

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MARK D. BACKHAUS,	:	CASE NO. 5:05-cv-2140
	:	
Petitioner,	:	
	:	
vs.	:	AMENDED OPINION & ORDER
	:	[Resolving Doc. No. 22]
UNITED STATES,	:	
	:	
Respondent.	:	
	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On September 9, 2005, Petitioner Bauckhaus filed this § 2255 action to set aside his conviction. [Doc. [1](#)]. On January 10, 2006, the United States opposed the action. [Doc. [7](#)]. This matter was referred automatically to United States Magistrate Judge James S. Gallas pursuant to Local Rule 72.2. [Doc. [3](#)].

On January 14, 2008, Magistrate Judge Gallas filed a Report and Recommendation recommending this Court the motion be granted with respect to his first, and third grounds to enable Bachaus to undertake a delayed appeal, but the Court not overturn his conviction at this time, pursuant to [Ludwig v. U.S. 162 F.3d 456, 459 \(6th Cir. 1998\)](#). [Doc. [22](#)]. Magistrate Gallas further recommends this Court deny the Petitioner’s second claim for relief that argues that the Petitioner’s counsel was ineffective for failing to move the Court to apply the safety valve provision under [18 U.S.C. §3553\(D\)](#). This claim, Magistrate Gallas recommends the Court find, is frivolous because no safety valve provision applies to the Petitioner’s offense of conviction. Finally, Magistrate Gallas recommends new counsel be appointed to the Petitioner Bachaus for his delayed appeal. See [Penson](#)

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[v. Ohio, 488 U.S. 75 \(1988\)](#). Neither party objects to the Magistrate Judge's recommendation.

The Federal Magistrates Act requires a district court to conduct a de novo review only of those portions of a Report and Recommendation to which the parties have made an objection. [28 U.S.C. § 636\(b\)\(1\)](#). Parties must file any objections to a Report and Recommendation within ten days of service. Failure to object within that time waives a party's right to appeal the magistrate judge's recommendation. [FED. R. CIV. P. 72\(a\)](#); *see* [Thomas v. Arn, 474 U.S. 140, 145 \(1985\)](#); [United States v. Walters, 638 F.2d 947 \(6th Cir. 1981\)](#). Absent objection, a district court may adopt the magistrate's report without review. [Thomas, 474 U.S. at 149](#). Moreover, having conducted its own review of the parties' briefs on the issue, this Court agrees with the conclusions of the Magistrate Judge.

Accordingly, the Court adopts in whole Magistrate Judge Gallas's findings of fact and conclusions of law and incorporates them fully herein by reference. The Court thus **GRANTS IN PART** the Petitioner's habeas petition with respect to his first and third grounds to allow the Petitioner Bachaus to undertake a delayed appeal, and appoints the Petitioner new counsel for the appeal. Further, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that, as to his second ground, an appeal from this decision could not be taken in good faith, and no basis exists on which to issue a certificate of appealability to the Petitioner. 28 U.S.C. §2653(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: February 19, 2008

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE