UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6203

ROBERT WILLIAM WAZNEY,

Petitioner - Appellant,

v.

WARDEN OF LEE CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:18-cv-02825-HMH)

Submitted: July 16, 2019 Decided: July 24, 2019

Before KING and RICHARDSON, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Robert William Wazney, Appellant Pro Se.

PER CURIAM:

Robert William Wazney seeks to appeal the district court's orders accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2012) petition. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Wazney has not made the requisite showing. Accordingly, we deny leave to proceed in forma pauperis, deny a certificate of appealability, and dismiss the appeal. In light of this disposition, we also deny Wazney's motion for appointment of counsel. 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.

DISMISSED

FILED: September 4, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6203
(6:18-cv-02825-HMH)

ROBERT WILLIAM WAZNEY

Petitioner - Appellant

v.

WARDEN OF LEE CORRECTIONAL INSTITUTION

Respondent - Appellee

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 King, Judge Richardson, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

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

Robert William Wazney,	)	
	)	
Petitioner,	)	C.A. No. 6:18-2825-HMH-KFM
	)	
vs.	)	**OPINION & ORDER**
	)	
Warden of Lee Correctional Institution,	)	
	)	
Respondent.	)	

This matter is before the court with the Report and Recommendation of United States Magistrate Judge Kevin F. McDonald, made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 of the District of South Carolina.[1] Robert William Wazney ("Wazney"), a state prisoner proceeding pro se, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. In his Report and Recommendation, Magistrate Judge McDonald recommends dismissing the petition without prejudice and without leave to amend because Wazney has not fully exhausted his state court remedies. (R&R 5, ECF No. 16.)

Wazney filed objections to the Report and Recommendation. (Objs., generally, ECF No. 24.) Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir. 1984). In the absence of specific objections to the Report and

[1] The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270-71 (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. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

Upon review, the court finds that many of Wazney's objections are non-specific, unrelated to the dispositive portions of the magistrate judge's Report and Recommendation, or merely restate his claims. The court, however, was able to glean two specific objections. Wazney objects (1) to the magistrate judge's finding that Wazney has not exhausted his state court remedies and (2) to the magistrate judge's finding that Wazney cannot cure the deficiencies in his petition by amendment. (Objs. 2-5, 7-8, ECF No. 24.)

First, Wazney submits that the magistrate judge erroneously concluded that Wazney has not exhausted his state court remedies. (Id. 2-5, ECF No. 24.) Wazney further argues that pursuing the available state court remedies is futile and that there is an "absence of state corrective process." (Id. 5, ECF No. 24.) A state prisoner must first exhaust state remedies before seeking federal habeas relief. See 28 U.S.C. § 2254(b)(1); Joseph v. Angelone, 184 F.3d 320, 328 (4th Cir. 1999). "In order to exhaust his or her claims in state court, a South Carolina petitioner must file an application for relief under the South Carolina Uniform Post[-]Conviction Procedure Act," S.C. Code Ann. § 17-27-10, *et seq.* Macon v. Cox, C.A. No. 6:04-1311-HFF, 2005 WL 4572216, at *4 (D.S.C. June 13, 2005) (unpublished), aff'd No. 05-7371, 2006 WL 786839 (4th Cir. Mar. 28, 2006) (unpublished). However, if there is an absence of state corrective process or the state process is ineffective to protect the petitioner's rights, a petitioner need not present his claim to the state courts. 28 U.S.C. § 2254(b)(1)(B).

Wazney alleges that he mailed an application for post-conviction relief ("PCR") to the Sumter County Court of Common Pleas on May 8, 2018, via certified mail, return receipt

requested, which was signed for on May 10, 2018. (Objs. 1, ECF No. 24.) In response, it appears the Sumter County Clerk of Court mailed Wazney a blank PCR application with a handwritten note attached informing him, "We have no PCR application on file for you. You must complete this application and return it to our office." (§ 2254 Pet. Attach. 1 (State Ct. Docs. 5), ECF No. 1-1.) However, Wazney did not follow these instructions. Instead, Wazney then mailed his PCR application to the South Carolina Supreme Court as an original action and to South Carolina Circuit Court Judge R. Ferrell Cothran, Jr. (Objs. 6, ECF No. 24.) The South Carolina Supreme Court dismissed Wazney's application on August 28, 2018, because the matter could be heard in the state trial court. (§ 2254 Pet. Attach. 1 (State Ct. Docs. 24), ECF No. 1-1.) See Key v. Currie, 406 S.E.2d 356, 357 (S.C. 1991) (holding that the South Carolina Supreme Court will not entertain matters in its original jurisdiction, absent an extraordinary reason, when the matter can be entertained in the state trial court).

