

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS RHODES,

Petitioner,
v.

CASE NO. 07-14113
Hon. Lawrence P. Zatkoff

THOMAS BELL,
Respondent,

**OPINION AND ORDER ADOPTING MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION**

Petitioner, a State of Michigan prisoner proceeding *pro se*, filed an application for the writ of habeas corpus, alleging that he was denied effective assistance of counsel and a fair trial, in violation of his Fifth, Sixth and Fourteenth Amendment rights. This matter is currently before the Court on Magistrate Judge Paul J. Komives' Report and Recommendation (Docket #23), wherein the Magistrate Judge recommends that this Court deny both: (a) Petitioner's application for the writ of habeas corpus, and (b) a certificate of appealability. Petitioner timely filed objections to the Report and Recommendation.

After a thorough review of the court file (including the parties' motions and briefs), the Report and Recommendation, and Petitioner's objections to the Report and Recommendation, this Court will adopt the Report and Recommendation and enter it as the findings and conclusions of this Court. The Court will, however, briefly address Petitioner's objections.

Petitioner argues that the Magistrate Judge erred in concluding that Petitioner's petition is procedurally barred pursuant to Michigan Court Rule ("MCR") 6.508(D)(3). Petitioner contends that Respondent waived this defense when he failed to assert it as an affirmative defense when filing his initial responsive pleading to Petitioner's application for writ of habeas corpus. Relying on the Sixth Circuit's decision in *Scott v. Collins*, 286 F.3d 923, 930-31 (6th Cir. 2002), Petitioner thus argues that the Magistrate Judge erred by *sua sponte* recommending that the Court dismiss the petition *sua sponte*. The Court does not find Petitioner's objections persuasive.

First, Respondent's initial responsive pleading was a motion for summary judgment based on the application being time-barred, an argument this Court found persuasive in dismissing Petitioner's petition. Upon the Sixth Circuit remanding the case and the Magistrate Judge directing Respondent to respond, Respondent filed a second motion for summary judgment, this time based on the argument that Petitioner's petition is procedurally barred pursuant to MCR 6.508(D)(3). As such, Respondent raised the MCR 6.508(D)(3) defense; it was not raised by the Magistrate Judge *sua sponte*.

Second, the Court finds that Respondent's reliance on *Scott v. Collins* is misplaced, as that case was abrogated (overruled) by the U.S. Supreme Court in 2006. *See Day v. McDonough*, 547 U.S. 198, 209 (2006). Moreover, as the *Day* opinion clearly explains, courts may, on their own initiative, raise a petitioner's procedural default; in fact, a court of appeals can do so even if the State failed to raise the defense at any time before the district court. *Id.* at 206; *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004). *See also Caspari v. Bohlen*, 510 U.S. 383 (1994); *Granberry v. Greer*, 481 U.S. 129 (1987). Accordingly, the Court concludes that the well-established law provides that: (1) Respondent was not precluded from raising in its second motion for summary judgment before this Court that Petitioner's petition is procedurally barred pursuant to MCR 6.508(D)(3), and (2) this Court is not precluded from finding that Petitioner's petition is procedurally barred pursuant to MCR 6.508(D)(3), even though Respondent did not raise the procedural bar defense in his initial motion for summary judgment.

Therefore, for the reasons stated above, the Court hereby **ORDERS** that Petitioner's application for the writ of habeas corpus is **DENIED** and this cause of action is **DISMISSED WITH PREJUDICE**. In addition, the Court **DENIES** a certificate of appealability with respect to all of the claims raised in Petitioner's petition. Judgment shall be entered accordingly.

IT IS SO ORDERED.

S/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: May 31, 2011

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on May 31, 2011.

S/Marie E. Verlinde
Case Manager
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