

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

FRANKLIN C. SMITH,

Petitioner,

v.

Case No. 2:18cv327

HAROLD W. CLARKE, Director,  
Virginia Department of Corrections,

Respondent.

FINAL ORDER

Before the Court are petitions for a writ of habeas corpus, ECF Nos. 8, 25, and 26 ("Petitions"),<sup>1</sup> filed pursuant to 28 U.S.C. § 2254, and the Respondent's motion to dismiss, ECF No. 14. On July 10, 2017, a jury convicted Petitioner of statutory burglary with intent to commit a larceny in the Circuit Court of the City of Virginia Beach. ECF No. 16-1 at 1. The trial court entered its judgment on March 2, 2018, and sentenced Petitioner to thirty months imprisonment. Id. at 1-2. The trial court also imposed an additional two years of incarceration, with such term suspended pending Petitioner's successful completion of two years of post-release supervision. Id. at 1. In his Petitions, the pro se

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<sup>1</sup> Petitioner filed three petitions for habeas relief in this Court. Because the petitions were substantially similar, the Court consolidated the petitions under the primary case number 2:18cv327. See ECF No. 24; Smith v. Clarke, 2:18cv296, ECF No. 4 (consolidating Case No. 2:18cv398 with 2:18cv296).

Petitioner challenges the constitutionality of his conviction and sentence.<sup>2</sup>

The pending Petitions were referred to a United States Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(B)-(C), Federal Rule of Civil Procedure 72(b), Eastern District of Virginia Local Civil Rule 72, and the April 2, 2002, Standing Order on Assignment of Certain Matters to United States Magistrate Judges. On December 30, 2019, the Magistrate Judge entered a Report and Recommendation ("R&R"), ECF No. 32, recommending that the motion to dismiss be granted and that the Petitions be denied and dismissed without prejudice. The parties were advised of their right to file written objections to the R&R.<sup>3</sup>

Petitioner filed an Objection to the R&R on March 23, 2020, and thereafter filed an Amended Objection to the R&R on March 26,

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<sup>2</sup> While there are many extraneous details contained in each petition and other documents filed by Petitioner, the Petitions each claim that Petitioner is being subjected to double jeopardy.

<sup>3</sup> On December 30, 2019, the Court mailed the R&R to Petitioner at his address on record. On January 13, 2020, Petitioner's copy of the R&R was returned to the Court by the post office with the envelope stamped "RETURN TO SENDER" and "NOT HERE". Thereafter, the Court confirmed through Virginia's Inmate Locator system that Petitioner had been released from the Virginia Beach Correctional Center. Even though Petitioner has not provided the Court with an updated mailing address, the Court later learned through the Inmate Locator system that Petitioner was once again being held at the Virginia Beach Correctional Center. Therefore, on March 2, 2020, this Court entered an Order, ECF No. 34, directing that the R&R be forwarded to Petitioner at the Virginia Beach Correctional Center, P.O. Box 6098, Virginia Beach, Virginia 23456, and advising Petitioner that any objections to the R&R be filed within fourteen days from the forwarding date (March 2, 2020). It is unclear from the record exactly when Petitioner mailed his Objection to the R&R, but the Court will treat such Objection, as well as Petitioner's Amended Objection, as timely for the purpose of its review and analysis.


2020. Respondent filed no objections. This Court conducts a de novo review of all portions of the Magistrate Judge's R&R to which specific objections are made. 28 U.S.C. 636(b)(1)(C). The Court may "accept, reject, or modify" the Magistrate Judge's R&R, "in whole or in part," or may "recommit the matter" to the Magistrate Judge with instructions for further consideration. Id.

Petitioner's Objection and Amended Objection put forth numerous arguments, many of which do not pertain specifically to the analysis in the R&R; however, the Court has liberally construed such arguments where possible for the purpose of its review. After reviewing the record and Petitioner's objections to the R&R, and having made de novo findings with respect to the portions to which Petitioner objected, the Court finds that none of the arguments put forth by Petitioner undercut the clear and sound reasoning set forth in the R&R, namely that Petitioner has not exhausted his available state court remedies or demonstrated the absence or ineffectiveness of such remedies, and therefore, the Court agrees with the R&R on the grounds stated by the Magistrate Judge and **ADOPTS** and **APPROVES** the R&R in its entirety as the Court's own opinion. Accordingly, the Respondent's motion to dismiss, ECF No. 14, is **GRANTED**, and the Petitions, ECF Nos. 8, 25, and 26, are **DISMISSED WITHOUT PREJUDICE**. It is therefore **ORDERED** that judgment be entered in favor of the Respondent.

Finding that the procedural basis for dismissal of Petitioner's § 2254 habeas petition is not debatable, and alternatively finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c); see Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a); Miller-El v. Cockrell, 537 U.S. 322, 335-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-85 (2000). Petitioner is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. Rule App. Proc. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). If Petitioner intends to seek a certificate of appealability from the Fourth Circuit, he must do so **within thirty (30) days** from the date of this Order. Petitioner may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk is **DIRECTED** to forward a copy of this Order to the Petitioner and counsel of record for the Respondent.

**IT IS SO ORDERED.**

/s/   
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Mark S. Davis  
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia  
May 21, 2020