IN THE SUPREME COURT OF THE UNITED STATES
October Term 2019

LEROY STATON, Petitioner

Against

SUPERINTENDENT, LEE CORRECTIONAL INSTITUTION,
BISHOPVILLE S.C.

96-GS-34-982
2018-CP-34-0113
(County of Marlboro)
Appellate Case: 2018-001731

APPENDIX

A, Defendant's history of disciplinaries in 22 years--None

B, USDC denial, 2012 WL 33214 B1-5

C, Co-Defendant's SCSC 2004, C1-2

D, SCSC May 31, 2019, D

E, SC, CoA, 6/26/19

F, SCSC, c. 11/25/19

G, USDC, 8/1/19 G1-116

H, US DC Order, 9/26/19, H1-4

I, US, CoA-4, November 14, 2019

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7504

LEROY L. STATON,

Petitioner - Appellant,

v.

SUPERINTENDENT LEE CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Timothy M. Cain, District Judge. (8:19-cv-01805-TMC)

Submitted: February 20, 2020 Decided: February 25, 2020

Before GREGORY, Chief Judge, RUSHING, Circuit Judge, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Leroy Staton, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

To SC Att Gen 2

PER CURIAM:

Leroy Staton seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing Staton's 28 U.S.C. § 2254 (2018) petition as an unauthorized, successive § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2018). 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) (2018). When, as here, 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. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Staton has not made the requisite showing. Accordingly, we deny a certificate of appealability 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

To SC Att On 3

Staton - Rec'd 3/4/20
Marvin " 3/7/20

FILED: February 25, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7504
(8:19-cv-01805-TMC)

LEROY L. STATON

Petitioner - Appellant

v.

SUPERINTENDENT LEE CORRECTIONAL INSTITUTION

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

To SC AG Gen - 1

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Leroy L. Staton, Petitioner, v. Superintendent Lee Correctional Institution, Respondent.	C/A No. 8:19-cv-01805-TMC-JDA **REPORT AND RECOMMENDATION**

Leroy L. Staton ("Petitioner"), proceeding pro se and in forma pauperis, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. Petitioner is a state prisoner in the custody of the South Carolina Department of Corrections and is currently incarcerated at the Lee Correctional Institution. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c), D.S.C., the undersigned Magistrate Judge is authorized to review such petitions for relief and submit findings and recommendations to the District Judge. For the reasons that follow, the Petition is subject to summary dismissal as successive and time barred.

BACKGROUND

This matter arises from Petitioner's conviction and sentence in the Marlboro County Court of General Sessions for murder, kidnapping, criminal sexual conduct in the first degree, and criminal conspiracy. Petitioner commenced the instant federal habeas action to challenge his conviction by filing a memorandum, which was construed as a habeas petition pursuant to 28 U.S.C. § 2254, along with attachments in support of his petition. [Docs. 1; 1-1.] By Orders dated June 28, 2019, and July 22, 2019, Petitioner was instructed to file with the Court a habeas petition on the standard court form. [Docs. 5; 9.]

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Thereafter, Petitioner filed the proper court form [Doc. 1-3], along with attachments [Doc. 1-5], which were attached to his original filing. The Court construes the original filing along with the filing on the standard court form [Docs. 1; 1-3] together as the Petition in this habeas action, and the Court has carefully reviewed each of the documents submitted by Petitioner in support of his Petition. Further, the Court takes judicial notice of the records in Petitioner's state criminal case and post-conviction relief actions as well as his prior federal habeas actions filed in this Court. *See Philips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (explaining courts "may properly take judicial notice of matters of public record"); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'").

This Court previously summarized the procedural history of Petitioner's state court criminal proceedings as follows:

> [In 1996,] the Marlboro County Grand Jury indicted Petitioner for murder, kidnapping, criminal sexual conduct in the first degree ("CSC 1st"), and criminal conspiracy. Represented by [counsel], on March 10, 1997, Petitioner proceeded to trial with five co-defendants before the Honorable Edward B. Cottingham. On March 18, 1997, Petitioner was found guilty of murder, kidnapping, CSC 1st, and criminal conspiracy. On March 19, 1997, Judge Cottingham sentenced Petitioner to life imprisonment for murder, a consecutive sentence of thirty years imprisonment for CSC 1st, and a concurrent sentence of five years for criminal conspiracy. Petitioner was not sentenced on the kidnapping count, pursuant to South Carolina statutory law [,] which provides that where a life sentence is imposed on a murder indictment, no sentence shall be imposed on a kidnapping indictment.

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Direct Appeal

Petitioner, represented by [counsel], appealed his convictions and sentences to the South Carolina Supreme Court, which transferred the case to the South Carolina Court of Appeals. On November 8, 2001, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. Petitioner filed a petition for rehearing on November 20, 2001, which was denied on January 8, 2002. On February 7, 2002, Petitioner filed a petition for writ of certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court denied Petitioner's petition for writ of certiorari on November 21, 2002[,] and issued remittitur on November 25, 2002.

PCR Proceedings

Petitioner, proceeding pro se, filed an application for post-conviction relief ("PCR") on November 19, 2003. . . . Petitioner, through counsel, filed an amended application on July 3, 2006. . . . On July 12, 2006, the PCR court held an evidentiary hearing into the matter. . . .

