APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAMIEN FREEMAN,
Petitioner-Appellant,

v.

LYNEAL WAINWRIGHT, WARDEN,
Respondent-Appellee.

No. 18-3913

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:17-cv-01368—James S. Gwin, District Judge.

Argued: March 11, 2020

Decided and Filed: May 12, 2020

Before: NORRIS, DONALD, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Katharine Mitchell-Tombras, COVINGTON & BURLING, LLP, Washington, D.C., for Appellant. Jerri Fosnaught, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Katharine Mitchell-Tombras, COVINGTON & BURLING, LLP, Washington, D.C., for Appellant. Jerri Fosnaught, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

NALBANDIAN, J., delivered the opinion of the court in which NORRIS, J., joined. DONALD, J. (pp. 9–13), delivered a separate dissenting opinion.

OPINION

NALBANDIAN, Circuit Judge. Missed deadlines are preventable and costly. So courts enforce them strictly. Unfortunately for Damien Freeman, that means the door to the federal courthouse is closed. This case presents a single question: does a limited resentencing that results in a better-than-before sentence constitute a new "judgment," as defined in 28 U.S.C. § 2244(d)(1)(A), which sets forth a one-year limitations period for habeas petitions? We hold that it does not, so we AFFIRM the district court's dismissal of Freeman's 28 U.S.C. § 2254 petition.

I.

Damien Freeman pleaded guilty to felony murder in 2001. An Ohio trial court sentenced Freeman to

fifteen years to life imprisonment, followed by post-release control for the maximum period allowed by law. Freeman failed to timely appeal.

Freeman took the proverb "if at first you don't succeed, try, try again" to heart. After four unsuccessful motions to withdraw his guilty plea and appeal belatedly, Freeman collaterally moved in state court to vacate his conviction and sentence in 2015. He argued the sentencing court's imposition of post-release control was "contrary to law" because Ohio law does not permit post-release control for felony murder convictions and his felony murder conviction was improper because there was no evidence he committed an underlying violent felony. (R. 9-2, Def.'s Mem. in Opp'n at PageID # 150.) The state trial court disagreed and denied his motion. But the Ohio Eighth Appellate District Court of Appeals granted Freeman post-conviction relief for the first time, at least in part. After affirming Freeman's conviction, that court agreed Ohio law does not provide for post-release control for felony murder. And it quoted *State v. Opalach*, No. 100938, 2014 WL 6065666, at *2 (Ohio Ct. App. Nov. 13, 2014), in holding that "a sentencing entry that incorrectly imposes postrelease control does not render the entire sentence void. Only that portion of the judgment that improperly imposes postrelease control is void." (R. 9-2, Journal Entry and Op. at PageID # 234.) So the Court of Appeals remanded Freeman's motion with direction "that a *nunc pro tunc* entry be entered to delete the imposition of postrelease control." (*Id.*)

On remand, in January 2017, the trial court "vacated and replaced, *nunc pro tunc*" the journal entry from Freeman's original sentencing in 2001. (R. 9-2, Journal Entry at PageID # 238.) The court's revision left intact its original sentencing journal entry except for the single sentence discussing post-release control, which it removed.

After securing this partial victory, Freeman tried another challenge, this time federal court. He filed the 28 U.S.C. § 2254 petition at issue in June 2017, challenging his conviction, in the Northern District of Ohio. But without reaching the merits of Freeman's petition, the district court granted Wainwright's motion to dismiss, finding that Freeman's petition is time barred. The court did however grant Freeman a certificate of appealability on whether the Ohio court's removal of post-release control from Freeman's sentence created a new judgment under § 2244(d)(1). So Freeman appeals the dismissal.

II.

We review de novo a district court's dismissal of a 28 U.S.C. § 2254 petition for untimeliness. *Crangle v. Kelly*, 838 F.3d 673, 677 (6th Cir. 2016).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes strict limits on federal habeas corpus petitioners. Relevant here, 28 U.S.C. § 2244(d)(1) imposes a "1-year period of limitation" on all "application[s] for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." That limitations period begins to run on the latest of four dates, but it's uncontested here the limitations period began to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" § 2244(d)(1)(A).

"Final judgment in a criminal case means sentence. The sentence is the judgment." *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)). And Freeman's sentence became final in January 2002 when he did not appeal within thirty days. *See* Ohio R. App. P. 4. But Freeman did not file his § 2254 petition until fifteen years later. So § 2244(d)(1) would ordinarily require

dismissal of the petition. In response, Freeman argues the Ohio trial court's revision of its sentencing journal entry in January 2017 constituted a new "judgment" under § 2244, thus his filing of the § 2254 petition six months later was within § 2244(d)(1)'s one-year period of limitation. Freeman's argument has some appeal but we ultimately reject it.

When courts engage in a full resentencing, the resulting sentence is a new "judgment" that restarts § 2244(d)(1)'s timeclock. *King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015). Which means the petitioner can challenge both his new sentence and his underlying conviction. *Id.* at 158. And in *Crangle v. Kelly*, we extended that principle to some limited resentencings, holding that "[a] new, worse-than-before sentence . . . amounts to a new judgment." 838 F.3d at 678. But to reach that conclusion, we first had to identify the limited resentencings that *do not* create new judgments. We noted the

> line of cases in which a limited resentencing *benefits* the prisoner, such as in a sentence-reduction proceeding under 18 U.S.C. § 3582(c) or Criminal Rule 35(b). Such sentence modifications, federal law provides, do not disturb the underlying initial judgment, which continues to "constitute[ ] a final judgment." 18 U.S.C. § 3582(b). As several other courts of appeals have noted, such "a reduced sentence [is] not a new one."

