

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11597-F

CARLTON MCKISSIC,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

ORDER:

Carlton McKissic moves for leave to proceed *in forma pauperis* (“IFP”) and for a certificate of appealability (“COA”), as construed from his notice of appeal, in order to appeal the dismissal of his 28 U.S.C. § 2254 petition without prejudice. The district court dismissed the § 2254 petition in part for failure to comply with the court’s orders and in part for failing to identify a claim for relief under Rule 4 of the Rules Governing § 2254 Cases.

To the extent that the court denied the petition for failure to comply with the court’s orders, a COA is DENIED in PART as unnecessary. *See Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017). To the extent the district court dismissed the petition on the merits under Rule 4, his COA is DENIED in PART because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Lastly, McKissic’s motion for leave to

proceed IFP is DENIED because the appeal is frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i); *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983).

If McKissic timely pays the appellate filing fee, he may only proceed on appeal with respect to the district court's denial of his § 2254 petition for failure to comply with the court's orders.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

CARLTON MCKISSIC,

Petitioner,

V.

Warden SHAWN EMMONS,

Respondent.

NO. 4:21-cv-00174-CDL-MSH

ORDER

Petitioner Carlton McKissic filed a *pro se* petition for a writ of habeas corpus challenging his conviction in the Superior Court of Muscogee County, Georgia. Pet. for Writ of Habeas Corpus, ECF No. 1. He also filed various other documents setting forth additional claims. *See, e.g.*, Notice of “Grounds,” ECF No. 8; Notice of Supplemental Review, ECF No. 9; Notice of “Response Review Contentions,” ECF No. 11. As a result, the United States Magistrate Judge ordered Petitioner to consolidate all of his claims by filing a recast petition, setting forth each constitutional error or deprivation entitling him to federal habeas corpus relief that he wanted to raise in this action. Order, ECF No. 13. Petitioner did not comply with the order to file a single consolidated petition, and the Magistrate Judge initially entered an order to show cause, Order to Show Cause, ECF No. 26, and then recommended that the petition be dismissed based on Petitioner’s continued failure to follow the Court’s orders. R. & R., ECF No. 32. Petitioner filed objections to the recommendation, Obj., ECF Nos. 36 & 37, and on de novo review, this Court adopted the recommendation and ordered this case dismissed. Order, ECF No. 38; J., ECF No. 39.

Petitioner has now filed a notice of appeal from the dismissal of this case. N.O.A., ECF No. 40. Neither the recommendation of dismissal nor the order adopting the recommendation addressed whether Petitioner was entitled to a certificate of appealability. Thus, that question is addressed herein.

When, as here, “the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim,” a certificate of appealability will not be issued unless the prisoner can show, at least, “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Reasonable jurists could not find that a dismissal of the instant action for Petitioner’s repeated failure to comply with the Court’s orders was debatable or wrong. *See Knox v. Morgan*, 457 F. App’x 777, 779 (10th Cir. 2012) (denying a certificate of appealability where the district court dismissed a habeas petition without prejudice for failing to comply with court orders). Thus, Petitioner is **DENIED** a certificate of appealability. Any motion for leave to appeal *in forma pauperis* will be moot in light of this order. Therefore, Petitioner is also **DENIED** leave to appeal *in forma pauperis*.

SO ORDERED, this 12th day of May, 2022.

S/Clay D. Land
CLAY D. LAND
U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

CARLTON MCKISSIC,

Petitioner,

V.

Warden SHAWN EMMONS,

Respondent.

NO. 4:21-cv-00174-CDL-MSH

RECOMMENDATION OF DISMISSAL

Petitioner Carlton McKissic filed a *pro se* petition for a writ of habeas corpus challenging his conviction in the Superior Court of Muscogee County, Georgia. Pet. for Writ of Habeas Corpus, ECF No. 1. He also moved for leave to proceed without prepayment of the filing fee or security therefor pursuant to 28 U.S.C. § 1915(a). Mot. for Leave to Proceed *In Forma Pauperis*, ECF No. 2. Petitioner's motion to proceed *in forma pauperis* was previously granted. Order, ECF No. 13. In that same order, it was noted that, since filing the petition in this case, Petitioner had filed various supplements and notices in which he elaborated on his arguments for relief and set forth additional claims. *Id.* (citing ECF Nos. 5-9, 11 & 12). As a result, Petitioner was ordered to consolidate all of his claims by filing a recast petition, setting forth each constitutional error or deprivation entitling him to federal habeas corpus relief that he wanted to raise in this action. *Id.*

Petitioner was directed to attach no more than ten additional pages setting forth his claims to the recast petition. *Id.* Moreover, Petitioner was ordered not to include any other attachments with the petition. *Id.* Finally, Petitioner was cautioned that his failure to fully and timely comply could result in the dismissal of this petition. *Id.*

Rather than filing a single consolidated petition, following the entry of the order to recast, Petitioner filed eight supplements to the petition (ECF Nos. 14-18, 21-22, 25),¹ two recast petitions (ECF Nos. 19 & 23), a letter relating to the order to recast (ECF No. 20), and a “notice of final review” (ECF No. 24). The second recast petition and notice of final review were in the nature of supplements to the first recast petition. In addition to the nine pages attached to the recast petition, the supplements filed following that petition added another twelve pages to Petitioner’s claims plus four pages of additional documents that Petitioner sought to add as exhibits. Thus, these filings did not comply with this Court’s order that Petitioner consolidate his claims into a single petition.

