

U.S. District Court

District of South Carolina
Notice of Electronic Filing

The following transaction was entered on 11/19/2019 at 1:51 PM EST and filed on 11/19/2019

Case Name: Utsey v. South Carolina Department of Corrections

Case Number: 8:19-cv-03218-JMC-JDA

Filer:

Document Number: 5

Docket Text:

PROPER FORM ORDER directing Plaintiff to notify the clerk in writing of any change of address. Case to be brought into proper form by 12/10/2019. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. Signed by Magistrate Judge Jacquelyn D Austin on 11/19/2019. (gpre,)

8:19-cv-03218-JMC-JDA Notice has been electronically mailed to:

8:19-cv-03218-JMC-JDA Notice will not be electronically mailed to:

Spencer Utsey
192660
F2-B-139
Kirkland Correctional Institution
4344 Broad River Road
Columbia, SC 29210

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1091130295 [Date=11/19/2019] [FileNumber=9363775-0] [13019d7251501590ca50b39729e759461140b9d72d3e30ae22a9a5237cbf81219ab76d92dc191fd86626f80d3e2a73585186ae954a7920c77548237199b23da9]]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Spencer Utsey,)	C/A No. 8:19-cv-03218-JMC-JDA
)	
Petitioner,)	
)	
v.)	ORDER
)	
South Carolina Department of Corrections,)	
Warden of Kirkland Correctional Institution,)	
)	
Respondent.)	
)	

Spencer Utsey, an inmate in the custody of the South Carolina Department of Corrections ("SCDC"), commenced this action by filing a hand-written document titled "Notice of intent to appeal and motion for the court." [Doc. 1.] The Clerk of Court opened the case as a civil rights action under 42 U.S.C. § 1983. The Pleading appears to challenge Petitioner's South Carolina state conviction and sentence, and he appears to seek review of the South Carolina Supreme Court's Order, dated October 15, 2019, denying his petition for writ of certiorari at case number 2019-001302. Therefore, the Court construes this action as seeking habeas corpus relief under 28 U.S.C. § 2254. See *In re Wright*, 826 F.3d 774, 779 (4th Cir. 2016) ("[R]egardless of how they are styled, federal habeas petitions of prisoners who are 'in custody pursuant to the judgment of a State court' should be treated as 'applications under section 2254.'"); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) ("[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus."). Accordingly, the Clerk of Court will be directed to re-characterize this action as a § 2254 habeas action.

As directed below, when Petitioner submits the § 2254 habeas petition on the court form, he is also directed to put in the § 2254 habeas petition all of the grounds and claims that he believes he has. Petitioner's attention is directed to the questions on the court form regarding the exhaustion of state remedies. If Petitioner did not intend to raise his claims as seeking habeas relief, he must advise the Court in writing and file the appropriate complaint on a standard court form.

Petitioner is an SCDC prisoner, proceeding pro se. Therefore, in the event that a limitations issue arises, Petitioner shall have the benefit of the holding in *Houston v. Lack*, 487 U.S. 266 (1988) (explaining that a prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to District Court). Under Local Civil Rule 73.02(B)(2) of the United States District Court for the District of South Carolina, pretrial

proceedings in this action have been referred to the assigned United States Magistrate Judge.

TO PETITIONER:

This case is not in proper form. **If Petitioner does not bring this case into proper form within the time permitted under this Order, this case may be dismissed for failure to prosecute and comply with an order of this Court under Rule 41 of the Federal Rules of Civil Procedure.**

Under General Order, *In Re: Procedures in Civil Actions Filed by Prisoner Pro Se Litigants*, No. 3:07-mc-5014-JFA (D.S.C. Sept. 18, 2007), the undersigned is giving Petitioner **twenty-one (21) days** from the date this Order is entered (plus three days for mail time) to:

- (1) Pay the five-dollar (\$5) filing fee for a habeas corpus action, or complete and return the Form AO 240 (application to proceed *in forma pauperis*) attached to this Order. If Petitioner decides to pay the five-dollar (\$5) filing fee for a habeas corpus action, the check for the filing fee should be made payable to "Clerk, U.S. District Court."¹
- (2) Complete, sign, and return a § 2254 habeas petition, which is attached to this Order. The Clerk of Court did file the hand-written pleading you submitted. However, you must complete a § 2254 habeas form. Thus, to preserve the issues raised in this case and give liberal construction to the pleadings, the current petition form that you are requested to submit will be filed as an attachment to Doc. 1. You are also directed to put in the § 2254 habeas petition all grounds and claims that you believe you have. See 28 U.S.C. § 2244 (regarding the finality of determination and explaining that a second or successive § 2254 habeas corpus application may only proceed under limited circumstances after the court of appeals authorizes it).
- (3) If Petitioner did not intend to file this action as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, he must

¹If Petitioner intends to assert claims pursuant to 42 U.S.C. § 1983, rather than assert claims under the applicable habeas statute, he must pay the applicable \$350.00 filing fee, and also the additional \$50.00 administrative fee set by the Judicial Conference. The \$400.00 check for the filing fee should be made payable to "Clerk, U.S. District Court." Again, if Petitioner believes that he is indigent, he must complete, sign, and return an Application to Proceed Without Prepayment of Fees and Affidavit (Form AO 240).

advise the Court in writing in response to this Order within the time permitted under the Order.

Petitioner must place the civil action number listed above (**Case No. 8:19-cv-03218-JMC-JDA**) on any document Petitioner submits to this Court pursuant to this Order. ***In the meantime, service shall not be authorized until the items specified above have been reviewed by the assigned Magistrate Judge.***

Any future filings in this case must be sent to the address below (300 East Washington Street, Room 239, Greenville, South Carolina 29601). All documents requiring Petitioner's signature shall be signed with Petitioner's full legal name written in Petitioner's own handwriting. Pro se litigants shall *not* use the "s/typed name" format used in the Electronic Case Filing System. In all future filings with this Court, Petitioner is directed to use letter-sized (8½ inches by 11 inches) paper only, to write or type text on one side of a sheet of paper only and not to write or type on both sides of any sheet of paper. Petitioner is further instructed not to write to the edge of the paper, but to maintain one inch margins on the top, bottom, and sides of each paper submitted.

