App. 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6704

GEORGE CLEVELAND, III,

Petitioner - Appellant,

v.

DIRECTOR JERRY B. ADGER, of the South Carolina Department of Probation Parole & Pardon Services (SCPPPS),

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, District Judge. (4:17-cv-03269-RBH)

Submitted: December 20, 2018 Decided: December 26, 2018

Before DIAZ and RICHARDSON, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

George Cleveland, III, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

App. 2

PER CURIAM:

George Cleveland, III, seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Cleveland has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

App. 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FflorENCE DIVISION

George Cleveland, III,	)	Civil Action No.: 4:17-cv-03269-RBH
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
Director Jerry B. Adger,	)	
	)	
Respondent.	)	
	)	

Petitioner, a state parolee proceeding pro se, commenced this action by filing a habeas petition pursuant to 28 U.S.C. § 2254.[1] *See* ECF No. 1. The matter is now before the Court on Petitioner's untimely objections to the Report and Recommendation ("R & R") of United States Magistrate Judge Thomas E. Rogers, III,[2] who recommends summarily dismissing Petitioner's habeas petition as untimely. *See* ECF Nos. 12 & 27.

Legal Standards

I. Review of the R & R

The Magistrate Judge makes only a recommendation to the Court. The Magistrate Judge's recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court must conduct a de novo review of those portions of the R & R to which specific objections are made, and it may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the

---

[1] *See generally Jones v. Cunningham*, 371 U.S. 236, 244 (1963) (holding a state parolee is "in custody" for purposes of the district court's habeas corpus jurisdiction).

[2] The Magistrate Judge issued the R & R in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.).

matter with instructions. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The Court must engage in a de novo review of every portion of the Magistrate Judge's report to which specific written objections have been filed. *Id.* However, the Court need not conduct a de novo review when a party makes only "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate [Judge]'s proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of ***timely filed*** specific objections to the R & R, the Court reviews only for clear error, *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), and the Court need not give any explanation for adopting the Magistrate Judge's recommendation. *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983). Failure to file timely objections constitutes a waiver of de novo review and a party's right to appeal this Court's order. 28 U.S.C. § 636(b)(1); *see Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *Carr v. Hutto*, 737 F.2d 433, 434 (4th Cir. 1984).

II. One-Year Statute of Limitations for Filing a § 2254 Habeas Petition

Petitioner filed his habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Accordingly, the provisions of the AEDPA apply. *Lindh v. Murphy*, 521 U.S. 320, 336–37 (1997).

A state prisoner seeking federal habeas relief under 28 U.S.C. § 2254 has one year to file his petition after the latest of four enumerated events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was

App-5

prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Thus, under subsection (A), "the one-year limitation period begins running when direct review of the state conviction is completed or when the time for seeking direct review has expired, unless one of the circumstances enumerated [in subsections (B), (C), or (D)] is present and starts the clock running at a later date." *Hill v. Braxton*, 277 F.3d 701, 704 (4th Cir. 2002).

The one-year limitation period is suspended for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In interpreting § 2244(d)(1) and (2), the Fourth Circuit has clarified the time that elapses between completion (or expiration) of direct review and commencement of state post-conviction review counts toward the one-year limitation period. *See Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000) ("In short, [28 U.S.C. § 2244(d)] provides that upon conclusion of direct review of a judgment of conviction, the one-year period within which to file a federal habeas petition commences, but the running of the period is suspended for the period when state post-conviction proceedings are pending in any state court."). The one-year limitation period in "§ 2244(d) is subject to equitable tolling in appropriate cases," *Holland v. Florida*, 560 U.S. 631, 645 (2010), but "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely

filing." *Id.* at 649 (internal quotation marks omitted). App. 6

Discussion[3]

The Court agrees with the Magistrate Judge that Petitioner's habeas petition is untimely.[4] On November 5, 2013, the state plea court sentenced Petitioner after he pled guilty to his criminal charges. Petitioner then had ten days to serve a notice of appeal. *See* Rule 203(b)(2), SCACR (requiring a criminal defendant to serve a notice of appeal within 10 days after imposition of the sentence). Because Petitioner did not file a direct appeal, his convictions became final on **November 15, 2013**. *See* 28 U.S.C. § 2244(d)(1)(A). The limitation period ran for **139 days from November 15, 2013, to April 3, 2014**, the date that Petitioner filed his state post-conviction relief ("PCR") application. *See id.* § 2244(d)(2). The limitation period was tolled until **August 8, 2016**, the date that the remittitur from the South Carolina Supreme Court (which denied review of Petitioner's PCR appeal) was filed in the state circuit court. *See Beatty v. Rawski*, 97 F. Supp. 3d 768, 775–76, 780 (D.S.C. 2015) (holding the final disposition of a PCR proceeding in South Carolina, for purposes of determining the date when a case is no longer pending under § 2244(d)(2), does not occur until the remittitur is filed in the circuit court). Consequently, the limitation period began running again on **August 8, 2016**, and **expired 226 days later on March 22, 2017**. However, Petitioner did not file anything relating to this § 2254 action

