UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6949

WILLIE JOHNSON,

Petitioner - Appellant,

v.

WARDEN KENNETH NELSON,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Richard Mark Gergel, District Judge. (9:23-cv-02864-RMG)

Submitted: January 30, 2024 Decided: February 6, 2024

Before KING, AGEE, and THACKER, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Willie Johnson, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Willie Johnson, a South Carolina prisoner, seeks to appeal the district court's order accepting the magistrate judge's recommendation, construing Johnson's 28 U.S.C. § 2241 petition as a 28 U.S.C. § 2254 petition, and dismissing the petition as unauthorized and successive. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Johnson has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We deny Johnson's motion for the appointment of counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Willie Johnson,

Petitioner,

v.

Warden Kenneth Nelson,

Respondent.

Case No. 9:23-cv-02864-RMG

ORDER AND OPINION

Before the Court is the Report and Recommendation ("R & R") of the Magistrate Judge (Dkt. No. 5) recommending that Petitioner's petition for writ of habeas corpus (Dkt. No. 1) be dismissed. Petitioner filed objections to the R & R. (Dkt. No. 11). For the reasons set forth below, the Court adopts the R & R and dismisses the petition without prejudice.

I. Background

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1985 conviction for murder. This is Petitioner's seventh § 2254 petition.

The Magistrate Judge found that because Petitioner has filed several habeas petitions prior to the petition currently before the Court, the Court must dismiss the current petition as successive, and Petitioner must seek leave from the United States Court of Appeals for the Fourth Circuit. 28 U.S.C. § 2244(b). Having reviewed the entire record, including Petitioner's Objections, the Court finds the Magistrate Judge fairly and accurately summarized the facts and applied the correct principles of law.

II. Standard

A. Review of Report and Recommendation

The Magistrate Judge makes a recommendation to the Court that has no presumptive weight and the responsibility to make a final determination remains with the Court. *See, e.g.*,

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Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Where there are specific objections to the R & R, the Court "makes a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* In the absence of objections, the Court reviews the R & R to "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note; *see also Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983) ("In the absence of objection ... we do not believe that it requires any explanation.").

B. Review of Petition for a Writ of Habeas Corpus

Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. A habeas petition is "successive" if a previously filed habeas petition was "adjudicated on the merits." *Slack v. McDaniel*, 529 U.S. 473, 485-89 (2000). In order to file a "successive" petition, the petitioner must first obtain authorization from the United States Court of Appeals for the Fourth Circuit.[1] *See, e.g.*, 28 U.S.C. § 2254(b)(3)(A) (mandating that "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application"); Rule 9 of Rules Governing § 2254 ("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 ..."); *Gonzales v. Crosby*, 545 U.S. 524, 530 (2005) (noting that "before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions"). If the petitioner of a successive petition did not first obtain the necessary authorization, the District Court lacks jurisdiction to consider the merits of the petition

and, as a result, must dismiss. *See, e.g.*, *Burton v. Stewart*, 549 U.S. 147, 153 (2007); *Smart v. Warden, Kershaw Corr. Inst.*, No. 2:13-cv-2449-GRA, 2013 WL 6054475, at *3 (D.S.C. Nov. 15, 2013) (dismissing unauthorized successive petition for lack of jurisdiction).

III. Discussion

The Magistrate Judge found, and Petitioner does not dispute, that Petitioner has sought habeas relief several times prior to this current petition. As such, the court agrees with the R & R's conclusion that Petitioner's current habeas petition must be dismissed as successive pursuant to 28 U.S.C. § 2244(b)(3)(A). As noted by the Magistrate Judge, leave from the United States Court of Appeals for the Fourth Circuit is required under the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") for filers of successive § 2254 habeas petitions. Therefore, as correctly instructed by the Magistrate, before Petitioner can file another habeas petition in the United States District Court, he must seek and obtain leave (i.e ., written permission) from the Fourth Circuit. 28 U.S.C. § 2244(b) (3)(A) ("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.").

Petitioner has timely filed objections to the R & R. Petitioner argues that his petition is not successive and that the court must consider the merits of his claims. Petitioner claims that the AEDPA does not apply to his petition because his conviction occurred in 1984 before the enactment of the AEDPA and § 2244. The AEDPA, however, applies to any petitions filed after the enactment of the Act. *Richardson v. U.S.*, Nos. 6:97CV113, 1997 WL 163456 at *1 (M.D.N.C. March 18, 1997) ("The statute was signed into law on April 24, 1996 by the President. The instant motion was filed after that date and therefore, the successive petition procedural provision of the AEDPA apply to it."). Petitioner also generally claims that by dismissing his habeas petition, the

Court is denying him access to the courts. Lastly, Petitioner makes multiple arguments as to the underlying merits of his habeas claim.

The Court finds Petitioner's objections to be without merit. It is undisputed that Petitioner has filed multiple habeas petitions prior to the petition at issue in this case. As such, the Court cannot consider a second or successive habeas petition unless Petitioner first obtains a permission from the United States Court of Appeals for the Fourth Circuit under 28 U.S.C. § 224(b)(3)(A). Until Petitioner obtains permission from the Fourth Circuit, this court is unable to address the underlying merits of his claim.

IV. Certificate of Appealability

The governing law provides:

> (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; *see also* Rule 1(b) Governing Section 2254 Cases in the United States District Courts ("The district court may apply any or all of these rules to a habeas corpus petition not covered by [28 U.S.C. § 2254]."). A prisoner satisfies the standard by demonstrating that reasonable jurists would find the Court's assessment of his constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 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). Here, the legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is denied.

V. Conclusion

For the reasons above, the Court **DISMISSES** Petitioner's habeas petition (Dkt. No. 1). without prejudice and without requiring the Respondent to file a return.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

September 5, 2023
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Willie Johnson, Petitioner, vs. Warden Kenneth Nelson, Respondent	)	C.A. No. 9:23-2864-RMG **ORDER**

This matter comes before the Court on Petitioner's motion to recuse the undersigned because of his rulings in a prior case brought by Petitioner. (Dkt. No. 10). The prior suit, *Johnson v. Stirling*, C.A. No. 9:18-3028 (D.S.C.), involved claims by Petitioner, a state prisoner, arising under 42 U.S.C. §§ 1983 and 1985. The suit was initially referred to the United States Magistrate Judge for pretrial handling. The Magistrate Judge issued a Report and Recommendation recommending that the Court grant the Defendants' motion for summary judgment. This Court adopted the Report and Recommendation of the Magistrate Judge as the order of the Court. *Johnson v. Stirling*, No. 9:18-3028-RMG, 2021 WL 1232658 (D.S.C. April 2, 2021). This Court's decision was affirmed by the Fourth Circuit in a *per curiam* order. *Johnson v. Stirling*, 2021 WL 5563933 (4th Cir. Nov. 29, 2021). The United States Supreme Court thereafter denied Petitioner's petition for a writ of *certiorari*. *Johnson v. Sterling*, 143 S.Ct. 220 (2022).

28 U.S.C. § 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This is an objective standard based on a "reasonable, well-informed observer who assesses all the facts and circumstances." *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998). The basis of the disqualification must

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come from an "extrajudicial source," and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 554-55 (1994). If a party is unhappy with a judge's rulings, his proper path is to file an appeal. *Id.* at 555. As the Fifth Circuit stated in *United States v. Gordon*, 61 F. 3d 263, 268 (5th Cir. 1995), "litigants may not make the trial judge into an issue because they dislike the court's approach or because they disagree with the ultimate outcome of their case."

Petitioner has offered no plausible basis for his motion to recuse. The Court is aware of no basis upon which its impartiality might reasonably be questioned. The fact that Petitioner was previously an unsuccessful litigant before the Court is plainly not a proper basis for disqualification. Petitioner's motion to recuse (Dkt. No. 10) is denied.

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

September 5, 2023
Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Willie Johnson, Petitioner,	)	C/A No. 9:23-02864-RMG-MHC
v.	)	**REPORT AND RECOMMENDATION**
Warden Kenneth Nelson, Respondent.	)	

Willie Johnson, a pro se state prisoner incarcerated at the Broad River Correctional Institution of the South Carolina Department of Corrections (SCDC), filed a Petition for habeas corpus relief. Under 28 U.S.C. § 636(b) and 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.

I. NOTICE OF RECHARACTERIZATION OF PETITION

Petitioner filed this action on a Form AO 242 (Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241) in which he appears to seek habeas relief under 28 U.S.C. § 2241 (§ 2241). However, a petition for writ of habeas corpus pursuant to § 2241 and a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (§ 2254) are separate and distinct mechanisms for obtaining post-conviction relief. A § 2241 petition attacks the manner in which a sentence is executed. *See* 28 U.S.C. § 2241(a). By contrast, a § 2254 motion challenges the constitutional validity of a state conviction or sentence. *In re Wright*, 826 F.3d 774, 779 (4th. Cir. 2016). Regardless of the label used by a petitioner, the subject matter of the motion, and not its title, determines its status. *See e.g., Calderon v. Thompson*, 523 U.S. 538, 554 (1998); *Castro v. United States*, 540 U.S. 375, 794 (2003) (stating that a court may recharacterize a pro se motion "to create better correspondence between the substance" of the motion and "its underlying legal basis"); *see also Adams v.*

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Middlebrooks, 810 F. Supp. 2d 119, 122 (D.D.C. 2011) (finding that a petitioner's choice of statute is not dispositive and that a petitioner may not escape the requirements found under § 2254 by filing the petitioner under § 2241); *Wilson v. Clarke*, No. 3:21CV613-HEH, 2022 WL 47605, at *1 (E.D. Va. Jan. 5, 2022) (noting, in denying motion to amend § 2241 petition, that § 2241 was the wrong vehicle for the petitioner to challenge his state court detention), *appeal dismissed*, No. 22-6088, 2023 WL 3617842 (4th Cir. May 24, 2023).

Here, Petitioner is a state inmate. He asks to be released from custody and, thus, appears to be challenging his conviction and/or sentence. Petitioner is therefore given notice that this case is recharacterized as an action brought under § 2254.

II. BACKGROUND

Petitioner was convicted on the charge of murder (indictment number 85-GS-10-159) in the Court of General Sessions for Charleston County and was sentenced to a term of life imprisonment on April 18, 1985. His conviction was affirmed on direct appeal by the Supreme Court of South Carolina on December 8, 1986. *See Johnson v. Bodison*, No. 9:09-1782-PMD-BM, 2009 WL 3738786, at * 3 (D.S.C. Nov. 9, 2009).

On March 30, 1989, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (case number 3:89-00722-MJP) that was dismissed on March 14, 1990. The United States Court of Appeals for the Fourth Circuit dismissed Petitioner's subsequent appeal but modified the judgment to indicate the dismissal was without prejudice because the petition was a mixed petition. *Johnson v. Evatt*, No. 89-6412, 900 F.2d 252 (4th Cir. Apr. 4, 1990).

A second § 2254 petition was filed in 1990, service was authorized, and respondents filed a motion for summary judgment.. The respondents' motion for summary judgment was granted.

See Johnson v. Evatt, No. 3:90-1308-MJP-HMH (D.S.C.).[1] The Fourth Circuit granted a certificate of probable cause to appeal on June 10, 2002, and appointed counsel (David I. Bruck, Esq.), to represent the petitioner and oral argument was held. On May 26, 1993, the Fourth Circuit affirmed the judgment of the district court. *See Johnson v. Evatt*, No. 91-7166, 993 F.2d 1537 (4th Cir. 1993), *cert. denied*, 510 U.S. 936 (1993).

Petitioner filed a third § 2254 petition on January 28, 1994, the respondents' motion for summary judgment was granted, and the petition was dismissed on March 10, 1995. *See Johnson v. Evatt*, No. 0:94-310-MJP-BM (D.S.C.). On June 28, 1995, the Fourth Circuit dismissed Petitioner's appeal. *Johnson v. Evatt*, 60 F.3d 822 (4th Cir. 1995).

Petitioner filed his fourth § 2254 petition on April 23, 1999. The respondents' motion for summary judgment was granted and the action was dismissed as successive on October 8, 1999. *See Johnson v. Catoe*, No. 0:99-1070-MJP-BM (D.S.C.). The Fourth Circuit dismissed Petitioner's appeal on December 22, 1999. *Johnson v. Catoe*, 202 F.3d 259 (4th Cir. 1999).

Petitioner filed a fifth § 2254 petition on March 6, 2007, and it was dismissed as a successive petition on June 19, 2007. *Johnson v. Ozmint*, No. 0:07-0604-PMD-BM (D.S.C.). The Fourth Circuit dismissed Petitioner's appeal on August 24, 2007. *Johnson v. Warden, Lieber Corr. Inst.*, 235 F. App'x 69 (4th Cir. 2007). A sixth § 2254 petition, filed by Petitioner on July 6, 2009, was dismissed as successive on November 9, 2009. *Johnson v. Bodison*, No. 9:09-1782-PMD-BM, 2009 WL 3738786 (D.S.C. Nov. 9, 2009).

[1] A federal court may take judicial notice of the contents of its own records, as well as those records of other courts. *See Aloe Creme Labs., Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (noting that courts may take judicial notice of other courts' records and proceedings).

In this seventh § 2254 Petition, Petitioner asserts that the trial judge in his criminal case failed to "actually"[2] sign the order committing him to the SCDC. ECF No. 1 at 6. He attached a memorandum in which he appears to allege claims concerning post-conviction relief proceedings and appeals. Petitioner may also be attempting to allege claims concerning his conditions of confinement. *See* ECF No. 1-2.[3]

III. STANDARD OF REVIEW

A pro se habeas petition is reviewed pursuant to the procedural provisions of the Rules Governing Section 2254 Proceedings in the United States District Court, 28 U.S.C. § 2254;[4] the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996; and 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); and *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983). The Court screens a petitioner's lawsuit to determine "[i]f it plainly appears from the

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[2] In a previous case brought by Petitioner under 42 U.S.C. § 1983 (§ 1983), the court concluded that Petitioner could not bring a challenge to the fact of his confinement in a § 1983 action and also found that:

> Plaintiff's claim cannot proceed because there is simply no evidence, other than Plaintiff's say-so, that he is being improperly detained. The record contains a copy of Plaintiff's commitment order, which indicates Plaintiff was "committed to jail 10–03–84," and it states that Plaintiff is "confined under the jurisdiction and control of the South Carolina Department of Corrections for a period of his life." (Def.'s Mot. for Summ. J. Ex. 2 [23–4].) The order is dated April 18, 1985, and although it does not contain the handwritten signature of the judge, it is signed as "s/ T.L. Hughston, Jr." (*Id.*) Plaintiff has not pointed to, and the court has not found, any authority to suggest the commitment order is invalid.

Johnson v. Ozmint, 567 F. Supp. 2d 806, 813 (D.S.C. 2008).

[3] To the extent Petitioner may be attempting to raise a claim concerning his conditions of confinement at SCDC, he may not bring such claims in this habeas action and must do so, if at all, in a separate civil action. *See Preiser v. Rodriguez*. 411 U.S. 475, 500 (1973) (complaint or petition challenging the fact or duration of confinement should be construed and processed as a habeas corpus petition, while a complaint or petition challenging the conditions of confinement should be construed and processed as a complaint pursuant to 42 U.S.C. § 1983).

[4] The Rules Governing Section 2254 are applicable to habeas actions brought under § 2241. *See* Rule 1(b), Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254.

petition and any attached exhibits that the petitioner is not entitled to relief in the district court[.]" Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts.

Pro se petitions are held to a less stringent standard than those drafted by attorneys, and a court is charged with liberally construing a petition filed by a pro se litigant to allow the development of a potentially meritorious case. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, even when considered under this less stringent standard, for the reasons set forth below, the Petition submitted in this case is subject to summary dismissal.

IV. DISCUSSION

This action should be summarily dismissed because this is a successive § 2254 petition. "Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas corpus or [a 28 U.S.C.] § 2255 motion to vacate sentence without first receiving permission to do so from the appropriate circuit court of appeals." *In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997). The "gatekeeping" mechanism created by the AEDPA amended 28 U.S.C. § 2244(b) to provide:

> The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. § 2244(b)(3)(A). A three-judge panel has 30 days to determine whether "the application makes a prima facie showing that the application satisfies the requirements of" § 2244(b). § 2244(b)(3)(C); see §§ 2244(b)(3)(B), (D).

Felker v. Turpin, 518 U.S. 651, 657 (1996).

For a petition to qualify as "successive," a prior petition must have been adjudicated on the merits. *See Slack v. McDaniel*, 529 U.S. 473, 485-89 (2000); *see also Henderson v. Bazzle*, C/A No. 9:08-978-MBS-GCK, 2008 WL 1908535, at *3 (D.S.C. April 29, 2008) (for a petition to qualify as "successive," the prior petition must have been adjudicated on the merits which includes a prior dismissal of a petition as untimely); *Tyler v. Caine*, 533 U.S. 656 (2001) (Section 2244(b)

applies when first habeas corpus petition adjudicated on the merits was filed prior to enactment of the AEDPA and a second petition was filed after the enactment of the AEDPA).[5] Petitioner previously filed a petition pursuant to § 2254 (case number 3:90-1308-MJP-HMH) in which he challenged the same conviction and sentence as challenged in the present Petition. A motion for summary judgment was filed by the respondents in the earlier petition and the motion was granted. *See Johnson v. Evatt*, No. 3:90-1308-MJP-HMH (D.S.C.); *Johnson v. Evatt*, No. 91-7166, 993 F.2d 1537 (4th Cir. 1993), *cert. denied*, 510 U.S. 936 (1993). Thus the present Petition qualifies as a successive action because Petitioner's second § 2254 petition challenged the same conviction and sentence and was decided on the merits. Therefore, this action should be summarily dismissed because it is successive and Petitioner has not alleged that he received permission from the United States Fourth Circuit Court of Appeals before he submitted his Petition to this Court.

