In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-10217

LARRY JEROME GRADY,

Petitioner-Appellant,

versus

KEVIN WHITE,
Capt.,
ATTORNEY GENERAL, STATE OF ALABAMA,
STATE OF ALABAMA,
LEE COUNTY, ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 3:22-cv-00508-ECM-SMD

Before JORDAN, GRANT, and LAGOA, Circuit Judges.

BY THE COURT:

Petitioner-Appellant's motion for default judgment is DENIED. This Court does not resolve appeals by default. *See* Fed. R. App. P. 31(c); 11th Cir. R. 42-2(f). To the extent Petitioner-Appellant seeks to petition for rehearing, his filing falls short of the requirements to "state with particularity each point of law or fact that [he] believes the court has overlooked or misapprehended and [to include] argu[ment] in support of the petition," Fed. R. App. P. 40(a)(2) & IOP 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

LARRY JEROME GRADY, AIS 143344,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACT. NO. 3:22-cv-508-ECM
	)	(WO)
KEVIN WHITE, *et al.*,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION and ORDER

On October 3, 2022, the Magistrate Judge entered a Recommendation that this case be dismissed (doc. 6) to which no objections have been filed. Upon an independent review of the file, upon consideration of the Recommendation, and for good cause, it is

ORDERED as follows that:

1. the Recommendation of the Magistrate Judge is ADOPTED;

2. the Petitioner's "Motion to Reconsider Appeal to Federal Court 2254" (doc. 1) is DISMISSED for lack of jurisdiction to the extent that the Petitioner seeks relief in the nature of mandamus;

3. the Petitioner's "Motion to Reconsider Appeal to Federal Court 2254" (doc. 1) is DISMISSED for lack of jurisdiction to the extent that the Petitioner seeks relief under 28 U.S.C. § 2254 because the Petitioner has not obtained the requisite preauthorization from the Eleventh Circuit Court of Appeals to file a successive petition; and

4. this case is dismissed.

A separate final judgment will be entered.

Done this 4th day of January, 2023.

/s/ Emily C. Marks
EMILY C. MARKS
CHIEF UNITED STATES DISTRICT JUDGE

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	)	
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FINAL JUDGMENT

In accordance with the memorandum opinion entered in this case on this day, it is the ORDER, JUDGMENT and DECREE of the Court that this case is DISMISSED.

The Clerk of the Court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to FED. R. CIV. P. 58.

DONE this 4th day of January, 2023.

/s/ Emily C. Marks
EMILY C. MARKS
CHIEF UNITED STATES DISTRICT JUDGE

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. § 1291:** Final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. § 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983) (citing *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(b); *Perez-Priego v. Alachua County Clerk of Court*, 148 F.3d 1272 (11th Cir. 1998). However, under 28 U.S.C. § 636(c)(3), the Courts of Appeals have jurisdiction over an appeal from a final judgment entered by a magistrate judge, but only if the parties consented to the magistrate's jurisdiction. *McNab v. J & J Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b). *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201, 108 S.Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. § 1292(a):** Under this section, appeals are permitted from the following types of orders:
      i. Orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions; However, interlocutory appeals from orders denying temporary restraining orders are not permitted. *McDougald v. Jenson*, 786 F.2d 1465, 1472-73 (11th Cir. 1986);
      ii. Orders appointing receivers or refusing to wind up receiverships; and
      iii. Orders determining the rights and liabilities of parties in admiralty cases.

   (d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P. 5:** The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93

L.Ed. 1528 (1949); *Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. *Rinaldo v. Corbett*, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

(a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the order or judgment appealed from is entered. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD – no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P. 4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P. 4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend or reopen the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time to file an appeal may be reopened if the district court finds, upon motion, that the following conditions are satisfied: the moving party did not receive notice of the entry of the judgment or order within 21 days after entry; the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice, whichever is earlier; and no party would be prejudiced by the reopening.

(e) **Fed.R.App.P. 4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. *See also* Fed.R.App.P. 3(c). A *pro se* notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court lacks jurisdiction, *i.e.*, authority, to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

IN THE UNITED STATES DISTRICT COURT
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RECOMMENDATION OF THE MAGISTRATE JUDGE

I. INTRODUCTION

Petitioner Larry Jerome Grady has filed what he styles as a "Motion to Reconsider Appeal to Federal Court 2254." Doc. 1. Grady appears to seek orders by this Court that: (1) direct the Lee County Circuit Court to grant his application to proceed *in forma pauperis* on a state post-conviction petition he filed in that court in May 2021, and (2) direct the Clerk of the Lee County Circuit Court to send this Court all documents Grady filed in that court "since 2018 to now 2022." Doc.1 at 4–5. Grady states he "would like for this Federal Case to be handled by this Federal Court under Rule 2254 because this is a Federal Case." Doc. 1 at 5. As discussed below, this Court is without jurisdiction to grant Grady the requested relief.

II. DISCUSSION

Under the All Writs Act, federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 1651. The statutory language of 28 U.S.C. § 1651, "in aid of their respective jurisdictions, does not empower a district court to create jurisdiction where . . . none exists." *Gehm v. New York Life Ins. Co.*, 992 F. Supp. 209, 211 (E.D.N.Y. 1998). Specifically, "a court may issue orders under the Act only to protect a previously and properly acquired jurisdiction." *Id.* While the law is well settled that federal district courts have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or one of its agencies to perform a specific duty, *see* 28 U.S.C. § 1361, federal courts lack jurisdiction to issue writs compelling action by state officials in the performance of their duties when relief in the nature of mandamus is sought. *Lamar v. 118th Judicial Dist. Court of Tex.*, 440 F.2d 383, 384 (5th Cir. 1971).

Grady asks this Court to direct the Lee County Circuit Court to grant his application to proceed *in forma pauperis* on his state post-conviction petition and to direct the Clerk of the Lee County Circuit Court to send this Court all documents Grady has filed in that court since 2018. *See* Doc.1 at 4–5. By asking this Court to compel these actions by state officials, Grady seeks relief in the nature of mandamus. This Court lacks jurisdiction to grant such relief. *See Lamar*, 440 F.2d at 384; *Lawrence v. Miami-Dade County State Attorney Office*, 272 F. App'x 781, 781–82 (11th Cir. 2008); *Davis v. Lansing*, 851 F.2d 72, 74 (2d Cir. 1988). For this reason, Grady's self-styled "Motion to Reconsider Appeal

to Federal Court 2254," insofar as Grady seeks relief in the nature of mandamus, is due to be dismissed for lack of jurisdiciton.

As previously noted, Grady states he "would like for this Federal Case to be handled by this Federal Court under Rule 2254 because this is a Federal Case. *See* Doc. 1 at 5. The "traditional meaning and purpose of habeas corpus [is] to effect release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 486 n. 7 (1973). It is unclear whether, anywhere in his instant filing, Grady requests release from his custody under the state court judgment that is the basis of that custody, i.e., his 2005 Lee County murder conviction for which he was sentenced as a habitual offender to life in prison. It is likewise unclear whether Grady anywhere presents a specific claim challenging that conviction and sentence. However, even if Grady's instant filing is construed as a petition for writ of habeas corpus under 28 U.S.C. § 2254, this action is still due to be dismissed for want of jurisdiction because the petition constitutes a successive habeas petition filed without the required appellate court permission.

Under 28 U.S.C. § 2244(b)(3)(A), "[b]efore 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). "A motion in the court of appeals for an order

authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals" and may be granted "only if [the assigned panel of judges] determines that the application makes a prima facie showing that the application satisfies the requirements of [28 U.S.C. § 2244(b)(1) or (b)(2)]."[1] 28 U.S.C. § 2244(b)(3)(B), (C).

This Court's records indicate that on June 3, 2011, Grady filed a previous habeas

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[1] Section 2244(b)(1) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. § 2244(b)(1).

Section 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

petition under 28 U.S.C. § 2254 challenging the same 2005 Lee County murder conviction and life sentence he challenges by his current petition. *See Grady v. Jones*, Case No. 3:11cv430-WKW-WC. In that prior habeas action, this Court denied Grady relief and dismissed his petition with prejudice. *Id.*, Docs. 65, 69. A final judgment was entered by the district court on February 26, 2014. *Id.*, Doc. 70.

Grady furnishes no certification from the Eleventh Circuit Court of Appeals authorizing this Court to proceed on his present successive habeas petition challenging his 2005 Lee County murder conviction and life sentence. "Because this undertaking [is a successive] habeas corpus petition and because [Grady] had no permission from [the Eleventh Circuit] to file a [successive] habeas petition, . . . the district court lack[s] jurisdiction to grant the requested relief." *Gilreath v. State Board of Pardons and Paroles*, 273 F.3d 932, 933 (11th Cir. 2001). *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (providing that, without an order from the Court of Appeals authorizing the district court to consider a successive habeas petition, the district courts lack jurisdiction to consider the petition). Consequently, insofar as Grady's self-styled "Motion to Reconsider Appeal to Federal Court 2254" is construed as a 28 U.S.C. § 2254 petition for writ of habeas corpus, the petition should be dismissed as a successive petition filed without the required preauthorization from the Eleventh Circuit Court of Appeals.

VII. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that Grady's self-styled "Motion to Reconsider Appeal to Federal Court 2254" (Doc. 1) be:

(1) DISMISSED for lack of jurisdiction to the extent Grady seeks relief in the nature of mandamus; and

(2) DISMISSED for lack of jurisdiction to the extent Grady seeks habeas corpus relief under 28 U.S.C. § 2254, because Grady has not obtained the required preauthorization to file a successive § 2254 petition from the Eleventh Circuit Court of Appeals.

It is Further

ORDERED that the parties shall file any objections to this Recommendation on or before October 17, 2022. A party must specifically identify the factual findings and legal conclusions in the Recommendation to which objection is made; frivolous, conclusive, or general objections will not be considered. Failure to file written objections to the Magistrate Judge's findings and recommendations in accordance with the provisions of 28 U.S.C. § 636(b)(1) shall bar a party from a de novo determination by the District Court of legal and factual issues covered in the Recommendation and waives the right of the party to challenge on appeal the district court's order based on unobjected-to factual and legal

conclusions accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); 11TH CIR. R. 3-1. *See Stein v. Lanning Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

DONE this 3rd day of October, 2022.

/s/ Stephen M. Doyle
STEPHEN M. DOYLE
CHIEF U.S. MAGISTRATE JUDGE

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