---

[3] The R & R throughly summarizes the relevant facts and applicable law with citations to the record and judicially noticed sources. *See generally Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("[F]ederal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue[.]").

[4] The Magistrate Judge raised the issue of timeliness *sua sponte* and provided Petitioner an opportunity to respond. *See Day v. McDonough*, 547 U.S. 198, 209 (2006) ("[D]istrict courts are permitted . . . to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition."); *Hill*, 277 F.3d at 705–08 (recognizing a district court may raise the one-year limitation period *sua sponte* so long as it "give[s] the *pro se* § 2254 petitioner prior notice and an opportunity to respond"). Petitioner has also had an opportunity to respond via his objections to the R & R.

until August 4, 2017.[5] *See Cleveland v. Adger*, No. 4:17-cv-02112-RBH, at ECF No. 1 (D.S.C.) (filed Aug. 4, 2017). The Court concludes Petitioner's § 2254 petition is untimely because it was filed over four months after the expiration of the one-year limitation period in 28 U.S.C. § 2244(d). Moreover, the Court finds Petitioner is not entitled to equitable tolling because he has not shown that he pursued his rights diligently or that some extraordinary circumstance prevented him from timely filing his habeas petition. *See Holland*, 560 U.S. at 649.

Petitioner has filed objections to the R & R, but these objections are **untimely**. *See* ECF No. 27. After the Magistrate Judge entered the R & R,[6] the Court granted Petitioner two extensions (of almost two months) to file objections. *See* ECF Nos. 18 & 23. The Court's second order granting an extension required Petitioner to file objections by April 24, 2018, and notified him that "[n]o further extensions will be granted." *See* ECF No. 23. However, Petitioner did not file his objections until April 30, 2018.[7] Because his objections are untimely, the Court need not consider them and "must only

---

[5] The instant § 2254 petition was docketed on December 4, 2017. *See* ECF No. 1. However, as the Magistrate Judge explains, Petitioner attempted (unsuccessfully) to obtain an extension of time to file his § 2254 petition in the other action cited above, *see* R & R at pp. 1–2, 6; and therefore both the Magistrate Judge and the Court are giving Petitioner the benefit of the doubt and using August 4, 2017, as the date he filed this § 2254 action.

In his objections, Petitioner attempts to relitigate his prior motion seeking an extension of time to file his § 2254 petition. *See* R & R at p. 1. However, both this Court and the Magistrate Judge have squarely addressed this issue and explained the Court cannot grant such a motion. *See* R & R at p. 2; *Cleveland v. Adger*, No. 4:17-cv-02112-RBH, at ECF Nos. 19 & 23 (D.S.C.). The cases that Petitioner cites (*Santiago v. Riley*, No. 4:16-cv-03512-RMG (D.S.C.) and *Smith v. Warden*, No. 4:16-cv-04008-TLW (D.S.C.)) involve the Magistrate Judge granting a respondent's motion for an extension of time to file a *responsive pleading* to a § 2254 petition—such relief is routine in § 2254 actions and completely different than that Petitioner seeks (i.e., extending a statute of limitations).

[6] The R & R notified Petitioner that "**[f]ailure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation.**" R & R at p. 9. *See generally Green v. Reynolds*, 671 F. App'x 70–71 (4th Cir. 2016) ("The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance.").

[7] A paper is filed when it is delivered to the Clerk (or a judge), not when it is mailed. *See* Fed. R. Civ. P. 5(d)(2). Petitioner was in jail at one point during this action, but he was not in jail when the Court granted the last extension requiring him to file objections by April 24, 2018, or when he actually filed his objections. Thus, the prison mailbox rule is not at issue here. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

satisfy itself that there is no clear error on the face of the record." *Diamond*, 416 F.3d at 315 (internal quotation mark omitted).