Petitioner may be attempting to assert a claim that relies on a new rule of constitutional law or on new evidence. A petitioner may be able to present a claim for the first time in a successive habeas petition where the claim relies on a new rule of constitutional law, *see* 28 U.S.C. § 2244(b)(2)(A), or, if the claim is based on newly discovered evidence, where the petitioner can make a prima facie showing of both cause and prejudice within the meaning of § 2244(b)(2)(B)(i) and § 2244(b)(2)(B)(ii). *See Evans v. Smith*, 220 F.3d 306, 323 (4th Cir. 2000). However, even if Petitioner could show that his grounds satisfy these strict requirements, the Fourth Circuit is still the proper tribunal to make that decision when authorization is requested, not the district court. *See* 28 U.S.C. § 2244(b)(3)(A); *see also Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) ("[B]efore the district court may accept a successive petition for filing, the court of appeals must determine

[5] The issue of successiveness of a habeas petition may be raised by the court *sua sponte*. *Rodriguez v. Johnson*, 104 F.3d 694, 697 n. 1 (5th Cir. 1997); *Simmons v. South Carolina*, No. 6:14-cv-4803-RBH, 2015 WL 2173233, at *4 (D.S.C. May 8, 2015).

that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions.") (citing 28 U.S.C. § 2244(b)(3)). Therefore, because Petitioner did not first obtain permission from the Fourth Circuit Court of Appeals to file this successive § 2254 Petition, this Court does not have jurisdiction and the Petition should be summarily dismissed. *See Burton v. Stewart*, 549 U.S. 147, 153 (2007) (holding that failure of petitioner to obtain authorization to file a "second or successive" petition deprived the district court of jurisdiction to consider the second or successive petition); *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").

V. RECOMMENDATION

Accordingly, it is **RECOMMENDED** that the Petition in this action be **DISMISSED** without prejudice and without requiring Respondent to file a return.

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

Molly H. Cherry
United States Magistrate Judge

August 15, 2023
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

FILED: March 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6949
(9:23-cv-02864-RMG)

WILLIE JOHNSON

Petitioner - Appellant

v.

WARDEN KENNETH NELSON

Respondent - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Willie Johnson, Plaintiff, v. Bryan P. Stirling, West Price; Emily A. Farr, Dr. Rick Toomey, Elizabeth Simmons; Dr. Stacy Smith, Defendants.	Civil Action No. 9:18-3028-RMG **ORDER**

I. Background

Plaintiff, Willie Johnson is proceeding *pro se*. He brings an action against Defendants Bryan Stirling, West Price, Emily A. Farr, Elizabeth Simmons, Dr. Stacey Smith, and Dr. Rick Toomey. Plaintiff's Second Amended Complaint alleges several claims against Defendants, but on October 21, 2019, the Court dismissed all of Plaintiff's claims except for deliberate indifference to a serious medical need pursuant to 42 U.S.C. § 1983. (Dkt. Nos. 47; 64). As to Plaintiff's deliberate indifference claim, Plaintiff alleges he was diagnosed with myeloma bone cancer in December 2016 and was transferred to Kirkland Correctional Institute ("KCI") for transfer to an outside medical facility. (Dkt. No. 47 at 9). Plaintiff alleges that in August 2017, Defendant Price improperly cancelled his stem cell transplant that was prescribed by the Medical University of South Carolina ("MUSC"). (*Id.* at 10). Plaintiff alleges he did not receive proper medical care because Defendants Price and Simmons were EMTs and not licensed nurses. (*Id.* at 10-13). In addition, Plaintiff contends that Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith were aware

that Defendants Smith and Price were unqualified but hired them and allowed them to treat Plaintiff, which amounts to a violation of Plaintiff's constitutional rights. (*Id.*).

On October 19, 2020, Defendants filed a motion for summary judgment. (Dkt. No. 161). Plaintiff filed a response in opposition (Dkt. No. 166), Defendants filed a reply (Dkt. No. 167), and Plaintiff filed a sur-reply. (Dkt. No. 169). On March 3, 2021, the Magistrate Judge issued an R & R recommending the Court grant Defendants' motion for summary judgment and dismiss Plaintiff's claim. (Dkt. No. 170). On March 19, 2021, Plaintiff filed objections to the R & R. (Dkt. No. 172). The matter is ripe for the Court's adjudication.

II. Legal standard

A. Summary Judgment

To prevail on a motion for summary judgment, the movant must demonstrate that there is no genuine issue of any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment has the burden of identifying the portions of the "pleadings, depositions, answers to interrogatories, any admissions on file, together with the affidavits, if any, which show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court will construe all inferences and ambiguities against the movant and in favor of the non-moving party. *US. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The existence of a mere scintilla of evidence in support of the non-moving party's position is insufficient to withstand a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). However, an issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the non-movant. *Id.* at 257.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." *Id.* at 587. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id. quoting First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

B. Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *See Mathews v. Weber*, 423 U.S. 261, 270 – 71 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made. Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(l). In the absence of any specific objections, "a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation omitted). Defendant filed objections and therefore the R & R is reviewed *de novo*.

III. Discussion

Upon a thorough review of the record, the parties' arguments, and the R & R, the Court finds the Magistrate Judge comprehensively analyzed the issues and correctly determined that Defendants' motion for summary judgment should be granted.

A. Eleventh Amendment Immunity

To the extent Plaintiff asserts claims against Defendants in their official capacities, such claims are barred by the Eleventh Amendment. The Eleventh Amendment bars federal courts from hearing claims against a state or its agents, instrumentalities, and employees, unless the state has consented to suit. *Fauconier v. Clarke*, 966 F.3d 265, 279 (4th Cir. 2020); *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). There are two methods by which a state's Eleventh Amendment immunity may be overcome, and neither method is applicable here. First, Congress may explicitly legislate to abrogate this immunity. Section 1983 does not abrogate Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). Second, the state may voluntarily waive its Eleventh Amendment immunity. South Carolina has not consented to suit in federal district court. S.C. Code Ann. § 15-78-20(e).

In this case, Defendants Stirling, Price, Simmons, and Dr. Smith were employed by the South Carolina Department of Corrections ("SCDC"). (Dkt. No. 161-4; 161-5; 161-6). Defendant Farr was employed as the Director of the South Carolina Department of Labor, Licensing, and Regulation ("SCLLR") and Defendant Dr. Toomey was employed as the Director of the South Carolina Department of Health and Environmental Control ("DHEC"). (Dkt. No. 161-3). SCDC, SCLLR, and DHEC are state agencies.[1] As such, to the extent Plaintiff attempts to assert claims Defendants in their official capacity, Defendants are entitled to Eleventh Amendment immunity.

[1] Plaintiff objects to the R & R's finding that Defendants are protected by the Eleventh Amendment Immunity. (Dkt. No. 172 at 4-7). The Court finds that Plaintiff's objection is without merit as several courts have found that employees of SCDC, DHEC and SCLLR are protected from suit under Eleventh Amendment immunity. *See Rhoden v. South Carolina Dep't of Corr.*, No. 4:17-2537-HMH-TER, 2017 WL 9288217, at *3 (D.S.C. Oct. 4, 2017) (dismissing claims against prison warden in his official capacity because warden was entitled to Eleventh Amendment immunity), *adopted by*, 2017 WL 5494126 (D.S.C. Nov. 16, 2017), *amended*, 2017 WL 6032341 (D.S.C. Dec. 6, 2017); *Magwood v. Streetman*, C/A No. 2:15-1600-RMG-BM, 2016 WL 5334678, at *4 (D.S.C. Aug. 15, 2016) (noting SCLLR is a state agency entitled to Eleventh Amendment immunity), *adopted by*, 2016 WL 5339579 (D.S.C. Sep. 22, 2016); *Stepheney v. Publix's Food Store Pharmacys CEO*, C/A No. 1:11-3402-MBS-SVH, 2012 WL2502722, at *3 (D.S.C. Jan. 20, 2012)

B. Deliberate Indifference Claims

Plaintiff asserts a § 1983 deliberate indifference claim against Defendants as individuals. To state a § 1983 claim, a Plaintiff must demonstrate that Defendants, acting under color state law, deprived him of a right secured by the Constitution or the laws of the United States. 42 U.S.C. § 1983. Claims that prison officials were deliberately indifferent to an inmate's serious medical needs sounds in the Eighth Amendment, cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1979). To sustain a deliberate indifference claim pursuant to § 1983, a plaintiff must make (1) a subjective showing the officer was deliberately indifferent to his medical needs and (2) an objective showing that those needs were serious. *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008). To meet the subjective component, the officer must have "actual knowledge of the risk of harm to the inmate" and "the officer must also have recognized that his actions were insufficient to mitigate the risk of harm to the inmate from his medical needs." *Iko*, 535 F.3d at 241. The subjective prong of a deliberate indifference claim is a "very high standard" and a showing of mere negligence will not meet it. *Young v. City of Mt. Ranier*, 238 F.3d 567, 575-76 (4th Cir. 2001). To meet the objective component, a serious medical condition is one that has been "diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 210 (4th Cir. 2017).

In this case, there is no dispute Plaintiff's myeloma bone cancer is an objectively serious medical condition. Upon a careful review of the record, the parties' arguments, and the R & R, the Court finds the Magistrate Judge correctly determined that Plaintiff fails to identify evidence

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(noting DHEC is a state agency entitled to Eleventh Amendment immunity from § 1983 claims), *adopted sub nom. Stepheney v. Publix's Food Store Pharmacy(s)*, C/A No. 1:11-3402-MBS, 2012 WL 2500368 (D.S.C. June 27, 2012).

in the record to support a § 1983 action against Defendants regarding the subjective component of his medical indifference claim.[2]

1. Defendants Stirling, Farr, Dr. Toomey, Dr. Smith

Plaintiff appears to assert that Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith are vicariously liable for the medical care provided to plaintiff by Defendants Price and Simmons, as EMTs. The doctrine of *respondent superior* has no application under § 1983. *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985). There are three elements necessary to establish supervisory liability under § 1983: (1) the supervisor had actual or constructive knowledge that a subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to people like the plaintiff; (2) the supervisor's response was so inadequate as to constitute deliberate indifference or tacit authorization of the subordinate's conduct; and (3) there is an "affirmative causal link" between the supervisor's inaction and the plaintiff's constitutional injury. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

Plaintiff does not set forth evidence to establish supervisor liability under § 1983 as to Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith. The evidence reflects that Defendant Farr is the Director of SCLLR and Dr. Toomey, is the Director of DHEC. (Dkt. No. 161-3). Neither of these Defendants were direct supervisors of Defendants Price and Simmons as SCDC employees. SCDC controls all hiring, training, and firing decisions of its employees. (Dkt. Nos. 161-2; 161-3). Defendants Stirling and Smith are employed by SCDC and Plaintiff appears to allege supervisory liability based on the use of EMTs to provide medical care. (Dkt. Nos. 161-5; 161-6).

[2] Plaintiff objects to the Magistrate Judge's findings on pages 6-7 of the R & R that Plaintiff has failed to identify evidence in the record to support a § 1983 action against Defendants with regard to the subjective component of his Eighth Amendment claim. (Dkt. No. 172 at 8-9). Yet, Plaintiff has not come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Yet, Plaintiff failed to identify a specific injury as a result of this practice and fails to identify any conduct of these Defendants that amounts to deliberate indifference.

Plaintiff does not set forth evidence to establish that Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith were directly deliberately indifferent to Plaintiff's serious medical need. Plaintiff must show that the officials were aware of facts from which the inference could be drawn that a substantial risk of harm existed and drew that inference. *Heyer*, 849 F.3d at 211. In her Affidavit, Dr. Smith states that "while the doctors at MUSC believed the stem cell transplant would help, the care Plaintiff received, including aggressive chemotherapy, is a [p]roper course of treatment for myeloma bone cancer." (Dkt. No. 161-6 at 2). Plaintiff seeks to find Defendants liable for the alleged cancellation of his stem cell transplant. (Dkt. No. 47 at 10-13). Dr. Smith states that although MUSC recommended the stem cell transplant, SCDC needed to approve it and the decision to approve was not made by her nor any of the other Defendants. (Dkt. No. 161-6 at 2). Dr. Smith states the stem cell treatment was not officially scheduled and therefore was not ever cancelled. (*Id.*). Disagreements between an inmate and a physician over the inmate's proper medical care fail to state a § 1983 claim unless exceptional circumstances are alleged. *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985).

The Court finds the Magistrate Judge correctly determined that at most, Plaintiff asserts a medical malpractice claim against Defendants, which does not amount to a violation of Plaintiff's Eighth Amendment rights. *Estelle*, 429 U.S. at 106 (explaining that a complaint a physician has been negligent in diagnosing a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment and medical malpractice does not become a constitutional violation merely because the victim is a prisoner.) There is no genuine issue of material fact Defendants Stirling, Farr, Dr. Toomey, and Dr. Smith directly or in a supervisory

capacity, knew of and disregarded an excessive risk of harm to Plaintiff's health or safety. Therefore, summary judgment is granted as to these Defendants.

2. Defendants Price and Simmons

Plaintiff alleges that Defendants Price and Simmons were deliberately indifferent to his serious medical needs. Plaintiff alleges he received insufficient medical care because these Defendants provided medical care as EMTs and not licensed nurses. The record contains the Affidavits of Defendants Stirling and Dr. Smith who aver that the use of licensed, supervised EMTs is acceptable under SCDC policies. (Dkt. Nos. 161-5 at 1; 161-6 at 1). In her Affidavit, Defendant Dr. Smith states that the use of licensed, supervised EMTs is comparable to the role of a Licensed Practical Nurse, and that all EMTs used in the infirmaries within SCDC are supervised by an attending, licensed physician, as well as licensed registered nurses. (Dkt. No. 161-6 at 1). Dr. Smith states that EMTs do not make decisions on treatment methods, do not direct the course of an inmate's care, and do not make medical diagnoses; rather, these decisions are delegated to the attending physician and health directors at SCDC. (Dkt. No. 161-6 at 1-2). Defendant Simmons echoes Dr. Smith's statement that as an EMT she does not make decisions to direct treatment and the course of an inmate's care, nor did she make any medial or treatment diagnosis regarding Plaintiff. (Dkt. No. 161-4 at 1-2). Last, Dr. Smith states that Defendants Price and Simmons were properly trained and observed, and that they provided Plaintiff adequate care. (Dkt. No. 161-6 at 1).

As to Plaintiff's allegation that Defendant Price cancelled Plaintiff's stem cell transplant that MUSC prescribed, Plaintiff fails to establish a deliberate indifference claim. The record reflects that EMTs do not determine treatment methods and are not responsible for directing an inmate's care. (Dkt. Nos. 161-4 at 1-2; 161-6 at 2). Defendant Dr. Smith states that MUSC recommended

a stem cell transplant, but the transplant was never approved by SCDC and was cancelled because it was never officially scheduled. (Dkt. No. 161-6 at 2). Plaintiff has not provided any evidence to demonstrate that Defendants Price and Simmons knew of and disregarded an excessive risk to Plaintiff's health or safety.[3] Therefore, summary judgment is appropriate as to Defendants Price and Simmons.

3. Qualified Immunity

Upon a review of the record, the parties' arguments, and the R & R, the Court finds the Magistrate Judge correctly determined that Defendants are protected by qualified immunity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A court must first make a threshold inquiry of whether a plaintiff's allegations, if true, establish a clear constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 736 (2002). If a violation of a constitutional right exists, qualified immunity shields a prison official from liability unless the violation was of a "clearly established right of which a reasonable person would have known." *Wilson v. Kittoe*, 337 F.3d 392, 397 (4th Cir. 2003) (citing *Saucier*, 533 U.S. at 201). In *Pearson v. Callahan*, the United States Supreme Court held that the district court has discretion to determine which of the two prongs of the qualified immunity analysis should be

[3] In response to Defendants' motion for summary judgment, Plaintiff includes the Affidavit of Barry L. Singer, M.D. (Dkt. No. 166-3 at 2-5). Mr. Singer's Affidavit is in support of a medical malpractice claim Plaintiff brought in the Court of Common Pleas for Richland County. *Willie Johnson v. South Carolina Dep't of Corr.*, C/A No. 2019CP4001890. Plaintiff may pursue a medical malpractice case in state court, but the alleged medical malpractice in this situation does not give rise to a constitutional claim asserted under § 1983. *Estelle*, 429 U.S. at 106.

addressed first in light of the circumstances presented in the case at hand. 555 U.S. 223, 226-7, 237 (2009).

In this case, the evidentiary record establishes that Plaintiff failed to establish a genuine issue of material fact as to his allegations his constitutional rights were violated. The Magistrate Judge found that because Defendants did not violate Plaintiff's constitutional rights, they are also shielded from liability by qualified immunity. Plaintiff generally objects to the Magistrate Judge's finding on qualified immunity. (Dkt. No. 172 at 13-14). Plaintiff's objection is without merit as the record establishes Defendants did not violate his constitutional rights, and under *Pearson,* it is not necessary to proceed to the second step of the qualified immunity test. 555 U.S. at 236-43.

IV. Conclusion

For the reasons stated above, the Court **ADOPTS** the R & R as the Order of the Court. (Dkt. No. 170). Defendant's motion for summary judgment (Dkt. No. 161) is **GRANTED**.

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Court Judge

April 2, 2021
Charleston, South Carolina

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