Accordingly, Petitioner was ordered to respond and show cause to the Court why this case should not be dismissed for failure to comply with the order to recast his petition into one consolidated petition consistent with the Court’s previous order. Order to Show Cause, ECF No. 26. Petitioner was cautioned that, in responding to the show cause order, he was also required to file a single consolidated petition setting forth each of the claims that he wanted to raise in this proceeding. *Id.* Petitioner was further directed that the petition must comply with the Court’s previous order limiting him to attaching ten pages and that he was not to file any supplements or other documents modifying the petition or setting forth additional facts or claims. *Id.* Petitioner was given fourteen days to respond to the show cause order and file his recast petition and was cautioned that his failure to respond and to follow the instructions set forth in that order would result in the dismissal of this petition. *See* Fed. R. Civ. P. 41(b) (allowing the district court to dismiss a case for

¹ Five of these supplements (ECF Nos. 14-18) appear to have been filed before Petitioner received this Court’s order. The remaining documents were submitted after he received the order to recast.

failure to follow court orders); *see also Frank v. Schulson*, 782 F. App'x 917, 920 n.2 (11th Cir. 2019) (recognizing the authority of the district court to manage its own docket and to dismiss a case *sua sponte* on this basis using a fair procedure).

After the order to show cause was entered, Petitioner submitted two supplements, which he likely mailed before he received the show cause order. *See* Suppl., ECF Nos. 27 & 28. Thereafter, Petitioner filed a recast habeas corpus petition. Recast Pet., ECF No. 29. Since filing the petition, he has also submitted a four-page "leniency brief" and a six-page document, both containing additional arguments about his case. Brief, ECF No. 30; Notice of Filing Case Law, ECF No. 31. Thus, Petitioner has again not complied with the order to consolidate all of his claims into a single petition and to refrain from filing additional documents or supplements.

Petitioner also has not filled in answers to the questions on the habeas corpus form regarding the grounds he is seeking to raise. *See* Recast Pet., ECF No. 29. Instead, Petitioner has listed his claims of error in an attachment. Attach. to Recast Pet., ECF No. 29-1. In particular, Petitioner lists fifty-three types of error, which he apparently is asserting occurred in his criminal case, but Petitioner does not provide any factual information regarding the proceedings in his case to show how any of these purported errors apply here.² *Id.* at 1-2. Insofar as Petitioner did not properly fill out the habeas corpus form and did not answer the questions on the form to set out his claims, Petitioner's

² At one point, Petitioner discusses a "failure to apply his *Boykin* rights" during a plea hearing. Attach. to Recast Compl. 2-3, ECF No. 29-1. On the surface, it appears as though Petitioner may be providing factual allegations relating to his case, but the facts he discusses relate to a failure to advise a defendant of certain rights during a plea hearing pursuant to a plea agreement. *See id.* Petitioner, however, pled not guilty to the charges against him and had a jury trial. Recast Compl. 1-2, ECF No. 29. Thus, it does not appear that these are factual allegations relating to Petitioner's actual case.

recast petition again does not comply with the previous orders directing him to file a single, proper recast petition.

Moreover, because Petitioner has not asserted any facts to support his claims or show that the purported errors occurred, he has not identified any claim on which the Court could grant habeas relief. In this regard, Rule 4 of the Rules Governing § 2254 Cases requires district courts to dismiss habeas corpus petitions without ordering the State to respond “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief.” *Paez v. Sec’y, Fla. Dep’t of Corrs.*, 947 F.3d 649, 653 (11th Cir. 2020) (quoting Rule 4). To survive a Rule 4 review, a habeas petition must set forth facts that, if true, would establish a constitutional violation entitling the petitioner to relief. *Id.* at 653 (citing *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011) (holding that a § 2254 petition must comply with the “fact pleading requirements of [Habeas] Rule 2(c) and (d)” to survive dismissal under Rule 4)).

Here, because Petitioner has set forth no facts to support his claims of error, his petition is subject to dismissal. *Id.* at 649. Therefore, it is now **RECOMMENDED** that the petition be **DISMISSED WITHOUT PREJUDICE** based on Petitioner’s failure to comply with the Court’s orders in this case and because he has not properly stated any habeas corpus claims. *See* Fed. R. Civ. P. 41(b) (allowing the district court to dismiss a case for failure to follow court orders); *see also Frank*, 782 F. App’x at 920 n.2 (11th Cir. 2019) (recognizing the authority of the district court to manage its own docket and to dismiss a case *sua sponte* on this basis using a fair procedure).

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1), Plaintiff may serve and file written objections to

this recommendation with the United States District Judge to whom this case is assigned within **FOURTEEN (14) DAYS** of his being served with a copy of this Order. Plaintiff may seek an extension of time in which to file written objections or amendments, provided a request for an extension is filed prior to the deadline for filing written objections. Any objection is limited in length to **TWENTY (20) PAGES**. *See* M.D. Ga. L.R. 7.4. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. *See* 11th Cir. R. 3-1.

SO RECOMMENDED, this 8th day of March, 2022.

/s/ Stephen Hyles

UNITED STATES MAGISTRATE JUDGE