

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

LEONARD BRAYNEN, JR.,

Petitioner,

v.

Civil Action No. 5:17CV151  
(STAMP)

MICHAEL MARTIN,<sup>1</sup>

Respondent.

**MEMORANDUM OPINION AND ORDER**  
**AFFIRMING AND ADOPTING MAGISTRATE**  
**JUDGE'S REPORT AND RECOMMENDATION**

I. Background

The petitioner, Leonard Braynen, Jr. ("Braynen"), filed this pro se<sup>2</sup> petition under 28 U.S.C. § 2254 arguing that he is being held in state custody in violation of the Constitution or laws or treaties of the United States. The respondent filed an answer requesting that the Court deny petitioner's requested relief and dismiss the petition with prejudice as petitioner has not demonstrated that his continued incarceration violates clearly established federal law. ECF No. 27 at 30. Petitioner filed a response to respondent's answer to the petition. ECF No. 34.

This matter was referred to United States Magistrate Judge Robert W. Trumble under Local Rule of Prisoner Litigation and

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<sup>1</sup>By order dated September 11, 2018, Michael Martin was substituted as respondent for John T. Murphy. ECF No. 14.

<sup>2</sup>"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1416 (10th ed. 2014).

Procedure 2. ECF No. 11. The magistrate judge issued a report recommending that this Court deny and dismiss the petition with prejudice. Petitioner Braynen did not file objections to the report and recommendation. For the following reasons, this Court adopts and affirms the report and recommendation in its entirety and denies the petition.

## II. Applicable Law

Under 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. Because petitioner did not file any objections to the report and recommendation, the magistrate judge's findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

## III. Discussion

In his report and recommendation, the magistrate judge correctly addressed the four grounds for relief alleged in the petition.

The magistrate judge properly noted that petitioner's second and third grounds for relief were not presented to the West Virginia Supreme Court of Appeals ("WVSCA") in petitioner's state habeas appeal. The magistrate judge determined that petitioner would be procedurally barred under West Virginia Code § 53-4A-1(c) from presenting his claims regarding ineffective trial counsel and the trial court's 404(b) ruling in state court, and thus, these

claims are procedurally defaulted and should be dismissed with prejudice. ECF No. 35 at 14-15.

As to petitioner's first ground for relief regarding alleged violation of Article 36 of the Vienna Treaty, the magistrate judge properly determined that the three alleged violations can be reduced to the claim that petitioner was not informed of his right to contact the Bahamian Consulate, and therefore his consent to the police search and his decision to plead guilty were not fully knowing and voluntary. Id. at 22. Upon review, the magistrate judge concluded the WVSCA's application of federal law, i.e. Article 36 of the Vienna Treaty, was reasonable and accurate and supported by the factual record, and the petitioner's first ground for relief should be dismissed with prejudice. Id. at 22.

As to petitioner's fourth ground for relief regarding alleged ineffective assistance of counsel, the magistrate judge determined "there is a reasonable argument that trial counsel's representation did not fall below an objective standard of reasonableness and that the WVSCA's application of Strickland<sup>[3]</sup> was reasonable." Id. at 26. Further, the magistrate judge concluded that petitioner is not entitled to federal habeas relief on his final ground. Id. at 27. In sum, the magistrate judge found that the WVSCA's application of federal law was reasonable and accurate and

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<sup>3</sup>Strickland v. Washington, 466 U.S. 668 (1984).

supported by the factual record, and that petitioner's fourth ground for relief should be dismissed with prejudice. Id. at 28.

Thus, the magistrate judge recommended that the petitioner's petition (ECF No. 1) be denied and dismissed with prejudice.

Upon review, this Court finds no clear error in the determinations of the magistrate judge and thus upholds his recommendation.

#### IV. Conclusion

For the reasons set forth above, the magistrate judge's report and recommendation (ECF No. 35) is AFFIRMED AND ADOPTED in its entirety. Accordingly, the petitioner's petition under § 2254 (ECF No. 1) is DENIED.

It is ORDERED that this civil action be DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this Court.

This Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the petitioner has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail and to

counsel of record herein. Under Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: August 12, 2019

/s/ Frederick P. Stamp, Jr.  
FREDERICK P. STAMP, JR.  
UNITED STATES DISTRICT JUDGE