

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

MARCUS FOSTER, :  
 :  
 Petitioner, :  
 : No. 113109  
 v. :  
 :  
 STATE OF OHIO, :  
 :  
 Respondent. :

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: PETITION DENIED**

**DATED: September 11, 2023**

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Writ of Habeas Corpus  
Motion No. 567135  
Order No. 567142

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***Appearances:***

Marcus Foster, *pro se*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for respondent*.

FRANK DANIEL CELEBREZZE, III, P.J.:

{¶ 1} Marcus Foster, the petitioner, has filed a document captioned “writs of habeas corpus” that will be treated as a petition for a writ of habeas corpus. Foster is currently incarcerated in the Cuyahoga County Jail because of criminal charges

pending in *State v. Foster*, Cuyahoga C.P. No. CR-23-682282. Foster seeks his immediate release from incarceration based upon a lack of a preliminary hearing and a procedural bindover. The state of Ohio, by and through Cuyahoga County Prosecutor, Michael C. O'Malley, has filed a motion for summary judgment that is granted for the following reasons.

## **I. Substantive Analysis of Petition for Habeas Corpus**

{¶ 2} Foster's claim of lack of a preliminary hearing and bindover do not support the petition for a writ of habeas corpus. A preliminary hearing, which includes a bindover if required, is rendered unnecessary and not mandated if the defendant is indicted by a grand jury. Foster was indicted by the Cuyahoga County Grand Jury in Cuyahoga C.P. No. CR-23-682282 on June 28, 2023. *See* Crim.R. 5(B)(1); *State v. Wigglesworth*, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969); *White v. Maxwell*, 174 Ohio St. 186, 187 N.E.2d 878 (1963); *State v. Bear*, 4th Dist. Gallia No. 20CA9, 2021-Ohio 1539; *Clarke v. McFaul*, 8th Dist. Cuyahoga No. 89436, 2007-Ohio-1592; *Nash v. McFaul*, 8th Dist. Cuyahoga No. 81439, 2002-Ohio-3647.

## **II. Procedural Defects**

{¶ 3} In addition, the petition for a writ of habeas corpus is procedurally defective.

### **A. Civ.R. 10 Caption**

{¶ 4} Civ.R. 10(A) requires a complaint to include the names and addresses of all parties in the caption. Civ.R. 10(A) applies to Foster's petition for habeas

corpus. *Kneuss v. Sloan*, 146 Ohio St.3d 248, 2016-Ohio-3310, 54 N.E.3d 1242. The failure of Foster to comply with Civ.R. 10(A) provides sufficient grounds to deny the request for a writ of habeas corpus. *Greene v. Turner*, 151 Ohio St.3d 513, 2017-Ohio-8305, 90 N.E.3d 901.

### **B. Proper Party**

{¶ 5} R.C. 2725.04 provides that an application for a writ of habeas corpus must be brought by petition, signed, and verified by the party that seeks relief, or by some person for him and requires the petition to specifically name the officer or person in whose custody the prisoner is confined or restrained. R.C. 2725.04(B). Foster has failed to name any law enforcement officer or penal institution as respondent and thus has failed to comply with R.C. 2725.04(B). *State ex rel. Sherrills v. State*, 91 Ohio St.3d 133, 742 N.E.2d 651 (2001); *Whitman v. Shaffer*, 8th Dist. Cuyahoga No. 94486, 2010-Ohio-446.

### **C. Verified Petition**

{¶ 6} R.C. 2725.04(D) requires that a petition for a writ of habeas corpus must be verified. Herein, Foster has failed to verify his petition for habeas corpus, which requires denial. *Chari v. Vore*, 91 Ohio St.3d 323, 744 N.E.2d 763 (2001); *State ex rel. Crigger v. Ohio Adult Parole Auth.*, 82 Ohio St.3d 270, 695 N.E.2d 254 (1998). In *Chari v. Vore*, the Ohio Supreme Court firmly established that an unverified petition for habeas corpus must be denied.

#### **D. Commitment Papers — R.C. 2725.04**

{¶ 7} R.C. 2725.04(D) requires that a copy of the commitment papers or cause of detention be attached to the petition for habeas corpus. A petition for habeas corpus, that fails to comply with the commitment paper requirement of R.C. 2725.04(D), is fatally defective. *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78; *Bloss v. Rogers*, 65 Ohio St.3d 145, 602 N.E.2d 602 (1992).

#### **E. Compliance with R.C. 2969.25**

{¶ 8} Finally, Foster has failed to comply with R.C. 2969.25(A) which provides that an inmate who files an extraordinary-writ action against a government entity in the court of appeals must attach an affidavit listing all federal and state civil actions and appeals of civil actions he has filed in the previous five years. The sworn affidavit must include (1) a brief description of the nature of each civil action or appeal, (2) the case name, case number, and court in which the civil action or appeal was filed, (3) the name of each party to the civil action or appeal, and (4) the outcome of the civil action or appeal. *Id.* R.C. 2969.25(A) requires “strict compliance.” *State ex rel. Swanson v. Ohio Dept. of Rehab. & Corr.*, 156 Ohio St.3d 408, 2019-Ohio-1271, 128 N.E.3d 193. Noncompliance with this requirement is fatal to an inmate’s complaint. *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, 788 N.E.2d 634.

{¶ 9} R.C. 2969.25(C) mandates that the petition contain a statement certified by the institutional cashier setting forth the balance in the inmate’s account for the preceding six months. *State ex re. Neil v. French*, 153 Ohio St.3d 271, 2018-

Ohio-2692, 104 N.E.3d 764. The failure to comply with R.C. 2969.25(A) and (C) cannot be cured by an amended complaint. *State ex rel. Hall v. Mohr*, 140 Ohio St.3d 297, 2014-Ohio-3735, 17 N.E.3d 581.

**{¶ 10}** Accordingly, we grant the motion for summary judgment. Costs to Foster. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

**{¶ 11}** Petition denied.

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FRANK DANIEL CELEBREZZE, III, PRESIDING JUDGE

MARY J. BOYLE, J., and  
MICHAEL JOHN RYAN, J., CONCUR