IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JERMAINE SPENCE, *

Petitioner, *

vs. *

CASE NO. 4:21-CV-117 (CDL)

GEORGIA DEPARTMENT OF BEHAVIORAL HEALTH, et al., *

Respondents. *

O R D E R

After a de novo review of the record in this case, the Report and Recommendation filed by the United States Magistrate Judge on August 30, 2021 is hereby approved, adopted, and made the Order of the Court, including the denial of a certificate of appealability.

The Court considered Petitioner's objections to the Report and Recommendation and finds that they lack merit.

IT IS SO ORDERED, this 18th day of October, 2021.

S/Clay D. Land
CLAY D. LAND
U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JERMAINE SPENCE,	:	
	:	
Petitioner,	:	
	:	**No. 4:21-cv-00117-CDL-MSH**
VS.	:	
	:	
GEORGIA DEPARTMENT OF BEHAVIORAL HEALTH, et al.,	:	
	:	
Respondents.	:	

RECOMMENDATION OF DISMISSAL

Pro se Petitioner Jermaine Spence has filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. ECF No. 1. He has paid the filing fee. Petitioner's application is thus ripe for review.

I. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts requires a federal court to screen a habeas petition prior to any answer or other pleading. This Rule applies to habeas actions under both 28 U.S.C. § 2254 and 28 U.S.C. § 2241. See R. 1(b), Rules Governing § 2254 ("[T]he district court may apply any or all of these rules to a habeas petition not covered by Rule 1(a)."). Rule 4 requires that the petition be dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." R. 4, Rules Governing § 2254 Cases.

II. Petitioner's Allegations

Petitioner complains that he has been wrongly deemed mentally incompetent.[1] ECF No. 1 at 1: s*ee also* ECF No. 5 at 1-2. Petitioner further complains that he was wrongly subjected to an involuntary commitment to a hospital between 2019 and 2020. ECF No. 1 at 1. Petitioner, however, is not currently confined in a jail, prison, or hospital. *Id*.; ECF No. 5 at 2.

Petitioner argues that "DBHDD, the probate and OSAH Court should not be permitted to deprive Mr. Spence, a proud Homosexual, of the Liberty and success found in having an unblemished consumer report - not containing a non-factual mental health diagnosis." ECF 5-1 at 3. He asserts that "this case alleging a deprivation of Constitutional Rights without attacking the Constitution deserves Federal District Court review." *Id*. Petitioner further states that he is "concerned that inclusion of a fictitious diagnosis in the probate and OSAH court clerk holdings is, albeit privately embarrassing, has not undergone transmission to mass media… [t]herefore, in light of Mr. Spence's childhood-old aspiration to engage in politics and public service, the harm to Mr. Spence's well-being and life is minimal at this time." *Id*. at 3-4.

III. Analysis

Petitioner brought a similar habeas petition in the United States District Court Northern District of Georgia in which he sought an order expunging, withdrawing and

[1] Petitioner has filed a similar pleading as a §1983 civil rights complaint in this Court. *See Spence v. Bishara*, 1:20-cv-00230-LAG.

requiring the "destruction" of orders deeming him mentally incompetent in Fulton County. See *Spence v. Howard*, 1:18-cv-05003-SCJ (N.D. Ga. Feb. 27, 2019). The Northern District of Georgia denied Petitioner's writ of habeas corpus (*Id*. at ECF No. 15) to which Petitioner filed a notice of appeal (*Id*. at ECF No. 24). Within sixty days after the Northern District of Georgia denied Petitioner a Certificate of Appealability (*Id*. at ECF No. 37) and before the Eleventh Circuit Court of Appeals could adjudicate his appeal, Petitioner filed this action in this Court.[2] This Court can see no difference in its analysis of the case at hand from the findings of the Northern District of Georgia in its case.