Id. (quoting *United States v. Jones*, 796 F.3d 483, 485 (5th Cir. 2015)) (alteration in original). So to conclude that a court's addition of post-release control by *nunc pro tunc* order to the petitioner's sentence created a new "judgment" under § 2244(d)(1), we first had to

determine that the court's action resulted in a "new, worse-than-before sentence[.]" *Id*. at 678–80.

We confronted a limited resentencing resulting in a better-than-before sentence in *Eberle v. Warden, Mansfield Correctional Institution*—albeit an unpublished decision before *Crangle*. 532 F. App'x 605 (6th Cir. 2013). In facts much like Freeman's, the Ohio Court of Appeals determined that an Ohio trial court incorrectly included post-release control in a defendant's sentence, so it "vacated the postrelease-control portion of the lower court's sentencing entry." *Id*. at 607. The defendant then filed a § 2254 petition more than one year after his original sentence became final. *Id*. Because "no resentencing hearing was held, no new sentencing entry was filed, and no new judgment issued" we determined the Ohio Court of Appeals' "single sentence modification [was] not a new sentence that restart[ed] the AEDPA clock." *Id*. at 610. The same holds true in Freeman's case, especially post-*Crangle*.

Just like *Eberle*, the trial court here did not hold a resentencing hearing. Nor, in effect, did it issue a *new* sentencing entry or issue a *new* judgment. Rather, it made a "single sentence modification" to Freeman's original sentencing journal entry, striking all post-release control. *See id*.; (R. 9-2, Journal Entry at PageID # 238.) True, the trial court labeled its own action as "vacat[ing] and replac[ing]" the original sentencing journal entry. But as Freeman concedes, we are not bound by the label a state court places on its actions, instead we must look to what the court actually did. (Appellant's Reply Br. at 6.) After all, the trial court only struck a single sentence from its original journal entry without even holding a hearing. What's more, Ohio law tells us "a sentencing entry that incorrectly imposes postrelease control does not render the entire sentence void. Only that portion of the judgment that improperly imposes postrelease control

is void." *Opalach*, No. 100938, 2014 WL 6065666, at *2. So it's clear that Freeman's resentencing, to the extent that term appropriately characterizes what the trial court did, was limited.

Crangle makes clear that limited resentencings that benefit the prisoner "do not disturb the underlying initial judgment, which continues to constitute a final judgment." 838 F.3d at 678 (internal quotation marks omitted). If adding post-release control "materially increases the potential restrictions on [a prisoner's] liberty" and leaves the prisoner worse off, then removing post-release control must materially decrease the potential restrictions on a prisoner's liberty and leave the prisoner better off. *Id*. at 679. Thus, the trial court's modification of Freeman's sentence qualifies as a "limited resentencing [that] *benefits* the prisoner," and did not disturb Freeman's initial judgment. And because Freeman filed his § 2254 petition over fifteen years after that initial judgment became final, § 2244(d)(1) requires dismissal of the petition.

Freeman tries to avoid *Crangle* three ways. We discuss each in turn.

First, Freeman argues the *Crangle* holding we apply here is dicta. He says distinguishing between sentences that leave a prisoner worse off and sentences that leave a prisoner better off was "'not necessary to the outcome' of the case and [is] therefore 'dicta that is not binding.'"

(Appellant's Br. at 14 (citing *United States v. McMurray*, 653 F.3d 367, 375 (6th Cir. 2011).) Freeman gets the legal rule right but the application wrong.

True, when an opinion discusses an issue beyond what the court must decide in that case, those

statements do not bind future panels. *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 781 (6th Cir. 2014) (per curiam). But we believe that *Crangle's* discussion of limited resentencings that benefit prisoners was necessary to determine whether an addition of post-release control to an existing sentence created a new judgment under § 2244(d)(1). That's because, as *Crangle* remarks, there is a line of cases from many circuits holding that various forms of sentence modifications and reductions do not disturb the underlying judgment. *See* 838 F.3d at 678. So to not flout these precedents, we had to explain that it is not just the limited nature of these resentencings that explains why they do not create a new judgment. Rather, it is the combination of their limited nature *and* beneficial result for the prisoner. *See id*. And, in fact, we framed the "final question" as whether the sentence modification at issue there created a "new, worse-than-before sentence[.]" *See id*. at 678–79. This seminal issue was not dicta, but a question we had to reach. So our answer then binds us now.[1]

Second, Freeman says *Crangle*'s statement "that its holding is limited to new, worse-than before sentences is inconsistent with both binding Supreme Court precedent and persuasive authority from other Circuits. Those decisions compel the conclusion that any substantive re- sentencing—even one favorable to a petitioner—constitutes a new judgment, resetting the statute of limitations clock." (Appellant's Br. at 16–17 (internal quotation marks omitted).) He cites two

[1] As we discuss below, Supreme Court and Sixth Circuit precedent, other than *Crangle*, do not address the question presented here. So if Freeman were correct that the portion of *Crangle* we rely on is dicta, than this would be a question of first impression for our Circuit. Even if that were the case, we would reach the same result as the panel in *Crangle*.

Supreme Court cases *Crangle* allegedly violates. First is *Burton v. Stewart*, 549 U.S. 147 (2007). Freeman argues that because the Court in *Burton* held that a resentencing that increased a prisoner's potential early release credits created a new judgment under AEDPA, *Crangle*'s distinction between resentencings that leave a prisoner better off and those that leave a prisoner worse off cannot be correct. But that ignores the first aspect of *Crangle*'s holding.

Under *King*, any full resentencing creates a new judgment for AEDPA purposes. *See* 807 F.3d at 156. *Crangle* only says *limited* resentencings that provide a prisoner with a better- than-before sentence do not create new judgments. *See* 838 F.3d at 678. In the state court proceedings underlying *Burton*, a Washington trial court engaged in a full resentencing on remand.[2] *See generally State v. Burton*, 101 Wash. App. 1041 (2000) (discussing the resentencing procedure employed on remand). So *Burton* confirms our holding in *King* and is consistent with *Crangle*.

Next Freeman claims *Crangle* violates *Magwood v. Patterson*, 561 U.S. 320 (2010). He says that because a resentencing resulting in the same sentence as the original sentence constituted a new judgment in *Magwood*, it can't be true that a prisoner must be left worse off for a resentencing to create a new judgment under AEDPA. But an Alabama court conducted a full resentencing for Magwood. *See Magwood v. State*, 548

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[2] The dissent's lengthy discussion of *Burton* omits this key difference between that case and ours. Because *Burton* dealt with a full resentencing it did not "directly" address the question presented here: whether *limited* resentencings that result in better-than-before sentences for the prisoner constitute new judgments under § 2244(d)(1)(A). And because *Burton* is distinguishable it does not bind us here.

So. 2d 512, 513 (Ala. Crim. App. 1988). So again, *Crangle* accords with Supreme Court precedent.

Finally, we note that "we need not look [elsewhere] when binding precedent from our own Circuit answers the question." *United States v. Cavazos*, 950 F.3d 329, 336 (6th Cir. 2020). Because *Crangle* binds us, any persuasive authority from other Circuits is irrelevant. But it is relevant that we have consistently applied *Crangle* to cases like Freeman's, albeit in unpublished orders. *See, e.g.*, *In re Robinson*, No. 18-4210, 2019 U.S. App. LEXIS 14685, at *4–5 (6th Cir. May 16, 2019); *Martin v. Phillips*, No. 17-5499, 2018 WL 5623651, at *2 (6th Cir. July 13, 2018); *Cortez v. Warden Chillicothe Corr. Inst.*, No. 17-3530, 2018 U.S. App. LEXIS 27015, at *3–4 (6th Cir. Feb. 16, 2018); *In re Lloyd*, No. 17-4014, 2018 U.S. App. LEXIS 1990, at *3 (6th Cir. Jan. 25, 2018).

As a last-ditch effort, Freeman puts forth several "practical considerations" he claims bolster his position. But "[t]he text is the law, and it is the text that must be observed." *Appoloni v. United States*, 450 F.3d 185, 199 (6th Cir. 2006) (Griffin, J., concurring in part) (quoting Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 22–23 (1997)). So the statutory text and precedents interpreting that text must guide us. Weighing practical considerations is the responsibility of Congress, not the judiciary. *See Georgia v. Public.Resource.Org, Inc.*, --- S. Ct. ----, 2020 WL 1978707 at *9 (Apr. 27, 2020) ("It is generally for Congress, not the courts, to decide how best to pursue [a statute's] objectives. And that principle requires adherence to precedent when, as here, we have construed the statutory text and tossed the ball into Congress's court, for acceptance or not as that branch elects." (cleaned up)).

III.

For these reasons, we **AFFIRM** the district court's dismissal of Freeman's 28 U.S.C. § 2254 petition because it is time barred.

DISSENT

BERNICE BOUIE DONALD, dissenting. I disagree with the majority's conclusion that *Crangle v. Kelly*, 838 F.3d 673 (6th Cir. 2016) necessitates its holding. In determining so, the majority's decision conflicts with Supreme Court precedent. Therefore, I dissent.

In *Crangle*, we reversed the district court's holding that Crangle's 28 U.S.C. § 2254 petition was untimely. 838 F.3d at 675. The timeliness of Crangle's petition hinged on whether the recent change to his sentence—the imposition of post-release control—constituted a new judgment under 28 U.S.C. § 2244(d)(1)(A). *Id.* We held that "[a] new, worse-than-before sentence . . . amounts to a new judgment." *Id.* at 678. Because Crangle's *nunc pro tunc* order, adding post-release control, increased the restrictions on his liberty, it constituted a worse-than-before sentence and amounted to a new judgment, restarting his § 2244(d)(1)(A) clock. *Id.* at 679-80.

Crangle tells us that a *nunc pro tunc* order changing the imposition of post-release control, but otherwise keeping a defendant's sentence intact—what the majority considers a "limited resentencing"—constitutes a new judgment because the change amounts to "a material difference in [a defendant's] conditions of confinement." *Id.* at 680. *Crangle* answers whether a defendant is subject to a new judgment when the change to the defendant's sentence is worse-than-before. What about, as here, where the

defendant's sentence may be characterized as better-than-before? Is the answer any different?[3]

As the majority points out, *Crangle* also answers that question, but it does so unnecessarily. The majority claims that, in order to reach *Crangle*'s holding, "we first had to identify the limited resentencings that *do not* create new judgments." Op. at 4. But that is simply not true. We acknowledged as much in *Crangle*, noting that, "*[o]ur analysis is consistent with* a line of cases in which a limited resentencing benefits the prisoner . . . ." *Id.* at 678 (emphasis added and removed). The majority failed to include this prelude to *Crangle*'s discussion, which emphasizes that its analysis is "consistent with a line of cases" answering a different question than the one posed, based on different circumstances. That is dictum. "Strictly speaking an obiter dictum is a remark made or opinion expressed by a judge, in his decision upon a cause, by the way—that is, incidentally or collaterally, and not directly upon the question before the court . . . ." *PDV Midwest Ref., L.L.C. v. Armada Oil & Gas Co.*, 305 F.3d 498, 510 (6th Cir. 2002) (quoting Black's Law Dictionary, 1100 (7th ed. 1999)). Whether a better-than-before sentence constitutes a new judgment was not the question before us in *Crangle*. Unlike mere dicta, the binding aspect of a court's holding is "necessary to" its outcome. *United States v. McMurray*, 653 F.3d 367, 375-76 (6th Cir. 2011). Contrary to the majority's construction, "consistent with" does not have the same meaning as "necessary to." It is not necessary to define the incidental or collateral bounds of the answer to a question in order to answer it.

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[3] The majority ignores a third question: What about when it is unclear whether the sentence is better- or worse-than-before?

While *Crangle* answered our question in dictum, the Supreme Court was confronted with the question directly. In *Burton v. Stewart*, 549 U.S. 147 (2007), a case upon which *Crangle* relied, the Supreme Court was faced with determining whether the petitioner's amended, better- than-before sentence constituted a new judgment for the purposes of § 2244. Although the Supreme Court ultimately held that the district court lacked jurisdiction to consider Burton's petition, in doing so, the Court determined that Burton's better-than-before sentence—increasing his eligibility for early release credits—amounted to a new judgment. *Burton*, 549 U.S. at 156- 57.

In 1994, a state trial court sentenced Burton to a 562-month sentence for rape, robbery, and burglary, based on two alternative grounds under Washington's sentencing scheme— running all three counts consecutively for a total of 562 months or, in the alternative, imposing an "exceptional sentence of 562 months solely for the rape conviction" with the other sentences running concurrently. *Id.* at 149-50. In 1996, after a prior, unrelated conviction was overturned, Burton received an amended judgment and sentence, which "imposed a new sentence that relied solely on an exceptional 562-month sentence for the rape conviction, run concurrently with the other two terms." *Id.* at 150. On direct review, the state appellate court upheld Burton's conviction, but remanded for resentencing because the trial court's exclusive reliance on the exceptional rape sentence decreased Burton's potential early release credits. *Id.* In 1998, the trial court entered a second amended judgment and sentence, again imposing a 562-month sentence, but this time reverting to its original ground—running the three counts consecutively. *Id.* at 151.

Importantly, because of the adjusted basis of his sentence under the 1998 judgment, Burton became eligible for early release credits for up to thirty-three

percent of his sentence, whereas when he was charged solely based on the rape count pursuant to the 1996 judgment his early release credit could not exceed fifteen percent of his term. *Washington v. Burton*, No. 35747-6-I, 1997 Wash. App. LEXIS 933, at *14 (Ct. App. June 9, 1997). Burton therefore received a less severe, better-than-before sentence. *Id.* at *37-38 ("Because the [1996 sentence] is more severe than the [1994] sentence in its implications for potential good time, we . . . vacate the sentence and remand.").

While Burton's direct appeal of this new sentence was pending, he filed a § 2254 petition in the federal district court, challenging his custody by disputing the constitutionality of his three convictions, but not addressing his sentencing claims. *Burton*, 549 U.S. at 151. The district court denied his petition, and the Ninth Circuit affirmed on appeal. *Id.* In 2002, Burton filed another § 2254 petition, now challenging the constitutionality of his 1998 sentence. *Id.* at 151-52. The district court again denied his petition, and the Ninth Circuit affirmed on appeal. *Id.* at 152. The Supreme Court granted certiorari, holding that "because the 2002 petition is a 'second or successive' petition that Burton did not seek or obtain authorization to file in the District Court, the District Court never had jurisdiction to consider it in the first place." *Id.* In making this holding, it was necessary for the Court to address Burton's argument that his instant petition was not a second or successive petition because it challenged a different judgment than his earlier petition:[4]

> But this argument misreads AEDPA, which states that the limitations period

[4] Specifically, Burton claimed that his 1998 petition was filed pursuant to his 1994 judgment, while the instant 2002 petition challenged his 1998 judgment. *Id.* at 155-56.

> applicable to "a person in custody pursuant to the judgment of a State court" shall run from, as relevant here, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A). Final judgment in a criminal case means sentence. The sentence is the judgment. Accordingly, Burton's limitations period did not begin until both his conviction and sentence became final by the conclusion of direct review or the expiration of the time for seeking such review—which occurred well after Burton filed his 1998 petition.

Id. at 156-57 (internal citations and quotations omitted).

The Supreme Court's holding that the district court did not have jurisdiction to consider Burton's second or successive petition required a finding that Burton's better-than-before 1998 judgment, increasing his early release credit, constituted a new judgment. *Id.* Consider it the other way: if the Supreme Court did not decide that Burton had received a new judgment in 1998 because it was better than his 1996 judgment, then Burton's petition would have been untimely as it would have been filed more than one year after the limitations period.[5] Had that been the Supreme Court's

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[5] If this was the case, Burton's 1996 judgment would have become final on April 20, 1998, when the Supreme Court denied his petition for writ of certiorari to the Court of Appeals of Washington. *Burton v. Washington*, 523 U.S. 1082 (1998) (denying cert.). Therefore, the time for Burton to file his instant petition would have expired on April 20, 1999, long before he filed the petition in 2002.

reasoning, then the Court would have had no need to address the second or successive petition argument.

Burton thus necessitates that whether a new sentence is better or worse for the petitioner is not an element of whether a new sentence constitutes a new judgment for the purposes of § 2244. Whatever dicta was added in *Crangle* regarding differences between better- or worse- than-before sentences is contrary to the Supreme Court's binding precedent. As previously examined, *Crangle* declared that a change, even a "limited" one, such as to a defendant's post- release control is "a material difference in [the defendant's] conditions of confinement" which constitutes a new judgment. *Id.* at 680. Therefore, because Freeman's June 28, 2017, petition was filed within one year of his new judgment becoming final on December 27, 2016, Freeman's petition was filed within the one-year limitations period imposed by 28 U.S.C. § 2244(d)(1).

