021 the Ohio Adult Parole Authorities issued a Violation Hearing Continuance Form 3311. (Not serviced or certified)

February 8<sup>th</sup>, 2021 the supervising officer conducts a preliminary hearing at the Franklin County Correctional Facility in Columbus, Ohio.

February 17<sup>th</sup>, 2021 Petitioner is transferred to the Lorain Correctional Institution, site of the Hearing and is the first time Petitioner is presented with the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance Form 3311. (No one services or certifies the document)

March 24<sup>th</sup>, 2021 the APA conducts a parole revocation hearing. (Before any testimony and evidence can be placed on the record petitioner objects to the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance being utilized to conduct the hearing based on the Document being invalid because it was not serviced or certified an allows the timeframe to be violated) Petitioner's parole is revoked and he is sentenced to (3) three-years' incarceration and must go before the APA for consideration of release.

Because there are no appeals to a parole revocation hearing, petitioner must inquire into the cause of his imprisonment through the Writ of Habeas Corpus.

Petitioner files his Writ in the Eleventh Appellate District of Ohio, Lorain, County and to the Ohio State Supreme Court to which these Courts Dismiss the petition for failure to meet the strict mandatory filing requirements and sua sponte with no adjudication of his claims. *Baldwin v. Jones*, 1995 U. S. Dist. LEXIS 6100 @ HN19 "[I]f the state court under state law chooses not to reply on a procedural bar . . . , then there [\*83] is no basis for federal habeas court's refusing to consider the merits of the federal claim." *Harris*, 489 U.S. at 265 n.12, 103 L. Ed. 2d at 319 n.12; see *Wainwright v. Witt*, 469 U.S. 412, 431 n.11, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). Moreover, "[a] state court's decision to raise and answer a constitutional question sua sponte [, however,] will . . . permit subsequent federal habeas review."

Prayerfully Petitioner turned to this Court seeking review and adjudication of his claims and the Court could not determine if Petitioner was not entitled to relief and ordered Respondent to answer and return the Writ.

Respondent answered and returned the Writ May 19<sup>th</sup>, 2023 at which time Petitioner replied with his traverse June 30<sup>th</sup>, 2023.

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Petitioner filed a Summary Judgment and Respondent filed opposition to that Summary Judgment now the Magistrate Judge in this case the Honorable Thomas M. Parker did file his Report and Recommendation which now brings us to this point in the proceedings where Petitioner Must Object to the Courts Report and Recommendation.

The Report and Recommendation per Doc #23 Page ID #403 – Page ID # 406 @ B. ODRC Policy; the report states that: “Foster’s habeas claims challenge the timeliness of, and notices regarding, his parole revocation.

While in fact the timeliness of, and notices thereof are part of the claim, alone they do not entitle Petitioner to relief. Material to the finding of facts:

1. Petitioner inquiries into the cause of his imprisonment based on an invalid Document that allows APA to conduct a hearing. Without the Document there could be no parole revocation hearing and subsequently no sentence thereof resulting in “Plain Error” and cannot be held “Harmless.”
2. The Magistrate Judge includes within his report:
  - Portions of the ODRC Policy
  - The document utilized by APA to conduct a hearing that is material to the finding of facts to Petitioner’s claim. (See Doc 1-4 Page ID #40 and Doc #1 Page ID # 4-12) also (See Magistrate’s report Doc #23 Page ID # 403 – Page ID #406)

Within the report, at this portion of the record, the Court utilizes the word “appears” (6) six times. His first use of the word is used to determine a material fact that is false. (See Doc #23 Page ID #404 ¶ 2 sentence 1) “Foster’s original hearing appears to have been scheduled for March 9<sup>th</sup>, 2021. Petitioner’s originally scheduled hearing date is that of March 8<sup>th</sup>, 2021. (See Doc #12-1 Page ID # 278)

Relevant to this fact is Petitioner’s Availability per calendar affirming Petitioner’s Originally scheduled hearing date according to the ODRC Policy. (See Doc #1-2 Page ID # 28 Sect. VI-E-1a) “A violation hearing shall be conducted no later than twenty (20) business days

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from the date the offender become available” and extended 5 business days for a total of (25) twenty-five business days according to Doc #1-3 Page ID 39 and also reflected in the report @ Doc #23 Page ID #404 ¶ 1) Where the Court errors is not utilizing Petitioner’s availability Date.

This is a material fact relevant to Petitioner’s claim that the Originally scheduled hearing date to the Document is fraudulent and is one of his claims as to why this Document is invalid. (See Doc #1 Page ID.#7 – 12)

The Magistrate Judge errors to his finding of facts where he decides to decipher the document from top to bottom. (See Doc #23 Page ID#405)

Where the report does state “ECF Doc: 1-4. The origin of this form is uncertain.” The Court fails to determine the origins of the document which is critical to whether it is a valid document and should be part of his findings of fact.

At the same Page ID # once again there is the utilization of the word, “appear.” “It appears to indicate that the originally scheduled hearing was to occur on March 9<sup>th</sup>, 2021 to which this is not a concrete finding of fact but looks to be a fact, thus now creating a Dispute.

The Court further states that the document appears to have been approved by Hearing Officer Michael E. Anderson on the same date the form was created, February 2<sup>nd</sup>, 2021 and that the Continuance moved the hearing to March 23<sup>rd</sup>, 2021.

The Court errors where it fails to consider #1 and #2 between the date of March 23, 2021. This was a previously approved scheduled hearing date now being disapproved. A finding of fact is very much needed because this date affixed in this area means there is another Violation Hearing Continuance Form 3311. This document does not approve two hearing dates on the same document as the Court suggest here. (See Petitioner’s New Evidence exhibit “A”)

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It has been Petitioner's claim from the very being of his petition that there are two Violation Hearing Continuances Form 3311 in this case, this date affixed in this area verifies that fact.

It now becomes relevant and material to Petitioner's claim because if he was serviced and certified with another Continuance form 3311 other than the February 2<sup>nd</sup>, 2021 continuance then which one did he sign in the Preliminary Hearing? If it was not the later then there is a clear violation of the process because APA knowingly does not service the February 2<sup>nd</sup>, 2021 continuance thereby not only violating the process but deceiving Petitioner through the process.

If there is two Violation Hearing Continuance Form 3311 to these proceedings, then that becomes a major problem as to which one was utilized at the Preliminary Hearing then it is relevant to the finding of fact and more importantly as to whether Petitioner is entitled to relief.

Depending on which Document was utilized goes to the heart of whether the Preliminary Hearing can be held as reliable and without a valid Preliminary Hearing the process can no longer be held as reliable. *Morrissey v. Brewer*, 408 U. S. 471 @ HN8 Due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

The Respondent's return of the writ fails to include a copy of any/no Violation Hearing Continuance Form 3311 to its filing of the state records as ordered by the Court. While all the other records to the Parole Revocation Hearing Process are made available these Violation Hearing Continuance Form 3311 are omitted from their records. Petitioner presented evidence in

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his filings that there were two sets of documents to this case and why he has two sets of different records but the Why there are two sets of documents is a mystery? (See Exhibit "B").

Petitioner does file a Reply to Respondent's Opposition to Petitioner's Summary Judgment at which time Petitioner does ask for an Evidentiary Hearing because of his "Evidence."

Baldwin v. Jones, 1995 U. S. Dist. LEXIS 6100 Essentially, HN64 a hearing must be held (1) if the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Lastly Petitioner objects to the Magistrate Judge determination of fact or cause that Petitioner should not be allowed a COA to the Appellate Court.

### **OF A TRUTH IN CONCLUSION**

Petitioner was guilty of his parole violation but that does not preclude him from being entitled to a fair, consistent, objective Hearing Process. Petitioner presents this Court with facts here that Dispute the Reports facts to which Court never sought the finding of facts. The APA is guilty of knowingly violating the Process; original documents Discovery could have verified these facts. One of the underlying principles of the DCM system is to give access to a fair court system. Petitioner presents facts Disputing the Report and Recommendation and now seeks fair findings of facts.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Objection was forwarded by regular U. S. Mail to Dave Yost, Office of the Ohio Attorney General's Office, James Rhodes State Office Tower 30 E. Broad St. 17<sup>th</sup> Fl. Columbus, Ohio 43215 this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

\_\_\_\_\_  
Ezra Foster #213-888  
Lake Erie Correctional Inst.  
501 Thompson Rd.  
P.O. Box 8000  
Conneaut, Ohio 44030

**DECLARANTION UNDER PENALTY**

Now comes Petitioner, Declarant Ezra C. Foster, declares (or certifies, verifies, or states) the following:

1. I am the pro-se Petitioner in the above captioned case.
2. On January \_\_\_\_, 2024, I deposited (by hand delivery), for mailing, my Objection to the Magistrate Judge's Report and Recommendation with the Unit Staff of the Housing unit in the housing unit in which he currently resides, as per the legal mail system.
3. Upon deposit, first-class postage was pre-paid by me.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct, executed on January \_\_\_\_, 2024.

\_\_\_\_\_  
Declarant

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# ADULT PAROLE AUTHORITY Violation Hearing Continuance

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Name: Hosie Williams	Offender #/COTS #: A680616
-------------------------	-------------------------------

I hereby make application for continuance of the violation hearing originally scheduled for:

Date: Mar 15, 2021	Time: 6:00 PM
-----------------------	------------------

For the following reason(s):

Counsel for Offender:	Date:
Unit Supervisor:	Date:

1. Application for continuance APPROVED and rescheduled for:

Date:	Time:
-------	-------

2. Application for continuance DISAPPROVED for the following reason(s):

Hearing Officer:	Date:
------------------	-------

I certify that this response was hand-delivered to me on:

Date:	Time:
-------	-------

Offender Signature:	Date:
Witness Signature:	Date:

Violation Hearing Continued by the Hearing Officer and scheduled for:

Date: Mar 29, 2021	Time: 11:00 AM
-----------------------	-------------------

For the following reason(s): Defense request: Inmate withdrew waiver.

