

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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| HOWARD GRIBBIN, |) | |
| |) | |
| Petitioner |) | |
| |) | |
| v. |) | 1:22-cv-00335-NT |
| |) | |
| STATE OF MAINE, |) | |
| |) | |
| Respondent |) | |

**RECOMMENDED DECISION AFTER PRELIMINARY
REVIEW OF PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner seeks habeas relief pursuant to 28 U.S.C. § 2254. (Petition, ECF No. 1.) Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, upon the filing of a petition, the Court must conduct a preliminary review of the petition, and “must dismiss” the petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” After a review in accordance with Rule 4, I recommend the Court dismiss the matter.

DISCUSSION

Petitioner alleges various grounds for relief from a state court judgment entered following his guilty plea to a charge of aggravated criminal mischief in October 2021. Petitioner also alleges he filed a petition for post-conviction review in state court in June 2022. Petitioner evidently filed for relief in this Court because he had not heard much from the state court in response to his motion.

As part of the preliminary review of the petition, the Court directed the State, through the Office of the Maine Attorney General, to file a report on the status of

Petitioner's state court petition. (Order, ECF No. 2.) The State filed copies of the state court's docket, which reflects that an evidentiary hearing on Petitioner's state court petition is scheduled for December 28, 2022.

Under 28 U.S.C. § 2254(a), a person in custody pursuant to the judgment of a state court may apply to a federal district court for writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." A petitioner is required to exhaust available state court remedies before he seeks federal habeas review. 28 U.S.C. § 2254(b), (c).¹ "Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the 'opportunity to pass upon and correct' alleged violations of its

¹ Title 28 U.S.C. § 2254(b) and (c) address exhaustion and state:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State;
or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam)) (quotation marks omitted). In *Baldwin*, the Court noted that "[t]o provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Id.* (quoting *Duncan*, 513 U.S. at 365–66).

Given that Petitioner's state court petition is scheduled for hearing in December, approximately six months after the filing of the petition, Petitioner's state court remedy is available and not yet exhausted. Dismissal, therefore, is warranted.

CONCLUSION

Based on the foregoing analysis, an evidentiary hearing is not warranted under Rule 8 of the Rules Governing Section 2254 Cases. I recommend the Court dismiss Petitioner's petition for habeas relief under 28 U.S.C. § 2254 without prejudice, and that the Court deny a certificate of appealability pursuant to Rule 11 of the Rules Governing Section 2254 Cases because there is no substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c)(2).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district

court is sought, together with a supporting memorandum, within fourteen (14) days of being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 7th day of November, 2022.