FILED: February 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6954
(0:18-cv-01445-JFA)

CALVIN LYNDALE GADDY, a/k/a Calvin L. Gaddy

Plaintiff - Appellant

v.

U.S. DISTRICT COURT COLUMBIA; S.C. ATTORNEY GENERAL'S OFFICE; CLERK OF COURT JEFF HAMMOND; MRS. JACQUELYN D. AUSTIN; S.C. STATE ATTORNEY GENERAL

Defendants - Appellees

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Thacker, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix D

(17)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6954

CALVIN LYNDALE GADDY, a/k/a Calvin L. Gaddy,

Plaintiff - Appellant,

v.

U.S. DISTRICT COURT COLUMBIA; S.C. ATTORNEY GENERAL'S OFFICE; CLERK OF COURT JEFF HAMMOND; MRS. JACQUELYN D. AUSTIN; S.C. STATE ATTORNEY GENERAL,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Joseph F. Anderson, Jr.; Senior District Judge. (0:18-cv-01445-JFA)

Submitted: December 18, 2018 Decided: December 21, 2018

Before AGEE, THACKER, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Calvin Lyndale Gaddy, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Appendix (A)

ORiginAL

(18)

PER CURIAM:

Calvin Lyndale Gaddy appeals the district court's order dismissing as frivolous his complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983 (2012). The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) (2012). The magistrate judge recommended that relief be denied and advised Gaddy that failure to file timely, specific objections to this recommendation could waive appellate review of a district court order based upon the recommendation. RETURN BACK A PAGE TO: 6-27-2018

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. *Wright v. Collins*, 766 F.2d 841, 845-46 (4th Cir. 1985); *see also Thomas v. Arn*, 474 U.S. 140 (1985). Gaddy has waived appellate review by failing to file specific objections after receiving proper notice. PROSE LITIGANT being hinder Relief See Next page (2) plaintiff Filed Objection 6-27-2018

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

EXHIBIT V (4)

(19)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Calvin Lyndale Gaddy, #323551,

Plaintiff,

v.

U.S. District Court Columbia; SC Attorney General's Office; Clerk of Court Jeff Hammond; Mrs. Jacquelyn D. Austin; South Carolina State Attorney General,

Defendants.

C/A No.: 0:18-1445-JFA

CASE 18.6954 J.F.A

ORDER

Suspicious (UNPROFESSIONAL) Not Serve SUMMONS FROM ORIGINAL Complaint below ?

Calvin Lyndale Gaddy ("Plaintiff"), a state prisoner proceeding pro se, brings this civil action pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging violations of his constitutional rights. (ECF No. 1). Plaintiff filed this action *in forma pauperis* under 28 U.S.C. § 1915.[1] In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d) (D.S.C.), the case was referred to a Magistrate Judge for review.

I. PROCEDURAL BACKGROUND

Suspicious For tort Claim Misconduct

Plaintiff filed his Complaint on May 25, 2018. (ECF No. 1). On June 19, 2018, the

[1] Because the Complaint was filed pursuant to 28 U.S.C. §§ 1915, this Court is charged with screening Plaintiff's lawsuit to identify cognizable claims or to dismiss the Complaint if, after being liberally construed, it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

1 Exhibit 0001 - 2018

Appendix (C)

(20)

CASE 186954 J.FA

Magistrate Judge issued a Report and Recommendation ("Report"). (ECF No. 9). Plaintiff filed an objection to the Report on June 27, 2018. (ECF No. 13).

Thus, this matter is ripe for review.

II. LEGAL STANDARD ?

The Magistrate Judge assigned to this action[2] prepared a thorough Report and Recommendation, recommending the Court dismiss this action as frivolous and without issuance and service of process. (ECF No. 9 p. 13). Additionally, the Magistrate recommended that this action be deemed a "strike" pursuant to 28 U.S.C. § 1915(g). *Id.* (ECF No. 41). The Report sets forth, in detail, the relevant facts and standards of law on this matter, and this Court incorporates those facts and standards without a recitation.