Hearing Officer: Erin K. Hoston	Date: 2/26/2021
------------------------------------	--------------------

~~I certify that this response was hand-delivered to me on:~~

Date: XXXXXXXXXXXXXXXXXXXX	Time: XXXXXXXXXXXXXXXXXXXX
-------------------------------	-------------------------------

Offender Signature: Due to state of emergency continuance mailed RW	Date:
Witness Signature: Rebecca Vogel	Date: 3/11/2021



# ADULT PAROLE AUTHORITY Violation Hearing Continuation

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Name: Hosie Williams	Offender #/COTS #: A680866
-------------------------	-------------------------------

I hereby make application for continuance of the violation hearing originally scheduled for:

Date: Mar 15, 2021	Time: 9:30am
-----------------------	-----------------

For the following reason(s): Inmate withdrew/waiver

Counsel for Offender:	Date:
Unit Supervisor:	Date:

1. Application for continuance APPROVED and rescheduled for:

Date: Mar 29, 2021	Time: 1230p
-----------------------	----------------

2. Application for continuance DISAPPROVED for the following reason(s):

Hearing Officer: Erin K. Hoston		Date: 3/15/2021
------------------------------------	--	--------------------

I certify that this response was hand-delivered to me on:

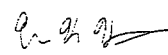
Date:	Time:
-------	-------

Offender Signature:	Date:
Witness Signature:	Date:


Violation Hearing Continued by the Hearing Officer and scheduled for:

Date: Apr 7, 2021	Time: 12:30 PM
----------------------	-------------------

For the following reason(s): Hearing Officer schedule

Hearing Officer: Erin K. Hoston		Date: 3/15/2021
------------------------------------	---	--------------------

I certify that this response was hand-delivered to me on:

	Date:	Time:
---	-------	-------

Offender Signature: <i>due to state of emergency continuance mailed</i>	Date: 3/15/2021
Witness Signature: <i>Rebecca Vogel</i>	Date: 3/15/2021

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

EZRA C. FOSTER  
A#213-888  
Lake Erie Correctional Institution  
501 Thompson Road  
P.O. Box 8000  
Conneaut, Ohio 44030

Petitioner *pro-se*

v.

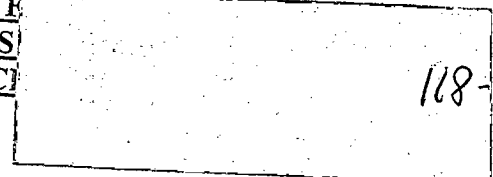
MS. M. MACKEY, WARDEN *et al*  
Lake Erie Correctional Institution  
501 Thompson Road  
P.O. Box 8000  
Conneaut, Ohio 44030

Respondent

Respondent/Counsel  
Dave Yost, Office of the  
Ohio Attorney General  
James Rhodes State Office Tower  
30 E. Broad St. 17<sup>th</sup> Fl.  
Columbus, Ohio 43215

)  
)  
) CASE No. 1:23-CV-00139-JJH  
)  
)  
) JUDGE JEFFREY J. HELMICK  
)  
)

REQUESTING THE COURT TO TAKE  
NOTICE OF A JUDICIAL NOTICE  
OF ADJUDICATIVE FACTS  
PURSUANT TO USCS  
RULES OF EVIDENCE



Now comes Petitioner, "Ezra C. Foster," in the above captioned case requesting the Court to take notice of a Judicial Notice of Adjudicative Facts pursuant to USCS Fed. Rules of Evidence R. 201 (c) (2) and the time to file is at any stage of the proceedings.

(c) Taking Notice. The Court:

(2) Must take judicial notice if a party request it and the court is supplied with the necessary information.

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(d) Timing. The court may take judicial notice at any stage of the proceeding.

**THE NECESSARY INFORMATION:**

It is Petitioner's claim that, "PLAIN ERROR" occurs when the Ohio Adult Parole Authorities (APA) prematurely issues a document known as the "Violation Hearing Continuance, Form 3311," that violates and prejudices the violation hearing process according to the Ohio Director's Violation Hearing Process - Policy 105-PBD-09 authorized by O.R.C. 5120.01 rendering the document invalid; violating Petitioner's right to Due Process and Unlawfully depriving him of his Liberty. (See Doc #1 - 4 of 20 Page ID #4 -thru- 12 of 20 Page ID #12)

At no stage of the proceedings does the Respondent nor any Ohio Court Dispute Petitioner's evidence, "The Document." They fail to include the document with the State records with their filing to this Court. (See Doc #12-1, 10 of 242 Page ID #106 -thru- 12-1, 35 of 242 Page ID #131)

It is the Magistrate Judge who has generated a report recommendation that evaluates this document and makes a determination that Petitioner's claim to this document is without merit.

The Magistrate Judge states within the report several grounds as to why it appears why the document is valid and why it appears Petitioner's claims to the document are without merit. (See Doc #23, 2 of 28 Page ID #403 @ B. ODRC Policy - thru - Doc #23, 5 of 28 Page ID #406) At Doc #23, 4 of 28 Page ID #405 the Court states, Paragraph 1 sentence 1 "The origin of this form is uncertain." It is at this point in the proceedings an adjudicative fact must be noticed. Pursuant to USCS Fed. Rules Evid. R. 201 (b) (2):

(b) Kinds of Facts That May Be Judicially Notice. The court may judicially notice a fact that is not subject to reasonable dispute because It:

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

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The Court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

The bottom of the document calls for Distribution of color coded copies to all concerned parties. These copies are all part of the original document and are not copies that can be manipulated or altered, whose accuracy cannot reasonably be questioned.

#### **DISTRIBUTION OF THIS DOCUMENT**

1. The white copy – to the – VSP Officer at ODRC 4545 Fisher Road Suite D, Columbus, Ohio 43228
2. The Canary copy – to the – Unit APA Division at ODRC 4545 Fisher Road, Columbus, Ohio 43228
3. The Pink copy – to the – Jail/Reception center; in the present case it is the Franklin County Correctional Facility in Columbus, Ohio; site of the Preliminary Hearing.
4. The Goldenrod copy – to the – Offender; all offenders Goldenrod copies are confiscated by the ODRC and supposedly redacted and a copy returned to the offender at the Lorain Correctional Institution 2075 S. Avon – Beldon Rd., Grafton, Ohio 44044; site of the Parole Revocation Hearing.

The document calls for service and certification and one of the two copies as alleged by the Magistrate Judge as being hand delivered to Petitioner on February 8<sup>th</sup>, 2021 along with the Notice of Release Violation Hearing form in the state records acknowledging the document and the original hearing date of March 9<sup>th</sup>, 2021 changing to March 23<sup>rd</sup>, 2021 and then changing the hearing date once again to March 24<sup>th</sup>, 2021 to which Petitioner now request that the Court take notice of a Adjudicative Fact of the origins of the document.


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It is Petitioner's claim that this document was not a part of the February 8<sup>th</sup>, 2021 Preliminary Hearing and that there was a totally different set of documents utilized at this hearing and is invalid in its originally scheduled hearing date and its unauthorized usage. But it is the Magistrate Judge's evaluation that it is a valid document but is uncertain as to the origins of the document and could have established the origin through the distribution.

If the document is hand delivered to Petitioner February 8<sup>th</sup>, 2021 at the Preliminary Hearing as determined by the Court (See Doc #23, 5 of 28 Page ID #406) and then serviced, certified, and distributed properly and proper procedures were followed according to the Director's Policy then the origins can now be accurately and readily be determined from sources whose accuracy cannot reasonably be questioned.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Judicial Notice of Adjudicative Facts was mailed first-class postage prepaid, to The Ohio Attorney General's Office, Dave Yost, James Rhodes State Office Tower 30 E. Broad St. 17<sup>th</sup> Fl. Columbus, Ohio 43215 this 5<sup>th</sup> day of FEBRUARY, 2024.

  
Ezra C. Foster #213-888 *pro-se*

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(1) Specify all grounds for relief available to the petitioner

Grounds #1

PETITIONER SEEKS A WRIT OF HABEAS CORPUS BECAUSE HE WAS DENIED HIS MINIMAL U. S. FOURTEENTH AMENDMENT CONSITITUTINAL RIGH TO DUE PROCES DURING HIS PAROLE REVOCATION HEARING PROCESS AND AS A RESULT DEPRIVED OF HIS LIBERTY.

Grounds #2

AN INMATE IMPRISONED BYA REVOCATION OF HIS PAROLE IS NOT ENTITLED TO AN APPEAL; HE IS DENIED THE ONLY REMEDY TO INQUIRE INTO THE CAUSE OF HIS IMPRISONMENT THROUGH A WRIT OF HABEAS CORPUS; WHEN OHIO COURT'S INTERPOSE A FINANCIAL CONSIDERATION OF INDIGENCY AS A STATE PRISONER AND HIS EXERCISE OF A STATE RIGHT TO SUE FOR HIS LIBERTY IT DENIES HIM EQUAL PROTECTION OF THE LAW.

(2) State the facts supporting each grounds:

GROUND #1 FACTS

Part 1 of Grounds #1 facts:

*Morrissey v. Brewer, 408 U. S. 471, 33 L. Ed 2d 48*

We see, therefore that [HN4] The liberty of a parolee, although indeterminate, includes the core values of unqualified liberty and its termination inflicts a "grievous loss" and often on others. It is hardly useful any longer to try to deal with this problem in whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment its termination calls for some orderly process, however informal.

The Director of the Ohio Department of Rehabilitation and Corrections is authorized by O.R.C. 5120.01 as the executive head of the department the total operations and management of

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the department by establishing procedures as set forth in Ohio Policy 105-PBD-09 the "Violation Hearing Process."