This view is also consistent with the precedent of several of our sister circuits. *See Gonzalez v. Sherman*, 873 F.3d 763, 765-66 (9th Cir. 2017) (finding that petitioner's new sentence crediting 554 days of presentence credit compared to his previous sentence crediting 533 days amounted to a new judgment); *In re Gray*, 850 F.3d 139, 140 (4th Cir. 2017) (holding that petitioner's new sentence of life imprisonment compared to his previous sentence of death constituted a new judgment); *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1275-76 (11th Cir. 2014) (per curiam) (concluding that petitioner's new sentence of twenty-seven years' imprisonment compared to his previous sentence of forty years' imprisonment, resulted in a new judgment).

The majority is right: the text is the law. But we are bound by this Court and the Supreme Court's precedential interpretations of that text. Although we have failed to apply *Burton*'s holding in a number of

unpublished post-*Crangle* opinions, *see* Op. at 7, the only thing worse than making those errors is continuing to defend them when the answer is now clear. I would **VACATE** the district court's dismissal of Freeman's § 2254 petition and **REMAND** it for reconsideration.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-3913

DAMIEN FREEMAN,
Petitioner-Appellant,

v.

LYNEAL WAINWRIGHT, WARDEN,
Respondent-Appellee.

Before: NORRIS, DONALD, and NALBANDIAN, Circuit Judges.

JUDGMENT

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

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's dismissal of Damien Freeman's petition under 28 U.S.C. § 2254 is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DAMIEN FREEMAN,
Petitioner,

v.

WARDEN LYNEAL WAINWRIGHT,

Respondent.

Case No. 1:17-CV-1368

Opinion & Order
[Resolving Doc. 1]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On December 11, 2001, Petitioner Damian Freeman plead guilty to the murder of eleven-month-old Ciera Freeman and an Ohio court sentenced him fifteen years to life. Proceeding *pro se*, on June 28, 2017, he petitioned the Court for a writ of habeas corpus under 28 U.S.C. § 2254.[1] The State filed a motion to dismiss,[2] which Freeman

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[1] Doc. 1.
[2] Doc. 9.

opposed.[3] Magistrate Judge William H. Baughman Jr. recommends denying his petition,[4] and Freeman objects.[5]

For the following reasons, the Court **OVERRULES** Petitioner's objections, **ADOPTS** Magistrate Judge Baughman's Report and Recommendation, and **DENIES** the Petition.

I. BACKGROUND

Freeman's Petition to vacate a 2001 conviction raises obvious statute of limitations issues. A habeas petition filed under § 2254 is subject to a one-year limitations period. 28 U.S.C. § 2244(d)(1).

In September 2001, a Cuyahoga County Grand Jury indicted Petitioner Freeman for felony murder,[6] felonious assault,[7] and endangering children.[8] The indictment came after the August 23, 2001 death of 11-month-old Ciera Freeman.[9] On December 11, 2001, Freeman pled guilty to the felony murder count and the Cuyahoga Court of Common Pleas nolled[10] the other two counts. The court then sentenced Freeman to an indeterminate sentence of fifteen years to life and a term of post-release control.[11]

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[3] Doc 10
[4] Doc 11.
[5] Doc 13.
[6] O.R.C. 2903.02(B)
[7] O.R.C. 413757
[8] O.R.C. 2919.22
[9] *See* Doc. 9-2 (state court record) at 1-3.
[10] "[T]o abandon (a suit or prosecution); to have (a case) dismissed by a *nolle prosequi*." *Black's Law Dictionary* (8th ed. 2004).
[11] Doc. 9-2 at 6.

On August 7, 2002, Freeman moved the Cuyahoga Court of Common Pleas to withdraw his plea and appeal his conviction;[12] the Court of Appeals of Ohio denied this motion in September of 2002.[13] In March and July of 2004, Freeman moved again to withdraw his guilty plea under Ohio Rule of Criminal Procedure 32.1. These motions were denied, and the Eighth Appellate District of the Court of Appeals of Ohio dismissed his appeal *sua sponte* on April 15, 2005.[14] Freeman did not appeal this Court of Appeals dismissal decision.

On September 15, 2015, Freeman filed a *pro se* motion with the Cuyahoga Court of Common Pleas to vacate his conviction and sentence.[15] On October 15, 2015, the court denied Freeman's motion.[16] Freeman appealed; on December 15, 2016, the Eighth Appellate District of the Court of Appeals of Ohio affirmed his conviction.[17] However, the court held that the trial court's imposition of post-release control was improper, and directed the trial court to enter a *nunc pro tunc* order removing the imposition of post-release control.[18] Otherwise, the Ohio Court of Appeals affirmed the 2001 sentence. On December 27, 2016, the Court of Common Pleas journalized this *nunc pro tunc* order, vacating his original sentence and replacing it with an order that did not include post-release control.[19]

Freeman appealed the appeals court's decision to the Ohio Supreme Court. On May 31, 2017, the Ohio

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[12] *Id.* at 7.
[13] *Id.* at 14.
[14] *Id.* at 22.
[15] *Id.* at 23
[16] *Id.* at 60.
[17] *Id.* at 150.
[18] *Id.*
[19] *Id.* at 152.

Supreme Court declined to exercise jurisdiction over the appeal.[20]

Freeman filed his habeas petition with the Court on June 28, 2017.[21]

In a July 30, 2018 Report and Recommendation, Magistrate Judge Baughman recommended that the Court dismiss Freeman's petition as untimely, because it was filed beyond the one-year limitations period imposed by 28 U.S.C. § 2244(d)(1). Petitioner objected.