Appellant Filed 59(E) Preserving Appellant Review

A district court is only required to conduct a de novo review of the specific portions of the Magistrate Judge's Report to which an objection is made. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); *Carniewski v. W. Va. Bd. of Prob. & Parole*, 974 F.2d 1330 (4th Cir. 1992). In the absence of specific objections to portions of the Magistrate's Report, this Court is not required to give an explanation for adopting the Magistrate's recommendation. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Thus, the Court must only review those portions of the Report to which Plaintiff has made a specific

with Objection to Report 59(E) was with Appellant Objection

[2] The Magistrate Judge's review is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2) (D.S.C.). The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b)(1).

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See: Above: For tort Wrong (1)

Page (2) Plaintiff Filed, Objection to Report & Recommendation June 27, 2018 ?

(21) Exhibit 0003 # - 2018

CASE: 18-6954. J.F.A.

written objection. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 316 (4th Cir. 2005).

"An objection is specific if it 'enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute.'" *Dunlap v. TM Trucking of the Carolinas, LLC*, No. 0:15-cv-04009-JMC, 2017 WL 6345402, at *5 n.6 (D.S.C. Dec. 12, 2017) (citing *One Parcel of Real Prop. Known as 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996)). A specific objection to the Magistrate's Report thus requires more than a reassertion of arguments from the Complaint or a mere citation to legal authorities. *See Workman v. Perry*, No. 6:17-cv-00765-RBH, 2017 WL 4791150, at *1 (D.S.C. Oct. 23, 2017). A specific objection must "direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982).

"Generally stated, nonspecific objections have the same effect as would a failure to object." *Staley v. Norton*, No. 9:07-0288-PMD, 2007 WL 821181, at *1 (D.S.C. Mar. 2, 2007) (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)). The Court reviews portions "not objected to—including those portions to which only 'general and conclusory' objections have been made—for *clear error*." *Id.* (emphasis added) (citing *Diamond*, 416 F.3d at 315; *Camby*, 718 F.2d at 200; *Orpiano*, 687 F.2d at 47).

III. ANALYSIS → Prose Without Attorney disadvantaged Request Jury trial

In his Objection to the Magistrate's Report, Plaintiff has made no specific

Exhibit # 0004 3 2018

(22) (2)

CASE 186954 J.F.A.

objections. *See* (ECF No. 13). To the contrary, Plaintiff merely cites to legal authorities, makes conclusory allegations, and reasserts arguments from his Complaint. *See id.* Without specific objections to the Report, this Court is not required to give an explanation for adopting the Magistrate's recommendation. *See Camby*, 718 F.2d at 199.

IV. CONCLUSION

After carefully reviewing the applicable laws, the record in this case, as well as the Report, this Court finds the Magistrate Judge's recommendation fairly and accurately summarizes the facts and applies the correct principles of law. Accordingly, the Court adopts the Magistrate's recommendation (ECF No. 9). Therefore, Plaintiff's Complaint is dismissed as frivolous and without issuance and service of process. Additionally, this action is hereby deemed a "strike" pursuant to 28 U.S.C. § 1915(g).

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

July 9, 2018
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

See (Above);

Exhibit 0005 # 2018

(3) #

(23)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Calvin Lyndale Gaddy, #323551, Plaintiff, vs. U.S. District Court Columbia; SC Attorney General's Office; Clerk of Court Jeff Hammond; Mrs. Jacquelyn D. Austin; South Carolina State Attorney General, Defendants.	C/A No. 0:18-1445-JFA-JDA **REPORT AND RECOMMENDATION**

Exhibit (d)

Calvin Lyndale Gaddy ("Plaintiff"), proceeding pro se, brings this civil action pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging violations of his constitutional rights. Plaintiff is a state inmate incarcerated at Kershaw Correctional Institution. He files this action in forma pauperis under 28 U.S.C. § 1915. For the reasons below, the undersigned recommends summary dismissal of this action as the case is frivolous and further recommends the action be deemed a "strike" pursuant to 28 U.S.C. § 1915(g).

(SEE) ALL Exhibit **BACKGROUND** (ANALYZE) ALL August 02, 2007

The allegations in the Complaint are difficult to decipher. However, liberally construed, the Complaint appears to allege that Defendants' actions individually and collectively constitute obstruction of justice, bias, prejudice, fraud, and vindictiveness, all in deprivation of Plaintiff's civil rights, including, among others, false imprisonment and violations of due process. [Doc. 1. at 1–3.] According to Plaintiff, Defendants have violated his due process rights under the Fourteenth Amendment by committing fraud, by engaging in erroneous judicial procedures, and by obstructing justice, all of which have

(24) page (2) (a) · Appendix (1) (G) Exhibit # (D) (2)

prejudiced Plaintiff and resulted in an "illegal" sentence. [*Id.* at 5.] Specifically, Plaintiff alleges he was never convicted by a "Legal Grand Jury in General Session by presiding Judge" in violation of S.C. Code § 14-9-210. [*Id.*] As such Plaintiff contends, his felony conviction and sentence in the Lancaster County Court of General Sessions is unlawful due to the absence of a properly documented indictment issued by a grand jury and because their was no presiding judge present on August 2, 2007. [*Id.* at 5–6.] Instead, because there was no properly impaneled grand jury the State of South Carolina printed false grand jury information. [*Id.* at 6.]

Following his conviction and sentence, Plaintiff filed a federal habeas corpus petition.[1] [*Id.*] However, in the habeas action, the magistrate judge relied on the State and failed to properly perform her job. [*Id.*] Plaintiff has attempted numerous times to dispute the indictment issue noted above—i.e., the fact that no grand jury was in session on his August 2007 case and the lack of impanelment documentation signed by a judge. [*Id.* at 7.] For his relief, Plaintiff seeks $250,000 in damages and relief from "imminent damage found of fraud upon courts." [*Id.*] Plaintiff attached to his Complaint 128 additional pages of documents, in which Plaintiff presents a "memorandum of law," annotated copies of various state and federal court records and orders in his prior cases, newspaper articles,

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[1] In his Complaint, Plaintiff cites the following cases, which he has filed in this Court: No. 8:10-cv-01743-JFA, No. 8:13-cv-2387-JFA-JDA, No. 8:13-cv-02541-JFA, No. 8:15-cv-02772-JFA, No. 8:15-cv-03706-JFA. The Court takes judicial notice that Plaintiff filed a habeas action in this Court pursuant to 28 U.S.C. § 2254, and this Court granted summary judgment for the Respondent. *See* Order, *Gaddy v. McCall*, No. 8:10-cv-1743-JFA-JDA (D.S.C. Sept. 27, 2011), ECF No. 56. *See also Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (courts "may properly take judicial notice of matters of public record"); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'").

2 1/2 #

Exhibit (3) - 2018

(25)

04

and South Carolina Department of Corrections ("SCDC") documents, including inmate grievance forms and responses. [*See* Docs. 1-1 and 1-2.]

STANDARD OF REVIEW

Pursuant to the provisions of 28 U.S.C. §636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(d) DSC, the undersigned is authorized to review the Complaint for relief and submit findings and recommendations to the District Court. Plaintiff filed this action pursuant to 28 U.S.C. § 1915, the in forma pauperis statute. This statute authorizes the District Court to dismiss a case if it is satisfied that the action "fails to state a claim on which relief may be granted," is "frivolous or malicious," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Further, Plaintiff is a prisoner under the definition in 28 U.S.C. § 1915A(c), and "seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). Thus, even if Plaintiff had prepaid the full filing fee, this Court is charged with screening Plaintiff's lawsuit to identify cognizable claims or to dismiss the Complaint if (1) it is frivolous, malicious, or fails to state a claim upon which relief may be granted, or (2) seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

As a pro se litigant, Plaintiff's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*). However, even under this less stringent standard, Plaintiff's Complaint is subject to summary dismissal. The mandated liberal construction afforded to pro se pleadings means that if the court can reasonably read the

pleadings to state a valid claim on which Plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented, *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999), or construct Plaintiff's legal arguments for him, *Small v. Endicott*, 998 F.2d 411, 417-18 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

Although the Court must liberally construe the pro se Complaint and Plaintiff is not required to plead facts sufficient to prove his case as an evidentiary matter in the Complaint, the Complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)); *see also Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (explaining that a plaintiff may proceed into the litigation process only when his complaint is justified by both law and fact); *cf. Skinner v. Switzer*, 562 U.S. 521 (2011) (holding that plaintiff need not pin his claim for relief to precise legal theory).

DISCUSSION

Plaintiff filed his Complaint pursuant to 42 U.S.C. § 1983, which "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). A civil action under § 1983 "creates a private

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right of action to vindicate violations of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Plaintiff also has asserted claims in his Complaint pursuant to *Bivens*, in which the Supreme Court established a direct cause of action under the Constitution of the United States against federal officials for the violation of federal constitutional rights. 403 U.S. at 389. A *Bivens* claim is analogous to a claim under 42 U.S.C. § 1983; however, federal officials cannot be sued under § 1983 because they do not act under color of state law. *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982). Case law involving a § 1983 claim is applicable in a *Bivens* action and vice versa. *See Butz v. Economou*, 438 U.S. 478, 499 (1978); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Turner v. Dammon*, 848 F.2d 440, 443–44 (4th Cir.1988). To establish a claim under *Bivens*, a plaintiff must allege two elements: (1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States and (2) the defendant did so under color of federal law. *See Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (setting forth requirements for a § 1983 claim); *see also Bivens*, 403 U.S. at 389 ("In [a previous case], we reserved the question whether violation of [the Constitution] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does."). A *Bivens*

claim, like a civil rights action filed pursuant to § 1983, "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

As noted, although the Court must liberally construe the pro se Complaint and Plaintiff is not required to prove his case as an evidentiary matter in the Complaint, Plaintiff's Complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. 662 (quoting *Twombly*, 550 U.S. 544); *see also Francis*, 588 F.3d at 193. "A claim has 'facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 388 (4th Cir. 2014).

Here, the entire Complaint should be dismissed because it is frivolous. The crux of this action appears to be a challenge to Plaintiff's custody in the SCDC as unlawful. To the extent Plaintiff may be seeking release from SCDC, release from prison is not available in this civil rights action.[2] *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (stating that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983"); *Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973) (attacking the length of duration of confinement is within the core of habeas

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[2] As noted, Plaintiff previously filed a habeas action in this Court pursuant to 28 U.S.C. § 2254, and the Court granted summary judgment to the Respondent, dismissing the Petition. *See* Order, *Gaddy v. McCall*, No. 8:10-cv-1743-JFA-JDA (D.S.C. Sept. 27, 2011), ECF No. 56.

corpus). And, to the extent Plaintiff is seeking damages or injunctive relief based on his alleged unlawful confinement in SCDC, his claim is premature because he is currently serving a sentence for a conviction that has not yet been invalidated. In *Heck*, the Supreme Court pronounced,

> . . . in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

Id. Further, the Supreme Court stated that,

> . . . when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id. This is known as the "favorable termination" requirement, which Plaintiff has not alleged. *See Wilson v. Johnson*, 535 F.3d 262, 263 (4th Cir. 2008).

The *Heck* holding applies to this case. Plaintiff seems to allege he was not legally convicted of the state crime for which he is currently serving a sentence. This Court takes judicial notice that Plaintiff was convicted of voluntary manslaughter in 2007 in the Lancaster County Court of General Sessions and received a 25-year sentence. *See* Report and Recommendation, *Gaddy v. Toal*, No. 8:13-cv-2541-JFA (D.S.C. Sept. 27, 2013), ECF No. 10, *adopted by*, ECF No. 15. Plaintiff does not allege that his conviction

has been invalidated, for example, by a reversal on direct appeal or a state or federal court's issuance of a writ of habeas corpus. A favorable determination on the merits of Plaintiff's § 1983 claim would imply that Plaintiff's criminal conviction and sentence, which he is currently serving, were invalid. Thus, this § 1983 claim should be dismissed because a right of action has not accrued.[3]

Additionally, this action is frivolous because Plaintiff has filed several prior civil actions on identical grounds seeking to attack the validity of his state conviction. This Court has ruled in Plaintiff's prior cases that the *Heck* rule bars such a claim. *See* Order, *Gaddy v. State of South Carolina*, No. 8:16-cv-1335-JFA-JDA (D.S.C. Aug. 9, 2016), ECF No. 20; Order, *Gaddy v. South Carolina Dept. of Corrections Office of General Counsel*, No. 8:15-cv-2772-JFA-JDA (D.S.C. Feb. 11, 2016), ECF No. 25, *appeal pending;* Order, *Gaddy v. Toal*, No. 8:13-cv-2541-JFA (D.S.C. Nov. 21, 2013), ECF No. 15; Order, *Gaddy v. South Carolina District Court*, No. 8:13-cv-2387-JFA-JDA (D.S.C. March 18, 2014), ECF No. 32. Thus, Plaintiff has been informed that this type of § 1983 claim has no basis in law, and his bringing such a claim again is frivolous. *See Nagy v. FMC Butner*, 376 F.3d 252, 256-57 (4th Cir. 2004) (explaining that "[t]he word 'frivolous' is inherently elastic and 'not susceptible to categorical definition.'"); *Worley v. Keller*, 475 F. App'x 484 (4th Cir. 2012) (a suit is frivolous if it lacks an arguable basis in law or fact).

Even though Plaintiff's Complaint, as a whole, is frivolous and subject to summary dismissal for the reasons stated above, the Court will nevertheless evaluate the claims

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[3] Because a right of action has not yet accrued, the limitations period will not begin to run until the cause of action accrues. *See Morris v. Cardillo*, C/A No. 0:10-443-JFA-PJG, 2010 WL 2722997, at *2 (D.S.C. April 15, 2010), *adopted by* 2010 WL 2722992 (D.S.C. July 9, 2010).

presented in the instant action as to the specific Defendants named in the Complaint. As an initial matter, Plaintiff has failed to allege any specific facts against any of the named Defendants. The sole allegation in the Complaint that can be liberally construed as a factual averment against any of the named defendants is Plaintiff's assertion that "the magistrate judge relied on state [sic], not doing her proper job." This allegation, without more, fails to state a cognizable claim for relief. Because Plaintiff has failed to allege any specific conduct by any of the named Defendants, he has failed to state a claim for relief. *See Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974) ("Where a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed."); *Newkirk v. Circuit Court of City of Hampton*, No. 3:14-cv-372-HEH, 2014 WL 4072212, at *2 (E.D. Va. Aug. 14, 2014) (finding the complaint was subject to summary dismissal where plaintiff made no factual allegations against the named defendants within the body of the pleading). The Court also will separately evaluate Plaintiff's claims generally made in his Complaint as to the named Defendants.

Defendant U.S. District Court Columbia

As noted, Plaintiff's Complaint is devoid of any factual allegations against Defendant U.S. District Court Columbia, and the Complaint therefore fails to state a claim for relief as to this Defendant. Further, the U.S. District Court is a federal courthouse in Columbia, South Carolina, and, as a building, cannot be sued pursuant to *Bivens*. *See Lester v. Greenville Cty. of Court House*, No. 6:12-cv-1318-TMC-TER, 2012 WL 2849391, at *2 (D.S.C. June 7, 2012), *Report and Recommendation adopted by* 2012 WL 2856517

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(D.S.C. July 11, 2012), *aff'd*, 489 F. App'x 714 (4th Cir. 2012); *Jones v. Lexington Cty. Det. Ctr.*, 586 F. Supp. 2d 444, 451 (D.S.C. 2008); *Preval v. Reno*, 57 F. Supp. 2d 307, 310 (E.D. Va. 1999) ("[T]he Piedmont Regional Jail is not a 'person,' and therefore not amenable to suit under 42 U.S.C. § 1983."). It is well settled that only "persons" may act under color of federal law; therefore, a defendant in a *Bivens* action, like a § 1983 claim, must qualify as a "person." *See* 42 U.S.C. § 1983; *Monell v. Dep't. of Soc. Serv.*, 436 U.S. 658, 690 n.55 (1978) (noting that for purposes of § 1983 a "person" includes individuals and "bodies politic and corporate"). Accordingly, the U.S. District Court in Columbia is not a "person" subject to suit under *Bivens* and should be dismissed as a defendant. *See Quadir v. Cooke*, No. 4:08-cv-498-TLW-JRM, 2008 WL 5215610, at *8 (D.S.C. Dec. 11, 2008); *Cyrus v. U.S. Marshals of Columbia, SC*, No. 8:05-cv-1384-HFF-BHH, 2007 WL 601610, at *3 n.5 (D.S.C. Feb. 21, 2007), *amended sub nom.* 2007 WL 809608 (D.S.C. Feb. 27, 2007), *aff'd sub nom.* 249 F. App'x 969 (4th Cir. 2007).