The policy is presented to this court and was presented to the Ohio State Courts as part of petitioner's evidence. This policy addresses the minimal due process requirements to be observed during the violation hearing process in Ohio pursuant to *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 48. (See exhibit B)

#### APPLICABILITY OF THE POLICY (See exhibit B-Page 1- sect. III)

"This policy applies to all employees of the Ohio Department of Rehabilitation and Correction (ODRC) Adult Parole Authority (APA) and all offenders under court, parole, post-release control (PRC) Transitional Control (TRC), and interstate compact supervision."

This policy becomes the minimal Fourteenth Amendment U. S. Constitutional right to due process in *Morrissey v. Brewer* to be afforded petitioner during his violation hearing process as adopted by the Director of the Department of Rehabilitation and Correction.

#### THE PURPOSE OF THE POLICY (See exhibit B-Page 1- sect. II a)

"The purpose of this policy is to promote fair, consistent, and objective decision making when violation behavior by offenders under adult parole authority (APA) supervision is addressed through a violation hearing."

The Ohio Adult Parole Authorities (APA) violated the time frame by which to conduct petitioner's hearing.

This Ohio policy has a time frame by which a hearing must be conducted and a state statute that determines what happens when APA does not adhere to that time frame.

#### Time Frame to conduct a hearing (See exhibit B-Page 7-sect. VI-E-1a)

"A violation hearing shall be conducted no later than twenty (20) business days from the date the offender becomes available,"

Petitioner became available February 1<sup>st</sup>, 2021. (See exhibit A)

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The time frame to conduct a hearing is extended from twenty (20) business days to twenty-five (25) business days. (See exhibit C – 1 of 1 – ODRC Policy/Operation Manual Variance Request) “The total time frame is now twenty-five business days.” Twenty-five business days from petitioner’s availability of February 1<sup>st</sup>, 2021 is March 8<sup>th</sup>, 2021 and now becomes petitioner’s originally scheduled hearing date.

APA is allowed to extend the time frame beyond the twenty-five (25) business days. (See exhibit B – Page 7 – sect. VI – E – 1b)

“unless the offender thereafter becomes unavailable as described in section VI-F-5 of this policy or a continuance is granted by a hearing officer.”

In the present case a hearing officer grants a continuance.

The Continuance Process (See exhibit B – Page 7 – sect. VI – F – 3 & 4)

3. “A hearing officer may continue, reschedule, or cancel a violation hearing without a request from any party. The hearing officer shall provide notice of any such change to all parties.”

4. “A violation hearing shall be rescheduled for no more than ten (10) business days from the previously scheduled hearing date.

Utilizing the Director’s policy, the total time for APA to conduct a hearing is twenty-five business days (25) plus ten (10) business days per continuance. In the present case petitioner became available February 1<sup>st</sup>, 2021 and twenty-five business days from that date is March 8<sup>th</sup>, 2021 and the continuance allowed the time to conduct a hearing ten (10) business days from that date, which would have rendered the hearing on March 22<sup>nd</sup>, 2021. The petitioner’s hearing was conducted March 24<sup>th</sup>, 2021, exceeding the mandatory allotted thirty-five (35) business days. March 24<sup>th</sup>, 2021 allows the hearing to be conducted thirty-seven (37) business days from availability exceeding the time frame.

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The Director's policy time frame to conduct a hearing was not adhered to and exceeded petitioner's time frame for a hearing to be conducted. Petitioner should have been released per O.R.C. 2967.15 (B) paragraph (3)

"If the authority fails to make a determination of the case of a parolee or releasee alleged to be a violator of the terms and conditions of the Parolee's or Releasee's conditional parole, other release, or post-release control sanctions within reasonable time, the parolee or releasee shall be released from custody under the same terms and conditions of the parolee's or releasee's original conditional pardon, parole, other release, or post-control sanctions."

**Part 2 of Grounds #1 facts:**

**EVIDENCE**

Petitioner now presents "Evidence" that the March 24<sup>th</sup>, 2021 hearing violated petitioner's right to due process, a fair, consistent, and objective hearing process and unlawfully deprives him of his liberty.

Petitioner now submits into evidence the Adult Parole Authorities (APA) "February 2<sup>nd</sup>, 2021 Violation Hearing Continuance," Form DRC 3311. (See exhibit D)

**RELEVANCE**

This document is utilized to reschedule the hearing and bring petitioner to the March 24<sup>th</sup>, 2021 parole revocation hearing; without this document there is no March 24<sup>th</sup>, 2021 hearing and no subsequent sentence thereof.

The APA violated the Director's policy when they knowingly issued the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance form DRC 3311 (exhibit D) when they:

1. Utilized a false misleading Originally Scheduled Hearing Date.
2. Knowingly allow the document to misrepresent and exceed the time frame to conduct a hearing.
3. Allow the document to exceed the authority by which form 3311 can be utilized.

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1. Utilizing a false misleading Originally Scheduled Hearing Date.

- APA issues a Violation Hearing Continuance DRC 3311 form on February 2<sup>nd</sup>, 2021.
- The originally scheduled hearing date on the document is March 9<sup>th</sup>, 2021 this date does not conform to petitioner's availability of February 1<sup>st</sup>, 2021. Twenty-five business days from February 1<sup>st</sup>, 2021 is March 8<sup>th</sup>, 2021, this is petitioner's originally scheduled hearing date
- March 9<sup>th</sup>, 2021 conforms to the date the Violation Hearing Continuance was issued and not to the date petitioner became available.

2. By utilizing the fraudulent date of March 9<sup>th</sup>, 2021 originally scheduled hearing date on the "evidence" it allows the hearing to be continued or reschedule beyond its allotted time frame.

Violation Hearing Continuance forms DRC 3311 can continue or reschedule a hearing for no more than ten (10) business days. (See exhibit <sup>B</sup> § sect. VI-F-4)

"A violation hearing shall be rescheduled for no more than ten (10) business days from the previously scheduled hearing date."

Utilizing the fraudulent date of March 9<sup>th</sup>, 2021 the time to conduct a hearing on the document is set on March 24<sup>th</sup>, 2021. Utilizing the Director's policy, the total time for APA to conduct a hearing is twenty-five business days plus ten (10) business days per continuance. In the present case petitioner became available February 1<sup>st</sup>, 2021 and twenty-five business days from that date is March 8<sup>th</sup>, 2021 and the continuance should have allowed the time to conduct a hearing ten (10) business days from that date, which would have rendered the hearing on March 22<sup>nd</sup>, 2021. Even if we were to believe petitioners originally scheduled hearing date is that of March the 9<sup>th</sup>, 2021, then APA still exceeds the thirty-five business days, time frame because now March 23<sup>rd</sup>, 2021 would be the date by which a hearing should have been conducted. March 24<sup>th</sup>, 2021 exceeds the time frame to conduct a hearing whether APA utilizes the March 9<sup>th</sup>, 2021 originally scheduled hearing date or March 8<sup>th</sup>, 2021 as the originally scheduled hearing date. The time allotted to conduct a hearing from availability and with a continuance is thirty-five (35) business

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days' petitioner's hearing was conducted thirty-seven (37) business days from availability with a continuance; exceeding the time frame.

3. If the date of March 9<sup>th</sup>, 2021 is believed to be petitioner's originally scheduled hearing date then the question must be raised as to when time started accruing to petitioner's twenty-five (25) business days. Counting the days from March 9<sup>th</sup>, 2021 means that time started accruing February 2<sup>nd</sup>, 2021, petitioner was available February 1<sup>st</sup>, 2021. If time is allowed to start accruing on February 2<sup>nd</sup>, 2021 then time started accruing on the date the "evidence" was issued. APA now utilizes this document in an unauthorized manner that is not prescribed in the Director's Policy and allows this document to reschedule and/or continue the hearing thirty-five business days where the Director's Policy only allows this document to reschedule and/or continue the hearing no more than ten (10) business days. (See exhibit B Page 7 sect. VI-F-4)

To further complicate matters petitioner must show that there are extraordinary circumstances *State ex. rel. Jackson v. McFaul*, 73 Ohio St. 3d 185 Overview:

"Although decisions of the Ohio Adult Parole Authority were not generally subject to review on a petition for Writ of Habeas Corpus, Habeas Corpus will lie in extraordinary circumstances where there was an unlawful restraint of petitioner's liberty."

that shows the fraudulent actions of APA during this violation hearing process and how significant the records become in this case. *State ex. rel. Keith v. OAPA*, 141 Ohio St. 3d. 315 2014-Ohio-4270.

A preliminary hearing was held February 8<sup>th</sup>, 2021 at the Franklin County Correctional Facility in Columbus, Ohio. During the preliminary hearing the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance document was not a part of that hearing and petitioner was not given notice of this continuance and it was never serviced.

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During the preliminary hearing petitioner was serviced and given notice to a totally different set of documents, containing a continuance that bolstered an originally scheduled hearing date of March 8<sup>th</sup>, 2021. Evident of this fact is (one) the February 2<sup>nd</sup>, 2021 continuance form has a DISAPPROVED date of March 23<sup>rd</sup>, 2021 changing the date to March 24<sup>th</sup>, 2021 claiming site was unavailable. This lets us know that there is another continuance. (two) All the documents have a distribution as to who receives the various color coded copies.

There is a color coded copy for the jail because the deputy sheriff has to witness petitioner's signature. Petitioner motioned the Ninth District Court for a copy of this document but the court dismisses petitioner's motion when they dismissed his petition.

Extraordinary circumstances continue when petitioner is transferred to the Lorain Correctional Institution in Lorain, Ohio site of the hearing. It is at this time that the institution at that time removed all inmates' original documents and redacts them and gave the offenders a copy of the documents. Petitioner did not receive redacted copies but instead received a copy of the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance, un-serviced, un-certified.