II. DISCUSSION

The Federal Magistrates Act requires a district court to conduct a *de novo* review only of those portions of the Report and Recommendation to which the parties have objected.[22]

Freeman raises two objections to Magistrate Judge Baughman's Report and Recommendation. First, he argues that the December 27, 2016 *nunc pro tunc* order qualifies as a new judgment re-starting 28 U.S.C. § 2244(d)(1)(A)'s one-year statute of limitations, making his petition timely. Second, he argues that the *nunc pro tunc* order was unlawful because it substantively changed his sentence.

Petitioner's first objection is overruled. Under 28 U.S.C. § 2244(d)(1)(A), the one-year statute of limitations for federal habeas relief began to run when "the [petitioner's] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Under this provision, the one-year limitations period began to

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[20] Doc. 1-2.

[21] Doc. 1.

[22] *See* 28 U.S.C. § 636(b)(1).

run—at the latest—in 2005, when the time to appeal the Court of Appeal's denial of his motion to withdraw his guilty plea expired.[23]

Petitioner, relying on the Sixth Circuit's decision *Crangle v. Kelly*,[24] argues that the *nunc pro tunc* order modifying his sentence is a new judgment reviving the statute of limitations.[25] However, the *Crangle* court noted that resentencings which benefit the petitioner "do not disturb the final underlying initial judgment, which continues to 'constitute[] a final judgment.'"[26] And in *Cortez v. Warden Chillicothe Correctional Institution*, the Sixth Circuit held that resentencings which remove post-conviction sentencing provisions do no restart the statute of limitations for habeas relief.[27]

Freeman's second objection is also overruled. His objection to the entry of the *nunc pro tunc* order seemingly turns on the idea that the order was used improperly, because it altered the substantive terms of his sentence instead of correcting a clerical

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[23] *See Gonzalez v. Thaler*, 132 S. Ct. 641, 646 (2012) ("[F]or a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' [for the purposes of § 2244(d)(1)(A)] on the date that the time for seeking such review expires.").

[24] 838 F.3d 673 (6th Cir. 2016).

[25] *See Crangle*, 838 F.3d at 680 (*nunc pro tunc* order imposing post-release control materially increased restrictions on petitioner's liberty, and thus constituted a new sentence resetting one-year statute of limitations under § 2244(d)(1)(A)).

[26] *Id*. at 678 (alteration in original) (quoting 18 U.S.C. § 3582(b)).

[27] *Cortez v. Warden Chillicothe Corr. Inst.*, No. 17-3530, 2018 WL 2382456, at *2 (6th Cir. Feb. 16, 2018) (order removing requirement that petitioner register as a sex offender does not restart statute of limitations).

error.[28] Whatever the merits of this argument, it does not allege an injury. Invalidating the *nunc pro tunc* order would not benefit Freeman, as the order vacated the portion of his original sentence that imposed post-release supervision.

Freeman's petition also raises arguments regarding the substantive sufficiency of his guilty plea under state law. Even if Freeman's petition were not time-barred, the Court could not consider these arguments because they do not raise constitutional claims.[29] Furthermore, the 2016 Ohio Court of Appeals decision considered and rejected Freeman's claims regarding the legal sufficiency of his plea.[30]

III. CONCLUSION

For the reasons stated above, the Court DENIES Freeman's petition for a writ of habeas corpus.

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[28] He did not raise this argument in his petition, and Magistrate Judge Baughman did not discuss it in his Report and Recommendation.

[29] *See* 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). Although couched as a claim about the effectiveness of his counsel, Freeman's petition challenges the legal sufficiency of his plea and not the assistance of his lawyer.

[30] *See* Doc. 9-2 at 149. *See also Davis v. Straub*, 430 F.3d 281, 291 (6th Cir. 2005) (federal court may not grant writ on the grounds that state court erred in interpretation of its own law).

IT IS SO ORDERED

Dated: September 10, 2018 */s/*
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DAMIEN FREEMAN,	:	CASE NO. 1:17-CV-1368
Petitioner,	:	
vs.	:	JUDGMENT
WARDEN LYNEAL WAINWRIGHT,	:	
Respondent.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

The Court has issued its opinion in the above-captioned matter. For the reasons stated in that opinion, the court ADOPTS Magistrate Baughman's Report and Recommendation and DENIES the petition for a writ of habeas corpus.

The Court will now GRANT a certificate of appealability on the issue of whether the Ohio Court of Appeals' December 15, 2016 decision removing post-release control from Freeman's sentence restarts the one-year statute of limitations under § 2244(d)(1)(A). The Court DENIES a certificate of appealability on any other issues Freeman has attempted to raise because an appeal of those issues could not be taken in good faith.

Accordingly, this action is terminated under Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

Dated: September 10, 2018

/s/
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff,

v.

DAMIEN FREEMAN,

Defendant.

Case No. 2017-0144

Entry

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

(Cuyahoga County Court of Appeals; No. 103660)

/s/_____
Maureen O'Connor
Chief Justice

APPENDIX D

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO

Plaintiff,

v.

DAMIEN FREEMAN,

Defendant.

CR-01-413757-ZA

Journal Entry

ON 12/15/2016 THE EIGHTH DISTRICT COURT OF APPEALS, IN CASE NUMBER 103660, REMANDED THIS CASE TO THE COURT OF COMMON PLEAS WITH INSTRUCTIONS TO PREP ARE A NUNC PRO TUNC SENTENCING ENTRY TO VACATE THE IMPROPER IMPOSITION OF POSTRELEASE CONTROL. THE ORIGINAL ENTRY AROSE FROM PROCEEDINGS TAKING PLACE ON DECEMBER 11, 2001 AND JOURNALIZED ON DECEMBER 14, 2001.