Defendants SC Attorney General's Office and State Attorney General

It is unclear why the South Carolina Attorney General's Office and State Attorney General are named as Defendants in the present matter. The Complaint contains no allegations of wrongdoing against these two Defendants and they are present only in the caption of the pleading. As a result, no plausible claim is stated against these two Defendants and they are entitled to summary dismissal. *See Potter*, 497 F.2d at 1207; *Newkirk*, 2014 WL 4072212, at *2. In the absence of substantive allegations of wrongdoing against these named Defendants, the Court is unable to liberally construe any type of plausible cause of action arising from the Complaint against them. *See Cochran*

v. Morris, 73 F.3d 1310, 1315 (4th Cir. 1996) (explaining statute allowing dismissal of in forma pauperis claims encompasses complaints that are either legally or factually baseless); *Weller v. Dep't of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 389 n.2 (4th Cir. 1990) (finding dismissal proper where there were no allegations to support claim); *Odom v. Trident Hosp. Dir.*, No. 5:17-cv-02540-RMG-KDW, 2017 WL 6016407, at *4 (D.S.C. Nov. 1, 2017), *Report and Recommendation adopted by* 2017 WL 5992088 (D.S.C. Dec. 4, 2017).

Defendant Clerk of Court Jeff Hammond

As noted, Plaintiff fails to allege any specific facts against Clerk of Court Jeff Hammond that would subject this Defendant to liability under § 1983. Furthermore, this Defendant has absolute immunity from suit. It is well settled that judges have absolute immunity from a claim for damages arising out of their judicial actions. *See Chu v. Griffith*, 771 F.2d 79, 81 (4th Cir. 1985). Notably, clerks of court and other court support personnel are entitled to immunity similar to judges when performing their quasi-judicial duties. *See Jarvis v. Chasanow*, 448 F. App'x 406 (4th Cir. 2011); *Stevens v. Spartanburg Cnty. Probation, Parole, and Pardon Serv.*, No. 6:09-cv-795-HMH-WMC, 2010 WL 678953, at *7 (D.S.C. Feb. 23, 2010). "Absolute immunity 'applies to all acts of auxiliary court personnel that are basic and integral part[s] of the judicial function.'" *Jackson v. Houck*, 181 F. App'x 372, 373 (4th Cir. 2006) (quoting *Sindram v. Suda*, 986 F.2d 1459, 1461 (D.C. Cir. 1993)). Here, the alleged wrongful acts, or failures to act, were part of the Clerk of Court's alleged quasi-judicial functions. *See Baccus v. Wickensimer*, No. 9:13-cv-1977-DCN-BM, 2013 WL 6019469, at *2–3 (D.S.C. Nov. 13, 2013) (explaining that judicial immunity is from

claims for damages and injunctive relief). Thus, this Defendant has absolute quasi-judicial immunity from this lawsuit.

Defendant Jacquelyn D. Austin

The undersigned magistrate judge has absolute judicial immunity from this civil action and should be dismissed from this case. It is well settled that judges have absolute immunity from a claim for damages arising out of their judicial actions unless they acted in the complete absence of all jurisdiction. *See Mireles v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 351–64 (1978); *see also Chu v. Griffith*, 771 F.2d 79, 81 (4th Cir. 1985) (explaining that even if a challenged judicial act was unauthorized by law, a judge still has immunity from a suit seeking damages). Whether an act is judicial or non-judicial relates to the nature of the act, such as whether it is a function normally performed by a judge and whether the parties dealt with the judge in his judicial capacity. *Mireles*, 502 U.S. at 12. Immunity applies even when the judge's acts were in error, malicious, or in excess of his authority. *Id.* at 12–13. Absolute immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis omitted); *see also Harlow*, 457 U.S. at 818 (explaining immunity presents a threshold question). Here, Plaintiff appears to allege that the undersigned did not properly perform her judicial duties because she relied on the "State." These allegations relate to judicial actions. Thus, because the alleged misconduct of the undersigned arose out of her judicial actions, judicial immunity squarely applies and should bar this lawsuit against her.