Petitioner is not given notice of this hearing in a timely fashion there is no service or certification to the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance. APA knowingly had petitioner sign documents at the preliminary hearing that were fraudulent, and that misrepresents his time frames, and hearing date.

During the actual revocation hearing itself petitioner goes on the record prior to any evidence being presented to question and object to the "evidence" of the February 2<sup>nd</sup>, 2021 Continuance. (1) form is not serviced or certified (2) the time has been exceeded. The hearing officer paused the hearing for 15 - 20 minutes to address petitioner's questions and objection. The hearing officer ruled that "A hearing officer can bring a continuance at any time during the proceedings."

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Petitioner agrees with that (See exhibit <sup>B</sup> sect. VI-F-3a) 3a "A hearing officer may continue, reschedule, or cancel a violation hearing without a request from any party." The hearing officer fails to answer the question of an un-serviced un-certified continuance form DRC 3311 that requires certification and notice given. (See exhibit <sup>B</sup> sect. VI-F-3b) 3b "The hearing officer shall provide notice of any such change to all parties. The hearing video – transcripts becomes "evidence." (3) to the hearing officer's failure to rule on the time frames and the un-serviced un-certified continuance; now the hearing officer becomes negligent in their actions. (See exhibit <sup>B</sup> sect. VI-J) J Violation Hearing Process: Preliminary Matters "Prior to the hearing, the hearing officer shall do all the following:"

(Sect. VI-J-3) Ensure all applicable timeframes have been adhered to;

(Sect. VI-J-4) Ensure the notice and service are in order, the proper forms were used and the proper procedures have been followed,

these things were not done in this case. (The hearing transcripts and/or video becomes significant records to the petitioner's claim)

Petitioner asserted his freedom of information action to the APA and received copies of his hearing process documents and discovered that the documents he used during the hearing do not match the documents he received, and he was never afforded the transcripts to the hearing and the other Violation Hearing Continuance form DRC 3311 sited in the DISAPPROVED section of his "evidence." (See exhibit E compare this continuance form to the "evidence" continuance form exhibit D, these forms should be the same they are not).

APA utilized the "evidence" of the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance form DRC 3311 in an unauthorized manner that is not prescribed by the Director's Policy and the use of this form, when it allows the petitioner's time to start accruing to his twenty-five (25) business days for a hearing to be conducted the date this form was issued and not the date

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petitioner became available. This form is fraudulent in its dates, usage, and actions and is no longer a valid form and must be voided. Without this document there is no March 24<sup>th</sup>, 2021 hearing and no subsequent sentence thereof. The hearing must be voided and the sentence vacated. The writ ought to issue a hearing held to confirm the facts, and petitioner should be released.

## GROUND #2 FACTS

*Smith v. Bennett, 365 U. S. 708 (Supreme Court 1961)*

[HN1] To interpose any financial consideration between an indigent prisoner of a state and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the law.

Ohio statute O.R.C. 2969.25 (C) (1)

(C) If an inmate who files a civil action or appeal against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency shall contain all of the following:

(1) A statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months as certified by the institutional cashier.

A barrier now exists between the indigent prisoner and his filing when the inmate must submit a statement that sets forth the balance in the inmate's account of the inmate for each of the preceding six months as certified by the institutional cashier.

In the current case petitioner placed his request for the statement in August 2021 to the institutional cashier, but her signature was not affixed to the statement until September 23<sup>rd</sup>, of 2021. At the time of petitioner's filing the institutional cashier sets forth the balance but does not certify the statement, the institutional librarian must certify the statement a cause for oversight.

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**CALENDAR #1 ORIGINALLY SCHEDULED HEARING TIMEFRAME**

February 1<sup>st</sup>, 2021 appellant was arrested and this is his availability date.

FEBRUARY 2021						
S	M	T	W	T	F	S
	1 Day 1	2 Day 2	3 Day 3	4 Day 4	5 Day 5	6
7	8 Day 6	9 Day 7	10 Day 8	11 Day 9	12 Day 10	13
14	15 Day 11	16 Day 12	17 Day 13	18 Day 14	19 Day 15	20
21	22 holiday	23 Day 16	24 Day 17	25 Day 18	26 Day 19	27
28						

MARCH 2021						
S	M	T	W	T	F	S
	1 Day 20	2 Day 21	3 Day 22	4 Day 23	5 Day 24	6
7	8 Day 25					13
14						20
21						27
28						

Appellant's twenty-five business days for a hearing to be conducted and his originally scheduled hearing date March 8<sup>th</sup>, 2021.

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**CALENDAR #2 ACTUAL TIMEFRAME  
HEARING CONDUCTED**

FEBRUARY 2021						
S	M	T	W	T	F	S
	1 Availability date	2 Day 1	3 Day 2	4 Day 3	5 Day 4	6
7	8 Day 5	9 Day 6	10 Day 7	11 Day 8	12 Day 9	13
14	15 Day 10	16 Day 11	17 Day 12	18 Day 13	19 Day 14	20
21	22 holiday	23 Day 15	24 Day 16	25 Day 17	26 Day 18	27
28						

MARCH 2021						
S	M	T	W	T	F	S
	1 Day 19	2 Day 20	3 Day 21	4 Day 22	5 Day 23	6
7	8 Day 24	9 Day 25	10 1 day	11 2 days	12 3 days	13
14	15 4 days	16 5 days	17 6 days	18 7 days	19 8 days	20
21	22 9 days	23 10 days	24 36 days	25	26	27
28	29	30	31			

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KITE PROCEDURE

1. Check with your Sergeant or Case Manager to see if this communication can be handled without a kite.
2. Write only to the Department that handles the problem you have. Others will merely forward your kite.
3. State your problems clearly and completely and thereby get immediate attention.
4. Avoid duplication of Kites, Writing to more than one office about the same thing will not obtain any faster attention.
5. Kites are to be used only for communication between inmates and Institutional Staff and not for any other purpose.

RETURN TO:

041B1207E

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Number: 213-888		Name: FOSTER	
Unit:	Lock: BH	207	Assi
To: APA		9-2021	

*C. Hastings*

FOLD HERE

CASE MANAGER	WARDEN	QUARTERMASTER
CLASSIFICATION	DEPUTY WARDEN ADMINISTRATION/SPECIAL SERVICES/PROGRAMS	RECORDS
COMMISSARY	DEPUTY WARDEN OPERATIONS	RECOVERY SERVICES
DENTAL	INST. INSPECTOR	RECREATION
USE HEALTH SERVICES REQUEST FORM, DRCS373 TO ACCESS DENTAL CARE	INVESTIGATOR	RELIGIOUS SERVICES
MEDICAL	JOB COORDINATOR	UNIT MANAGER
USE HEALTH SERVICES REQUEST FORM, DRCS373 TO ACCESS MEDICAL CARE	LIBRARY	EDUCATION
MAJOR	MAIL ROOM	FOOD SERVICE
MENTAL HEALTH	OTHER	APA

DRC 2005 (Rev. 08/2014)

KITE PROCEDURE

1. Check with your Sergeant or Case Manager to see if this communication can be handled without a kite.
2. Write only to the Department that handles the problem you have. Others will merely forward your kite.
3. State your problems clearly and completely and thereby get immediate attention.
4. Avoid duplication of Kites, Writing to more than one office about the same thing will not obtain any faster attention.
5. Kites are to be used only for communication between inmates and Institutional Staff and not for any other purpose.

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3/26: YOU NEED TO ADDRESS THIS AT YOUR VIOLATION HEARING. C. HASTINGS (APA)

ACCORDING TO YOUR VIOLATION HEARING  
PROCESS SECTION VI. J. VIOLATION HEAR-

ING PROCESS: PRELIMINARY MATTERS  
THE HEARING OFFICER (~~XXXXXXXXXX~~)  
(~~XXXXXXXXXX~~) IS RESPONSIBLE FOR SEVERAL  
THINGS. I NOW POINT TO NUMBER  
3. AND 4. OF THAT SECTION.

SECTION 3. REFERS TO TIMEFRAMES AND  
WETHER THEY HAVE BEEN ADHERED TO.  
IN THE PRESENT CASE I REFER TO THE  
CONTINUANCE FILED IN THIS CASE. I HAVE  
NO IDEA WHEN IT WAS FILED AND I  
NEVER RECEIVED NOTIFICATION OF THE  
CHANGE AS PROVIDED IN SECTION VI. F  
CONTINUANCES. NO MATTER WHAT DATE, THERE  
IS A VIOLATION FOR NOT SERVING THE  
OFFENDER WITHIN THREE (3) BUSINESS  
DAYS FROM THE DATE THE CONTINUANCE  
WAS ISSUED OR BY THE ORIGINALLY  
SCHEDULED HEARING DATE, WHICHEVER OCCURS  
FIRST. I HAVE NO IDEA THE <sup>DATE</sup> REASON  
FOR THE CONTINUANCE. COULD YOU ADDRESS  
THIS ~~SITUATION~~ SITUATION?