First, Petitioner brings this action as a habeas action under 28 U.S.C. § 2254.[3] While generally, a petition for writ of habeas corpus pursuant to § 2254 is brought after a state court judgment of conviction and sentence, there are other types of state court judgments within the meaning of the federal habeas statute to which a person may be held in custody such as civil commitment. *See generally Duncan v. Walker*, 533 U.S. 167, 176, (2001); *see e.g.*, *Ward v. Carroll*, No. 16-21258-CIV, 2018 WL 10666972, at *16 (S.D. Fla. Jan. 3, 2018), *report and recommendation adopted*, No. 16-21258-CIV, 2018 WL 10666969 (S.D. Fla. Feb. 26, 2018)(§ 2254 petitioner in custody pursuant to an involuntary civil commitment order under Florida's sexually violent predator statute); *Francois v.*

[2] The Eleventh Circuit Court of Appeals has also denied a Certificate of Appealability on August 12, 2021

[3] Petitioner's application in the Northern District of Georgia was brought under 28 U.S.C. § 2241 but at the time of that filing it appears he may have been in pre-trial custody in Fulton County, Georgia. *See* ECF No. 13 in *Spence v. Howard*, 1:18-cv-05003-SCJ (N.D. Ga. Feb. 27, 2019).

Henderson, 850 F.2d 231 (5 Cir. 1988)(§ 2254 petitioner in custody pursuant to a state court's commitment to a mental institution upon a verdict of not guilty by reason of insanity).

This Petitioner, however, is presently not in the custody of any jail, prison, or hospital. *See* ECF No. 5-1 at 2 ("… custody ended in July 2020 and by the OSAH order's actual termination date of October 2020"). Relief under § 2254 is only available to a person who is "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The "in custody" requirement is a prerequisite to invoking the Court's subject-matter jurisdiction. *Krott v. Walton CI Warden*, 727 F. App'x 649 (11th Cir. 2018) (citing *Diaz v. State of Fla. Fourth Judicial Circuit*, 683 F.3d 1261, 1264 (11th Cir. 2012)). Accordingly, this Court lacks jurisdiction to grant the relief Petitioner seeks under § 2254 because the Petitioner is not in custody.

Moreover, the Petitioner "prays for reversal of GA's COA opinion and the expunging of clerk's records/orders containing the untruthful mental health diagnosis." ECF 5-1 at 1. Thus, he is specifically requesting that this Court review the denial of his appeal in the Georgia Court of Appeals and in the Superior Court of Muscogee County to overturn the order of the Probate Court of Muscogee County and the State of Georgia Office of Administrative Hearings which deemed him mentally incompetent. *See Id*. at 6-32 and 146-151. This Court is barred from granting Petitioner the relief he seeks by the *Rooker-Feldman* doctrine. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983);

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). The *Rooker-Feldman* doctrine applies to cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). The *Rooker-Feldman* doctrine holds that "federal district courts and courts of appeals lack jurisdiction to review the final judgment of a state court." *Cardelle v. Miami-Dade County*, 472 F. App'x 449, 450 (11th Cir. 2018). Under the doctrine, a federal court may not review a claim that is "inextricably intertwined" with a state court judgment. *Cormier v. Horkan*, 397 F. App'x 550, 553 (11th Cir. 2010). "A claim is inextricably intertwined if it would effectively nullify the state court judgment or it succeeds on to the extent that the state court wrongly decided the issues." *Id.* "The *Rooker-Feldman* doctrine makes clear that federal district courts cannot review state court final judgments." *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (per curiam).

Here, Petitioner repeatedly refers to this court as "11th District Court of the Middle District of Georgia." ECF No. 5 at 1. He also indicates that his filing in this court is a "Notice of Appeal". *Id.* The Petitioner is asking this Court to review and invalidate the state court orders from the Probate Court of Muscogee County and the State of Georgia Office of Administrative Hearings as well as from the Superior Court of Muscogee County and the Georgia Court of Appeals. *See* ECF No. 5-1 at 2. This is specifically the type of scenario the *Rooker-Feldman* doctrine addresses. Accordingly, this Court lacks

jurisdiction to grant the relief Petitioner seeks.[4]

It is therefore **RECOMMENDED** that the Petition be **DISMISSED** without prejudice due to the lack of this Court's jurisdiction to grant the Petitioner the relief he seeks under § 2254 because he is not in custody and due to the *Rooker-Feldman* doctrine.

IV. Conclusion

For the forgoing reasons, it is **RECOMMENDED** that this action be **DISMISSED** without prejudice. It is also **RECOMMENDED** that a COA and any motion to proceed IFP on appeal be **DENIED**.

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1), Plaintiff may serve and file written objections to this Recommendation with the assigned United States District Judge, Clay D. Land, **WITHIN FOURTEEN (14) DAYS** after being served with a copy of this Recommendation. Plaintiff may seek an extension of time in which to file written objections, provided a request for an extension is filed prior to the deadline for filing written

[4] Even if Petitioner's filing is construed as an appeal of the denial of his writ of habeas corpus in the Northern District of Georgia, it is still subject to dismissal. Federal district courts like this Court and the Northern District of Georgia are courts of original jurisdiction not appellate jurisdiction. *See* 28 U.S.C. §§ 1331, 1332. 28 U.S.C. § 1291 makes *clear,* "[t]he courts of appeals ... shall have *jurisdiction of* appeals from all final decisions of the district courts of the United States[.]" 28 U.S.C. § 1294(1) goes on to provide that "appeals from reviewable decisions of the district ... courts shall be taken to the courts of appeals as follows: (1) [f]rom a district court of the United States to the court of appeals for the circuit embracing the district[.]" Thus, Congress has not given this Court jurisdiction to review a decision of another district court in or outside Georgia.

objections. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. See 11th Cir. R. 3-1.

Because this Report and Recommendation provides Petitioner an opportunity to file objections, it thus affords him notice and a reasonable opportunity to respond prior to a *sua sponte* dismissal of his petition. *See Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 655 (11th Cir. 2020) (A petitioner is "provided ample notice and opportunity to explain why his petition was timely in his form petition and again when he was given the opportunity to respond to the magistrate judge's Report and Recommendation that his petition be summarily dismissed..."), citing *Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998) (holding that plaintiff "was afforded both notice and a reasonable opportunity to oppose" procedural default when he was given an opportunity to object to the magistrate judge's Report and Recommendation that "placed [him] on notice that procedural default was a potentially dispositive issue").

SO RECOMMENDED, this 30th day of August, 2021.

/s/ Stephen Hyles
UNITED STATES MAGISTRATE JUDGE

THIRD DIVISION
DOYLE, P. J.,
REESE and BROWN, JJ.

May 28, 2021

In the Court of Appeals of Georgia

A21A0588. SPENCE v. DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES. DO-025
A21A0799. IN RE JERMAINE E. SPENCE. DO-034

DOYLE, Presiding Judge.

Jermaine E. Spence was involuntarily committed as an inpatient at a hospital. In Case No. A21A0799, he appeals from a superior court order dismissing his appeal of probate court ordersfor involuntary commitment. In Case No. A21A0588, Spence appeals from the same superior court order also dismissing his appeal of an administrative decision continuing his involuntary hospitalization. For the reasons that follow, we affirm in each case.[1]

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[1] We note that Spence is proceeding pro se, his filings are handwritten and difficult to comprehend, and it is not entirely clear which decision – the administrative order or the probate court order – are appealed in each of the instant appeals. Nevertheless, we have endeavored to ascertain the relief he seeks.

The record shows that the Georgia Department of Behavioral Health and Developmental Disabilities ("the Department") sought an order of continued hospitalization of Spence pursuant to OCGA § 37-3-83. On April 18, 2019, the Probate Court of Muscogee County entered an order for involuntary treatment. On July 3, 2019, the same court entered an order continuing his involuntary inpatient commitment and permitting Spence's forcible medication. Spence appealed the probate court decisions, designating the superior court as the proper appellate court, which notices he amended multiple times.

On November 19, 2019, an administrative law judge ("ALJ") with the Office of State Administrative Hearings ("OSAH") entered an order for Spence's involuntary inpatient commitment, finding that he "is incapable of properly caring for himself so as to create an imminently life-endangering crisis of readmission without appropriate supports as a result of his mental illness and lack of poor [sic] insight into his condition." On December 16, 2019, Spence filed with the Department a notice of appeal to the Superior Court of Muscogee County.

On August 27, 2020, the superior court entered an order (1) dismissing Spence's appeal of the November 2019 OSAH order, finding that the court lacked jurisdiction because Spence did not file his notice of appeal until July 13, 2020, more

than 30 days after the OSAH decision; and (2) dismissing his appeal of the probate court orders on the ground that the superior court lacked jurisdiction to consider the appeal pursuant to OCGA § 37-3-81. In Case No. A21A0588, Spence filed an application for discretionary review of the dismissal of his appeal of the OSAH decision, which this Court granted; in Case No. A21A0799, Spence directly appeals the dismissal of his appeal of the probate court decisions.

Case No. A21A0588

1. *Appeal of the dismissal of Spence's appeal of the OSAH decision*. Spence argues that the superior court erred by dismissing his appeal of the OSAH decision continuing his involuntary hospitalization. We find no basis for reversal.

Pretermitting whether Spence's notice of appeal was timely, the superior court lacked jurisdiction to hear the appeal of the OSAH decision. OCGA § 37-3-150 governs a patient's right to appeal an order of involuntary commitment.[2] OCGA § 37-3-150 provides in relevant part:

> The patient, the patient's representatives, or the patient's attorney *may appeal any order of the probate court or hearing officer rendered in a proceeding under this chapter to the superior court* of the county in

[2] See generally *Ga. Mental Health Inst. v. Brady*, 263 Ga. 591, 594 (2) (c) (436 SE2d 219) (1993).

> which the proceeding was held, except as otherwise provided in Article 6 of Chapter 9 of Title 15, and may appeal any order of the juvenile court rendered in a proceeding under this chapter to the Court of Appeals or the Supreme Court. *The appeal to the superior court shall be made in the same manner as appeals from the probate court to the superior court*, except that the appeal shall be heard before the court sitting without a jury as soon as practicable but not later than 30 days following the date on which the appeal is filed with the clerk of the superior court.[3]

Under the plain terms of this provision, a patient seeking review of an OSAH decision continuing his involuntary hospitalization must follow the same process as an appeal from a probate court order. And while an appeal under OCGA § 37-3-150 generally lies in the superior court, appeals from the Probate Court of Muscogee County, which has a population of more than 90,000, lie in this Court.[4] Therefore, the

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[3] (Emphasis added.)

[4] See OCGA §§ 15-9-120 (2) (defining "probate court" to mean probate court in a county – like Muscogee – with a population of 90,000 or more); 15-9-123 (a) (providing a right of appeal from a decision of the "probate court" to the Court of Appeals of Georgia or the Supreme Court of Georgia); 5-3-2 (b) (providing that "no appeal from the probate court to the superior court shall lie from any civil case in a probate court which is provided for by Article 6 of Chapter 9 of Title 15"); https://www.census.gov/quickfacts/muscogeecountygeorgia (listing Muscogee County's population as of the 2010 census as 189,885).

superior court lacked jurisdiction to consider Spence's appeal of the OSAH decision, and we affirm the court's dismissal of Spence's appeal.[5]

Case No. A21A0799

2. *Appeal of the dismissal of Spence's appeal of the probate court orders*. Spence also argues that the superior court erred by dismissing his appeal of the probate court orders. This argument is without merit.

As explained in Division 1, Spence's appeal of the probate court orders for involuntary hospitalization is governed by OCGA § 37-3-150, and the superior court

[5] See *Sawyer v. City of Atlanta*, 257 Ga. App. 324, 327 (571 SE2d 146) (2002), (holding that dismissal, rather than transfer to this Court, is proper when appeals are erroneously taken to the superior court because OCGA § 5-6-37, which prohibits the dismissal of an appeal based on a wrong appellate court designation, "does not apply when the appeal is filed in superior court but belongs in the Court of Appeals or the Supreme Court"), cert. denied Nov. 25, 2002.

did not have jurisdiction to consider Spence's appeal of the decisions of the Muscogee County Probate Court.[6] Therefore, dismissal of the appeal was proper.[7]

Judgment affirmed. Reese and Brown, JJ., concur.

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[6] See OCGA §§ 15-9-120 (2); 15-9-123 (a); 5-3-2 (b). We note that pursuant to 5-6-38 (d), an appellant may amend a timely notice of appeal to designate the correct appellate court before the court designated in the original notice enters judgment. See *Adams v. State*, 234 Ga. App. 696, 696-697 (1) (507 SE2d 538) (1998). Here, Spence amended his notice of appeal to designate this Court as the proper appellate court, but he did not do so until *after* the superior court entered its order dismissing his appeal. Therefore, his amendments are of no effect.

[7] We note that Spence has failed to include in the appellate record the transcripts of hearings before the ALJ and the probate court, which are necessary for review of Spence's substantive arguments. Therefore, even if Spence had filed his appeals in this Court, we would affirm the decisions of OSAH and the probate court. See *In re Holly*, 188 Ga. App. 202, 203 (372 SE2d 479) (1988) ("[I]n the absence of a transcript or other appropriate substitute, OCGA. § 5-6-41 (g), an appellate court is bound to assume that the trial court's findings are supported by sufficient competent evidence [because] there is a presumption in favor of the regularity of all proceedings in a court of competent jurisdiction, [and therefore], we are constrained to affirm the superior court's order [retaining a patient for involuntary treatment].") (punctuation omitted).

Court of Appeals of the State of Georgia

ATLANTA, September 25, 2020

The Court of Appeals hereby passes the following order

A21D0057. JERMAINE E. SPENCE v. STATE OF U.S. DEPARTMENT OF BEHAVIORAL HEALTH et al. .

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of Superior Court is directed to include a copy of this order in the record transmitted to the Court of Appeals.

LC NUMBERS:

SU20CV1325

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, September 25, 2020.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Stephen E. Castlen , *Clerk.*

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

JERMAINE E. SPENCE,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Civil Case No. SU-20-CV-1325**
	:	
STATE OF U.S. DEPARTMENT OF BEHAVIORAL HEALTH, WEST CENTRAL GEORGIA REGIONAL HOSPITAL ex rel. ELIZABETH CORRENTI, M.D., and JOHN DOE,	:	
	:	
Respondents.	:	

ORDER

This matter came before the Court on August 18, 2020, on petitioner's *pro se* motion to proceed, which the Court interprets as a motion for judgment on the pleadings. *See Davis v. State*, 330 Ga. App. 711, 712 (2015) (quoting *Jordan v. State*, 247 Ga. App. 551, 552 (2001)) ("there is no magic in mere nomenclature, and pleadings are construed to serve the best interests of the pleader, and are judged by function rather than name.") (internal quotations omitted). After considering the motion, the entire record of the matter, and all applicable legal principles, the Court finds and rules as follows:

On July 13, 2020, petitioner, proceeding *pro se*, filed an appeal in this Court from either an order of the Probate Court of Muscogee County, Georgia, or a final decision of the Office of State Administrative Hearings for the State of Georgia. Both documents were included in petitioner's appeal.

Before addressing the merits of petitioner's appeal, the Court notes that petitioner's appeal is one hundred and forty-six (146) pages long, of which one hundred and nineteen (119) are handwritten and appear to have been written with a marker. Most of the handwritten pages are

barely legible, and those which are legible are unintelligible with various legal jargon scattered throughout.

O.C.G.A. § 5-3-2 provides for appeals to the Superior Court from any decision made by the Probate Court, except those civil cases in a Probate Court which is provided for by Article 6 of Chapter 9 of Title 15 of the Official Code of Georgia Annotated. Those civil cases excepted from the statutory right of appeal to the Superior Court from Probate Court are governed by the process contemplated in O.C.G.A. § 15-9-123, which provides for appeals from such civil cases in Probate Court to the Supreme Court of Georgia or the Court of Appeals of Georgia, as outlined in Chapter 6 of Title 5 of the Official Code of Georgia Annotated.

Here, petitioner appeals from an order of the Probate Court of Muscogee County, Georgia, which order was issued pursuant to the Probate Court of Muscogee County, Georgia's, authority under O.C.G.A. § 37-3-81. Such orders are only appealable to the Supreme Court of Georgia or the Court of Appeals of Georgia, as outlined in Chapter 6 of Title 5 of the Official Code of Georgia Annotated. The Court, therefore, lacks jurisdiction to hear petitioner's appeal as to the order of the Probate Court of Muscogee County, Georgia.

O.C.G.A. § 5-3-20 provides that, in other appeals to the Superior Court, such appeal must be filed within thirty (30) days of the date of entry of the judgment, order, or decision complained thereof.

Pretermitting whether a final decision of the Office of State Administrative Hearings for the State of Georgia is such an appealable order, and pretermitting whether the parties as named herein are the proper parties for such an appeal, the final decision of the Office of State Administrative Hearings for the State of Georgia which petitioner seeks to appeal was entered on November 19, 2019.

Because petitioner did not file his appeal of the final decision of the Office of State Administrative Hearings for the State of Georgia until well after the expiration of the thirty (30) days in which he was required to file such an appeal, the Court lacks jurisdiction to hear petitioner's appeal as to the final decision of the Office of State Administrative Hearings for the State of Georgia.

IT IS ORDERED that petitioner's appeal is **DISMISSED.**

SO ORDERED, this 21st day of August, 2020.

JUDGE RON MULLINS
SUPERIOR COURT OF
MUSCOGEE COUNTY, GEORGIA

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of this Order by electronically filing (e-filing) via Odyssey eFileGA upon the following:

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This 27th day of August, 2020.

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