In any event, the Court has reviewed Plaintiff's objections and notes they would not change its decision to adopt the R & R. Petitioner argues his § 2254 petition is timely because it was filed within a year of the South Carolina Supreme Court issuing the remittitur in his PCR appeal. *See* ECF No. 27 at p. 2. However, as indicated above, the limitation period is not calculated this way and it ran for (1) the time that elapsed between the expiration of the time to appeal his guilty plea and the filing of his PCR action (139 days) and (2) the time that elapsed between the filing of the remittitur from his PCR appeal in the state circuit court and the filing of his first federal action (361 days). Petitioner also asserts that the state circuit court still has not ruled on two motions he filed in August and November of 2014, *see id.* at p. 3; however, those motions were filed during the pendency of his PCR action, and they do not affect the calculation of the limitation period.[8]

In sum, the Court finds Petitioner's § 2254 petition is untimely, not subject to equitable tolling, and must be denied.

Also, on April 27, 2018, Petitioner filed another motion for an extension of time to file objections, *see* ECF No. 26. The Court **DENIES** this motion based on its prior order informing Petitioner that no further extensions would be granted. *See* ECF No. 23.

[8] Additionally, Petitioner contends the Magistrate Judge erroneously considered his "Objections" (ECF No. 8) to the proper form order issued earlier in this case, *see* ECF Nos. 6 & 8, claiming that the undersigned should have ruled on them. *See* ECF No. 27 at p. 2. The Court notes the Magistrate Judge simply considered those "Objections" in addressing the timeliness of Petitioner's § 2254 petition, *see* R & R at pp. 4, 7; and in any event the Court has reviewed those "Objections" pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a) and finds the Magistrate Judge's proper form order is neither clearly erroneous nor contrary to law because, as explained in Footnote 3 above, the Magistrate Judge properly raised the issue of timeliness *sua sponte* in accordance with *Day* and *Hill*, *supra*.

Finally, Petitioner appears to argue the one-year limitation period is unconstitutional under the Suspension Clause of the U.S. Constitution. *See* U.S. Const., Art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). However, "[t]he constitutionality of AEDPA's limitation period has been upheld under the Suspension Clause of the United States Constitution." *Smith v. Ballard*, 2016 WL 3456452, at *7 (S.D.W. Va. May 26, 2016) (collecting cases), *adopted by*, 2016 WL 3460438 (S.D.W. Va. June 21, 2016).

App. 9

Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2254 Cases. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a petitioner satisfies this standard by demonstrating that reasonable jurists would find that the court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate *both* that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484–85. In this case, the Court concludes that Petitioner has failed to make the requisite showing of "the denial of a constitutional right."

Conclusion

Based upon the foregoing, the Court overrules Petitioner's objections and adopts and incorporates by reference the Magistrate Judge's R & R [ECF No. 12]. Accordingly, the Court **DENIES AND DISMISSES** Petitioner's § 2254 petition *with prejudice* and without requiring Respondent to file an answer or return. The Court **DENIES** a certificate of appealability because Petitioner has not made "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2). The Court **DENIES** Petitioner's Third Motion for an Extension of Time to File Objections to the R & R [ECF No. 26] and Motion to Correct Judgment [ECF No. 14].[9]

---

[9] Petitioner filed a Motion to Correct Judgment in the instant case and in his prior related case, and the Court has already entered an order denying the motion in the prior case and explaining the reasons for doing so. *See Cleveland v. Adger*, No. 4:17-cv-02112-RBH, at ECF No. 37 (D.S.C.) (filed May 7, 2018) ("Previously, the Court

IT IS SO ORDERED.

App. 10

Florence, South Carolina
May 22, 2018

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

---

entered an order directing 'the Clerk to open a separate case with a separate filing number' and to docket Petitioner's federal habeas petition filed pursuant to 28 U.S.C. § 2254, *see* ECF No. 32, and the Clerk did so. *See Cleveland v. Adger*, No. 4:17-cv-03269-RBH (filed Dec. 4, 2017). In that same order, the Court found Petitioner's pending motions moot. Petitioner has now filed a motion pursuant to Fed. R. Civ. P. 60(a) asking the Court to close the new case and reopen the instant case. *See* ECF No. 35 . '[T]he scope of a court's authority under Rule 60(a) to make corrections to an order or judgment is circumscribed by the court's intent when it issued the order or judgment.' *Sartin v. McNair Law Firm PA*, 756 F.3d 259, 266 (4th Cir. 2014). The Court notes Petitioner's new case is the proper one and provides him the opportunity to pursue his § 2254 action, and therefore the Court **DENIES** his motion.").