Additionally, Julie Coleman ("Coleman"), Assistant Attorney General for South Carolina, informed Wazney in an August 2, 2018 letter that he needed to file his PCR application with the Sumter County Clerk of Court in order for the South Carolina Attorney General's office to open a file regarding his PCR application. (§ 2254 Pet. Attach. 1 (State Ct. Docs. 1), ECF No. 1-1.) Wazney attached this letter to his petition in this case. Thus, Wazney plainly received the letter. Wazney did not follow these instructions and did not resubmit his PCR application to the Sumter County Clerk of Court. Thus, Wazney has not exhausted his state court remedies. Moreover, despite Wazney's assertion that South Carolina's PCR procedure is ineffective, the United States Court of Appeals for the Fourth Circuit has held that South Carolina's "state post-conviction procedure provides an effective remedy to [ ] petitioners and is one which should be exhausted

before federal relief can be considered." Patterson v. Leake, 556 F.2d 1168, 1173 (4th Cir. 1977). Accordingly, this objection is without merit.

Second, Wazney argues that he should be granted leave to amend his petition because he is "an indigent, incarcerated, pro se, misconvicted [sic] litigant who is not trained in the law." (Objs. 7, ECF No. 24.) However, Wazney's status as an indigent, pro se litigant does not affect the dispositive fact that the deficiencies in his petition cannot be cured by amendment because he has not exhausted his state court remedies. Goode v. Cent. Va. Legal Aid Soc'y, Inc., 807 F.3d 619, 623 (4th Cir. 2015). Thus, this objection is without merit. Accordingly, the court declines to afford leave to amend.

Therefore, after a thorough review of the magistrate judge's Report and the record in this case, the court adopts Magistrate Judge McDonald's Report and Recommendation and incorporates it herein by reference.

It is therefore

ORDERED that Wazney's petition, docket number 1, is dismissed without prejudice and without leave to amend. It is further

ORDERED that a certificate of appealability is denied because Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
December 13, 2018

NOTICE OF RIGHT TO APPEAL

Petitioner is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Robert William Wazney, Petitioner, vs. Warden of Lee Correctional Institution, Respondent.	Civil Action No. 6:18-2825 **REPORT OF MAGISTRATE JUDGE**

The *pro se* petitioner, Robert W. Wazney, brings this action pursuant to 28 U.S.C. § 2254 seeking habeas corpus relief. In accordance with the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (D.S.C.), the undersigned is authorized to review such petitions for relief and submit findings and recommendation to the District Court.

BACKGROUND

The petitioner is a state prisoner currently incarcerated at Lee Correctional Institution in Bishopville, South Carolina (doc. 1 at 1). He filed this action on October 18, 2018, seeking to vacate his 2015 convictions for Second Degree Sexual Misconduct with a Minor, entered in the Sumter County Court of General Sessions[1](*Id.*). The petitioner indicated he is serving an 80-year sentence (*Id.*).

The petitioner asserts that, following his conviction, he filed a direct appeal to the South Carolina Supreme Court, which was transferred to the South Carolina Court of Appeals (*Id.*). He indicates the South Carolina Court of Appeals dismissed the appeal on October 16, 2017 (*Id.* at 2). The petitioner states he then filed a petition for a writ of

[1] Review of the Public Index for the Third Judicial Circuit reflects that the petitioner was convicted of four counts of Second Degree Sexual Misconduct with a Minor. *See* http://publicinedex.sccourts.org/Sumter/PublicIndex/CaseDetails last visited November 8, 2018.

certiorari to the South Carolina Supreme Court which was dismissed on January 24, 2018 (*Id.* at 3). The record reflects that the petitioner has not filed an application for post-conviction relief in the state court. However, he appears to contend that he attempted to do so, but the Clerk of Court would not file his application (*Id.* at 6).

The petitioner filed the instant petition on October 18, 2108, alleging one ground for relief: that "[t]he pretrial restraint of legitimate untainted assets needed to retain counsel of choice violates the sixth amendment"(*Id.* at 5). He claims to have exhausted his remedies and asks this court to vacate his conviction and sentence. (*Id.* at 5,15).

By order dated October 25, 2018, the petitioner was informed that his case was not in proper form for service of process, and provided instructions for bringing the case into proper form (doc. 5). The petitioner was directed to pay the five-dollar ($5) filing fee, or complete and return the Form AO 240 (application to proceed *in forma pauperis*). The petitioner was also directed to answer Question 9(f)-"Grounds Raised" in his direct appeal following his conviction. On November 2, 2018, the petitioner complied with the Court's order by paying the filing fee (receipt number SCX300078836) and answering Question 9(f) (docs. 1-3 and 7).

STANDARD OF REVIEW

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c)(D.S.C.), the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the district court. This court is charged with screening the petitioner's lawsuit to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases in the U.S. District Courts (2012).

