

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-14894  
Non-Argument Calendar

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D.C. Docket No. 1:18-cv-02859-SCJ

JERRELL BERGER,

Petitioner-Appellant,

versus

ROBERT ADAMS,  
Warden,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Northern District of Georgia

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(August 13, 2019)

Before MARCUS, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Jerrell Berger, a Georgia state prisoner proceeding *pro se*, appeals the district court's dismissal, without prejudice, of his 28 U.S.C. § 2254 habeas corpus petition for his failure to comply with a court order. He argues the merits of his habeas petition, contending that he received ineffective assistance of counsel.

We generally review *de novo* a district court's dismissal of a § 2254 petition. *Clark v. Crosby*, 335 F.3d 1303, 1307 (11th Cir. 2003). However, where a district court dismisses an action for failure to comply with court rules, we review for abuse of discretion. *Betty K Agencies, Ltd. v. M/V Monada*, 432 F.3d 1333, 1337 (11th Cir. 2005). While we construe briefs filed by *pro se* litigants liberally, “issues not briefed on appeal by a *pro se* litigant are deemed abandoned.” *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (*per curiam*).

Here, because Berger failed to address the dismissal of his case—the only appealable issue—he has abandoned any argument regarding the dismissal, and thus, we affirm.

**AFFIRMED.**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-14894-JJ

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JERRELL BERGER,

Petitioner - Appellant,

versus

ROBERT ADAMS,  
Warden,

Respondent - Appellee.

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Appeal from the United States District Court  
for the Northern District of Georgia

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**ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC**

BEFORE: JILL PRYOR, ANDERSON and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

JERRELL BERGER,

Petitioner,

v.

ROBERT ADAMS,

Respondent.

CIVIL ACTION FILE

NO. 1:18-CV-2859-SCJ

**JUDGMENT**

This action having come before the Court, Honorable Steve C. Jones, United States District Judge, on the Report and Recommendation of the Magistrate Judge, and the Court having adopted said Recommendation as the Order of the Court, it is

**Ordered and Adjudged** that the petition for a writ of habeas corpus be, and the same hereby is, dismissed without prejudice pursuant to LR 41.3A(2), NDGa.

Dated at Atlanta, Georgia this 5th day of November, 2018.

JAMES N. HATTEN  
CLERK OF COURT

By: s/R. Spratt  
Deputy Clerk

Prepared, Filed and Entered  
In the Clerk's Office  
November 5, 2018  
James N. Hatten  
Clerk of Court

By: s/R. Spratt  
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

JERELL BERGER, GDC ID 530260, Petitioner,	:	HABEAS CORPUS 28 U.S.C. § 2254
	:	
v.	:	CIVIL ACTION NO.
	:	1:18-CV-2859-SCJ-CMS
WARDEN ROBERT ADAMS, Respondent.	:	
	:	

**FINAL REPORT AND RECOMMENDATION**

On July 27, 2018, I entered an Order (A) denying Jerrell Berger permission to proceed *in forma pauperis* in this *pro se* habeas corpus case and (B) directing him within twenty-eight days to (1) pay the \$5 filing fee and (2) file a supplement addressing his apparent failure to exhaust all available state remedies before seeking a federal writ of habeas corpus. *See* [3].

When Berger sought an extension of time to file his supplement and stated “the \$5 filing fee will be submitted/payed [sic] to this Court,” *see* [4], I extended his deadline through September 18, 2018.

As of September 18, 2018, Berger had neither filed his supplement, nor paid the \$5 filing fee.

I **DENY** Berger's second motion for an extension of time, which he did not date and "file" until September 22, 2018, because it was filed out-of-time and does not state adequate grounds to warrant a second extension. *See* [6].

I **RECOMMEND** that this case be **DISMISSED WITHOUT PREJUDICE** pursuant to Local Rule 41.3A(2) because Berger has failed to comply with a lawful court order directing him to pay the \$5 filing fee for this case.<sup>1</sup>

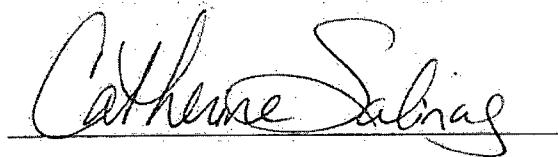
And I further **RECOMMEND** that Berger be **DENIED** a Certificate of Appealability because he does not meet the requisite standards. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (requiring a two-part showing (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling").

I **DIRECT** the Clerk to terminate the referral of this case to me.