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

George Cleveland, III
Petitioner
v.
Jerry B. Adger of the South Carolina Department of Probation Parole & Pardon Services (SCPPPS)
Respondent

Civil Action No. 4:17-cv-3269-RBH

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

❒ the petitioner *(name)* _____ recover from the respondent *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

❒ the petitioner recover nothing, the action be dismissed on the merits, and the respondent *(name)* _____ recover costs from the petitioner *(name)* _____.

■ other: This petition is dismissed with prejudice and without requiring Respondent to file an answer or return. The Court denies a certificate of appealability.

This action was *(check one)*:

❒ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

❒ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■ decided by the Honorable R. Bryan Harwell, United States District Judge. The court adopts the Report and Recommendation of the Honorable Thomas E. Rogers, III, United States Magistrate Judge.

Date: May 22, 2018

CLERK OF COURT

s/Debbie Stokes

Signature of Clerk or Deputy Clerk

App. 11

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

George Cleveland, III, *f/k/a George Cleveland, III, #357770,* Petitioner, vs. Director Jerry B. Adger, Respondent.	)	C/A No. 4:17-3269-RBH-TER Report and Recommendation

Petitioner, a state parolee proceeding *pro se*, filed a Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B) (2)(c) DSC. Having reviewed the Petition in accordance with applicable law, the court concludes that it should be summarily dismissed.

BACKGROUND[1]

On August 4, 2017, in a different action, Petitioner filed a Motion for an Extension to File a § 2254 Petition. (ECF No. 1, Cause No. 4:17-2112-RBH). Petitioner alleged his grounds for extension were multiple state court cases and a "huge" case file. Petitioner asserted the one-year statute of limitations ran under § 2244(d) on August 4, 2017; his reasoning was that it was a year from the South Carolina Supreme Court's denial of his Petition for Rehearing. Petitioner requested

[1] *See generally*, https://www2.greenvillecounty.org/SCJD/PublicIndex/PISearch.aspx (with search parameters limited by Petitioner's name). The court may take judicial notice of factual information located in postings on government websites. *See In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, 2008 WL 4185869 at * 2 (E.D. La. Sept. 8, 2008) (noting that courts may take judicial notice of governmental websites including other courts' records); *Williams v. Long*, No. 07-3459-PWG, 2008 WL 4848362 at *7 (D. Md. Nov. 7, 2008) (noting that some courts have found postings on government websites as inherently authentic or self-authenticating).

App. 12

an extension to file his Petition until October 4, 2017.

In its August 17, 2017 Order, the court informed Petitioner that his future Petition would be considered filed as of the date his Motion was filed, but the court would not be ruling on Petitioner's Motion. (ECF No. 9, Cause No. 4:17-2112-RBH). The court's Order instructed Petitioner to file a habeas petition within 21 days. (ECF No. 9, Cause No. 4:17-2112-RBH). On September 12, 2017, Petitioner filed another Motion for Extension of Time to File Habeas Petition. (ECF No. 14, Cause No. 4:17-2112-RBH). Petitioner stated his request was based on four other court deadlines in the "next couple of months." (ECF No. 14, Cause No. 4:17-2112-RBH). Petitioner stated that there was "simply not enough time to prepare [his] Petition with the above cases, [his] job, and school work." (ECF No. 14, Cause No. 4:17-2112-RBH). Petitioner requested an extension until October 27, 2017. (ECF No. 14, Cause No. 4:17-2112-RBH).

On September 18, 2017, the court again stated it would not be ruling on said motions and ordered Petitioner to file his Petition within 21 days. (ECF No. 15, Cause No. 4:17-2112-RBH). On October 3, 2017, Petitioner filed a Motion for Clarification of the Court's Prior Order. (ECF No. 18, Cause No. 4:17-2112-RBH). Petitioner asserted the court's order was irrelevant to his request for more time to file his habeas Petition. (ECF No. 18, Cause No. 4:17-2112-RBH)).