ACCORDINGLY, THE ENTRY JOURNALIZED 12/14/2001 IS HEREBY VACATED AND REPLACED, NUNC PRO TUNC, WITH THE FOLLOWING:

DEFENDANT IN COURT WITH COUNSEL DARYL DENNIE. PROSECUTING ATTORNEY EDWARD WALSH ALSO PRESENT.

DEFENDANT WAS ADVISED OF ALL CONSTITUTIONAL RIGHTS AND PENALTIES.

DEFENDANT RETRACTS FORMER PLEA OF NOT GUILTY AND ENTERS A PLEA OF GUILTY TO MURDER ORC 2903.02 (B) SENATE BILL TWO AS CHARGED IN COUNT ONE.

COURT FINDS DEFENDANT GUILTY. COUNTS TWO AND THREE ARE NOLLED.

DEFENDANT AND PROSECUTOR ADDRESS THE COURT.

THE COURT CONSIDERED ALL OF THE REQUIRED FACTORS OF THE LAW.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSES OF R. C. 2929.11.

THE COURT IMPOSES A PRISON TERM AT THE LORAIN CORRECTIONAL INSTITUTION OF 15 YEARS TO LIFE.

DEFENDANT TO RECEIVE l03 DAYS JAIL TIME CREDIT THROUGH DECEMBER 11, 2001.

DEFENDANT IS TO PAY COURT COSTS.

12/27/2016

CPJPO 12/27/2016 16:33:44

/s/_____
Judge Signature 01/03/2017

APPENDIX E

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103660

STATE OF OHIO,
Plaintiff-Appellee,

v.

DAMIEN FREEMAN,
Defendant-Appellant.

CR-01-413757-ZA

JUDGEMENT:
AFFIRMED IN PART, VACATED IN PART,
AND REMANDED

BEFORE: Laster Mays, J., Keough, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: December 15, 2016

ATTORNEYS FOR APPELLANT

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By: Jeffrey Gasmo
Assistant Public Defender
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John P. Parker
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Cleveland, Ohio 44119

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Brett Hammond
Assistant County Prosecutor
Justice Center, 9th floor
1200 Ontario Street
Cleveland, Ohio 44113

ANITA LAST MAYS, J.:

{§1} Defendant--appellant, Damien Freeman ("Freeman"), proceeding pro se, appeals from the trial court's denial of his motion to vacate a noncognizable offense and motion for sentencing. We affirm the trial court's decision, but remand for the limited purpose of vacating the imposition of postrelease control.

I. FACTS AND BACKGROUND

{§2} In September 2001, at the age of 24, appellant was indicted by the Cuyahoga County Grand Jury for allegations surrounding the August 23, 2001 death of Ciera Freeman, 11 months of age. Appellant was charged with murder (R.C. 2903.02(B)), felonious assault (R.C. 2903.11), and endangering children (R.C. 2919.22).

{§3} Counsel was appointed and, after several pretrials, and discovery, the trial court determined that appellant was competent to stand trial. On December 11, 2001, appellant retracted his not guilty plea. Appellant pled guilty to the murder charge {R.C. 2903.02(B)), and the trial court nolled the remaining charges.

{§4} On December 11, 2001, appellant was sentenced to a 15 years-to-life prison term at the Lorain Correctional Institution with 103 days of jail-time credit. The entry also provided that "postrelease control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28."

{§5} On September 3, 2002, this court dismissed appellant's pro se motion for delayed appeal and appointment of counsel pursuant to App.R. 5(A). On April 5, 2004, and August 4, 2004, appellant's motions

to withdraw his plea pursuant to Crim.R. 32.1 were denied.

{§6} Appellant's motion for the court reporter's transcript was denied on January 25, 2005, and his pro se appeal filed February 15, 2005, was sua sponte dismissed by this court on April 15, 2005, for failure to file a praecipe pursuant to Loc.App.R. 9(B).

{§7} On September 15, 2015, appellant filed a pro se "motion for vacation of noncognizable offense and motion for sentencing (for vacation of unauthorized imposition of postrelease control)." The motion, partly based on *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016,[1] was denied on October 2, 2015. Appellant filed the instant appeal on October 23, 2015, the oral argument for which was continued to allow appointment of counsel.

II. ASSIGNMENTS OF ERROR

{§8} Appellant appeals, proffering the following assignments of error:

I. The trial court committed error when it informed Mr. Freeman that it would impose and then did impose, as part of his sentence for murder, a period of postrelease control.

II. The trial court erred in finding appellant guilty of felony murder under R.C. 2903.02(B) where appellant was not, and could not have been, found guilty of an underlying felony.

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[1] It appears in appellant's most recent brief that the *Nolan* argument has been abandoned because *Nolan* held that attempted felony murder is not a cognizable crime in Ohio (R.C. 2903.02(B)), which does not apply to this case.

III. LAW AND ANALYSIS

A
Assignment of Error No. I

{§9} Appellant first argues that his conviction should be vacated and a new trial awarded due to the trial court's failure to properly advise him of postrelease control; therefore, his plea was not knowingly, intelligently and voluntarily made. We acknowledge the state's position that this argument may be barred by res judicata, because the issue could have been raised on direct appeal. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, § 59 (res judicata bars the assertion of claims in a motion to withdraw a guilty plea that was, or could have been, raised in a prior proceeding.) However, in light of the specific facts of this case, we will address the argument. We find that the argument lacks merit.