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<sup>1</sup> When Berger is prepared to pay the \$5 filing fee and to address his apparent failure to exhaust all available state remedies before seeking federal habeas relief, he may refile his petition in a new case.

**SO ORDERED, RECOMMENDED, AND DIRECTED,** this 3rd  
day of October, 2018.

A handwritten signature in black ink, appearing to read "Catherine Salinas", is written over a horizontal line.

Catherine M. Salinas  
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

JERELL BERGER, GDC ID 530260, Petitioner,	:	HABEAS CORPUS 28 U.S.C. § 2254
	:	
v.	:	CIVIL ACTION NO. 1:18-CV-2859-SCJ-CMS
WARDEN ROBERT ADAMS, Respondent.	:	

**ORDER FOR SERVICE OF  
REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE**

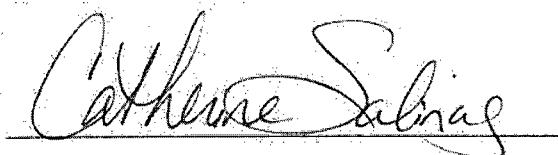
Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Civil Local Rule 72. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within fourteen (14) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District

Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings and conclusions of law will be limited to a plain error review. *See* 11th Cir. R. 3-1.

The Clerk is **DIRECTED** to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

**SO ORDERED**, this 3rd day of October, 2018.

A handwritten signature in black ink, appearing to read "Catherine Salinas", is written over a horizontal line.

Catherine M. Salinas  
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

JERELL BERGER,	:	
Petitioner,	:	
	:	CIVIL ACTION NO.
v.	:	1:18-CV-2859-SCJ
	:	
ROBERT ADAMS,	:	
Respondent.	:	

**ORDER**

Presently before the Court is the Magistrate Judge's Report and Recommendation (R&R) recommending that the instant habeas corpus petition be denied and the case dismissed. [Doc. 7]. Petitioner has filed his objections in response to the R&R. [Doc. 9].

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected portion under a "clearly erroneous" standard.

In the R&R, the Magistrate Judge recommends that Petitioner's 28 U.S.C. § 2254 petition for a writ of habeas corpus be denied without prejudice because Petitioner failed to submit the five dollar filing fee and failed to submit a supplement

addressing his apparent failure to exhaust his state court remedies, despite the fact that this Court ordered him to do so and further granted him an extension.

In his objections, Petitioner discusses the fact that he failed to pay the filing fee because he was waiting for the Fulton County Superior Court to rule on his motion to reduce his sentence. He does not, however, explain why he did not file a supplement addressing the issue of whether he exhausted his state court remedies. The local rules of this Court authorize the dismissal of an action when a party has failed to comply with a lawful order. Local Rule 41.3A(2).

While this Court might otherwise be inclined to allow Petitioner one more opportunity to comply, in this case it is clear that Petitioner has not exhausted his state court remedies. Petitioner was convicted on October 31, 2017. He did not appeal and he did not file a state habeas corpus petition. His sole effort at post-judgment relief in state court was his motion for a sentence reduction in the trial court.

Pursuant to 28 U.S.C. § 2254(b)(1)(A), this Court cannot grant a writ of habeas corpus unless the petitioner “has exhausted the remedies available in the courts of the State.” The Supreme Court has held that § 2254’s exhaustion requirement requires that “state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s appellate review process.” O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). A complete round of the

state appellate process includes discretionary appellate review “when that review is part of the ordinary appellate review procedure in the State.” *Id.* at 847. In Georgia, a complete round of the appellate process includes review by the Supreme Court of Georgia.

To put it very simply, this Court cannot entertain Petitioner’s habeas corpus petition until he has raised his claims before the Georgia Supreme Court. This Court notes, however, that it will dismiss this action without prejudice. That means that Petitioner can pursue his remedies in state court, such as filing a state habeas corpus action. If that action is unsuccessful, Petitioner should then appeal to the Georgia Supreme Court. Once that appeal has been completed, Petitioner will have exhausted his state court remedies, and he can return to this Court and file his petition pursuant to 28 U.S.C. § 2254. This Court warns Petitioner that the § 2254 statute includes a time limit which, as a general matter, runs during the period that he does not have anything pending in state court. In other words, Petitioner needs to begin exhausting his state court remedies right away.

For the reasons stated, the R&R, [Doc. 7], is hereby **ADOPTED** as the order of this Court, and the petition is **DENIED** without prejudice. The Clerk is **DIRECTED** to close this action.

This Court further agrees with the Magistrate Judge that Petitioner has failed to raise any claim of arguable merit, and a Certificate of Appealability is **DENIED** pursuant to 28 U.S.C. § 2253(c)(2).

**IT IS SO ORDERED**, this 5<sup>th</sup> day of November, 2018.

s/Steve C. Jones

STEVE C. JONES

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

JERRELL BERGER,

Petitioner,

v.

ROBERT ADAMS,

Respondent.

CIVIL ACTION FILE

NO. 1:18-CV-2859-SCJ

**JUDGMENT**

This action having come before the Court, Honorable Steve C. Jones, United States District Judge, on the Report and Recommendation of the Magistrate Judge, and the Court having adopted said Recommendation as the Order of the Court, it is

**Ordered and Adjudged** that the petition for a writ of habeas corpus be, and the same hereby is, dismissed without prejudice pursuant to LR 41.3A(2), NDGa.

Dated at Atlanta, Georgia this 5th day of November, 2018.

JAMES N. HATTEN  
CLERK OF COURT

By: s/R. Spratt  
Deputy Clerk

Prepared, Filed and Entered  
In the Clerk's Office  
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James N. Hatten  
Clerk of Court

By: s/R. Spratt  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-14894-B

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JERRELL BERGER,

Petitioner-Appellant,

versus

ROBERT ADAMS,  
Warden,

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Northern District of Georgia

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ORDER:

Jerrell Berger, a Georgia prisoner, moves this Court for a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP") in order to appeal the district court's dismissal without prejudice of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. The district court dismissed Berger's petition pursuant to a local court rule for failure to comply with its prior order requiring him to pay the filing fee and file a supplemental petition. The district court also denied him a second extension of time to comply with its prior order.

Although a COA generally is required to appeal a final order in a proceeding under § 2254, 28 U.S.C. § 2253(c)(1)(B), Berger does not require a COA to appeal the district court's order dismissing his petition without prejudice for failure to comply with a local rule because this order did not dispose of the merits in a habeas corpus proceeding and did not constitute a "final order"

within the meaning of § 2253(c). *Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017); *see also Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004) (holding that a COA was not required where the defendant appealed the district court's order dismissing his second or successive habeas petition for lack of jurisdiction without discussing the merits of his petition).

Because Berger has moved this Court for leave to proceed IFP, however, the appeal is subject to a frivolity determination. See 28 U.S.C. § 1915(e)(2)(B). “[A]n action is frivolous if it is without arguable merit either in law or fact.” *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quotation marks omitted).

Here, any appeal of the district court's order dismissing Berger's petition would be frivolous. A district court has authority to dismiss actions for failure to comply with local rules. Fed. R. Civ. P. 41(b); *Kilgo v. Ricks*, 983 F.2d 189, 192 (11th Cir. 1993). The Northern District of Georgia's local rules provide that “[t]he court may, with or without notice to the parties, dismiss a civil case for want of prosecution if: . . . (2) [a] plaintiff . . . fail[s] or refuse[s] to obey a lawful order of the court in the case. N.D. Ga. L. R. 41.3A(2). The district court did not abuse its discretion in dismissing without prejudice Berger's suit pursuant to N.D. Ga. L. R. 41.3A(2) because he did not comply with its order requiring him to pay the filing fee and file a supplemental petition no later than September 18, 2018, particularly considering that the court specifically warned Berger that failure to comply with its orders would result in dismissal. *See Mitchell v. Inman*, 682 F.2d 886, 887 (11th Cir. 1982) (holding that a district court should not dismiss the action of a *pro se* plaintiff based on a local rule when “there is nothing to indicate [the] plaintiff ever was made aware of it prior to dismissal”).

Similarly, an appeal from the district court's denial of Berger's second motion for an extension of time would be frivolous. This Court reviews a district court's denial of a motion for

an extension of time for an abuse of discretion and will affirm so long as the district court does not commit a clear error of judgment. *Young v. City of Palm Bay, Fla.*, 358 F.3d 859, 863 (11th Cir. 2004). A district court does not abuse its discretion by refusing to accept an untimely filing, as “[d]eadlines are not meant to be aspirational.” *Id.* at 864. The district court did not commit a clear error of judgment in denying Berger’s second motion for an extension of time where it had already granted one extension, he offered no explanation why he had not filed a supplemental petition addressing exhaustion of state court remedies, and he made the second request out of time. *See id.* at 863-64.

Accordingly, Berger’s motion for a COA is DENIED AS UNNECESSARY. Berger’s motion for leave to proceed on appeal IFP is DENIED.

/s/ Elizabeth L. Branch  
UNITED STATES CIRCUIT JUDGE