

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Barton A. Schilling, :  
 :  
 Petitioner : Civil Action 2:06-cv-316  
 :  
 v. : Judge Frost  
 :  
 Mike Sheets, Warden, : Magistrate Judge Abel  
 :  
 Respondent :

**REPORT AND RECOMMENDATION**

Petitioner Schilling, a state prisoner, brings this action for a writ of habeas corpus under the provisions of 28 U.S.C. §2254. This matter is before the Magistrate Judge on the Court's own motion. Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.

The petition alleges that on October 13, 2000, petitioner was convicted in the Court of Common Pleas for Tuscarawas County, Ohio for two counts of rape and two counts of gross sexual imposition. Petitioner alleges that he is held in the custody of respondents in violation of the Constitution of the United States.

This is a successive habeas corpus petition. Schilling filed a habeas corpus petition challenging these convictions June 30, 2003. *Barton T. Schilling v. Pat Hurley*, 2:03-cv-588. That petition was dismissed on the grounds that four of his claims were procedurally barred because he failed to present them to the Supreme Court of Ohio in a timely appeal of the decision of the Ohio Court of Appeals affirming the judgment of conviction. A fifth claim was denied as failing to state a claim for habeas corpus relief. Schilling did not appeal the January 27, 2005 judgment denying his habeas corpus petition.

Under the procedures adopted in *In re Jonathan Sims*, 111 F.3d 45, 47 (6th Cir. 1997), I RECOMMEND that this Court TRANSFER this case to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1631.

Petitioner's motion for leave to proceed *in forma pauperis* is GRANTED. It is ORDERED that petitioner be allowed to prosecute his action without prepayment of fees or costs and that judicial officers who render services in this action shall do so as if the costs had been prepaid.

The Clerk of Court is DIRECTED to mail or email a copy of this Order to the Attorney General of Ohio, Corrections Litigation Section, 150 East Gay Street 16th Floor, 43215.

If any party objects to this Order, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Order and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1)(B); Rule 72(b), Fed. R. Civ. P.

The parties are specifically advised that failure to object to the Order will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgment of the District Court. *Thomas v. Arn*, 474 U.S. 140, 150-52 (1985);

*United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also, Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989).

s/Mark R. Abel  
United States Magistrate Judge