(TRYING TO PRESERVE MY  
RIGHT FOR THE RECORD)

		Ezra C. Foster #A213-888 at Grafton Correctional Institution, 2500 South Avon-Beldon Road, Grafton, OH 44044 on 3/20/2023. (D,JJ) (Entered: 03/20/2023)
03/21/2023	<u>7</u>	<b>Motion</b> for default judgment filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope) (Mc,K) (Entered: 03/21/2023)
03/24/2023	<u>8</u>	<b>Order:</b> Petitioner Ezra Foster's motion for a preliminary injunction (ECF Doc. [3]), motion for extending his time to respond (ECF Doc. <u>4</u> ), and motion for default judgment (ECF Doc. <u>7</u> ) are DENIED. Please see the Order for details. Magistrate Judge Thomas M. Parker on 3/24/2023. (D,JJ) (Entered: 03/24/2023)
03/24/2023		Copy of <u>8</u> Order mailed to Dave Yost, Office of the Ohio Attorney General at James Rhodes State Office Tower, 30 E. Broad St., 17th Fl., Columbus, OH 43215; Petitioner Ezra C. Foster #A213-888 at Grafton Correctional Institution, 2500 South Avon-Beldon Road, Grafton, OH 44044; and Warden, Keith Foley at Grafton Correctional Institution, 2500 South Avon-Beldon Road, Grafton, OH 44044 on 3/24/2023. (D,JJ) (Entered: 03/24/2023)
04/06/2023	<u>9</u>	<b>Motion (Injunction)</b> to stay transfer of Petitioner out of Respondent's custody filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope) (Mc,K) (Entered: 04/06/2023)
05/02/2023	<u>10</u>	Address Change Notice filed by Ezra C. Foster. (Attachments: # <u>1</u> Envelope). (FML) (Entered: 05/02/2023)
05/16/2023	<u>11</u>	<b>Order:</b> Because petitioner Ezra Foster has already transferred correctional facilities and his transfer does not implicate the court's jurisdiction over his petitioner, Foster's motion to stay his transfer from Warden Keith Foley's correctional facility (ECF Doc. <u>9</u> ) is DENIED. Magistrate Judge Thomas M. Parker on 5/16/2023. (D,JJ) (Entered: 05/16/2023)
05/16/2023		Copy of <u>11</u> Order mailed to Dave Yost, Office of the Ohio Attorney General, James Rhodes State Office Tower, 30 E. Broad St., 17th Fl., Columbus, OH:43215; Petitioner Ezra C. Foster A#213-888 at Lake Erie Correctional Institution, 501 Thompson Rd, PO Box 8000, Conneaut, OH 44030; and to Keith Foley, Warden, Grafton Correctional Institution, 2500 South Avon-Beldon Road, Grafton, OH 44044 on 5/16/2023. (D,JJ) (Entered: 05/16/2023)
05/19/2023	<u>12</u>	<b>Return of Writ (2254) <u>1</u></b> Petition for Writ of Habeas Corpus filed by Keith Foley, Dave Yost. Related document(s) <u>1</u> . (Attachments: # <u>1</u> State Court Record (Exhibits 1-13 - bookmarked))(Fosnaught, Jerri) (Entered: 05/19/2023)
05/25/2023	<u>13</u>	<b>Motion</b> for Extension of Time Pursuant to USCS Fed. Rules Civ. Proc.R.6 to Reply to <u>12</u> Return of Writ filed by Petitioner Ezra C. Foster. Related document(s) <u>11</u> , <u>12</u> . (Attachments: # <u>1</u> Envelope) (R,AP) (Entered: 05/25/2023)
05/25/2023	<u>14</u>	Request for Discovery Pursuant to USCS Fed. Rules of Civ. Proc.R.26(b)(1) Discovery Scope and Limits in General filed by Ezra C. Foster. (Attachments: # <u>1</u> Envelope) (R,AP) (Entered: 05/25/2023)
05/31/2023	<u>15</u>	<b>Order:</b> Petitioner Ezra C. Foster's motion for an extension of time to file his traverse (ECF Doc. <u>13</u> ) is GRANTED. The Clerk's Office is hereby ordered to provide with a copy of this order, a copy of the Warden's Return of Writ, as well as all attached state court records. Foster's traverse will be due no later than July 23, 2023. Magistrate Judge Thomas M. Parker on 5/31/2023. (D,JJ) (Entered: 05/31/2023)
05/31/2023		Copy of <u>12</u> Return of Writ (2254) with attached State Court records, and <u>15</u> Order on Motion for extension of time, mailed to Ezra C. Foster A#213-888 at Lake Erie Correctional Institution, 501 Thompson Rd, PO Box 8000, Conneaut, OH 44030 on 5/31/2023. (D,JJ) (Entered: 05/31/2023)

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06/07/2023	<u>16</u>	<b>Motion to Compel</b> filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope) (Mc,K) (Entered: 06/07/2023)
06/07/2023		<b>Order</b> [non-document]: Petitioner Ezra Foster has filed a motion to compel the service of the warden's return of writ, claiming that he never received the return or the state court record. However, the clerk of court was ordered to serve Foster with said documents by this court's order of May 31, 2023 (ECF Doc. <u>15</u> ). And the docket reflects that the clerk complied with that order on the same day by mailing the return of writ and the state court record to Foster at his current address. Therefore, the motion to compel (ECF Doc. <u>16</u> ) can be, and hereby is, <b>DENIED AS MOOT. IT IS SO ORDERED.</b> Magistrate Judge Thomas M. Parker on 6/7/2023. (D,JJ) (Entered: 06/07/2023)
06/07/2023		Copy of Order [non-document] dated 6/7/2023 mailed to Ezra C. Foster A#213-888 at Lake Erie Correctional Institution, 501 Thompson Rd, PO Box 8000, Conneaut, OH 44030 on 6/7/2023. (D,JJ) (Entered: 06/07/2023)
06/08/2023	<u>17</u>	Supplement to Notice - Respondent's Opposition to Petitioner's Motion for Discovery (Doc. No. 14), filed by Keith Foley, Dave Yost. Related document(s) <u>14</u> . (Fosnaught, Jerri) (Entered: 06/08/2023)
06/30/2023	<u>18</u>	Traverse (Reply) to Return of Writ filed by Ezra C. Foster. Related document(s) <u>12</u> . (Attachments: # <u>1</u> Envelope) (L,Br) (Entered: 06/30/2023)
10/12/2023	<u>19</u>	<b>Motion</b> for summary judgment filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope) (Mc,K) (Entered: 10/12/2023)
10/26/2023	<u>20</u>	<b>Response to <u>19</u> Motion</b> for summary judgment filed by Keith Foley, Dave Yost. (Fosnaught, Jerri) (Entered: 10/26/2023)
11/13/2023	<u>21</u>	<b>Reply</b> to response to <u>19</u> <b>Motion</b> for summary judgment filed by Ezra C. Foster. (Attachments: # <u>1</u> Envelope) (M,CE) (Entered: 11/13/2023)
12/27/2023	<u>22</u>	<b>Report and Recommendation</b> that petitioner Ezra Foster's motion for summary judgment (ECF Doc. <u>19</u> ) be <b>DENIED</b> . Objections to Report & Recommendation due by 1/10/2024. Magistrate Judge Thomas M. Parker on 12/27/2023. (D,JJ) (Entered: 12/27/2023)
12/27/2023	<u>23</u>	<b>Report and Recommendation</b> that petitioner, Ezra Foster's petition for writ of habeas corpus (ECF Doc. <u>1</u> ) be <b>DISMISSED</b> with: (i) Ground One being <b>DISMISSED</b> as procedurally defaulted, noncognizable, and meritless and (ii) Ground Two being <b>DISMISSED</b> as procedurally defaulted, noncognizable, and meritless. I further recommend that Foster not be granted a certificate of appealability. Objections to Report & Recommendation due by 1/10/2024. Magistrate Judge Thomas M. Parker on 12/27/2023. (D,JJ) (Entered: 12/27/2023)
12/27/2023		Copy of <u>22</u> Report and Recommendation, and <u>23</u> Report and Recommendation, mailed to Ezra C. Foster #A213-888 at Lake Erie Correctional Institution, 501 Thompson Rd, PO Box 8000, Conneaut, OH 44030 on 12/27/2023. (D,JJ) (Entered: 12/27/2023)
01/12/2024	<u>24</u>	<b>Objection</b> to Report and Recommendation filed by Ezra C. Foster. Related document(s) <u>23</u> . (Attachments: # <u>1</u> Violation Hearing Continuance Forms, # <u>2</u> Violation Hearing Continuance Forms and Various Documents, # <u>3</u> Envelope) (W,Jo) (Entered: 01/12/2024)
02/08/2024	<u>25</u>	Notice of a Judicial Notice of Adjudicative Facts filed by Ezra C. Foster. (Attachments: # <u>1</u> Envelope)(W,Jo) (Entered: 02/08/2024)

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04/04/2024	<u>26</u>	<b>Motion</b> to Request Leave of Court for Discovery filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope)(W,Jo) (Entered: 04/04/2024)
04/16/2024	<u>27</u>	<b>Motion</b> Requesting that the Record be Expanded. Filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope)(W,Jo) (Entered: 04/16/2024)
04/18/2024	<u>28</u>	<b>Opposition</b> to <u>26</u> <b>Motion</b> for leave to <i>Conduct Discovery</i> filed by Keith Foley, Dave Yost. (Fosnaught, Jerri) (Entered: 04/18/2024)
04/29/2024	<u>29</u>	<b>Motion</b> for evidentiary hearing filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope)(W,Jo) (Entered: 04/29/2024)
04/30/2024	<u>30</u>	<b>Opposition</b> to <u>27</u> <b>Motion</b> to <i>Expand the Record</i> filed by Keith Foley, Dave Yost. (Fosnaught, Jerri) (Entered: 04/30/2024)
05/06/2024	<u>31</u>	Reply to Respondent's Opposition to Petitioner's Second Request for Discovery filed by Ezra C. Foster. Related document(s) <u>28</u> <u>26</u> . (Attachments: # <u>1</u> Envelope) (W,Jo) (Entered: 05/06/2024)
06/06/2024	<u>32</u>	Reply to Respondent's Opposition to Petitioner's Motion to Expand the Record filed by Ezra C. Foster. Related document(s) <u>30</u> . (Attachments: # <u>1</u> Exhibit A - Violation Hearing Continuance 3/9/21, # <u>2</u> Exhibit B - Violation Hearing Continuance 3/9/21, # <u>3</u> Exhibit C - Violation Hearing Continuance 3/23/21, # <u>4</u> Exhibit D - Violation Hearing Continuance 3/24/21, # <u>5</u> Envelope) (W,Jo) (Entered: 06/06/2024)
09/27/2024	<u>33</u>	Request for a ruling to pending motions filed by Ezra C. Foster. (Attachments: # <u>1</u> Envelope)(W,Jo) (Entered: 09/27/2024)
09/30/2024	<u>34</u>	<b>Motion</b> for an order going forward that mail from the U.S. District Court in this case be treated as legal mail. Filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope) (W,Jo) (Entered: 09/30/2024)
01/22/2025	<u>35</u>	<b>Motion</b> for Status Conference filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope)(W,Jo) (Entered: 01/22/2025)
02/24/2025	<u>36</u>	<b>Memorandum Opinion and Order</b> adopting Magistrate Judge Thomas M. Parker's Report and Recommendations and denying Petitioner's outstanding motions. re <u>19</u> , <u>22</u> , <u>23</u> , <u>26</u> , <u>27</u> , <u>29</u> , <u>34</u> , <u>35</u> . Judge Jeffrey J. Helmick on 2/24/2025. (M,SM) (Entered: 02/24/2025)
02/24/2025	<u>37</u>	<b>Judgment Entry</b> : For the reasons stated in the Memorandum Opinion and Order filed contemporaneously, I overrule the objections filed by Petitioner Ezra Foster, (Doc. No. <u>24</u> ), to Magistrate Judge Parker's second Report and Recommendation, (Doc. No. <u>23</u> ), and adopt the second Report and Recommendation. I conclude Foster's first ground for relief is meritless and his second ground for relief is procedurally defaulted. I deny Foster's petition as to Ground One and dismiss it as to Ground Two. I also adopt Judge Parker's first Report and Recommendation and deny Foster's motion for summary judgment. (Doc. No. <u>22</u> ). Further, I deny Foster's motions to conduct discovery, to expand the record, for an evidentiary hearing, for a control number, and for a status conference. (Doc. Nos. <u>26</u> , <u>27</u> , <u>29</u> , <u>34</u> , and <u>35</u> ). re <u>36</u> . Judge Jeffrey J. Helmick on 2/24/2025. (M,SM) (Entered: 02/24/2025)
02/24/2025		Copy of <u>36</u> Memorandum Opinion and Order and <u>37</u> Judgment Entry mailed to Ezra C. Foster A213-888 at Lake Erie Correctional Institution 501 Thompson Rd PO Box 8000 Conneaut, OH 44030 on 2/24/2025. Related document(s) <u>36</u> , <u>37</u> . (M,SM) (Entered: 02/24/2025)
03/31/2025	<u>38</u>	<b>Motion</b> for extension of time to file notice of appeal and to seek a COA. Filed by Petitioner Ezra C. Foster. (Attachments: # <u>1</u> Envelope)(W,Jo) (Entered: 03/31/2025)

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04/02/2025	<u>39</u>	<b>NOTICE OF APPEAL</b> to the Sixth Circuit Court of Appeals from the <u>36</u> Memorandum Opinion and Order of 2/24/25, filed by Ezra C. Foster. Filing fee not paid. (Attachments: # <u>1</u> Memorandum Opinion and Order, # <u>2</u> Motion for Certificate of Appealability; Returned to Appellant with instructions to file in Circuit Court, # <u>3</u> Envelope) (H,SP) (Entered: 04/03/2025)
04/02/2025	<del>38</del> <u>40</u>	<b>Motion</b> to appeal in forma pauperis filed by Petitioner Ezra C. Foster. (Related document(s) <u>39</u> ). (Attachments: # <u>1</u> Cashier's Statement, # <u>2</u> Affidavit of Ezra Foster, # <u>3</u> Envelope) (H,SP) (Entered: 04/03/2025)

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Appellate Court dismissal of petitioner's filing, and also dismissing his motion for production of documents and video/transcripts)

In conclusion Ohio courts become punitive and arbitrary to their dismissal of petitioner's filing and alleviate the Ohio Agency from liability.

**RELIEF SOUGHT**

APA's time frame to conduct a hearing was not adhered to and exceeded petitioner's time frame for a hearing to be conducted. Petitioner must be released per O.R.C. 2967.15

(B) paragraph (3)

"If the authority fails to make a determination of the case of a parolee or releasee alleged to be a violator of the terms and conditions of the Parolee's or Releasee's conditional parole, other release, or post-release control sanctions within reasonable time, the parolee or releasee shall be released from custody under the same terms and conditions of the parolee's or releasee's original conditional pardon, parole, other release, or post-control sanctions."

APA utilized the "evidence" of the February 2<sup>nd</sup>, 2021 Violation Hearing Continuance form DRC 3311 in an unauthorized manner that is not prescribed by the Director. The use of this form, when it allows the petitioner's time to start accruing to [redacted] business days for a hearing to be conducted the date this form was issued and not the date petitioner became available. This form is fraudulent in its dates, usage, and actions and is no longer a valid form and must be voided. Without this document there is no March 24<sup>th</sup>, 2021 hearing and no subsequent sentence thereof, this is a "Plain Error" that cannot be held "Harmless"; the hearing must be voided and the sentence vacated. The writ ought to issue a hearing held to confirm the facts, and petitioner should be released.

Lastly pursuant to O.R.C. 5120:1-1-13 "Discharge from Parole" (C)

"No parolee whose minimum sentence is life shall be released from parole earlier than five years after parolee has been released from the institution."

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IN THE UNITED STATES COURT  
OF APPEALS SIXTH CIRCUIT

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

EZRA C. FOSTER  
A#213-888  
Lake Erie Correctional Institution  
501 Thompson Road  
P.O. Box 8000  
Conneaut, Ohio 44030

Petitioner *pro-se*

v.

MS. M. MACKEY, WARDEN et al  
Lake Erie Correctional Institution  
501 Thompson Road  
P.O. Box 8000  
Conneaut, Ohio 44030

Respondent

Respondent/Counsel  
Dave Yost, Office of the  
Ohio Attorney General  
James Rhodes State Office Tower  
30 E. Broad St. 17<sup>th</sup> Fl.  
Columbus, Ohio 43215

) CASE NO. \_\_\_\_\_  
)  
)  
)

) JUDGE:  
)  
)

) CASE NO. 1:23-CV-00139 JJH  
)

) JUDGE JEFFREY J. HELMICK  
)

) MAGISTRATE JUDGE THOMAS  
) M. PARKER  
)

) PURSUANT TO 28 U.S.C.S. § 2253  
) SEEKING A CERTIFICATE OF  
) APPEALABILITY  
)  
)  
)

SEEKING A CERTIFICATE OF APPEALABILITY

JURISDICTION

Now comes Petitioner, "Ezra Foster," in the above caption Case No. \_\_\_\_\_  
in the United States District Court Northern District of Ohio Eastern Division seeking a  
Certificate of Appealability in the United States Court of Appeals Sixth Circuit Pursuant to  
USCS Sec. 2254 Cases R. 11 (a) Certificate of Appealability:

"If the Court denies a certificate the parties may not appeal the denial but may seek a certificate  
from the Court of Appeals under Federal Rule of Appellate Procedure 22."

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USCS Fed. Rules App. Proc. R. 22 (b) (1) & (2):

“(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 USCS § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 USC § 2253 (c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11 (a) of the Rules Governing Proceedings under 28 USC § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district court proceedings. If the district judge denied the certificate, the applicant may request a circuit judge to issue it.”

“(2) A request addressed to the court of appeals maybe considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

Because the District Court has denied the certificate now comes Petitioner requesting a Circuit Judge to issue a certificate of appealability to his filing with his notice of appeal.

### **PROCEDURAL HISTORY**

Petitioner filed a Writ of Habeas corpus pursuant to 28 USCS 2254 with the U. S. District Court Northern District of Ohio Eastern Division, January 24<sup>th</sup>, 2023.

Sixth Circuit District Judge Jeffrey J. Helmick assigned along with Magistrate Judge Thomas M. Parker.

March 20<sup>th</sup>, 2023 Magistrate Judge Thomas M. Parker does a preliminary review and examination of the petition and could determine if Petitioner was not entitled to relief and order's respondent to answer and return the writ, pursuant to USCS Fed. Rule 2254 R. 4, petition not dismissed.

Respondent answers and returns the Writ 05/19/2023

Petitioner files for discovery thereafter 05/25/2023

Respondent files opposition to Petitioner's discovery 06/08/2023

Petitioner files (Traverse) Reply 06/30/2023

Petitioner files for Summary Judgment 10/12/2023

Respondent files opposition to Summary Judgment 10/26/2023

Petitioner files reply to opposition to Summary Judgment 11/12/2023

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December 27<sup>th</sup>, 2023 Magistrate Judge files (2) two separate Report Recommendations to the District Judge.

1. Recommends to dismiss the Summary Judgment.
2. Weighs petition's evidence and finds Petitioner's claim to the evidence and the claims to the petition is without merit and recommends dismissal

Petitioner Concurs with the Court in that his Summary Judgment should be dismissed.

Petitioner Objects to the Petition being dismissed for lack of merit 01/12/2024

Petitioner files a Judicial Notice to the District Court 01/05/2024.

Petitioner files a Motion for Discovery 04/04/2024

Respondent Opposes Motion for Discovery 04/18/2023

Petitioner files a Reply to Respondent's Opposition for Discovery 05/06/2024

Petitioner files Motion to Expand the Record 04/16/2024

Respondent Opposes Motion to Expand the Record 04/30/2024

Petitioner files a Reply to Respondent's Opposition to Expand the Record 06/06/2024

Petitioner files a Motion to Compel for a ruling on his pending Motions.

