UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6227

GREGORY GREEN,

Plaintiff - Appellant,

v.

ALAN WILSON, Attorney General of South Carolina,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, Chief District Judge. (4:18-cv-03289-RBH)

Submitted: May 16, 2019

Decided: May 21, 2019

Before DIAZ and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Gregory Green, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Appendix A.

PER CURIAM:

Gregory Green appeals the district court's order accepting the recommendation of the magistrate judge and dismissing Green's 42 U.S.C. § 1983 (2012) complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Green v. Wilson*, No. 4:18-cv-03289-RBH (D.S.C. Feb. 4, 2019). 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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Gregory Green, Plaintiff, v. Alan Wilson, *Attorney General of South Carolina*, Defendant.	)	Civil Action No.: 4:18-cv-03289-RBH **ORDER**

This matter is before the Court for consideration of Plaintiff's objections to the Report and Recommendation ("R & R") of United States Magistrate Judge Paige J. Gossett, who recommends summarily dismissing Plaintiff's pro se complaint with prejudice.[1] *See* ECF Nos. 8 & 10.

Standard of Review

The Magistrate Judge makes only a recommendation to the Court. The Magistrate Judge's recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court must conduct a de novo review of those portions of the R & R to which specific objections are made, and it may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The Court must engage in a de novo review of every portion of the Magistrate Judge's report

[1] The Magistrate Judge issued the R & R in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (D.S.C.), and she reviewed Plaintiff's complaint pursuant to the screening provisions of 28 U.S.C. §§ 1915 and 1915A. The Court is mindful of its duty to liberally construe the pleadings of pro se litigants. *See Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). *But see Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) ("Principles requiring generous construction of pro se complaints are not, however, without limits. *Gordon* directs district courts to construe pro se complaints liberally. It does not require those courts to conjure up questions never squarely presented to them.").

Appendix B.

to which objections have been filed. *Id.* However, the Court need not conduct a de novo review when a party makes only "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate [Judge]'s proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of specific objections to the R & R, the Court reviews only for clear error, *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), and the Court need not give any explanation for adopting the Magistrate Judge's recommendation. *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983).

Discussion[2]

Plaintiff, a state prisoner proceeding pro se, filed a complaint pursuant to 42 U.S.C. § 1983 against the Attorney General of South Carolina alleging South Carolina Appellate Court Rule 243 is unconstitutional. *See* ECF No. 1. Specifically, Plaintiff contends the *intermediate* state appellate court—the South Carolina Court of Appeals—was not "obligated " to hear his post-conviction relief ("PCR") appeal but should have been. *Id.* at pp. 5–7. The Magistrate Judge recommends summarily dismissing Plaintiff's complaint with prejudice. *See* R & R at pp. 1, 4. Plaintiff has filed objections to the R & R. *See* ECF No. 10.

"Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Att'y's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009); *see also LaMar v. Ebert*, No. 18-6417, 2018 WL 6266759, at *4 (4th Cir. 2018) (articulating the *Osborne* standard in a § 1983 action).[3] The South

---

[2] The R & R thoroughly summarizes the factual and procedural background of this case, as well as the applicable legal standards.

[3] Plaintiff has previously filed a habeas petition pursuant to 28 U.S.C. § 2254, which the Court considered on the merits and dismissed with prejudice. *See Green v. Beckwith*, No. 0:17-cv-02784-RBH, 2018 WL 6829011 (D.S.C. Dec. 28, 2018). However, he has filed the instant action pursuant to 42 U.S.C. § 1983, and therefore this

Carolina Uniform Post-Conviction Relief Act provides that a final judgment in a PCR action "may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules." S.C. Code Ann. § 17–27–100. South Carolina Appellate Court Rule 243—the rule challenged by Plaintiff—provides that "[a] final decision entered under the Post-Conviction Relief Act shall be reviewed *by the Supreme Court* upon petition of either party for a writ of certiorari, according to the procedure set forth in this Rule." Rule 243(a), SCACR (emphasis added). However, Rule 243 provides that "[t]he Supreme Court *may* transfer a case filed under this rule to the Court of Appeals," and if the case is in fact transferred to and decided by the S.C. Court of Appeals, the Supreme Court can review that decision. Rule 243(l), SCACR (emphasis added); *see, e.g.*, *Buckson v. State*, 815 S.E.2d 436, 438 (S.C. 2018). However, Rule 243 makes clear that PCR appeals go directly to the S.C. Supreme Court, not the S.C. Court of Appeals (which will decide a PCR appeal only if it is transferred there).

As the Magistrate Judge correctly observes, Plaintiff has not provided any authority supporting his contention that an intermediate state appellate court (like the S.C. Court of Appeals) must hear a PCR appeal before a superior state appellate court does.[4] Moreover, he has not shown Rule 243 is

---

case does not appear to be a successive § 2254 petition in light of *Osborne*, wherein the Supreme Court "assume[d] without deciding," 557 U.S. at 67, that the plaintiff could challenge Alaska's PCR procedures via § 1983. *See* 557 U.S. at 66–67 ("While Osborne's claim falls within the literal terms of § 1983, we have also recognized that § 1983 must be read in harmony with the habeas statute. . . . While we granted certiorari on this question, our resolution of Osborne's claims does not require us to resolve this difficult issue."). Accordingly, the Court will assume *without deciding* that Plaintiff can bring a similar challenge here without violating the bar against successive petitions.