RECOMMENDATION

Based on the foregoing, it is recommended that the District Court dismiss this action as frivolous and without issuance and service of process. It is also recommended that this action be deemed a "strike" pursuant to 28 U.S.C. § 1915(g).[4] *See Neitzke v. Williams*,

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[4] Pursuant to 28 U.S.C. § 1915(e)(2) and (g), an inmate must prepay the filing fee if he has had three cases "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." *Id.* The Fourth Circuit has set forth the standard for determining which cases are subject to the "three-strikes" rule, explaining that "a dismissal without prejudice for failure to state a claim does not fall within the plain and unambiguous meaning of § 1915(g)'s unqualified phrase "dismissed . . . [for] fail[ure] to state a claim." *McLean v. United States*, 566 F.3d 391 (4th Cir. 2009). While a dismissal without prejudice for failure to state a claim does not count as a strike, the Fourth Circuit explained that "nothing in our analysis of dismissals for failure to state a claim suggests that dismissals for frivolousness should be exempted from § 1915(g)'s strike designation, even when the dismissal is rendered without prejudice." *McLean*, 566 F.3d at 399. Citing *Neitzke v. Williams*, 490 U.S. 319 (1989), the Fourth Circuit also noted that "*Neitzke* makes clear that a dismissal for frivolousness is of a qualitatively different character than a dismissal for failure to state a claim. As a result, our holding today should not be read to indicate that a dismissal for frivolousness that is rendered without prejudice should avoid a strike designation." *McLean*, 566 F.3d at 400. Thus, in this Circuit, under *McLean*, a "strike" may be "thrown" after review of the case, (1) if it is frivolous, or (2) if it fails to state a claim upon which relief may be granted but only if the case is dismissed with prejudice. *See, e.g., Demos v. U.S. Sec'y of Def.*, No. 2:13-1-TMC-BHH, 2013 WL 3353906, at *1 (D.S.C. May 16, 2013), *report and recommendation adopted by* 2013 WL 3353919 (D.S.C. July 3, 2013). Here, the undersigned recommends that this action be deemed a "strike" because the action is frivolous.

As discussed above, under *Heck*, a prisoner must show that his conviction or sentence has been reversed or vacated before he can recover in tort for the unlawful conviction or sentence. Where, as here, the conviction or sentence has not been overturned, the inmate's constitutional tort action under § 1983 must be dismissed. Several courts have held that a dismissal under *Heck* constitutes a "strike" under 28 U.S.C. § 1915(e)(2) and (g). *See, e.g., Sandles v. Randa*, 945 F. Supp. 169, 171 (E.D. Wis. 1996); *Sanders v. DeTella*, No. 96-cv-4481, 1997 WL 126866, at *3 (N.D. Ill. Mar. 13, 1997); and *Grant v. Sotelo*, No. 2:98-cv-0347, 1998 WL 740826, at *1 (N.D. Tex. Oct. 19, 1998) (following the decisions of *Sandles* and *Sanders*, but recognizing that "the question may be raised whether a cause dismissed pursuant to *Heck* considerations should be considered for purposes of computing the three strikes. . ."); *see also Adepegba v. Hammons*, 103 F.3d 383, 384 (5th Cir. 1996) (noting that the district court dismissed a

490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *McLean v. United States*, 566 F.3d 391, 399–400 (4th Cir. 2009). **Plaintiff's attention is directed to the important notice on the next page.**

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

June 19, 2018
Greenville, South Carolina

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claim as frivolous under *Heck*, which counted as a strike, and declining to address the propriety of the district court's dismissal because plaintiff had not exhausted his appeal); *Okoro v. Bohman*, 164 F.3d 1059, 1061-1064 (7th Cir. 1999) (discussing application of the "three strikes" statute in cases barred by *Heck*). Accordingly, the undersigned concludes that this action is frivolous under 28 U.S.C. § 1915(e)(2) and (g) and should be deemed a "strike" under the statute.