On October 12, 2017, the undersigned recommended that the action docketed as Cause No. 4:17-2112-RBH be dismissed without prejudice and noted that the court lacked the authority to grant Petitioner's Motion for Extension due to a lack of jurisdiction. *U.S. v. Leon*, 203 F.3d 162 (2d Cir. 2000). A federal court lacks jurisdiction to consider the timeliness of a habeas petition until a petition is actually filed. *Id.* (collecting cases). In filings after the recommendation of dismissal, Petitioner did file his Petition. On December 4, 2017, the district judge directed the Clerk to open

a separate case with a separate filing number; the instant case is that cause number. (ECF No. 32, Cause No. 4:17-2112-RBH). The district judge also mooted Petitioner's motion asking the court to deem his Petition as timely filed.

In the instant action, the court previously ordered Petitioner to pay the filing fee or file for *in forma pauperis* status and also ordered:

Upon initial review of the Petition, it appears from the face of the Petition that this case may be untimely filed. This order is notice to Petitioner that the court is considering dismissal of his case based on the running of the one-year statute of limitations. Unless the petitioner provides facts casting doubt on the issue of untimeliness of his Petition and thereby prevent dismissal based on the limitations bar, this case may be subject to dismissal. Accordingly, Petitioner is granted twenty-one (21) days to file a factual explanation with this court to show cause why his Petition should not be dismissed based on the application of the one-year limitation period established by 28 U.S.C. § 2244(d), including but not limited to, factual dispute regarding the relevant dates of filings in state court mentioned and/or facts supporting the application of equitable tolling. *See Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003).

(ECF No. 6).

The court also informed Petitioner:

Additionally, it appears Petitioner may have filed this action beyond the one-year statute of limitations. Therefore, this order is notice to Petitioner that the court may dismiss his case based on the running of the one-year statute of limitations. Section 2244(d) provides that a petition for writ of habeas corpus must be filed within one year of the date on which the conviction being challenged becomes final. The one-year period does not run ("is tolled") during the time period that a direct appeal and a post-conviction relief ("PCR")application are pending. Petitioner was convicted in November 2013 and it appears did not appeal his conviction. Petitioner first filed a state PCR on April 3, 2014, the remittitur was received in the lower court on August 8, 2016. While the one year time period running was tolled from April 3, 2014, until August 8, 2016, the time ran from November 15, 2013 to April 3, 2014 and from August 8, 2016, to the date Petitioner filed his Petition in 2017. Thus, it appears Petitioner is beyond the 1 year statute of limitations.

Further, § 2244(d)'s one-year statute of limitations is subject to equitable tolling which could extend the final date for filing. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000). A petitioner may be entitled to equitable tolling of the statute of limitations if he can demonstrate "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003). In 2010, the United States Supreme Court considered the issue and held that the statute would be

equitably tolled "only if [the petitioner] shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (quoting Pace, 544 U.S. at 418)).

(ECF No. 6).

Petitioner filed "objections" in response to the Proper Form Order. (ECF No. 8). Petitioner objects to the requirement of the $5 filing fee because he already paid a filing fee of $45 when he filed his first Motion for Extension to file his Petition in Cause No. 4:17-2112-RBH. (ECF No. 8). For purposes of judicial economy and efficiency, the court will waive the $5 filing fee in this cause number only in this limited instance.

Petitioner objects to the order for Petitioner to file a factual explanation with this court to show cause why his Petition should not be dismissed based on the application of the one-year limitation period established by 28 U.S.C. § 2244(d), including but not limited to, factual dispute regarding the relevant dates of filings in state court mentioned and/or facts supporting the application of equitable tolling. Petitioner states the undersigned cannot invoke the one year statute of limitations because Petitioner's several Motions for Extension of time to file his Petition were never ruled on. This issue was thoroughly addressed in the report and recommendation in cause no. 4:17-2112-RBH. However, in the below analysis of the statute of limitations, the court will assume, for the sake of argument, a filing date of his first Motion for Extension, dated August 4, 2017.

In Greenville County on November 5, 2013, Petitioner was convicted, after a guilty plea, of possession/disposing of a stolen vehicle(2 charges, one for a vehicle under $10,000, one for a vehicle over $10,000); false pretenses; and falsifying VIN intending to conceal(2 charges). Petitioner did not file a direct appeal. Petitioner timely filed a state PCR action on April 3, 2014, the remittitur was received from the Supreme Court in the lower court on August 8, 2016. Petitioner filed several

other documents with the South Carolina Supreme Court after the remittitur was issued. On January 4, 2017, the South Carolina Supreme Court ordered that no more filings be accepted since appellate jurisdiction had ended.

DISCUSSION

Under established local procedure in this judicial district, a careful review has been made of the *pro se* pleadings pursuant to the procedural provisions the Anti-Terrorism and Effective Death Penalty Act of 1996. The review has been conducted in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951 (4th Cir. 1995)(*en banc*); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978); and *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). The petitioner is a *pro se* litigant, and thus his pleadings are accorded liberal construction. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)(*per curiam*); *Cruz v. Beto*, 405 U.S. 319 (1972). Even under this less stringent standard, the petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Department of Social Services*, 901 F.2d 387, 390-91 (4th Cir. 1990).

With respect to his convictions and sentences, the petitioner's sole federal remedies are a writ of habeas corpus under either 28 U.S.C. § 2254 or 28 U.S.C. § 2241, which remedies can be sought only after the petitioner has exhausted his state court remedies. "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted." *Beard v. Green*, 523 U.S. 371,

375 (1998) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)); *see also* 28 U.S.C. § 2254(b); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973); *Picard v. Connor*, 404 U.S. 270 (1971).

The Petition in the above-captioned case is untimely.

The AEDPA, 28 U.S.C. § 2244(d) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a "properly filed" application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

As aforementioned, for purposes of this discussion it is assumed that August 4, 2017, the date his Motion for Extension of Time to File A Habeas Petition was filed, is the filing date of this action.

The Petition and public court records show the following periods of untolled time:

— November 15, 2013 (the date Petitioner's conviction became final)[2] to April 3, 2014 (the filing date for Petitioner's first state PCR action) (139 days)

---

[2] This date takes into consideration that the finality of the conviction does not arise until after the time to appeal runs, which is 10 days in this case. *See* S.C. App. R. 203.

App. 17

— August 8, 2016[3] (the date the remittitur was filed in the lower court on Petitioner's appeal of the denial of his first PCR action) to August 4, 2017 (the date of filing of the first Motion to Extend time for filing habeas petition in Cause No. 17-2112-RBH) (361 days)

Hence, the Petitioner has at least 500 days of untolled time. This aggregate time period exceeds the one-year statute of limitations of 28 U.S.C. § 2244(d). *See Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000). Therefore, the present petition is time-barred and should be dismissed on that basis.

Petitioner makes no equitable tolling arguments for his untimeliness, but instead argues that his Motion filed on the August 4, 2017 is timely for one year from the August 4, 2016 denial of the PCR Petition for Rehearing. As demonstrated above, that is an incorrect application of 28 U.S.C. § 2244(d). There is no evidence that warrants equitable tolling. Petitioner has made no showing that he pursued his rights diligently or that some extraordinary circumstances stood in his way to prevent him from timely filing his federal habeas petition. Therefore, the Petition should be dismissed as barred by the statute of limitations. *Hill v. Braxton*, 277 F.3d 701, 707 (4th Cir. 2002);[4] *see also Day v. McDonough*, 547 U.S. 198 (2006).

---

[3] *Cf. Beatty v. Rawski*, 2015 WL 1518083 (D.S.C. Mar. 31, 2015)(one-year limitations period for filing federal habeas petition remained tolled until remittitur on appeal from denial of post-conviction relief was filed in circuit court).

[4] The Petitioner's response to the court's order, plus his right to file objections to this Report and Recommendation constitute Petitioner's opportunities to object to a dismissal of this petition based on the statute of limitations. *Hill v. Braxton*, 277 F.3d at 707 (habeas case; timeliness may be raised *sua sponte* if evident from face of pleading, but petitioner must be given warning and opportunity to explain before dismissal). *Cf. Bilal v. North Carolina*, 287 Fed. Appx. 241, 2008 WL 2787702 (4th Cir. July 18, 2008).

App. 18

RECOMMENDATION

Accordingly, it is recommended that the § 2254 petition be dismissed *with prejudice and without requiring the respondent to file a return* because the petition is clearly untimely under the one-year limitations provision of the AEDPA, 28 U.S.C. § 2244(d).

s/ Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

February 12, 2018
Florence, South Carolina

Petitioner's attention is directed to the important notice on the next page.

App. 19

FILED: February 12, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6704
(4:17-cv-03269-RBH)

GEORGE CLEVELAND, III

Petitioner - Appellant

v.

DIRECTOR JERRY B. ADGER, of the South Carolina Department of Probation Parole & Pardon Services (SCPPPS)

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Diaz, Judge Richardson, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

Additional material from this filing is available in the Clerk's Office.