

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

MAURICE LATHAN,

Petitioner,

CASE NO. 2:09-CV-1002

JUDGE SARGUS

MAGISTRATE JUDGE KEMP

v.

SHERRI DUFFEY, Warden,

Respondent.

OPINION AND ORDER

On January 4, 2010, the Magistrate Judge issued a *Report and Recommendation* pursuant to Rule 4 of the Rules governing Section 2254 Proceedings in the United States District Courts recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. For the reasons that follow, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner objects to the Magistrate Judge's recommendation of dismissal of his habeas corpus petition as unexhausted. Petitioner contends that he has exhausted his claims by filing a state habeas corpus petition in the Ohio Supreme Court. *See Objections*. However, as noted by the Magistrate Judge, petitioner's on-the-record claims must be raised on direct appeal, and not in state habeas corpus proceedings. *See, e.g., McBroom v. Russell*, 77 Ohio St.3d 47, 48 (1996), citing *Lunda v. Russell*, 70 Ohio St.3d 561, 639 (1994)(habeas corpus not available to challenge validity or sufficiency of an indictment, as

direct appeal constitutes an adequate remedy for such claims). The Ohio Supreme Court has held:


“A writ of habeas corpus is warranted in certain extraordinary circumstances ‘where there is an unlawful restraint of a person's liberty and there is no adequate remedy in the ordinary course of law.’ ” *Johnson v. Timmerman-Cooper* (2001), 93 Ohio St.3d 614, 616, 757 N.E.2d 1153, quoting *Pegan v. Cramer* (1996), 76 Ohio St.3d 97, 99, 666 N.E.2d 1091.

... “ ‘[H]abeas corpus, like other extraordinary writ actions, is not available where there is an adequate remedy at law.’ ” *Agee v. Russell* (2001), 92 Ohio St.3d 540, 544, 751 N.E.2d 1043, quoting *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 383, 667 N.E.2d 1194.

Drake v. Tyson-Parker, 101 Ohio St.3d 210 (2004). Therefore, petitioner must file an appeal of the appellate court's denial of his motion for leave to appeal before obtaining federal habeas corpus review. 28 U.S.C. §2254(b), (c).

Pursuant to 28 U.S.C. §636(b), this Court has conducted a de novo review. For the foregoing reasons, and for reasons detailed in the Magistrate Judge's *Report and Recommendation*, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

IT IS SO ORDERED.

 1-26-2010
EDMUND A. SARGUS, JR.
United States District Judge