[4] Notably, in Plaintiff's PCR appeal, the S.C. Supreme Court did in fact transfer the appeal to the S.C. Court of Appeals; and the S.C. Court of Appeals issued the order denying certiorari to review the PCR court's decision. Thus, it is unclear why Plaintiff even alleges "there w[as] no intermediate court mandated to address his assignments of error." ECF No. 1 (Complaint) at p. 7. *See Green v. State*, No. 2016-000658, Order dated Mar. 2, 2017, *available at* https://ctrack.sccourts.org/public/ (South Carolina Appellate Case Management System). *See generally Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("[F]ederal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue[.]"). Finally, the Court takes judicial notice of the filings in Plaintiff's prior § 2254 action, including the aforementioned order by the S.C. Court of Appeals. *See Green v. Beckwith*, No. 0:17-cv-02784-RBH, at ECF No. 24-9 (D.S.C.).

"fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69. Plaintiff has failed to state a plausible claim for relief, and therefore the Court will dismiss this case with prejudice.[5]

Conclusion

For the foregoing reasons, the Court **ADOPTS** the R & R [ECF No. 8] and **DISMISSES** this action *with prejudice and without issuance and service of process.*

IT IS SO ORDERED.

Florence, South Carolina
February 4, 2019

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

[5] The Court agrees with the Magistrate Judge that Plaintiff cannot cure the defects in his complaint by mere amendment. *See* R & R at p. 4 n.2 (citing *McLean v. United States*, 566 F.3d 391, 400–01 (4th Cir. 2009)); *see generally Goode v. Cent. Virginia Legal Aid Soc'y, Inc.*, 807 F.3d 619, 623 (4th Cir. 2015). Accordingly, the Court is dismissing this action with prejudice.

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

Gregory Green, Plaintiff, v. Alan Wilson, *Attorney General of South Carolina*, Defendant.	)	C/A No. 4:18-3289-RBH-PJG **REPORT AND RECOMMENDATION**

The plaintiff, Gregory Green, a self-representediok state prisoner, brings this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff files this action *in forma pauperis* under 28 U.S.C. § 1915 and § 1915A. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.). Having reviewed the Complaint in accordance with applicable law, the court concludes that it should be summarily dismissed with prejudice and without issuance and service of process.

I. Procedural Background

Plaintiff, an inmate at the Manning Correctional Institution of the South Carolina Department of Corrections, brings this action pursuant to 42 U.S.C. § 1983 against the Attorney General of South Carolina. (Compl., ECF No. 1 at 2, 4.) Plaintiff alleges the State of South Carolina violated his right to equal protection and due process under the Fourteenth Amendment because his appeal from his state post-conviction relief proceeding went straight to the South Carolina Supreme Court rather than the Court of Appeals. (Id. at 4-6.) In other words, Plaintiff argues South Carolina

Appendix C.

PJG

Appellate Court Rule 243[1] is "unconstitutional as applied" because there is no intermediate appellate court to hear his appeal from his post-conviction relief proceeding. (Id.) Plaintiff seeks an injunction ordering the State to "implement an intermediate court" that will address constitutional claims in post-conviction relief appeals. (Id. at 7.)

II. Discussion

A. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Complaint pursuant to the procedural provisions of the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), including 28 U.S.C. § 1915 and 28 U.S.C. § 1915A. The Complaint has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit, and is also governed by 28 U.S.C. § 1915A, which requires the court to review a complaint filed by a prisoner that seeks redress from a governmental entity or officer or employee of a governmental entity. See McLean v. United States, 566 F.3d 391 (4th Cir. 2009). Section 1915A requires, and § 1915 allows, a district court to dismiss the case upon a finding that the action is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A(b).

In order to state a claim upon which relief can be granted, the plaintiff must do more than make mere conclusory statements. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp.

[1] "A final decision entered under the Post-Conviction Relief Act shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari, according to the procedure set forth in this Rule." SCACR 243(a).

PJG

v. Twombly, 550 U.S. 544, 555 (2007). Rather, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. The reviewing court need only accept as true the complaint's factual allegations, not its legal conclusions. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555.

This court is required to liberally construe *pro se* complaints, which are held to a less stringent standard than those drafted by attorneys. Erickson v. Pardus, 551 U.S. 89, 94 (2007); King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016). Nonetheless, 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 (4th Cir. 1990); see also Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for "all civil actions").

B. Analysis

The Complaint is filed 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)). To state a claim under § 1983, a plaintiff must allege: (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).

However, Plaintiff does not have a constitutional right to access to an intermediate appellate court in an appeal from his state post-conviction relief proceeding. Prisoners have only a "limited interest" in post-conviction proceedings, and there is no due process violation unless "the State's procedures for postconviction relief offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle

PJG

of fundamental fairness in operation." Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009); see also LaMar v. Ebert, __ F. App'x __, 2018 WL 6266759, at *4 (4th Cir. Nov. 30, 2018) ("In such circumstances, the State has more flexibility in deciding what procedures are needed in the context of postconviction relief, and due process does not dictate the exact form of post-conviction assistance a State must provide." (internal quotations and alterations omitted) (quoting Morrison v. Peterson, 809 F.3d 1059, 1065 (9th Cir. 2015)). Plaintiff has identified no authority that establishes a constitutional right to access an intermediate appellate court in addition to a superior appellate court, and Plaintiff fails to provide any justification for the court to find that such a right should be recognized here. Thus, Plaintiff fails to state a claim upon which relief can be granted.

III. Conclusion

For the foregoing reasons, it is recommended that the Complaint be dismissed with prejudice and without issuance and service of process.[2]

Paige J. Gossett

January 4, 2019
Columbia, South Carolina

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

[2] See McLean v. United States, 566 F.3d 391, 400-01 (4th Cir. 2009) (providing that dismissal of a *pro se* litigant's claim with prejudice is appropriate where the claim is substantively meritless and cannot be cured by amendment of the complaint).

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).