

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Dechaun Toliver,

Petitioner,

v.

Warden, Noble Correctional Institution,

Respondent.

Case No. 2:21-cv-4703

Judge Michael H. Watson

Magistrate Judge Merz

OPINION AND ORDER


Petitioner moves to alter or amend the Court's Opinion and Order dismissing his habeas petition. Mot., ECF No. 15. Magistrate Judge Merz issued a Report and Recommendation ("R&R") recommending the Court deny Petitioner's motion because it fails to satisfy the standard for amendment under Federal Rule of Civil Procedure 59(e). R&R, ECF No. 16. Petitioner timely objected to that recommendation, asserting he cited an intervening change in controlling law. Obj., ECF No. 17.

Upon de novo review, the Court agrees that Petitioner fails to cite an intervening change in controlling law. As the magistrate judge explained, *Gibbs v. Huss*, 12 F. 4th 544 (6th Cir. Aug. 30, 2021), is not an intervening change in controlling law for the simple reason that it was available to Petitioner when he filed his reply brief. Moreover, *Gibbs* supports Petitioner's general proposition that a state procedural rule that is typically "adequate and independent" enough to foreclose review of a federal constitutional claim can nonetheless "be

inadequate in exceptional cases in which exorbitant application . . . renders the state ground inadequate to stop consideration of a federal question.” *Id.* at 551 (cleaned up). But *Gibbs* did not address the further issue of whether *res judicata* was a sufficiently adequate state procedural rule, and it does not undermine the soundness of the Court’s procedural default analysis in Petitioner’s case.

Accordingly, Petitioner’s objection is **OVERRULED**, the R&R is **ADOPTED**, and Petitioner’s motion to alter or amend judgment is **DENIED**. Reasonable jurists would not disagree with this conclusion, and Petitioner is **DENIED** a certificate of appealability. The Court **CERTIFIES** that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*. The Clerk shall terminate ECF No. 15.

IT IS SO ORDERED.


MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT