

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

WALTER FRANK AGEE,

Petitioner,

vs.

**Civil Action No. 2:04 CV 13
(Maxwell)**

THOMAS L. McBRIDE, Warden,

Respondent.

ORDER

It will be remembered that the above-styled civil action was instituted on February 26, 2004, when *pro se* Petitioner, Walter Frank Agee, an inmate at Mt. Olive Correctional Complex in Mt. Olive, West Virginia, filed a Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody.

It will further be remembered that the above-styled civil action was referred to United States Magistrate Judge John S. Kaull for initial review and report and recommendation, pursuant to Standing Order of Reference for Prisoner Litigation Filed Pursuant To 28 U.S.C. § 2254 (Standing Order No. 5).

On February 8, 2005, United States Magistrate Judge John S. Kaull filed a Report And Recommendation in the above-styled civil action, wherein he recommended that the Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody be denied and dismissed with prejudice.

Magistrate Judge Kaull's Report And Recommendation expressly advised the Petitioner, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections to said Report And Recommendation within ten days after being served with a copy of the same.

The record herein reflects that on February 16, 2005, the Petitioner filed objections to the Magistrate Judge's Report And Recommendation in the form of a document entitled "Re: Answer To IV. Recommendation."

Upon examination of Magistrate Judge Kaull's Report And Recommendation, it appears to the Court that the issues raised by the Petitioner in his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody were thoroughly considered by Magistrate Judge Kaull in his Report And Recommendation. Furthermore, upon consideration of the Petitioner's objections to said Report And Recommendation, it appears to the Court that the Petitioner has not raised any issues that were not thoroughly considered by Magistrate Judge Kaull in said Report And Recommendation. Moreover, the Court, upon an independent *de novo* consideration of all matters now before it, is of the opinion that Magistrate Judge Kaull's Report And Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in the above-styled civil action. Therefore, it is

ORDERED that the Report And Recommendation entered by United States Magistrate Judge John S. Kaull on February 8, 2005 (Docket No. 12), be, and the same hereby is, **ACCEPTED** in whole and that this civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly, it is

ORDERED that the Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Docket No. 1), be, and the same is hereby, **DENIED** and **DISMISSED, with prejudice**.

Also pending in the above-styled civil action are two separate Motions by the Petitioner seeking the appointment of counsel. It is unclear from said Motions whether the Petitioner is seeking the appointment of counsel to represent him in the above-styled

habeas corpus proceeding or whether he is seeking the appointment of counsel to represent him in the event he decides to appeal this Court's rulings in the above-styled habeas corpus proceeding to the United States Court of Appeals for the Fourth Circuit. To the extend that the Petitioner seeks the appointment of counsel to represent him in the above-styled habeas corpus proceeding, the entry of this Order denying the Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody has rendered that request moot. To the extend that the Petitioner seeks the appointment of counsel to represent him in the event he decides to appeal the entry of this Order denying his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody to the United States Court of Appeals for the Fourth Circuit, such a request is premature until the Petitioner has actually filed a notice of appeal. For the foregoing reasons, it is, accordingly,

ORDERED that the following Motions be, and the same are hereby, **DENIED**:

1. Motion For Court Appointed Appellate Counsel To Prepare And File Final Appeal (Docket No. 14); and
2. Motion To Appoint Counsel (Docket No. 16).

It is further

ORDERED that, should the Petitioner desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$250.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, the Petitioner may, in accordance with the provisions of Rule 24(a) of the Federal Rules of Appellate

Procedure, seek leave to proceed *in forma pauperis* from the United States Court Of Appeals For The Fourth Circuit.

ENTER: March 15, 2006

/S/ Robert E. Maxwell
United States District Judge