

UNPUBLISHED

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

No. 23-7009

KENNETH OTENG DUODU,

Petitioner - Appellant,

v.

CHADWICH DOTSON,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:22-cv-00410-AWA-LRL)

Submitted: January 30, 2024

Decided: February 6, 2024

Before KING, AGEE, and THACKER, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Kenneth Oteng Duodu, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth Oteng Duodu seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Duodu's 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 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 Duodu has not made the requisite showing. *See Breard v. Pruett*, 134 F.3d 615, 619-21 (4th Cir. 1998) (holding that Vienna Convention claims must first be presented to state court to satisfy exhaustion of state court remedies). 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

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

KENNETH OTENG DUODU, #1828632

Petitioner,

v.

Case No.: 2:22cv410

**HAROLD W. CLARKE, Director,
Virginia Department of Corrections,**

Respondent.

FINAL ORDER

Before the Court is an Amended Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, ECF No. 6. In his Amended Petition, the *pro se* Petitioner alleges violation of federal rights pertaining to his conviction in the Fairfax County Circuit Court for statutory rape. As a result of the conviction, Petitioner was sentenced to thirty-five years imprisonment.

The matter was referred to a United States Magistrate Judge for report and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Federal Rule of Civil Procedure 72(b), Eastern District of Virginia Local Civil Rule 72, and the April 2, 2002, Standing Order of Assignment of Certain Matters to United States Magistrate Judges. In a Report and Recommendation filed on July 18, 2023, the Magistrate Judge recommended dismissal of the Amended Petition without prejudice, based on Petitioner's failure to exhaust his state court remedies. ECF No. 9. On July 31, 2023, and August 3, 2023, Petitioner timely filed objections to the Report and Recommendation. ECF Nos. 10, 11.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Report and Recommendation, and having made *de novo* findings with respect to the portions objected to, does hereby **ADOPT** and **APPROVE** the findings and recommendations set forth in the Report and Recommendation for Dismissal. It is, therefore, **ORDERED** that the Amended Petition, ECF No. 6, be **DENIED** and **DISMISSED WITHOUT PREJUDICE**

Finding that the procedural basis for dismissal of Petitioner's § 2254 Amended Petition is not debatable, and alternatively finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c); *see* Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a); *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483–85 (2000).

Petitioner is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. Rule App. Proc. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). If Petitioner intends to seek a certificate of appealability from the Fourth Circuit, he must do so **within thirty (30) days** from the date of this Order. Petitioner may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk is **DIRECTED** to forward a copy of this Final Order to Petitioner and a copy of the Amended Petition, its related filings and this Final Order shall be served on the Respondent by CM/ECF pursuant to their Agreement on Acceptance of Service with the Court.

IT IS SO ORDERED.

Arenda L. Wright Allen

Arenda L. Wright Allen
United States District Judge

Norfolk, Virginia
September 19, 2023

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

KENNETH OTENG DUODU, #1828632

Petitioner,

v.

Case No.: 2:22cv410

HAROLD W. CLARKE, Director,
Virginia Department of Corrections,

Respondent.

REPORT AND RECOMMENDATION FOR DISMISSAL

Before the Court is an Amended Petition for a Writ of Habeas Corpus filed by *pro se* Petitioner Kenneth Oteng Duodu (“Petitioner”) pursuant to 28 U.S.C. § 2254. ECF No. 6. The matter was referred to the undersigned United States Magistrate Judge (“the undersigned”) pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C), Federal Rule of Civil Procedure 72(b), Eastern District of Virginia Local Civil Rule 72, and the April 2, 2002, Standing Order on Assignment of Certain Matters to United States Magistrate Judges.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner is currently serving a thirty-five-year sentence for a January 20, 2017 conviction in Fairfax County Circuit Court. ECF No. 6 at 1. Petitioner filed a direct appeal of his conviction with the Virginia Court of Appeals and the Supreme Court of Virginia, alleging error because the Trial Court overruled the admission of relevant mitigating evidence at his sentencing hearing. *Id.* at 2–3. Both courts denied Petitioner’s claim of error. *Id.*

Appendix C

The Amended Petition pursuant to § 2254 alleges that Petitioner's constitutional rights were violated in connection with his conviction because, as a foreign citizen, pursuant to Article 36 of the Vienna Convention on Consular Relations, he was not afforded access to consult with the consulate or embassy for his home country—the Republic of Ghana. *Id.* at 5–10. However, according to the Amended Petition, Petitioner did not seek any relief in the state court regarding these claims prior to submitting the instant Amended Petition. *Id.* On February 14, 2023, the Court issued an Order directing Petitioner to show cause why this matter should not be dismissed for failure to exhaust his state court remedies. ECF No. 7. The Court's February 14, 2023 Order stated that “[f]ailure to comply with [the Show Cause Order] will result in the matter being submitted to a United States District Judge along with a recommendation for dismissal of the claims.” *Id.* On March 1, 2023, Petitioner filed a response that reiterated the claim of constitutional error in his Amended Petition, but did not address Petitioner's failure to exhaust his state court remedies. ECF No. 8.

Section 2254 allows a prisoner held in state custody to challenge detention on the grounds that their custody violates the “Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A state prisoner, however, must exhaust available state remedies or demonstrate the absence or ineffectiveness of such remedies before petitioning for federal habeas relief in order to give “state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing[.]” *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998) (citing 28 U.S.C. § 2254(b)); *Matthews v. Evatt*, 105 F.3d 907, 910–11 (4th Cir. 1997), *cert. denied*, 522 U.S. 833 (1997), 522 U.S. 964 (1997)); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (explaining that the purpose of the exhaustion doctrine is “to give the state courts a full and fair opportunity to

resolve federal constitutional claims before those claims are presented to the federal courts"). Importantly, “[t]he burden of proving that a claim is exhausted lies with the habeas petitioner.” *Id.* at 618 (citing *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994), *cert. denied*, 513 U.S. 1047 (1994)). To satisfy the exhaustion requirement, two conditions must be met: (1) the prisoner must seek review of his claim in the highest state court with jurisdiction to consider it through direct appeal or post-conviction proceedings, *see O'Sullivan*, 526 U.S. at 844–45; and (2) the “essential legal theories and factual allegations advanced in the federal court [must be] the same as those advanced at least once in the highest state court,” *Pruett v. Thompson*, 771 F. Supp. 1428, 1436 (E.D. Va. 1991), *aff'd*, 996 F.2d 1560 (4th Cir. 1993) (citing *Picard v. Connor*, 404 U.S. 270, 275–76 (1971)); *Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988); *Wise v. Warden*, 839 F.2d 1030, 1033–34 (4th Cir. 1988); *Daye v. Attorney Gen.*, 696 F.2d 186 (2d Cir. 1982)).

In the instant case, Petitioner pursued a direct appeal of his convictions to the Court of Appeals of Virginia and the Supreme Court of Virginia, however, he did not raise the claims he currently advances in his Amended Petition during that direct appeal. Because Petitioner has not presented his claims to the highest state court at least once, a federal court ruling would deny the state court a full and fair opportunity to consider Petitioner’s claims. Accordingly, the undersigned **FINDS** that Petitioner has not satisfied the exhaustion prerequisite to pursuing federal habeas relief, and this Court must decline to reach the merits of the Amended Petition until the state courts have been afforded a full opportunity to consider Petitioner’s claims. *Strader v. Allsbrook*, 656 F.2d 67 (4th Cir. 1981) (declining to reach the merits of the state habeas petitioner’s claims before affording the state courts full opportunity to consider the petitioner’s contentions). In light of Petitioner’s failure to establish that his claims are exhausted, the undersigned **RECOMMENDS**

that the Amended Petition, ECF No. 6, be **DENIED** and **DISMISSED WITHOUT PREJUDICE**.

REVIEW PROCEDURE

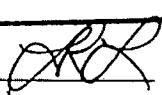
By receiving a copy of this Report and Recommendation, Petitioner is notified that:

1. Petitioner may file with the Clerk written objections to the above findings and recommendations within fourteen (14) days from the date this Report and Recommendation is forwarded to the objecting party. *See 28 U.S.C. § 636(b)(1)(C)*, computed pursuant to Federal Rule of Civil Procedure 6(a).
2. A United States District Judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The Petitioner is further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of the right to appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984), *cert. denied*, 474 U.S. 1019 (1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1954).

The Clerk is **DIRECTED** to forward a copy of this Report and Recommendation to Petitioner.

/s/

Lawrence R. Leonard
United States Magistrate Judge 
Lawrence R. Leonard
United States Magistrate Judge

Norfolk, Virginia
July 18, 2023