Petitioner is a pro se litigant. Petitioner's attention is directed to the following important notice:

You are ordered to always keep the Clerk of Court advised in writing (300 East Washington Street, Room 239, Greenville, South Carolina 29601) if your address changes for any reason, so as to assure that orders or other matters that specify deadlines for you to meet will be received by you. If as a result of your failure to comply with this Order, you fail to meet a deadline set by this Court, **your case may be dismissed for violating this Order.** Therefore, if you have a change of address before this case is ended, you must comply with this order by immediately advising the Clerk of Court in writing of such change of address and providing the Court with the docket number of all pending cases you have filed with this Court. Your failure to do so will not be excused by the Court.

TO THE CLERK OF COURT:

Based on the allegations in the Petitioner's hand-written pleading, the Court construes this action as a habeas corpus petition pursuant to 28 U.S.C. § 2254. Therefore, the Clerk of Court is directed to re-characterize and designate this action as pursuant to 28 U.S.C. § 2254. See *In re: Wright*, 826 F. 3d 774 (4th Cir. 2016).

The Clerk of Court is directed to add to the docket the Warden of Kirkland Correctional Institution as the Respondent, and to terminate the South Carolina Department

of Corrections, because a prisoner's custodian is the proper respondent in a habeas corpus action. See *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004).

The Clerk of Court shall mail a copy of this Order and the proper form documents to Petitioner. If Petitioner fails to provide any item listed above to the Clerk of Court within the period prescribed in this Order, the Clerk of Court shall forward the file to the assigned United States Magistrate Judge to determine if this case should be dismissed. See *In Re: Procedures in Civil Actions Filed by Prisoner Pro Se Litigants*, 3:07-mc-5014-JFA (D.S.C. Sept. 18, 2007). If, however, Petitioner provides this Court with the items listed above, the Clerk of Court should forward the file to the assigned Magistrate Judge to determine if service should be authorized.

To preserve issues raised in this case and give liberal construction to the pleadings, the Clerk of Court is directed to file the documents submitted by Plaintiff in response to this Order (the completed § 2254 habeas petition) as an attachment to Doc. 1.

The Clerk of Court shall not enter any change of address submitted by Petitioner which directs that mail be sent to a person other than Petitioner unless that person is an attorney admitted to practice before this Court who has entered a formal appearance.

IT IS SO ORDERED.

s/Jacquelyn D. Austin
United States Magistrate Judge

November 19, 2019
Greenville, South Carolina

U.S. District Court

District of South Carolina
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[STAMP dcecfStamp_ID=1091130295 [Date=11/19/2019] [FileNumber=9363775-0] [13019d7251501590ca50b39729e759461140b9d72d3e30ae22a9a5237cbf81219ab76d92dc191fd86626f80d3e2a73585186ae954a7920c77548237199b23da9]]

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To preserve issues raised in this case and give liberal construction to the pleadings, the Clerk of Court is directed to file the documents submitted by Plaintiff in response to this Order (the completed § 2254 habeas petition) as an attachment to Doc. 1.

The Clerk of Court shall not enter any change of address submitted by Petitioner which directs that mail be sent to a person other than Petitioner unless that person is an attorney admitted to practice before this Court who has entered a formal appearance.

IT IS SO ORDERED.

s/Jacquelyn D. Austin
United States Magistrate Judge

November 19, 2019
Greenville, South Carolina

FILED: June 8, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7683
(8:19-cv-03218-JMC)

SPENCER UTSEY, a/k/a Spencer Clay Utsey

Petitioner - Appellant

v.

WARDEN OF KIRKLAND CORRECTIONAL INSTITUTION

Respondent - Appellee

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Respondent

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Wynn, and
Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

W

Other Orders/Judgments

8:19-cv-03218-JMC Utsey v.
Warden of Kirkland Correctional
Institution

JDA-Inmate, PRIOR

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 10/14/2020 at 1:15 PM EDT and filed on 10/13/2020

Case Name: Utsey v. Warden of Kirkland Correctional Institution

Case Number: 8:19-cv-03218-JMC

Filer:

Document Number: 19

Docket Text:

ORDER. The court accepts the Magistrate Judges Report and Recommendation [12], DISMISSES WITHOUT PREJUDICE. Signed by Honorable J Michelle Childs on 10/13/20. (rweb,)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION**

Spencer Utsey,

Petitioner,

v.

Warden of Kirkland
Correctional Institution,

Respondent.

Civil Action No.: 8:19-cv-03218-JMC

ORDER AND OPINION

Petitioner Spencer Utsey, proceeding pro se,¹ filed the instant action against Respondent Warden of Kirkland Correctional Institution seeking a Petition for Writ of Habeas Corpus (the "Habeas Petition") pursuant to 28 U.S.C. § 2254 alleging that, *inter alia*, S.C. Code § 24-13-100 (West. 2020) is "an unconstitutional statute." (ECF No. 1 at 2.)

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), the matter was referred to the United States Magistrate Judge for pretrial handling. On December 12, 2019, the Magistrate Judge issued a Report and Recommendation ("Report") recommending that the court dismiss without prejudice Petitioner's instant Petition and without requiring Respondent to file a return. (See ECF No. 12 at 7.) Petitioner filed Objections to the Magistrate's Report and Recommendation which are presently before the court. (See ECF No. 14.) For the reasons set forth below, the court **ACCEPTS** the Magistrate Judge's Report and **DISMISSES** Petitioner's instant Habeas Petition (ECF No. 1) without prejudice and without

¹ "Because he is a pro se litigant, Petitioner's pleadings are construed liberally by the court and held to a less stringent standard than attorneys' formal pleadings." *Simpson v. Florence Cty. Complex Solic. 's Off.*, Civil Action No. 4:19-cv-03095-JMC, 2019 WL 7288801, at *2 (D.S.C. Dec. 30, 2019) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)). "This, however, 'does not transform the court into an advocate' for Petitioner; the court is not required to recognize Petitioner's claims if there is clearly no factual basis supporting them." *Id.* (quoting *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990)).

requiring Respondent to file a return.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is an inmate presently incarcerated at the Kirkland Correctional Institution in Columbia, South Carolina. *See SCDC Inmate Search*, <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000192660> (last visited Oct. 5, 2020). On June 15, 1999, a state court jury found Petitioner guilty of armed robbery. (*See* ECF No. 1-3 at 1.) As a result, Petitioner was sentenced to thirty years in prison. (*See id.*) Following his conviction,²

Petitioner filed a direct appeal on September 7, 2000. The South Carolina Court of Appeals affirmed the conviction on November 20, 2000. Petitioner filed a petition for a rehearing on December 5, 2000, which was denied on January 30, 2001. Petitioner [then] filed a petition for writ of certiorari to the South Carolina Supreme Court on April 2, 2001. The Supreme Court denied the petition on June 21, 2001[] and issued the remittitur the next day. Petitioner filed a pro se application for Post Conviction Relief (“PCR”) on April 9, 2002. After an evidentiary hearing on January 9, 2003, the PCR court filed an order of dismissal on March 3, 2003. Petitioner did not appeal the dismissal. Petitioner filed three more PCR applications—on April 18, 2008, December 6, 2011, and November 19, 2012—each of which was denied as being untimely for having been filed past the statute of limitations.

