UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6325

DAMORIUS D. GAINES, a/k/a Damorius Dontavis Gaines, a/k/a Damorius Dontavious Gaines,

Petitioner - Appellant,

v.

WARDEN JACKSON,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. Henry M. Herlong, Jr., Senior District Judge. (4:23-cv-00411-HMH)

Submitted: August 24, 2023 Decided: August 29, 2023

Before QUATTLEBAUM and HEYTENS, Circuit Judges, and MOTZ, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Damorius D. Gaines, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Damorius D. Gaines 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 Gaines 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). Gaines has forfeited appellate review by failing to file objections to the magistrate judge's recommendation after receiving proper notice. 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

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

Damorius D. Gaines, #346524 a/k/a Damorius Dontavis Gaines, a/k/a Damorius Dontavious Gaines, Petitioner, vs. Warden Jackson, Respondent.	)	C.A. No. 4:23-411-HMH-TER **OPINION & ORDER**

This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Thomas E. Rogers, III, 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 makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1) (2006).

The petitioner filed no objections to the Report and Recommendation. In the absence of objections to the magistrate judge's Report and Recommendation, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198,

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199 (4th Cir. 1983). The court must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

After a thorough review of the Report and Recommendation and the record in this case, the court adopts Magistrate Judge Rogers' Report and Recommendation and incorporates it herein. It is therefore

ORDERED that the petition is summarily dismissed without prejudice and without requiring respondent to file a return. It is further

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

IT IS SO ORDERED.

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

Greenville, South Carolina
March 20, 2023

NOTICE OF RIGHT TO APPEAL

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

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Damorius D. Gaines, #346524, *a/k/a Damorius Dontavis Gaines, a/k/a Damorius Dontavious Gaines,* Petitioner, vs. Warden Jackson, Respondent.	) C/A No. 4:23-411-HMH-TER))) Report and Recommendation))))))

Petitioner, a state prisoner, proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B) (2)(c) DSC. Having reviewed the petition in accordance with applicable law, the court concludes that it should be summarily dismissed. This is the fourth[2] unexhausted § 2254 action that Petitioner has filed while his PCR is still pending in state court. *See* Nos. 4:22-cv-3994; 4:22-cv-239; 4:23-cv-335. Petitioner should pursue his pending PCR in state court and as to Petitioner's allegations that No. 4:22-cv-298 in this court was a third appeal of his state court conviction after his PCR, repeatedly[3] filing in this district court is procedurally inappropriate as explained below while

[1] In this action, Petitioner filed a § 2241 form. Petitioner is not in federal custody but is held pursuant to a state court judgment. Petitioner's action is one arising from § 2254. *Joseph v. Wallace*, No. 8:22-CV-3282-RMG, 2022 WL 16638342, at *1 (D.S.C. Nov. 2, 2022)(finding state prisoner's § 2241 petition form was a § 2254 petition).

[2] In the interest of judicial economy and expediency and due to the repetitive nature of Petitioner's habeas filings, the undersigned recommends that the filing fee in this matter be suspended at this time.

[3] **The court has the authority to consider a tailored pre-filing injunction to prohibit Petitioner from filing of future habeas actions which are not ripe for adjudication in this court.** *See Cox v. SC*, No. 8:16-cv-1914-TMC-JDA, 2016 WL 8117950, at *2 (D.S.C. Sept. 12, 2016), *report and recommendation adopted*, 2017 WL 395302 (D.S.C. Jan. 30, 2017); *see also Miles v. Angelone*, 483 F. Supp. 2d 491, 497 (E.D. Va. 2007). Petitioner must exhaust his state court remedies before filing another habeas action in this court concerning these convictions.

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Petitioner's PCR is pending in the court of common pleas. (ECF No. 1).

DISCUSSION

On September 6, 2018, in Anderson County, Petitioner was found guilty after a jury trial of kidnapping, armed robbery, attempted armed robbery, and possession of a weapon.[4] On September 17, 2018, Plaintiff filed a direct appeal of the convictions. On July 8, 2020, the South Carolina Court of Appeals issued the remittitur dismissing the appeal. On June 4, 2020, Petitioner filed a PCR in the lower court. As of the date of this filing, the PCR remains pending in the court of common pleas. *See* No. 2020-CP-04-0122. Petitioner's last filing in the state PCR was in September 2022. The public records show Petitioner moved to remove his appointed counsel, the state court granted that motion, and Petitioner was ordered to proceed *pro se* as he requested. In 2021, Petitioner filed a motion for appointment of an attorney again in the PCR action.

Under established local procedure in this judicial district, a careful review has been made of the *pro se* pleadings and motion to proceed *in forma pauperis* pursuant to the procedural provisions of 28 U.S.C. § 1915 and the Anti-Terrorism and Effective Death Penalty Act of 1996. The review has been conducted in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951 (4th Cir. 1995)(*en banc*); *Todd v. Baskerville*, 712 F.2d

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[1] *See generally*,https://publicindex.sccourts.org/anderson/publicindex/with search parameters limited by Petitioner's name). The court may take judicial notice of factual information located in postings on government websites. *See In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, 2008 WL 4185869 at * 2 (E.D. La. Sept. 8, 2008) (noting that courts may take judicial notice of governmental websites including other courts' records); *Williams v. Long*, No. 07-3459-PWG, 2008 WL 4848362 at *7 (D. Md. Nov. 7, 2008) (noting that some courts have found postings on government websites as inherently authentic or self-authenticating).

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70 (4th Cir. 1983); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978); and *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). The petitioner is a *pro se* litigant, and thus his pleadings are accorded liberal construction. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)(*per curiam*); *Cruz v. Beto*, 405 U.S. 319 (1972). Even under this less stringent standard, the petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Department of Social Services*, 901 F.2d 387, 390-91 (4th Cir. 1990).

With respect to his convictions and sentences, Petitioner's sole federal remedies are a writ of habeas corpus under either 28 U.S.C. § 2254 or 28 U.S.C. § 2241, which remedies can be sought only after the petitioner has exhausted his state court remedies. "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted." *Beard v. Green*, 523 U.S. 371, 375 (1998) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)); *see also* 28 U.S.C. § 2254(b); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973); *Picard v. Connor*, 404 U.S. 270 (1971). It is well-settled that state prisoners must exhaust all available state-court avenues for challenging their convictions before they seek habeas relief in federal court. *See* 28 U.S.C. § 2254(b)(1). Section 2254 generally forbids federal courts from granting collateral relief until prisoners have "fairly presented" their claims in each appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 27 (2004); *see also Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) ("The exhaustion requirement ... serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights."); *Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010) (noting that "a federal habeas court may consider only those issues that have

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been properly presented to the highest state courts with jurisdiction to decide them"). To satisfy his burden, Petitioner must show that both the operative facts and the controlling legal principles were presented to the highest state court. *Gordon v. Braxton*, 780 F.3d 196, 201 (4th Cir. 2015).

Here, Petitioner's PCR appears to be ongoing, as the matter is still pending before the court of common pleas. Because appellate review of the PCR court's decision is necessary to show exhaustion in South Carolina, Petitioner's federal habeas claims are unexhausted and premature at this stage. *See Braveboy v. James*, No. 8:20-cv-03486-TMC-JDA, 2020 WL 8713682, at *3 (D.S.C. Nov. 10, 2020), *adopted*, 2021 WL 423410 (D.S.C. Feb. 8, 2021); *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (noting that state prisoners must invoke "one complete round of the State's established appellate review process"). Thus, it is recommended that Petitioner's habeas Petition be dismissed so that he may exhaust his state-court remedies as required under 28 U.S.C. § 2254(b)(1). *See, e.g., Goss v. Williams*, No. 2:18-cv-2938-BHH, 2020 WL 502635, at *2 (D.S.C. Jan. 31, 2020), appeal dismissed, 814 F. App'x 776 (4th Cir. 2020) (dismissing pro se § 2254 petition for failure to exhaust state remedies where PCR application was still pending before state court); *Braveboy*, 2020 WL 8713682, at *3 ; *Washington v. Cartledge*, No. 4:08-cv-04052-PMD, 2010 WL 1257356, at *2 (D.S.C. Mar. 29, 2010); *Young v. Warden of Perry Corr. Inst.*, No. 2:20-CV-03974-RMG-MGB, 2021 WL 2210800, at *3 (D.S.C. May 13, 2021), *report and recommendation adopted*, 2021 WL 2210712 (D.S.C. June 1, 2021).

RECOMMENDATION

Accordingly, it is recommended that the § 2254 petition be summarily dismissed *without prejudice and without requiring the respondent to file a return.* Petitioner can refile his § 2254 petition with the Court after he has exhausted his state court remedies. The undersigned reminds Petitioner to

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be mindful of the statute of limitations applicable to this action. *See* 28 U.S.C. § 2244(d).

s/ Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

February 16, 2023
Florence, South Carolina

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