{§10} Appellant relies on *State v. Rembert*, 8th Dist. Cuyahoga No. 99707, 2014-Ohio-300, § 24, where Rembert challenged the validity of his plea due to the trial court's failure to provide proper instruction regarding postrelease control and parole. We determined that Rembert's plea was knowingly, intelligently, and voluntarily made. Our analysis in *Rembert* applies here, but not to appellant's benefit, because our decision does not entitle appellant to a new trial.

{§11} Appellant was sentenced to 15 years to life, and advised that "postrelease control is part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28." As we acknowledged in *Rembert*, who was sentenced to life imprisonment with parole eligibility after 25 years, "because parole is not certain to occur, the trial court would not be required to explain it in the plea colloquy." *Id*. at § 27.

{§12} R.C. 2967.8 does not provide: for postrelease control for felony murder; therefore, it was error to impose postrelease control in this case. *State v. Davis*, 8th Dist. Cuyahoga No. 95440, 2011-Ohio-2526, § 13. However, appellant has not been prejudiced thereby. *State v. Stokes*, 8th Dist. Cuyahoga No. 93154, 2010-Ohio-3181, § 9. In addition:

> [A] sentencing entry that incorrectly imposes postrelease control does not render the entire sentence void. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, § 26. Only that portion of the judgment that improperly imposes postrelease control is void. *Id.*; [*State] v. Evans*, 8th Dist. Cuyahoga No. 95692, 2011-Ohio-2153, § 8-9.

State v. Opalach, 8th Dist. Cuyahoga No. 100938, 2014-Ohio-5037, § 8.

{§13} The state has conceded this portion of the error. We thus direct that a nunc pro tunc entry be entered to delete the imposition of postrelease control. "A trial court may use a nunc pro tunc entry to correct mistakes in judgments, orders, and other parts of the record so the record speaks the truth. *State v. Spears*, 8th Dist. Cuyahoga No. 94089, 2010-Ohio-2229, § 1." *State v. Davis*, 8th Dist. Cuyahoga No. 95440, 2011-Ohio-2526, § 15.

B
Assignment of Error No. II.

{§14} Appellant's second assigned error challenges the felony murder conviction. We find that this error lacks merit.

{§15} Appellant was convicted under R.C. 2903.02(B):

> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

{§16} As the state aptly observes, appellant's guilty plea is a complete admission of guilt. In exchange for the guilty plea to felony murder, the remaining charges were nolled. By law, appellant's guilty plea constitutes a waiver of the asserted error here:

> [A] defendant waives all appealable errors that may have occurred at trial when he or she enters a guilty plea as part of a plea bargain, *unless* the purported errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Brusiter*, 8th Dist. Cuyahoga No. 98614, 2013-Ohio-1445, § 5; *State v. Milczewski*, 8th Dist. Cuyahoga No. 97138, 2012-Ohio-1743, § 5, citing *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991).

(Emphasis added.) *State v. Davis*, 8th Dist. Cuyahoga No. 101502, 2015-Ohio-1144, § 13.

{§17} In addition, a plea bargain is a matter of contract, which is enforceable by its terms. *See State v. Dunbar*, 8th Dist. Cuyahoga No. 87317, 2007-Ohio-1693, § 16, citing *State v. Carpenter*, 68 Ohio St.3d 59, 61, 623 N.E.2d 66 (1993).

{§18} Based on the foregoing, we find that the appellant's second assigned error fails.

IV. CONCLUSION

{§19} Appellant's convictions are affirmed; however, we remand the case to the trial court to issue a nunc pro tunc entry deleting the imposition of postrelease control.

{§19} Judgment is affirmed in part, vacated in part, and remanded.

It is ordered that appellee and appellant share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

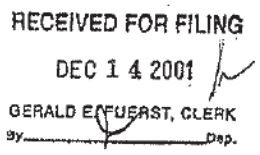
It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/_____
ANITA LASTER MAYS, JUDGE

KATHLEEN AN KEOUGH, P.J., and EILEEN T. GALLAGHER, J., CONCUR

APPENDIX F



IN THE COURT OF COMMON PLEAS
STATE OF OHIO
CUYAHOGA COUNTY, OHIO

STATE OF OHIO
Plaintiff,

vs.

DAMIEN FREEMAN,
Defendant.

CR-01-413757-ZA

Journal Entry

DEFENDANT IN COURT WITH COUNSEL DARYL DENNIE. PROSECUTING ATTORNEY EDWARD WALSH ALSO PRESENT. DEFENDANT WAS ADVISED OF ALL CONSTITUTIONAL RIGHTS AND PENALTIES.

DEFENDANT RETRACTS FORMER PLEA OF NOT GUILTY AND ENTERS A PLEA OF GUILTY TO MURDER ORC 2903, 02 (B) SENATE BILL TWO AS CHARGED IN COUNT ONE.

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THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSES OF R. C. 2929.11.

THE COURT IMPOSES A PRISON TERM AT LORAIN CORRECTIONAL INSTITUTION OF 15 YEARS TO LIFE. DEFENDANT TO RECEIVE 103 DAYS JAIL TIME CREDIT, TO DATE. POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR THE MAXIMUM PERIOD ALLOWED FOR THE ABOVE FELONY (S) UNDER R. C. 2967.28. DEFENDANT IS TO PAY COURT COSTS.

/s/_____
JUDGE WILLIAM J. COYNE

I CERTIFY the above to be a true copy of the said Judgment and Sentence. Given under my hand and seal of said Court this 14 day of Dec., 2001.

GERALD E. FUERST, Clerk, By_____
Deputy

Pursuant to the within order and sentence of the Court, I did convey the within named _____, to _____ on, _____, 2001.

GERALD T. MCFAUL, Sheriff, By _____
Deputy Sheriff.