

FINDINGS OF FACT

1. According to the allegations gleaned from the preliminary petition for writ of habeas corpus filed on petitioner's behalf by John Ross Holladay, Esquire, (Doc. 2), Stinson entered a counseled guilty plea to second-degree rape on November 3, 2007 and was later sentenced to a twenty-year term of imprisonment (*id.* at 7). This term was split, Stinson being ordered "to serve 3 years in a jail-like facility with the balance of 17 years suspended for 10 years of formal supervision including sex offender treatment through the Mobile County Community Corrections Center[.]" (*Id.*) Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals on May 22, 2009. (*Id.* at 16) His application for rehearing was denied and, according to Stinson, the Alabama Supreme Court denied his petition for writ of certiorari sometime during the month of September, 2009 (*id.* at 8).²

2. In his petition filed in this Court, Stinson appears to be asserting

² The petition also contains the following paragraph:

Stinson retained new counsel and during September and October of 2008 filed a series of motions relating to sentencing guidelines and []his appeal. Stinson also filed an application to proceed in forma pauperis. With exception for rehearing on Alabama Sentencing Guidelines and bond on []his appeal, all other aspects of Stinson's post-trial motions were denied.

(*Id.* at 7)

the following claims: (1) his Sixth Amendment right to a public trial was violated on account of the many closed-door meetings conducted by the trial judge during his sentencing proceeding (*see id.* at 5, 7-8 & 11-16); and (2) “[t]o the extent [he] is precluded from arguing this issue because his counsel failed to timely raise it, the assistance of that counsel was ineffective, and the failure represents a manifest injustice[.]” (*Id.* at 16)

3. It is apparent from Stinson’s federal habeas petition that petitioner has not file a Rule 32 petition in state court collaterally attacking his conviction and sentence. (*See Doc. 2*) The only mention Stinson makes of Rule 32 is the following: “In part due to the Ala.R.Crim.Proc. Rule 32.2 preclusion of remedies with respect to claims of ineffective assistance provided by counsel in this petition, and in the prior appeals herein, Petitioner asserts that he has exhausted all of the remedies described [in] 28 U.S.C. Section 2254(b).” (*Id.* at 4)

CONCLUSIONS OF LAW

1. A district court has the power under Rule 4 of the Rules Governing Section 2254 Cases “to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state.” *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999). Rule 4 provides, in pertinent part, that “[i]f

it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” 28 U.S.C. foll. § 2254, Rule 4.

2. A claim for federal habeas corpus relief is not exhausted so long as a petitioner “has the right under the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c). “Section 2254(c) requires only that state [petitioners] give state courts a *fair* opportunity to act on their claims.” *See O’Sullivan v. Boerckel*, 526 U.S. 838, 844, 119 S.Ct. 1728, 1732, 144 L.Ed.2d 1 (1999) (emphasis in original; citations omitted). “Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state [petitioners] must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *Id.* at 845, 119 S.Ct. at 1732; *see Heck v. Humphrey*, 512 U.S. 477, 480-481, 114 S.Ct. 2364, 2369, 129 L.Ed.2d 383 (1994) (“The federal habeas corpus statute . . . requires that state [petitioners] first seek redress in a state forum.”); *Preiser v. Rodriguez*, 411 U.S. 475, 477, 93 S.Ct. 1827, 1830, 36 L.Ed.2d 439 (1973) (“If . . . habeas corpus is the exclusive

federal remedy . . . , then a [petitioner] cannot seek the intervention of a federal court until he has first sought and been denied relief in the state courts, if a state remedy is available and adequate.”).

3. A habeas claim is deemed to be exhausted when “it is fair to assume that further state proceedings would be useless.” *Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). This standard is met when the precise issue raised in a habeas petition has been “fairly presented” to the state’s highest court. *See id.* (citation omitted). The exhaustion requirement is not met “where the claim has been presented for the first and only time in a procedural context in which the merits will not be considered unless ‘there are special and important reasons therefor[.]’” *Id.* (citation omitted). If the claims raised in a federal habeas corpus petition have not been exhausted, the petition should be dismissed. *See Anderson v. Harless*, 459 U.S. 4, 6 & 7-8, 103 S.Ct. 276, 277 & 278, 74 L.Ed.2d 3 (1982). Each and every claim raised in the petition must be exhausted to the state’s highest court and it is the petitioner’s burden to show that all claims have been fairly presented to that court. *See Rose v. Lundy*, 455 U.S. 509, 520, 102 S.Ct. 1198, 1204, 71 L.Ed.2d 379 (1982) (“[O]ur interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any

claims to federal court, be sure that you first have taken each one to state court.”); *Morales v. Shannon*, 2007 WL 1877977, *3 (E.D. Pa. 2007) (“A petitioner must exhaust state remedies as to each of his federal claims.”); *United States ex rel. Quezada v. Uchtman*, 2006 WL 3341200, *2 (N.D. Ill. 2006) (“[T]he petitioner must properly assert each claim at each and every level in the state court system, either on direct appeal of his conviction or in post-conviction proceedings.”).

4. The exhaustion requirement is excused if “there is either an absence of available State corrective process[] or . . . circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i) & (ii). A failure to exhaust has been excused where, because of prior rulings, resort to the state courts would be futile. *See Allen v. State of Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984). Exhaustion has also been excused where the state has unreasonably delayed in acting on the petitioner’s efforts to invoke state remedies or fails to address the petition without explanation. *See, e.g., Hollis v. Davis*, 941 F.2d 1471, 1475 (11th Cir. 1991) (“A federal *habeas* petitioner need not wait until his state petitions for relief are exhausted, if the state court has unreasonably or without explanation failed to address petitions for relief.”), *cert. denied*, 503 U.S. 938, 112 S.Ct.

1478, 117 L.Ed.2d 621 (1992); *Cook v. Florida Parole & Probation Comm'n*, 749 F.2d 678, 679 (11th Cir. 1985) (“State remedies will be found ineffective and a federal habeas petitioner will be excused from exhausting them in the case of unreasonable, unexplained state delays in acting on the petitioner’s motion for state relief.”). Finally, other special or exceptional circumstances may also excuse exhaustion. *See, e.g., Clarke v. Grimes*, 374 F.2d 550, 551 (5th Cir. 1967) (“It is true that under *Fay v. Noia*, the federal trial court has broad discretion to hear a habeas corpus petition though state remedies have not been exhausted, if there are circumstances which demand relief to protect the rights of the prisoner.”).

5. The complaint filed by petitioner in this case establishes, on its face, that Stinson has not presented his ineffective of assistance of counsel claim to the state courts of Alabama. While petitioner references, in general, Alabama’s preclusion of remedy rule, that is, Ala.R.Crim.P. 32.2 (*see* Doc. 2, at 4), he cites to absolutely no Alabama case law establishing that exhaustion would be futile nor has he established that his failure to exhaust should be otherwise excused. In fact, the very nature of the ineffective assistance of counsel claim Stinson wants this Court to consider is such that it should be presented first to Alabama’s state court because should the Alabama courts

agree with petitioner's claim in this regard, on collateral review, they would then be poised to address his claim that he was deprived of his constitutional right to a public trial. Accordingly, this action should be dismissed without prejudice to allow Stinson the opportunity to exhaust his state remedies.

6. Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, the undersigned recommends that a certificate of appealability in this case be denied. 28 U.S.C. foll. § 2254, Rule 11(a) (“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.”). The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where “the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2243(c)(2). Where, as here, a habeas petition is being denied on procedural grounds without reaching the merits of the underlying constitutional claims, “a COA should issue [only] when the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural

ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003) (“Under the controlling standard, a petitioner must ‘sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.””). Inasmuch as Stinson has not exhausted his ineffective assistance of counsel claim in the state courts of Alabama and this Court must dismiss all of his constitutional claims to allow him to return to state court to exhaust his state remedies as to this unexhausted claim, see *Jimenez v. Florida Dept. of Corrections*, 481 F.3d 1337, 1342 (11th Cir.) (“If a petitioner has not exhausted all claims in a petition, a federal court must dismiss without prejudice both exhausted and unexhausted claims to allow petitioners to return to state court to exhaust state remedies for all claims.”), *cert. denied sub nom. Jimenez v. McDonough*, 552 U.S. 1029, 128 S.Ct. 628, 169 L.Ed.2d 405 (2007), a reasonable jurist could not conclude either that this Court is in error in dismissing the instant petition or that Stinson should be allowed to proceed further, *Slack, supra*, 529 U.S. at 484, 120 S.Ct. at 1604 (“Where a plain procedural bar is present and the district court is correct to invoke it to dispose

of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.”).

CONCLUSION

The Magistrate Judge recommends that Roderick Dewayne Stinson, Jr.’s petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, be dismissed, without prejudice, to allow petitioner the opportunity to fully exhaust his state court remedies. Petitioner is not entitled to a certificate of appealability and, therefore, he is not entitled to appeal *in forma pauperis*.

The instructions which follow the undersigned’s signature contain important information regarding objections to the report and recommendation of the Magistrate Judge.

DONE this the 16th day of December, 2009.

s/WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

**MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS AND
RESPONSIBILITIES FOLLOWING RECOMMENDATION, AND
FINDINGS CONCERNING NEED FOR TRANSCRIPT**

1. **Objection.** Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); *Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B, 1982)(*en banc*). The procedure for challenging the findings and recommendations of the Magistrate Judge is set out in more detail in SD ALA LR 72.4 (June 1, 1997), which provides that:

A party may object to a recommendation entered by a magistrate judge in a dispositive matter, that is, a matter excepted by 28 U.S.C. § 636(b)(1)(A), by filing a ‘Statement of Objection to Magistrate Judge’s Recommendation’ within ten days³ after being served with a copy of the recommendation, unless a different time is established by order. The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party’s arguments that the magistrate judge’s recommendation should be reviewed *de novo* and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

A magistrate judge's recommendation cannot be appealed to a Court of Appeals; only the district judge's order or judgment can be appealed.

2. **Transcript (applicable Where Proceedings Tape Recorded).** Pursuant to 28 U.S.C. § 1915 and FED.R.CIV.P. 72(b), the Magistrate Judge finds that the tapes and original records in this case are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

³ Effective December 1, 2009, the time for filing written objections was extended to “14 days after being served with a copy of the recommended disposition[.]” Fed.R.Civ.P. 72(b)(2).