As a *pro se* litigant, the petitioner's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by lawyers. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, even under this less stringent standard, a pro se pleading remains subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts that

set forth a claim cognizable in a federal district court. *Weller v. Dept. of Social Services*, 901 F.2d 387, 391 (4th Cir.1990).

DISCUSSION

The petition for a writ of habeas corpus should be dismissed because it is clear that the petitioner has not fully exhausted his state-court remedies. With respect to the petitioner's conviction and sentence, the petitioner's sole federal remedies are a writ of habeas corpus under either 28 U.S.C. § 2254 and possibly, but much less commonly, a writ of habeas corpus under 28 U.S.C. § 2241, which remedies can be sought only after the petitioner has exhausted his state court remedies. *See* 28 U.S.C. § 2254(b). Section 2254's exhaustion requirement provides:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

§ 2254(b), (c). This doctrine requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to the state's highest court for consideration. *See Picard v. Connor*, 404 U.S. at 276. Before a federal court may consider a habeas claim under § 2254, the petitioner must give the state court system "'one full opportunity to resolve any constitutional issues by invoking one complete round of the

State's appellate review process. . . .'" *Longworth v. Ozmint*, 377 F.3d 437, 447-48 (4th Cir. 2004) (quoting from *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). That "complete round" of appellate review also includes "discretionary review" such as the filing of a petition for writ of certiorari to the South Carolina Supreme Court seeking review of the dismissal of a post-conviction relief ("PCR") application. *Id.* at 448.

However, a petitioner need not present his claim to the state courts if state court remedies are ineffective to protect his rights. 28 U.S.C. § 2254(b). A petitioner has the burden to prove that the state-court remedies are ineffective or futile to protect his rights. *See, e.g., Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994); *Cunningham v. Warden, FCI-Bennettsville*, No. 9:10-2105-CMC-BM, 2011 WL 9933741, at * 2 (D.S.C. April 19, 2011). Before the petitioner can be said to have exhausted his state-court remedies, he must first complete the direct-appeal process and then file and pursue a PCR application in Sumter County. The United States Court of Appeals for the Fourth Circuit has held that South Carolina's Uniform Post-Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 through 17-27-160, is a viable state-court remedy. *Miller v. Harvey*, 566 F.2d 879, 880-81 (4th Cir. 1977); *Patterson v. Leeke*, 556 F.2d at 1170-73 & n.1. If the petitioner files a PCR application, which is later denied by the Court of Common Pleas for Sumter County, he must then seek state appellate review of that PCR denial before he can be said to have exhausted his available state remedies.

The petitioner states that he has exhausted his state court remedies (doc. 1 at 5), however he contradicts this assertion by acknowledging that he has not filed a state application for PCR (*Id.* at 6).[2] Although he attempts to excuse his failure to file a PCR application by claiming the Clerk of Court would not file it, correspondence from the Clerk of Court's Office, indicates otherwise. Specifically, it states:

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[2] In responding to the question whether he raised the ground presented in his habeas petition through a PCR motion, he checked both "Yes" and "No". He explained that "Court Clerk James C. Campbell Clerk of Court" will not file my PCR" (*Id.* at 6).

> We have no PCR application on file for you. You must complete this application and return it to our office.

(doc. 1-1 at 5). The petitioner has not submitted any documentation suggesting he complied with the directive to complete and return the PCR application or to resubmit a prior PCR application that he claims to have attempted to file. As such, the petitioner plainly has not exhausted his state court remedies as he has not filed a PCR application directed towards his 2015 convictions in the Sumter County courts. As a result, the ground raised in the instant habeas petition has not yet been considered and addressed by the courts of South Carolina.

Because it is clear from the face of the pleadings that the petitioner has viable state court remedies (PCR and appellate review of PCR) that have not been fully utilized and because the petitioner has not demonstrated futility, the petition should be dismissed. *See Slayton v. Smith*, 404 U.S. 53, 54 (1971) (federal habeas court should not retain the case on its docket pending exhaustion of state court remedies, but, absent special circumstances, should dismiss the petition).

RECOMMENDATION

The petitioner cannot cure the defects in his petition by mere amendment. *See generally Goode v. Cent. Virginia Legal Aid Soc'y, Inc.*, 807 F.3d 619, 623 (4th Cir. 2015); *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1066 (4th Cir. 1993). Accordingly, the undersigned recommends that the district court decline to automatically give the petitioner leave to amend, and dismiss the petition without prejudice.

IT IS SO RECOMMENDED.

The petitioner's attention is directed to the important notice on the next page.

Kevin F. McDonald
United States Magistrate

November 14, 2018
Greenville, South Carolina

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
300 East Washington Street, Room 239
Greenville, South Carolina 29601

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).

Additional material from this filing is available in the Clerk's Office.