

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

Fred Billiter, Jr.,	:	
	:	
Petitioner	:	Civil Action 2:10-cv-00434
	:	
v.	:	Judge Marbley
	:	
Warden, Noble Correctional Institution,	:	Magistrate Judge Abel
	:	
Respondents	:	
	:	

Report and Recommendation

Petitioner Fred Billiter, Jr., a state prisoner, brings this action under 28 U.S.C. §2254 for a petition for writ of habeas corpus. This matter is before the Magistrate Judge on respondent's June 18, 2010 motion to dismiss the petition as a successive petition or, in the alternative, transfer it to the United States Court of Appeals for the Sixth Circuit (doc. 3).

The petition alleges that on November 1, 1999 Billiter pleaded guilty in the Court of Common Pleas for Tuscarawus County, Ohio of GSI, pandering and rape. He was sentenced to 31 years incarceration. The petition alleges that Billiter's convictions violated the U.S. Constitution because (1) he was denied access to the courts when he did not receive an evidentiary hearing; (2) new evidence entitles him to an evidentiary hearing; (3) the state failed to properly execute warrants; and (4) his guilty plea was unlawfully coerced.

However, petitioner previously filed a habeas corpus petition on June 14, 2002. *Billiter v. Russell*, 5:02-cv-01120 (N.D. Ohio 2002). This new petition is a successive habeas

corpus petition. Under the provisions of 28 U.S.C. § 2244(b)(3)(A) and (C) a second or successive petition can-not be filed in the district court unless petitioner files an application in the court of appeals and that court issues an order authorizing the filing of the petition.

The Magistrate Judge RECOMMENDS that respondent's June 18, 2010 motion to dismiss the petition as a successive petition or, in the alternative, transfer (doc. 3) be GRANTED and that under the procedures adopted in *In re Jonathan Sims*, 111 F.3d 45, 47 (6th Cir. 1997) this Court TRANSFER this case to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1631.

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

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

s/Mark R. Abel
United States Magistrate Judge