

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DAVID CHARLES SUSSMAN,

Petitioner,

v.

4:20cv414–WS/MAF

SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

ORDER ADOPTING THE MAGISTRATE JUDGE’S
REPORT AND RECOMMENDATION

Before the court is the magistrate judge’s report and recommendation (ECF No. 24) docketed August 23, 2021. The magistrate judge recommends that Petitioner’s amended § 2254 petition for writ of habeas corpus be dismissed for failure to exhaust administrative remedies and for lack of merit. Petitioner has filed objections (ECF No. 33) to the report and recommendation. Respondent has not filed a response to Petitioner’s objections.

The undersigned has reviewed the record, including Petitioner’s objections, and has determined that the report and recommendation is due to be adopted. Like

the magistrate judge, the undersigned not only concludes that Petitioner failed to exhaust his administrative remedies, but also finds that Petitioner's § 2254 habeas petition—challenging a prison disciplinary report on First Amendment grounds—fails on the merits. Whether the language used in Petitioner's grievance is construed as threatening or simply disrespectful,¹ Respondent's issuance of a disciplinary report based on that language did not violate Petitioner's constitutional rights. Petitioner's objections to the contrary are unpersuasive. *See Mathews v. Paynter*, 752 F. Appx. 740, 744 (11th Cir. 2018) (holding that an inmate's disrespectful speech in a grievance violated Florida Administrative Code, Rule 33–601.314(1), and was not protected speech, thus requiring dismissal of the inmate's complaint for failure to state a claim).

Accordingly, it is ORDERED:

1. The magistrate judge's report and recommendation (ECF No. 24) is ADOPTED and incorporated by reference into this order.

2. Respondent's motion (ECF No. 15) to dismiss for failure to exhaust administrative remedies is GRANTED.

¹ Florida Administrative Code, Rule 33–601.314, Section 1–3, prohibits “[s]poken, written, or gestured threats.” Florida Administrative Code, Rule 33–601.314, Section 1–4, prohibits “[d]isrespect to officials, employees, or other persons of constituted authority expressed by means of words, gestures, and the like.”

3. Petitioner's § 2254 habeas petition is DISMISSED.
4. The clerk shall enter judgment stating: "All claims are DISMISSED."
5. The clerk shall close the case.
6. A certificate of appealability is DENIED.
7. Leave to appeal in forma pauperis is DENIED.

DONE AND ORDERED this 19th day of November, 2021.

s/ William Stafford _____
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE