

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

SYLVANIUS O. FURLOW,

Plaintiff-Petitioner,

vs.

ERNIE MOORE, WARDEN,

Defendant-Respondent.

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Case No. 3:06cv108

JUDGE WALTER HERBERT RICE

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DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS  
OF UNITED STATES MAGISTRATE JUDGE (DOC. #17) IN THEIR  
ENTIRETY, AS SUPPLEMENTED HEREIN; PLAINTIFF-PETITIONER'S  
OBJECTIONS TO SAID JUDICIAL FILING (DOC. #18) OVERRULED;  
JUDGMENT TO ENTER IN FAVOR OF DEFENDANT-RESPONDENT AND  
AGAINST PLAINTIFF-PETITIONER, DISMISSING PETITION FOR WRIT OF  
HABEAS CORPUS AS PROCEDURALLY BARRED; TERMINATION ENTRY

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Pursuant to the reasoning and citations of authority set forth by the United States Magistrate Judge, in his Report and Recommendations filed January 25, 2007 (Doc. #17), and this Court's reasoning set forth below, as well as upon a thorough *de novo* review of this Court's file and the applicable law, said Report and Recommendations, as supplemented herein, are adopted in their entirety. The Plaintiff-Petitioner's Objections to said judicial filing (Doc. #18) are overruled. Judgment will be ordered entered in favor of Defendant-Respondent and against

Plaintiff-Petitioner, dismissing the Plaintiff-Petitioner's Petition for Writ of Habeas Corpus, upon its merits, as procedurally defaulted.

The Magistrate Judge predicated his procedural default analysis on the conclusion that the refusal of the Ohio Supreme Court to grant him leave to file a delayed appeal constituted an adequate and independent state ground for denying him the relief he seeks in this matter. The conclusion of the Magistrate Judge in that regard is unquestionably correct. *See e.g., Smith v. State of Ohio Dept. of Rehabilitation*, 463 F.3d 426, 430-32 (6<sup>th</sup> Cir. 2006). In addition, Judge Merz rejected Plaintiff-Petitioner's assertion that his procedural default was excused as a result of the failure of his appellate counsel to provide him a copy of the decision of the Clark County Court of Appeals affirming his conviction and sentence, given that the Plaintiff-Petitioner had failed to seek leave to appeal that decision to the Ohio Supreme Court within 45 days of receiving a copy of same. *Smith*, like this litigation, raised the identical issue of procedural default as a result of the petitioner's failure to file an appeal with the Ohio Supreme Court within 45 days of the decision by the state court of appeals. Therein, the petitioner similarly argued that his procedural default was excused, because of the failure of his appellate counsel to provide him a copy of the state appellate court's decision. The Sixth Circuit held that the petitioner's default was not excused, given that he had not sought leave to file a delayed appeal with the Ohio Supreme Court within 45 days of receiving the appellate court's decision. *Id.* at 435-36. In accordance with

*Smith*, therefore, this Court concludes that the failure of Plaintiff-Petitioner's appellate counsel to furnish him with a copy of the decision of the Clark County Court of Appeals, affirming his conviction and sentence, does not excuse his procedural default herein, given his failure to seek leave to file a delayed appeal in the Ohio Supreme Court within 45 days of the receipt of the appellate court's decision.

Given that the Court's decision herein would not be debatable among jurists of reason, and that Plaintiff-Petitioner has failed to make a substantial showing of the denial of a constitutional right, this Court denies a Certificate of Appealability and, given that any appeal herefrom would be objectively frivolous, this Court likewise denies any anticipated motion for leave to appeal *in forma pauperis*.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

February 4, 2008

/s/ Walter Herbert Rice

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WALTER HERBERT RICE  
UNITED STATES DISTRICT JUDGE

Copies to:

Sylvanius O. Furlow, Pro Se

Chief Magistrate Judge Michael R. Merz