Utsey v. McCall, Civil Action No. 8:13-cv-01433-JMC, 2014 WL 4825625, at *2 (D.S.C. Sept. 24, 2014) (internal citations omitted). Petitioner then filed a pro se Petition for Writ of Habeas Corpus in this court on May 23, 2013. (*See* ECF No. 12 at 5.) This court dismissed with prejudice the Petition on September 24, 2014. (*See id.*) On September 21, 2017, Petitioner filed a fifth PCR action in state court which remains pending at this time. *See Utsey v. South Carolina*, Civil Action No. 2017-cp-05-00184, available at <https://publicindex.sccourts.org/Bamberg/Publ>

² The court takes judicial notice of the records filed in Petitioner’s state court actions and prior habeas actions pursuant to 28 U.S.C. § 2254 and relevant civil rights actions filed in this court at case numbers 5:19-cv-02873-JMC and 8:13-cv-01433-JMC. *See Phillips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (noting that courts “may [] take judicial notice of matters of public record”); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (citation and quotation marks omitted) (noting that the “most frequent use of judicial notice is in noticing the content of court records”).

icIndex/PISearch.aspx (search by case number) (last visited Oct. 8, 2020). On October 10, 2019, Petitioner filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against Judge Edgar W. Dickson related to a state court action. (See ECF No. 12 at 4 n.3.) This case remains pending. (See *id.*) The Magistrate Judge “recommend[s] summary dismissal of [the] action.” (*Id.*)

On November 12, 2019, Petitioner filed a hand-written document captioned as “Notice of [I]ntent to Appeal and Motion for the [C]ourt.” (ECF No. 1 at 1.)³ As the Magistrate Judge correctly notes, Petitioner’s filings are “difficult to decipher.” (ECF No. 12 at 3.) Construing Petitioner’s pleadings liberally, however, it appears Petitioner asserts the following grounds for relief. First, Petitioner argues that he “won [his] PCR [appeal], but the state lost Petitioner[’s] transcript.” (ECF No. 1 at 4.) Second, Petitioner argues that he “filed a Complaint and a lawsuit in which a Report and Recommendation [issued by this court], stated in part . . . [that] judicial act was unauthorized by law, the judge still has immunity from a suit seeking damages, and the court overlook this and refuse to rule and grant relief.” (*Id.* at 12 (referring presumably to Petitioner’s pending 42 U.S.C. § 1983 action against Judge Dickson).) Petitioner seeks to vacate his sentence and conviction and be immediately released from incarceration. (See *id.* at 15.)

Petitioner makes additional allegations in his initial hand-written submission. (See *generally id.*) First, Petitioner asserts that he wishes to appeal the court’s ruling dated October

³ The Clerk of Court subsequently docketed this case as a civil rights action filed pursuant to 42 U.S.C. § 1983. However, upon review of the handwritten submission, the Magistrate Judge concluded that the action appeared to be one seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. Accordingly, by Order dated November 19, 2019, the Magistrate Judge directed the Clerk of Court to update the cause of action and nature of the suit. (See ECF No. 5 at 3.) The Magistrate Judge also directed Petitioner to complete and file a petition on the standard § 2254 court form. (See *id.*) The Order specifically stated that “[i]f Petitioner did not intend to file this action as a Petition for Writ of Habeas Corpus pursuant to § 2254, he must advise the [Magistrate Judge] in writing . . . within the time permitted under the Order.” (*Id.* at 2–3.) Petitioner filed the instant Petition and did not alert the Magistrate Judge that he intended to file a different type of action. (See ECF No. 1–3.) This court concludes, therefore, that Petitioner “intended to bring this action as a habeas action.” (ECF No. 12 at 1 n.1.)

15, 2019, denying his petition for a writ of certiorari, (*see id.* at 1) and attaches a copy of an Order by the South Carolina Supreme Court dated October 15, 2019, denying a petition for writ of certiorari (*see id.* at 1-1). Second, Petitioner argues “that methamphetamine is not [a] violent substance[.]” (*Id.* at 1.) Petitioner contends “meth is ice and it[']s a narcotic drug that [has] been changed to nonviolent.” (*Id.* at 2.) Accordingly, Petitioner argues that the “legislature has to change the law for [S.C. Code §] 24-13-100 to non-violent, because it[']s like taking a murder offense from under the statu[t]e you can't it will still be violent offense.” (*Id.*) In his hand-written statement, Petitioner seeks immediate release from prison because he is “under a[n] unconstitutional statute § 24-13-100.”⁴ (*Id.*) Petitioner attempts to make additional allegations about methamphetamine and other drug statutes—citing various cases in turn—but these additional allegations are unintelligible. (*See id.* at 3–5.)

On December 12, 2019, the Magistrate Judge issued the Report and Recommendation at issue concluding that “the Petition filed in this case is successive and should[, therefore,] be summarily dismissed [without prejudice and] without requiring the Respondent to file a return.” (ECF No. 12 at 2.) On December 20, 2019, Petitioner filed Objections to the Magistrate’s Report and Recommendation. (*See generally* ECF No. 14.)

II. JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 2254, which provides that a federal district court has jurisdiction to entertain a § 2254 habeas petition when the petitioner is “in custody pursuant to the judgment of a State court . . . in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

⁴ S.C. Code § 24-13-100 (West, 2020) provides that “for purposes of definition under South Carolina law, a ‘no parole offense’ means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.”

III. STANDARD OF REVIEW

A. Report and Recommendation

The Magistrate Judge's Report and Recommendation is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge only makes a recommendation to this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The recommendation has no presumptive weight and the responsibility to make a final determination remains with the court. *See id.* The court reviews *de novo* only those portions of the Report and Recommendation to which specific objections are filed.⁵ *See Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005). The court reviews those portions which are not specifically objected to only for clear error. *See id.* at 316. The court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation or recommit the matter with instructions. *See* 28 U.S.C. § 636(b)(1).

IV. ANALYSIS

A. The Report and Recommendation

In the Report, the Magistrate Judge recommends that the court dismiss without prejudice Petitioner's Petition and without requiring Respondent to file a return. (See ECF No. 12 at 7.) In reaching her recommendation, the Magistrate Judge noted that "[t]his is the *second* Petition [for Writ of Habeas Corpus] filed under § 2254 that Petitioner has submitted to this [c]ourt in his efforts to challenge the constitutionality of his state court criminal conviction and sentence." (*Id.* at 5 (emphasis added).) According to the Magistrate Judge, because Petitioner's instant Petition is attacking the same conviction attacked in his first Petition and because the first Petition was

⁵ 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." *One Parcel of Real Prop. Known As 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Thomas v. Arn*, 476 U.S. 140, 147 (1985)).

adjudicated on the merits, the instant Petition is “successive” for purposes of 28 U.S.C. § 2244(b). (*See id.* at 6-7 (citing *In re Williams*, 444 F.3d 233, 236 (4th Cir. 2006)).) Under § 2244(b)(3)(A), the Magistrate Judge noted, an applicant seeking to file a successive habeas petition must first “file in the court of appeals a motion for leave to file a second or successive habeas application in the district court.” (*Id.* at 6 (citing *Felker v. Turpin*, 518 U.S. 651, 657 (1996) (citing § 2244(b)(3)(A))).) Because Petitioner “did not obtain [such] authorization from the [United States] Court of Appeals [for the Fourth Circuit (“Fourth Circuit”)] to file the [instant successive] Petition,” the Magistrate Judge concluded that this “[c]ourt does not have jurisdiction to consider it.” (*Id.* at 7 (citing *United States v. Winestock*, 340 F.3d 200, 205–06 (4th Cir. 2003)).)

Accordingly, the Magistrate Judge recommended that Petitioner’s instant Petition (ECF No. 1) be dismissed without prejudice and without requiring Respondent to file a return.

B. Petitioner’s Objections to the Report and Recommendation

In his Objections, Petitioner asserts that the Magistrate Judge’s Report should be rendered “invalid” for several reasons. (*See* ECF No. 14 at 1.)

First, Petitioner argues that because the Magistrate Judge’s Report and Recommendation is not physically signed by the Magistrate Judge, the Report and Recommendation is invalid. (*See id.*; *see also id.* at 4–5 (noting that because the Magistrate Judge’s signature “appears to be a copyright or machinery signature printout [sic], . . . [Petitioner] must [] automatically w[i]n”).)

Second, Petitioner argues that his instant Petition is not an improperly submitted Petition because “only the [first is] pending . . . in Bamberg County’s Petitioner’s PCR.” (*Id.* at 2.) Furthermore, Petitioner argues that “[t]he ‘gatekeeping’ mechanism created by the AEDPA,” (ECF No. 12 at 6), “do[es] not apply to [him] because every[]time [he] filed a PCR appeal or

Habe[as Petition,] the court gave [him] permission to file and sent Petitioner back [to] the lower courts,” (ECF No. 14 at 4).

Third, Petitioner argues that the Magistrate Judge failed to resolve or “answer” his 42 U.S.C § 1983 claim against state court judge Edgar Dickson. (ECF No. 14 at 2.)

As a result of the aforementioned Objections, Petitioner asserts that the court should reject the Report and Recommendation and “immediate[ly] release [him] from prison.” (*Id.* at 1; *see also id.* at 2, 5.)

C. The Court’s Review

Petitioner seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. Although this statute is the appropriate vehicle for a state prisoner, like Petitioner, to challenge his state conviction, relief under the statute is unavailable to Petitioner because his instant Petition is successive. *See Abraham v. Padua*, Civil Action No. 6:11-cv-2067-RMG, 2012 WL 4364643, at * 1 (D.S.C. Sept. 24, 2012) (noting that the district “[c]ourt lacks jurisdiction to hear [Petitioner’s] second claim for habeas relief until authorized by the . . . Fourth Circuit”). The court, therefore, first addresses this procedural default and then turns to Petitioner’s Objections as they relate to this procedural default.

The AEDPA “limits the circumstances under which a petitioner may file a second or successive application for federal habeas relief.” *Id.* (citing 28 U.S.C. § 2244(b)); *see also In re Williams*, 443 F.3d at 235 (citation omitted) (“The [AEDPA] impose[s] strict limits on the consideration of ‘second or successive’ habeas petitions.”). “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A); *see also* Rule 9, Rules Governing Section 2254 Cases

in the United States District Courts (“Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2243(b)(3) and (4).”).

“There is no question that [Petitioner’s] proposed [H]abeas [P]etition is, numerically, his second one.” *In re Williams*, 443 F.3d at 235. Petitioner’s first Petition seeking relief under 28 U.S.C. § 2254 was submitted to this court on May 31, 2013. *See generally Utsey v. McCall*, 2014 WL 4825625 (D.S.C. Sept. 24, 2014). The instant Petition for relief under 28 U.S.C. § 2254 was submitted to this court on November 12, 2019. (*See* ECF No. 1.) “However, it is settled law that not every numerically second petition is a ‘second or successive’ petition within the meaning of the AEDPA.” *In re Williams*, 443 F.3d at 235. To be considered “successive,” the subsequent petition must be an attack on the same state conviction challenged in the first petition *and* the first petition must have been adjudicated on the merits. *See id.* at 236; *see also Henderson v. Bazzle*, Civil Action No. 9:08-cv-978-MBS, 2008 WL 1908535, at *3 (D.S.C. April 29, 2009) (noting that for a petition to qualify as “successive,” the prior petition must have been adjudicated on the merits).

Petitioner’s instant Petition is successive. Petitioner’s first § 2254 action filed in this court challenged his state court conviction for which he is currently serving and was decided on the merits. *See generally Utsey*, 2014 WL 4825625 (granting Respondent’s motion for summary judgment and denying Petitioner’s petition for a Writ of Habeas Corpus). Because Petitioner’s first Petition was dismissed on the merits, the instant Petition, attacking the same state court conviction, is successive under 28 U.S.C. § 2244(b). *See Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1181 (4th Cir. 1989) (citations omitted) (noting that a summary judgment dismissal is a final adjudication on the merits under Fourth Circuit case law). Therefore, before this court may

review the merits of Petitioner's second Petition, he must seek authorization to file such a petition from the Fourth Circuit. See *Winestock*, 340 F.3d at 205-06; *Joseph v. McKie*, Civil Action No. 8:14-cv-4100-RMG, 2014 WL 7369571, at *4 (citing *id.*) ("Because it appears that Petitioner did not obtain authorization from the Fourth Circuit [] to file [his successive] [p]etition, th[e] [district] [c]ourt does not have jurisdiction to consider it."). To hold otherwise, would allow Petitioner an impermissible "second bite at the apple with respect to claims that have already been denied on the merits." *In re Williams*, 444 F.3d at 236.

Upon its consideration of the foregoing, the court finds the Magistrate Judge did not commit clear error in finding that Petitioner's procedural error currently bars the district court from considering the merits of Petitioner's successive Petition. Accordingly, this court accepts the Magistrate Judge's Report.

The court now turns to Petitioner's Objections to the Magistrate Judge's Report.

1. Failing to Physically Sign the Report and Recommendation

Petitioner argues that the Magistrate Judge's Report and Recommendation should be declared "invalid," (ECF No. 1 at 1), because the Magistrate Judge did not physically sign the Report, but rather used what "appears to be a copyright or machinery signature printout [sic]," (*id.* at 4). The court rejects this argument.

In this district,

[e]lectronically filed court orders and judgments shall have the same force and effect as if the judge had affixed a signature to a paper copy of the document and the document had been entered on the docket in the traditional manner. *The judge's signature on an electronic order may appear as "s/" followed by the judge's name where the signature would otherwise appear or as a digital signature.*

See *Electronic Case Filing Policies and Procedures*, United States District Court for the District of South Carolina at 5 (last modified Dec. 1, 2016) (emphasis added), <http://www.scd.uscourts.g>

ov/AttorneyResourceManuals/ECF/ECF_Policy_and_Procedures.pdf (last visited Oct. 6, 2020).

Here, the Magistrate Judge properly affixed her digital signature to the Report at issue. The Magistrate Judge's electronic signature on the Report begins with "s/" and is "followed by the judge's name where the signature would otherwise appear." *Id.* at 5 (referencing ECF No. 12 at 7). The Magistrate Judge is not required to use a "digital signature" or physically sign the Report as Petitioner asserts. *See id.*

The court concludes, therefore, that Petitioner is not entitled to habeas relief on this ground.

2. Successive Petition

Petitioner challenges the Report's finding that Petitioner's instant Petition is a successive petition that cannot be reviewed by this court without explicit authorization from the Fourth Circuit. (*See* ECF No. 14 at 2 ("[T]his wouldn't be Petitioner's second habeas corpus nor [fourth] PCR, post[-]conviction relief applications, only the [first] because its pending now with instructions in Bamberg County.") (verbatim).) Petitioner also argues that even if his instant Petition constitutes a successive Petition, he is not required to abide by the gatekeeping mechanisms established by the AEDPA. (*See id.* at 4 ("[The gatekeeping mechanisms] created by the AEDPA . . . do not apply to me because every[]time I filed a PCR or Habe[as Petition,] the court gave me permission to file and sent [me] back [to] the lower courts.") (verbatim).)

Petitioner's first argument is unavailing. Petitioner argues that his instant Petition is not successive for purposes of 28 U.S.C. § 2244. (*See id.* at 2.). However, his instant Petition challenges the same state court conviction as his previous petition for habeas relief, *compare* ECF No. 1-3 at 1 *with Utsey*, Civil Action No. 8:13-cv-1433-JMC at ECF No. 1, and his first Petition was adjudicated on the merits, *see generally Utsey*, 2014 WL 4825625; *see also Shoup*,

872 F.2d at 1181 (concluding that a dismissal on a motion for summary judgment constitutes an adjudication on the merits). Petitioner's instant Petition is, therefore, successive for purposes of 28 U.S.C. § 2244. *See In re Williams*, 444 F.3d at 236. Petitioner must, therefore, acquire authorization from the Fourth Circuit before this court may review the merits of his successive Petition. *See* 28 U.S.C. § 2244(b).

Petitioner's second argument is equally unavailing. Petitioner's argument is difficult to fully articulate, but to the extent that Petitioner is arguing that he is immune from following the AEDPA's provisions governing habeas petitions in federal courts just because previous appeals were allowed to proceed in "lower courts," this argument must be rejected. (ECF No. 14 at 4.) The AEDPA governs the circumstances under which a petitioner may file successive applications for federal habeas relief. *See generally* 28 U.S.C. § 2244(b); *see also Hansen*, 2012 WL 4364643 at *1. Petitioner must abide by these provisions every time he seeks a successive petition for habeas relief. *See* 28 U.S.C. § 2244(b)(3)(A) (emphasis added) (stating that "[b]efore a[ny] . . . successive application permitted by this section is filed in the district court, the applicant *shall* move in the appropriate court of appeals for an order authorizing the district court to considering the application").

The court concludes, therefore, that Petitioner is not entitled to habeas relief on this ground.

3. Failure to Address 28 U.S.C. § 1983 Claim

Petitioner next argues that the Magistrate Judge failed to resolve or "answer" his 42 U.S.C § 1983 claim against state court judge Edgar Dickson. (ECF No. 14 at 2.) In his Objections, Petitioner asserts that the Magistrate Judge "did not deny the claim nor answer [the claim] that [J]udge Edgar Dickson . . . pre-signed a conditional order of dismissal stemming from

a PCR application.” (ECF No. 14 at 2.)⁶ Because the Magistrate Judge failed to provide a response to this assertion, Petitioner requests “immediate release.” (*Id.* at 3.) Petitioner’s argument is difficult to comprehend. To the extent Petitioner is arguing that the Magistrate Judge should have considered the *merits* of Petitioner’s instant Petition *before* determining whether *jurisdiction* is proper in this venue, the court cannot agree.

“[A] federal court [] may not rule on the merits of a case without first determining that it has jurisdiction over” the claims asserted and the parties present in the suit. *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93–102 (1998)); *see also Trustgard Ins. Co. v. Collins*, 942 F.3d 195 (4th Cir. 2019) (noting that the court “must generally decide jurisdictional questions first”). Without proper jurisdiction, a federal court “cannot proceed at all in any cause.” *Steel Co.*, 523 U.S. at 94.

As stated above, Petitioner lacks jurisdiction in this court without proper authorization from the Fourth Circuit. *See supra* Part IV.C. Until Petitioner “file[s] in the [Fourth Circuit] a motion for leave to file a . . . successive habeas application in [this] district court,” *Felker*, 518 U.S. at 657 (citations omitted), this court is not the proper tribunal to consider Petitioner’s habeas claims, *see Winestock*, 340 F.3d at 205-06. *See also Joseph*, 2014 WL 7369571 at *4 (citing *id.*).

The court concludes, therefore, that Petitioner is not entitled to habeas relief on this ground.

V. CONCLUSION

For the reasons set forth above, the court hereby **OVERRULES** Petitioner Spencer Utsey’s Objections (ECF No. 14), **DISMISSES WITHOUT PREJUDICE** Petitioner Utsey’s

⁶ A copy of the conditional order is attached to Petitioner’s Objections. (*See generally* ECF No. 14-1.)

Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) without requiring Respondent to file a return. The court **ACCEPTS** the Magistrate Judge's Report and Recommendation (ECF No. 12) and incorporates it herein by reference.

CERTIFICATE OF APPEALABILITY

The law governing certificates of appealability provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right. (c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 536 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met.

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

October 13, 2020
Columbia, South Carolina

20-7683

Spencer Utsey

#192660

KIRKLAND CORRECTIONAL INSTITUTION

4344 Broad River Road

Columbia, SC 29210-0000

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7683, Spencer Utsey v. Warden of Kirkland
8:19-cv-03218-JMC

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED

COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN

BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: April 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7683
(8:19-cv-03218-JMC)

SPENCER UTSEY, a/k/a Spencer Clay Utsey

Petitioner - Appellant

v.

WARDEN OF KIRKLAND CORRECTIONAL INSTITUTION

Respondent - Appellee

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Respondent

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

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UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-7683

SPENCER UTSEY, a/k/a Spencer Clay Utsey,

Petitioner - Appellant,

v.

WARDEN OF KIRKLAND CORRECTIONAL INSTITUTION,

Respondent - Appellee,

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Respondent.

Appeal from the United States District Court for the District of South Carolina, at
Anderson. J. Michelle Childs, District Judge. (8:19-cv-03218-JMC)

Submitted: March 15, 2021

Decided: April 23, 2021

Before MOTZ and WYNN, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Spencer Utsey, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Spencer Utsey seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 petition. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge recommended that relief be denied and advised Utsey that failure to file timely, specific objections to this recommendation could waive appellate review of a district court order based upon the recommendation.

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. *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017); *Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985); see also *Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). Although Utsey received proper notice and filed timely objections to the magistrate judge's recommendation, he has waived review of the claims pursued on appeal because his objections did not address the same claims. See *Martin*, 858 F.3d at 245 (holding that, "to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection" (internal quotation marks omitted)).

Accordingly, we deny a certificate of appealability and dismiss the appeal. 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

20-7683

Spencer Utsey

#192660

KIRKLAND CORRECTIONAL INSTITUTION

4344 Broad River Road

Columbia, SC 29210-0000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7683
(8:19-cv-03218-JMC)

SPENCER UTSEY, a/k/a Spencer Clay Utsey

Petitioner - Appellant

v.

WARDEN OF KIRKLAND CORRECTIONAL INSTITUTION

Respondent - Appellee

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Respondent

TEMPORARY STAY OF MANDATE

Under Fed. R. App. P. 41(b), the filing of a timely petition for rehearing or rehearing en banc stays the mandate until the court has ruled on the petition. In accordance with Rule 41(b), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

U.S. District Court

District of South Carolina
Notice of Electronic Filing

The following transaction was entered on 10/16/2019 at 5:32 PM EDT and filed on 10/16/2019

Case Name: Utsey v. Dickson

Case Number: 5:19-cv-02873-JMC-JDA

Filer:

Document Number: 8

Docket Text:

ORDER directing Clerk not to authorize service and advising plaintiff to notify Clerk in writing of any change of address. Plaintiff has incurred a debt to the U.S.A. in the amount of \$350. Signed by Magistrate Judge Jacquelyn D. Austin on 10/16/2019 (gpre.)

5:19-cv-02873-JMC-JDA Notice has been electronically mailed to:

5:19-cv-02873-JMC-JDA Notice was electronically mailed to:

Spencer Utsey

192660-

F2-B-139

Kirkland Correctional Institution

4344 Broad River Road

Columbia, SC 29210

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1091130295 [Date=10/16/2019] [FileNumber=9310620-0] [a398f4301bc8bb0aa46e78b3275300827c263a65415afc056d7e334265bdfc2b3aac40db1f323d5a150b21aff61afdc45442591f988d0c943a17018268cec7f]]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Spencer Utsey,)	C/A No. 5:19-cv-02873-JMC-JDA
)	
Plaintiff,)	
)	
v.)	
)	ORDER
Edgar W. Dickson,)	
)	
Defendant.)	
_____)	

This is a civil action filed by a state prisoner proceeding pro se. Therefore, in the event that a limitations issue arises, Plaintiff shall have the benefit of the holding in *Houston v. Lack*, 487 U.S. 266 (1988) (prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to District Court). Under Local Civil Rule 73.02(B)(2), D.S.C., pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge.

PAYMENT OF THE FILING FEE:

By filing this case, Plaintiff has incurred a debt to the United States of America in the amount of \$350. See 28 U.S.C. § 1914. This debt is not dischargeable in the event Plaintiff seeks relief under the bankruptcy provisions of the United States Code. See 11 U.S.C. § 523(a)(17). A prisoner is permitted to file a civil action without prepayment of fees or security therefor under 28 U.S.C. § 1915. Plaintiff has submitted an Application to Proceed Without Prepayment of Fees and Affidavit (Form AO 240) to this Court pursuant to 28 U.S.C. § 1915(a)(1), which is construed as a motion for leave to proceed in forma pauperis. A review of the motion reveals that Plaintiff does not have the funds to prepay the filing fee.

Plaintiff's motion [Doc. 2] for leave to proceed in forma pauperis is **GRANTED**. As the Court has granted Plaintiff permission to proceed in forma pauperis, the agency having custody of Plaintiff shall collect payments from Plaintiff's prisoner trust account in accordance with 28 U.S.C. § 1915(b)(1) and (2), until the full \$350 filing fee is paid.

TO PLAINTIFF:

Plaintiff must place the civil action number listed above (**5:19-cv-02873-JMC-JDA**) on any document provided to the Court pursuant to this Order. **Any future filings in this case must be sent to the address below: (300 East Washington Street, Room 239, Greenville, South Carolina 29601).** All documents requiring Plaintiff's signature shall be signed with Plaintiff's full legal name written in Plaintiff's own handwriting. Pro se litigants shall *not* use the "s/typed name" format used in the Electronic Case Filing System. In all future filings with this Court, Plaintiff is directed to use letter-sized (8½ inches by 11 inches)

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paper only, to write or type text on one side of a sheet of paper only, and not to write or type on both sides of any sheet of paper. Plaintiff is further instructed not to write to the edge of the paper, but to maintain one inch margins on the top, bottom, and sides of each paper submitted.

Plaintiff is a pro se litigant. Plaintiff's attention is directed to the following important notice:

You are ordered to always keep the Clerk of Court advised in writing (300 East Washington Street, Room 239, Greenville, South Carolina 29601) if your address changes for any reason, so as to assure that orders or other matters that specify deadlines for you to meet will be received by you. If as a result of your failure to comply with this Order, you fail to meet a deadline set by this Court, your case may be dismissed for violating this Order. Therefore, if you have a change of address before this case is ended, you must comply with this Order by immediately advising the Clerk of Court in writing of such change of address and providing the Court with the docket number of all pending cases you have filed with this Court. Your failure to do so will not be excused by the Court.

TO THE CLERK OF COURT:

This case is subject to summary dismissal based on an initial screening conducted pursuant to 28 U.S.C. §1915 and/or 28 U.S.C. § 1915A. Therefore, the Clerk of Court shall not issue the summons or forward this matter to the United States Marshal for service of process at this time.

The Clerk of Court shall mail a copy of this Order to Plaintiff.

The Clerk of Court shall not enter any change of address submitted by Plaintiff which directs that mail be sent to a person other than Plaintiff unless that person is an attorney admitted to practice before this Court who has entered a formal appearance.

IT IS SO ORDERED.

s/Jacquelyn D. Austin
United States Magistrate Judge

October 16, 2019
Greenville, South Carolina

Plaintiff's attention is directed to the important WARNING on the following page.

IMPORTANT INFORMATION PLEASE READ CAREFULLY

WARNING TO PRO SE PARTY OR NONPARTY FILERS

ALL DOCUMENTS THAT YOU FILE WITH THE COURT WILL BE AVAILABLE TO THE PUBLIC ON THE INTERNET THROUGH PACER (PUBLIC ACCESS TO COURT ELECTRONIC RECORDS) AND THE COURT'S ELECTRONIC CASE FILING SYSTEM. CERTAIN *PERSONAL IDENTIFYING INFORMATION* SHOULD NOT BE INCLUDED IN, OR SHOULD BE REMOVED FROM, ALL DOCUMENTS BEFORE YOU SUBMIT THE DOCUMENTS TO THE COURT FOR FILING.

Rule 5.2 of the Federal Rules of Civil Procedure provides for privacy protection of electronic or paper filings made with the court. Rule 5.2 applies to ALL documents submitted for filing, including pleadings, exhibits to pleadings, discovery responses, and any other document submitted by any party or nonparty for filing. Unless otherwise ordered by the court, a party or nonparty filer should not put certain types of an individual's personal identifying information in documents submitted for filing to any United States District Court. If it is necessary to file a document that already contains personal identifying information, the personal identifying information should be "blacked out" or redacted prior to submitting the document to the Clerk of Court for filing. A person filing any document containing their own personal identifying information waives the protection of Rule 5.2(a) by filing the information without redaction and not under seal.

1. Personal information protected by Rule 5.2(a):
 - (a) **Social Security and Taxpayer identification numbers.** If an individual's social security number or a taxpayer identification number must be included in a document, the filer may include only the last four digits of that number.
 - (b) **Names of Minor Children.** If the involvement of a minor child must be mentioned, the filer may include only the initials of that child.
 - (c) **Dates of Birth.** If an individual's date of birth must be included in a document, the filer may include only the year of birth.
 - (d) **Financial Account Numbers.** If financial account numbers are relevant, the filer may include only the last four digits of these numbers.
2. Protection of other sensitive personal information – such as driver's license numbers and alien registration numbers – may be sought under Rule 5.2(d) (filings made under seal) and (e) (protective orders).

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[Plaintiff's] PCR" on December 29, 2017. [*Id.* at 5.] Plaintiff alleges that Defendant held the Order in his office for about nine months before sending the Order to Plaintiff. [*Id.*] For his injuries, Plaintiff contends that was "injured inside [and] out; pain, suffering, and denial of freedom" as a result of Defendant's pre-signing the Conditional Order of Dismissal at case number 2017-cv-05-00184. [*Id.* at 6.] For his relief, Plaintiff seeks \$6 million in damages because he is being detained illegally against his will. [*Id.*] Plaintiff makes similar allegations in his attachment to the Complaint. [Doc. 1-1 at 1-4.] Specifically, Plaintiff contends that Defendant committed an "act of perjury or concealment of a document coupled with [an] intentional scheme to defraud the court [which] justifies the setting aside of a judgment due to extrinsic fraud." [*Id.* at 4.] Plaintiff also includes a copy of the Conditional Order of Dismissal [*id.* at 8-19], as well as a letter from the South Carolina Office of Disciplinary Counsel in response to a complaint Plaintiff filed against Defendant with that Office [*id.* at 20-21].

The Court takes judicial notice¹ of Plaintiff's state court records as well as other cases he has filed in his Court. Importantly, the undersigned notes that Plaintiff previously filed a habeas action under 28 U.S.C. § 2254 in this Court at case number 8:13-cv-1433, in which the Court granted summary judgment for the Respondent. See *Utsey v. McCall*, No. 8:13-cv-1433, 2014 WL 4825625, at *3 (D.S.C. Sept. 24, 2014). The Court summarized Plaintiff's criminal action and related appeals and collateral actions as follows:

¹See *Philips v. Pitt Cty. 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.'" (alteration omitted)).

Petitioner was found guilty after a June 15, 1999, jury trial on a charge of armed robbery and was sentenced to 30 years in prison. Petitioner filed a direct appeal on September 7, 2000. The South Carolina Court of Appeals affirmed the conviction on November 20, 2000. Petitioner filed a petition for a rehearing on December 5, 2000, which was denied on January 30, 2001. Petitioner filed a petition for writ of certiorari to the South Carolina Supreme Court on April 2, 2001. The Supreme Court denied the petition on June 21, 2001, and issued the remittitur the next day. Petitioner filed a *pro se* application for Post Conviction Relief ("PCR") on April 9, 2002. After an evidentiary hearing on January 9, 2003, the PCR court filed an order of dismissal on March 3, 2003. Petitioner did not appeal the dismissal. Petitioner filed three more PCR applications—on April 18, 2008, December 6, 2011, and November 19, 2012—each of which was denied as being untimely for having been filed past the statute of limitations.²

Utsey, 2014 WL 4825625, at *1 (citations to the record omitted). Plaintiff filed a fifth PCR action in the Bamberg County Court of Common Pleas on September 21, 2017, at case number 2017-cp-05-00184, which remains pending at this time. See *Utsey v. State of South Carolina*, No. 2017-cp-05-00184, available at <https://publicindex.sccourts.org/Bamberg/PublicIndex/PISearch.aspx> (search by case number) (last visited Oct. 16, 2019).

The present case arises from a PCR action filed by Plaintiff in the Orangeburg County Court of Common Pleas on October 27, 2016, at case number 2016-cp-38-1382. See *Utsey v. State of South Carolina*, No. 2016-cp-38-1382 (the "PCR Action"), available at <https://publicindex.sccourts.org/Orangeburg/PublicIndex/PISearch.aspx> (search by case number) (last visited Oct. 16, 2019). In that action, Judge Dickson issued a Conditional Order of Dismissal that was dated December 29, 2017, and entered on the docket on

²Plaintiff's PCR actions are found at case numbers 2002-cp-05-000555, 2008-cp-05-00073, 2011-cp-05-00265, and 2012-cp-05-00210, in the Bamberg County Second Judicial Circuit Public Index, available at <https://publicindex.sccourts.org/Bamberg/PublicIndex/PISearch.aspx> (last visited Oct. 16, 2019).



January 8, 2018. [Doc. 1-1 at 19.] Judge Dickson concluded that the action was subject to summary dismissal as it was successive and time-barred. [Id. at 17-19.] Judge Dickson notified Plaintiff that the action would be dismissed in its entirety if Plaintiff did not show cause why the Order should not become final within twenty days from the date of service of the Order on Plaintiff. [Id. at 19.] Plaintiff filed a response to the Conditional Order of Dismissal on September 18, 2018. See *PCR Action*, Response to the Conditional Order of Dismissal, filed Sept. 18, 2018.

STANDARD OF REVIEW

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 would be charged with screening Plaintiff's lawsuit to identify cognizable claims or to dismiss the Complaint if (1) it were frivolous, malicious, or failed to state a claim upon which relief may be granted, or (2) if it sought monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

Because Plaintiff is a pro se litigant, his 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).

DISCUSSION

Plaintiff filed this action 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 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).

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 his pleadings,

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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (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, 530 (2011) (holding that plaintiff need not pin his claim for relief to precise legal theory). "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).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As noted, although the court must liberally construe the pro se complaint, a plaintiff must do more than make conclusory statements to state a claim for relief. See *Iqbal*, 556 U.S. at 677; *Twombly*, 550 U.S. at 555. Rather, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face, and the reviewing court need only accept as true the complaint's factual allegations, not its legal conclusions. *Iqbal*, 556 U.S. at 678–79; see also *Adams v. Rice*, 40 F.3d 72, 74–75 (4th Cir. 1994) (explaining that, although the court must liberally construe the pro se complaint, a plaintiff must do more than make mere conclusory statements to state a claim); *White v. White*, 886 F.2d 721, 723–74 (4th Cir. 1989) (dismissing complaint dismissed because it "failed to contain any factual allegations tending to support his bare assertion"). While Plaintiff is not required to plead

facts sufficient to prove his case as an evidentiary matter in the complaint, he must allege facts that support a claim for relief. *Bass v. DuPont*, 324 F.3d 761, 765 (4th Cir. 2003).

Here, Plaintiff's Complaint is subject to summary dismissal because Defendant is immune from suit and because Plaintiff has failed to state a claim for relief. The Court will address each issue below.

Defendant is entitled to dismissal

Plaintiff alleges that Defendant violated his rights when he entered a Conditional Order of Dismissal in Plaintiff's PCR action. [Doc. 1 at 4–5.] Plaintiff also alleges that Defendant improperly held the Order of Dismissal and committed fraud. [*Id.* at 4–5; Doc. 1-1 at 3.]

Defendant 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 have in the complete absence of all jurisdiction. See *Mireles v. Waco*, 502 U.S. 9, 11–12 (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 if a challenged judicial act was unauthorized by law, the 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. Immunity presents a threshold question. See *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982). Absolute immunity is “an immunity from suit rather than a mere defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Here, Plaintiff seems to allege that Defendant improperly entered an Order of Dismissal and held that Order for a period of nine months. These allegations relate to a judicial action. Thus, because the alleged misconduct of Defendant arose out of his judicial actions, judicial immunity squarely applies and should bar this lawsuit against him.

Plaintiff's claims are subject to dismissal

Further, the entire Complaint should be dismissed because it is frivolous and his claim for relief is barred by the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994). Plaintiff seeks monetary damages because of Defendant's allegedly unlawful actions in entering the Conditional Order of Dismissal. [Doc. 1 at 6.] Plaintiff also contends he is "being detained illegally, forcefully and against [his] will." [*Id.*] To the extent Plaintiff may be seeking release from the custody of SCDC, release from prison is not available in this civil rights action. See *Heck*, 512 U.S. at 481 (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) (explaining a challenge to the duration of confinement is within the core of habeas corpus). In this action, however, because Plaintiff is seeking money damages based on his allegedly 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,

§ 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal).⁴ See *Neitzke v. Williams*, 490 U.S. 319, 324–25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972).

IT IS SO RECOMMENDED.


s/Jacquelyn D. Austin

United States Magistrate Judge

October 16, 2019
Greenville, South Carolina

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

⁴The undersigned finds that Plaintiff cannot cure the defects in his Complaint by mere amendment and therefore recommends that the instant action be dismissed without affording Plaintiff an opportunity to amend because amendment would be futile. See *Goode v. Cent. Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619, 624 (4th Cir. 2015); *Thomas v. Drive Auto. Indus. of Am., Inc.*, No. 6:18-cv-169-AMQ, 2018 WL 5258811, at *2 (D.S.C. July 25, 2018) (declining to automatically give plaintiff leave to amend pursuant to *Goode* because plaintiff could not cure the defects in his claims against defendant by mere amendment), *Report and Recommendation adopted by* 2018 WL 5255183 (D.S.C. Oct. 22, 2018); *Workman v. Kernell*, No. 6:18-cv-00355-RBH-KFM, 2018 WL 4826535, at *2 (D.S.C. Oct. 2, 2018) (declining to give plaintiff leave to amend because it would be futile for plaintiff to amend his complaint against the defendants being dismissed), *aff'd*, 766 F. App'x 1 (4th Cir. 2019).

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