District Court denies Petition 02/24/2025

Now comes Petitioner/Applicant, "Ezra Foster," seeking a Certificate of Appealability pursuant to 28 USCS § 2253 Appeal (a)

In a Habeas Corpus proceeding or a proceeding under section 2255 (28 USCS Section 2255) before a District Judge, the final order shall be subject to review, on appeal, by the Court of appeals for the circuit in which the proceedings is held.

And (c)(2)

"A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

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While in fact Petitioner is not entitled to a certificate of appealability as a matter of right but must make a substantial showing of the denial of a constitutional right 28 USC sect. 2253 (c)(2).

In *Easley v. Cromartie*, 532 U. S. 234 @HN5 “we review the District Court’s findings only for “Clear Error.” In applying this standard, we, like any reviewing court, will not reverse a lower court’s finding of fact simply because we “would have decided the [\*\*\*\*17] case differently.” *Anderson v. Bessemer City*, 470 U. S. 564, 573, 84 L. Ed 518, 105 S. Ct. 1504 (1985). Rather a reviewing court must ask whether “on the entire evidence,” it is “left with the definite and firm conviction that a mistake has been committed,” *United States v. United States Gypsum Co.* 333 U. S. 364, 395, 926. Ed. 746, 68 S. Ct. 525 (1948).

“Clear Errors” to the District Court’s findings is that of:

#### CLEAR ERROR 1

**IN THE PRESENT CASE THERE ARE TWO PETITIONS FOR A WRIT OF HABEAS CORPUS FILED IN TWO DIFFERENT OHIO COURTS, BUT IT WOULD BE CLEAR ERROR TO DISMISS THE PETITION PLACED IN THE OHIO STATE SUPREME COURT FOR THE MANDATORY FILING REQUIREMENT OF OHIO REVISED CODE 2969.25 (C) BECAUSE IT IS NOT SUBJECT TO THE MANDATORY FILING REQUIREMENT OF 2969.25 (C) BECAUSE OF OHIO REVISED CODE 2969.21 (B) (2).**

1. In Ohio the Writ of Habeas Corpus may be filed to the various Courts of Ohio pursuant to Ohio Revised Code 2725. Each court has its own local rules to the filing of the Writ of Habeas Corpus. In the present case there are (2) two petitions for a writ of habeas Corpus in two different State Courts:

Petition A. Filed with the Ohio Ninth District Court of Appeals, dismissed for a mandatory filing requirement pursuant to ORC 2969.25 (C), no review of the claims. An Ohio Civil R. 60 B for relief from the Judgement/Order filed and denied. Petition was appealed to the Ohio State Supreme Court as a matter of right; affirms lower court decision. *Id* PageID#132

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Petition B. Filed to the Ohio State Supreme Court to which the mandatory filing requirement of ORC 2969.25 (C) does not apply, pursuant to ORC 2969.21 (B) (2) "Civil action appeal against a government entity or employee" does not include any civil action that an inmate commences against the state, a political subdivision, or an employee of the state or a political subdivision in **the court of claims or the supreme court** or an appeal of the judgement or order entered by the court of claims in a civil action of that nature, that an inmate files in a court of appeals or the supreme court. This petition cannot be procedurally defaulted for the mandatory filing requirements of ORC 2969.25 (C). *Id* PageID#297

Petitioner is not entitled to an appeal to a revocation of his parole. His only remedy is that of a habeas corpus petition to Ohio Courts. Petitioner attempts to exhaust his remedies in State Courts and does give the highest court in the State a chance to address his claims, thus the two petitions. After the initial review of the petition pursuant to USCS sect. 2254 Cases R. 4 the assigned Magistrate Judge could not determine if petitioner was entitled to relief and does not dismiss the petition and order's respondent to answer and return the writ.

It would be "Clear Error" for the District Court to dismiss Petition B. for the same "Procedural Default" of Petition A. (*id.* Page#523 - 524)

## **CLEAR ERROR II**

**THE DISTRICT COURT ABUSES ITS DISCRETION WHERE IT FAILS TO TAKE JUDICIAL NOTICE OF PETITIONER'S FILING FOR JUDICIAL NOTICE OF AN ADJUDICATIVE FACT PURSUANT TO FEDERAL RULE OF EVIDENCE 201 (b) (2) WHERE HE DOES SUPPLY THE COURT WITH THE NECESSARY INFORMATION.**

2. The District Court discusses that "AEDPA" does prohibit the issuance of a writ of habeas corpus with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
  - (1) Resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States;
  - (2) Resulted in a decision was based on an unreasonable determination of facts in light of the evidence presented in the state court proceedings.

The State Court proceedings are silent to the claim of the petition's "Evidence" to both Petition A. and Petition B. Respondent was ordered to address all the claims to the petition, it

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chose to stay silent to the "Evidence" and omitted it from its' records and any related documents as well as opposing discovery. Because the State Court Records stay silent to this "Evidence" the claim goes un-adjudicated in State Courts and resulted in a decision based on an unreasonable determination of facts in light of the "Evidence" presented in the State proceedings.

The Magistrate Judge is the only Court of record that adjudicates' the claim to the "Evidence" through his findings and adopted by the District Court to his review that allows for a second "Clear Error." (*id*, PageID#405 - 406)

Petitioner's Objection to the Report Recommendation does dispute the "Evidence" (The "Document") utilized in this case that was never properly serviced, certified, or notification given as being "invalid."

It has been the contention of Petitioner throughout all proceedings that the "Document" was knowingly utilized by the Adult Parole Authorities in an unauthorized manner and proper procedures were not followed in the issuing of this "Document" as dictated by the Policy that governs both the "Document" and the "APA's allowed usage of the Document."

At the beginning of the parole revocation hearing before any evidence or testimony could be had Petitioner exercised that "Preliminary Matters" be reviewed pursuant to the Policy for the Violation Hearing Process at which time the Hearing Officer must "3. Ensure all applicable timeframes have been adhered to; 4. Ensure the notice and service are in order, the proper forms were used, and that proper procedures have been followed, including the Ohio public defender referral process." *Id* PageID#32 J. 3. & 4.

Petitioner presents the "Document" to the Hearing Officer so that it could be acknowledged that he was not given proper service, certification, or notification of this "Document" as it appears here. The Hearing Officer's response to the "Document" was, "a

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Hearing Officer may continue, reschedule, or cancel a violation hearing without a request from any party," but fails to cite the second sentence of the policy, that states "The hearing officer shall provide **notice** of any change to all parties." (*Id* PageID#28 F. 3)

Because the original Hearing date had come and gone the Violation Hearing Continuance Form that allows the APA to continue the hearing beyond the allotted original hearing date was "**invalid**" the Hearing Officer should have released Petitioner back to parole pursuant to ORC 2967.15 (B) paragraph 3. (*id*, PageID#18)

Presented with the petition is the "Document" and the "Policy" that sets forth the usage of this "Document," and it is the Policy that renders the "Document" **invalid**, not Petitioner. (*id* PageID#22-39)

The continuing of the hearing from its original hearing date is part of the Ohio Violation Hearing Process. Because the hearing is continued beyond the allotted hearing date; service, certification, and notification must be given to a new hearing date, that is done through the Violation Hearing Process of a "Continuance." (*id* PageID#28 – 29 Sect. F. 1 – 7)

Examination of the "Document" reveals that it calls for service, certification and notification. Through the Policy the "Document" must be serviced, certified, and proper notification given. (*id*, PageID#24 – 25 Sect. VI 1, 3 b. & c).

It is the Petitioner's claim that proper procedures were not followed in the servicing, certification, and notification of this "Document." What becomes prevalent and material to this "Document" is that Petitioner is never serviced, certified nor given notification of this hearing date at any time and evident of that would be the **original document** by which this copy is taken.

While in fact the District Court does not acknowledge that there is a "preliminary hearing" to a parole revocation hearing, (*id*, PageID#522) *Morrissey v. Brewer*, 408 U. S. 471 @

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HN8 “due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.” *Hyser v. Reed*, 115 U. S. App. D.C. 254, 318 F. 2d 225 (1963) such an inquiry should be seen as in the nature of a “Preliminary Hearing” to determine there is probable cause or reasonable ground to be that the arrested parolee has committed acts that would constitute a violation of parole conditions.

*Morrissey @ LE dHN[17] [17] LE dHN[18] [18]* with respect to the preliminary hearing before this officer, HN11 the parolee should [\*\*\*\*31] be given notice that the hearing [489] will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation.

By whatever name the District Court might acknowledge that of the February 8<sup>th</sup>, 2021 proceeding that Petitioner was serviced his notification forms it is his contention that they were not this “Document” and that he was never serviced, certified, or given notification of a March 24<sup>th</sup>, 2021 hearing.

If this “Document” is proven to be invalid then there could be no March 24<sup>th</sup>, 2021 hearing and subsequently no sentence thereof. Because the “Document” was issued February 2<sup>nd</sup>, 2021 a day after his arrest APA knowingly violated the Violation Hearing Process Policy and the proceedings can no longer be held as reliable and are unreasonable.

In the present case at bar it is the Magistrate Judge who adjudicates the “Document” and finds that the “Document” appears to be **valid** but further states that he is “**Uncertain to the origins of this Form.**” (*id*, PageID#405)

While in fact the Respondent and the District Court try to argue that Petitioner’s claim is that of a time violation for conducting the hearing, Petitioner agrees with both the respondent and

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the district court that several months beyond the time to conduct a hearing is not unreasonable; in fact, there are rulings that hold several years is not unreasonable in certain cases and in the present case that does not entitle him to relief. *Smith v. United States Parole Comm'n*, 2015 U. S. Dist. LEXIS 94441 @ 11 Discussion ¶ 3 “Although the Supreme Court has not delineated what amount of time is unreasonable, it found that a lapse of two months would not appear to be unreasonable. The *Smith* court further found that delays of 5 months, 4 months, 63 days not unreasonable, nor 82 days not unreasonable, unlike in the present case it would stand to reason that several days would not be unreasonable.

It is the “Document” Petitioner claims that entitles him to relief because of the absent of required proper service and notification. Without this “Document” there could be no March 24<sup>th</sup>, 2021 Violation hearing; without a March 24, 2021 hearing there could be no sentence thereof.

It is at this point in the proceedings that an adjudicative fact must be noticed to which on February 8<sup>th</sup>, 2024 Petitioner requested the District Court to take notice of a Judicial Notice of adjudicative facts pursuant to USCS Federal Rules of Evidence Rule 201 (b) The court may judicially notice a fact that is not subject to reasonable dispute because it: can be accurately and readily determine from sources whose accuracy cannot reasonably be questioned.

In *O'Toole v. Northrop Gruman Corp.*, 499 F. 3d. 1218 @ HN4 Federal Rule of Evidence 201 (b) states, “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned.” Mr. O'Toole's request falls under (b)(2). As he correctly asserts, Rule 201 (d) makes the rule mandatory when it applies; a court shall take judicial notice if requested by a party and supplied with the necessary information.

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Both the Magistrate Judge and Petitioner are “**Uncertain to the origins of this Form/Document**” and it can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned. (See Judicial Notice filed 02/8/2024 to the District Court)

In *O’Toole*, @ HN5 “We review the district court’s decision not to take judicial notice for abuse of discretion,” and so I do ask this court to review for abuse of discretion.

### **CLEAR ERROR III**

**WHEN THE STATE PRACTICES FALL SHORT OF WHAT IS CONSTITUTIONALLY REQUIRED OF THE STATE IN FOLLOWING ITS POLICY THE DISTRICT COURT ABUSES ITS DISCRETION WHEN IT FAILS TO VERIFY NOTIFICATION TO THE PAROLLEE IN THE PAROLE VIOATION PROCESS.**

*Morrissey v. Brewer*, 408 U. S. 471 @ LEdHN[22] [22] LEdHN[23] [23] We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, other by judicial decision usually on due process grounds.

The Director of the Ohio Department of Rehabilitation and Corrections is authorized by O.R.C. 5120.01 as the executive head of the department the total operations and management of the department by establishing procedures as set forth in Ohio Policy 105-PBD-09 the “Violation Hearing Process.”

There is but one claim by which Petitioner is entitled to relief, and that is of the “Document” utilized to conduct his March 24<sup>th</sup>, 2021 Revocation Hearing; without it there could be no March 24<sup>th</sup>, 2021 hearing and subsequently no sentence thereof.

In the present case at bar it is the Magistrate Judge’s findings that the “Document” utilized during Petitioner’s Violation Hearing Process **appears** to be **valid** and that Petitioner’s claim to the “Document” was without merit.

The “Document” is governed by the Policy and not by Petitioner, nor the APA, and not by the Magistrate Judge, nor the District Court. The Petitioner has utilized the Policy to make his

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claims to the violations of the "Document," so if Petitioner's claims to the "Document" are without merit then the Policy is without merit.

It is the Magistrate Judge's findings @ PageID#405 – 406 that adjudicates the "Document" **appearing** to be **valid** but fails to include any portion of the Policy to bolster his findings.

The way the "Document" appears here is the same as it appears at the March 24<sup>th</sup>, 2021 hearing; without signatures, or proper notification. It is brought to the attention of the Hearing Officer that the "Document" was not given proper notification and that proper procedures were not followed. The Hearing Officer's response to the "Document" was that "A Hearing Officer can reschedule, continue, or cancel the hearing at any time during the proceedings.

According to the Policy the Hearing Officer can reschedule, continue, or cancel a hearing at any time, but must give notice to all parties. (*Id* PageID#28 F. 3)

According to the Policy it must be serviced upon the offender no later than the expiration of three (3) business days from the date the continuance is issued or by the originally scheduled hearing date, whichever occurs first. (*id.* PageID#29 F. 7.)

The originally scheduled hearing date is that of March 8<sup>th</sup>, but says March 9<sup>th</sup>, 2021 on the "Document" but for sake of argument will stipulate to March 9<sup>th</sup>, 2021 hearing date for now (because this too is a violation of the Policy by which the originally scheduled hearing date is determined) but servicing must take place within the three (3) business days because it occurs before the March 8<sup>th</sup>, or 9<sup>th</sup>, originally scheduled hearing date.

Depending on original documents utilized at a February 8<sup>th</sup>, 2021 proceeding depends whether the "Document" to be valid. It has been the contention of petitioner throughout that this

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document was not part of the proceedings and was that of another "Document" that bolsters a different hearing date.

The Policy makes it clear that at the time of service, an attempt shall be made to determine whether the offender is contesting any or all the alleged charges; and APA staff serving the forms shall attempt to obtain all the appropriate signatures, initials, and dates on the forms at the time of service; and if an offender refuses to sign, initial, or date the forms, then a notation shall be made to that effect, such as "Refused to Sign," and the notation shall be initialed by a witness. (*id.* PageID#25 @ 3. b. & c.)

If an attempt was made to obtain all the appropriate signatures, initials, and dates on this form then there should be a notation of a refusal to sign. There should be no reason why petitioner should have a copy of this "Document" if it was properly serviced and notification given.

If Petitioner was able to present this "Document" to the Hearing Officer March 24<sup>th</sup>, 2021 without service or certification as it appears here, then clearly there must been some problem with notification there would be no need for two sets of documentation to these proceedings. ("Documents" before his Parole Revocation Hearing" *id.* PageID#160 – 171 / "Documents" after his Parole Revocation Hearing" *id.* PageID#173 – 179)

Petitioner does sign and initial all documents presented to him February 8<sup>th</sup>, 2021 but they were not of a March 24<sup>th</sup>, 2021 hearing date. Whatever documents were signed at this proceeding becomes relevant to whether these documents are valid???

Original documents become relevant to the validity of these documents and what was serviced and given notification opposed to what wasn't. If proven to be invalid the APA would have knowingly violated the Violation Hearing Process and knowingly violated due process.

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In *Gasca v. Precythe*, 83 F. 4<sup>th</sup> 705 it was noted that the District Court did not abuse its discretion when the State practices fall short of what is constitutionally required of the State in following its policy @ HN6. Ohio State Policy requires that service of notification to the offender must take place within the three (3) business days of when it was issued or by the originally scheduled hearing date, whichever occurs first.

In the present case at bar the District Court fails to make findings of what "Document" was serviced and given notification at the February 8<sup>th</sup>, 2021 proceedings but instead the Court interjects its own findings based on the appearance of the "Document" and not the Policy of the "Document" to determine the constitutional requirement thereof.

*Gasca v. Precythe*, 83 F. 4<sup>th</sup> 705 @ **D. Revocation Decisions (Remedies 10, 11 & 12)**

*Gasca continued @ HN6* The state must provide parolees with "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey*, 408 U. S. at 489. MDOC's policy is to notify parolees about revocation decisions, but the policy and MDOC's [\*711] practices fall short [\*\*6] of what is constitutionally required.

First, MDOC's policy is inconsistently implemented. To fix this, the district court ordered MDOC to follow its policy, which requires MDOC to deliver a notification to parolees within 10 days of the date listed on the notice. Given that the district court pulled the 10-day figure from MDOC's policy, we see no reason to believe that this timeframe is unduly burdensome.

Second, MDOC has no policy requiring written notice of the evidence relied on and reasons for revoking parole. *See id.* The district court fixed this by requiring MDOC's notices to outline the evidence relied on, mitigating circumstances considered, and reasons for revocation. MDOC argues that it was an abuse of discretion to require a written statement even when a parolee waives a revocation hearing. But because some revocation decisions are appealable even if a

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hearing is waived, it was not an abuse of discretion to require MDOC to provide a written statement to create an adequate basis for review.<sup>3</sup> At the same time, the district court abused its discretion by requiring MDOC to explain the mitigating circumstances considered. An explanation of the evidence relied on and reasons for [\*\*7] revoking parole will capture any mitigating circumstances that played a role in MDOC's decision, so requiring additional discussion about the mitigating circumstances MDOC considered is unduly burdensome. *Cf. Black v. Romano*, 471 U. S. 606, 613, 105 S Ct. 2254, 85 L. Ed. 2d 636 (1985) (declining to impose a "requirement that the factfinder elaborates upon the reasons for a course not taken" because it "would unduly burden the revocation proceeding").

## CONCLUSION

There is but one claim that entitles Petitioner to relief, it is the "Document" presented as evidence. The claim is simply and does not cause undue burden to the revocation proceedings in adjudicating the fact of whether the "Document" is "valid" or "invalid."

Both the District Court and Petitioner both agree that they are "Uncertain to the origins of this "Form/Document but can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned. (See Judicial Notice filed 02/8/2024 to the District Court)

If proven to be an "invalid" "Document" then Petitioner would be entitled to relief or a different ruling to his motions that were denied to which further proceedings should be had. The Court is not in the habit of letting inmates go but if the constitution requires that the inmate be given due process and it is the State's Policy that requires notification within three business days from when it is issued or from the last scheduled hearing date whichever comes first. In the present case the District Court and Petitioner were "Uncertain to the origins of this

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"Form/Document." Its validity is an adjudicative fact that must be resolved to fairly adjudicate the claim.

If "valid" then Petitioner's claim is without merit and petition writ should be dismissed, but if proven to be "invalid" then the State Policy would have been violated as well as his right to due process and he would be entitled to relief.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Request Seeking a Certificate of Appealability was mailed first-class postage prepaid, to The Ohio Attorney General's Office, Dave Yost, Office of the Ohio Attorney General James Rhodes State Office Tower 30 E. Broad St. 17<sup>th</sup> Fl. Columbus, Ohio 43215, this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

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