On July 28, 2006, the PCR court issued its decision, denying and dismissing with prejudice Petitioner's PCR application. . . . On October 31, 2007, Petitioner appealed the denial of his PCR application by way of a petition for writ of certiorari to the South Carolina Supreme Court. . . . The State filed a return to the petition, and on May 8, 2008, the South Carolina Supreme Count granted the petition for writ of certiorari. However, on March 23, 2009, . . . the court dismissed the writ of certiorari as improvidently granted. Remittitur was issued on April 8, 2009.

State Petition for Writ of Habeas Corpus

On March 18, 2010, Petitioner filed a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court. . . . By order dated April 21, 2010, the South Carolina Supreme Court found Petitioner had not shown "a violation which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice" and denied the petition.

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Staton v. Warden Kershaw Correctional Institution, No. 8:11-cv-00745-TMC-JDA (D.S.C. Nov. 18, 2011), Doc. 48 at 2–6 (citations and footnotes omitted).

On March 24, 2011, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court, asserting 24 grounds for relief. *Staton v. Warden Kershaw Correctional Institution*, No. 8:11-cv-00745-TMC-JDA (D.S.C. Mar. 29, 2011), Doc. 1. On January 6, 2012, the Court granted summary judgment for the Respondent and dismissed the petition with prejudice as time-barred. *Staton v. Warden Kershaw Correctional Institution*, No. 8:11-cv-00745-TMC-JDA (D.S.C. Jan. 6, 2012), Doc. 55.

In the instant Petition, Petitioner asserts two grounds to support his claim for federal habeas relief. First, Petitioner contends he is not guilty because the deceased victim was "found in [a] stream [of] still water, fully clothed – sealed in duct tape, making her rape-proof. Autopsy showed no sex abuse. No rape means [n]o gang rape, and no gang murder, no conspiracy." [Doc. 1-3 at 5.] Second, Petitioner contends the State's witnesses were incompetent to testify because "Davis had brain damage [and] was psychotic[.] Ransom blacked out [and] had memory loss." [*Id.* at 7.] For his relief, Petitioner requests to be released from state imprisonment and custody. [*Id.* at 12.] Regarding the timeliness of the instant Petition, Petitioner asserts that he is actually innocent and that the State provides no remedy for actual innocence. [*Id.* at 10.]

STANDARD OF REVIEW

Under established local procedure in this judicial district, a careful review has been made of the pro se petition filed in the above-captioned case. The review was conducted pursuant to the procedural provisions of 28 U.S.C. § 1915, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. 104-132, 110 Stat. 1214, and 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, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983). Further, this Court is charged with screening Petitioner's lawsuit to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases in the U.S. District Courts (2012). Pursuant to this rule, a district court is "authorized to dismiss summarily any habeas petition that appears legally insufficient on its face." *McFarland v. Scott*, 512 U.S. 849, 856 (1994).

Because Petitioner is a pro se litigant, his pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (per curiam). However, 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 cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 390–91 (4th Cir. 1990).

DISCUSSION

Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the legality or duration of his custody. *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Here, Petitioner challenges his state conviction, seeking habeas relief under 28 U.S.C. § 2254. Nevertheless, after a review of the Petition and the record in this case, the Petition appears to be subject to dismissal because it is both successive and time barred.

The Petition is successive

Although 28 U.S.C. § 2254 is the appropriate vehicle for a state prisoner to challenge a state conviction, relief under the statute is unavailable to the Petitioner because the instant Petition is successive. This is the second § 2254 petition[1] that Petitioner has submitted to this Court in his efforts to challenge the constitutionality of his state court criminal convictions. As stated, on March 24, 2011, Petitioner filed his first petition in this Court for relief under 28 U.S.C. § 2254, which was dismissed with prejudice on January 6, 2012. *See Staton v. Warden Kershaw Corr. Inst.*, No. 8:11-cv-745-TMC (D.S.C. Jan. 6, 2012), Doc. 55. Accordingly, this second habeas Petition is successive, and Petitioner has failed to obtain authorization from the Fourth Circuit to file a successive petition.

On April 24, 1996, the AEDPA amended 28 U.S.C. § 2254 and other habeas statutes:

> The AEDPA effected a number of substantial changes regarding the availability of federal postconviction relief to individuals convicted of crimes in federal and state courts. Of particular importance here are the provisions of the AEDPA codifying and extending judicially constructed limits on the consideration of second and successive applications for collateral relief. Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas

[1]The undersigned notes that Petitioner also filed a habeas petition in this Court in 2001 while his state criminal case was on direct appeal. *See Staton v. Harrison*, 2:01-cv-2487-PMD (D.S.C. June 11, 2011), Doc. 1. However, that action was dismissed without prejudice on March 25, 2002, because the direct appeal was still pending and the claims raised in the federal habeas petition were unexhausted. *Staton*, 2:01-cv-2487-PMD, Doc. 12. On May 24, 2010, Petitioner filed a motion for authorization to file a successive habeas application in the Fourth Circuit Court of Appeals. *Staton*, 2:01-cv-2487-PMD, Doc. 15. The Fourth Circuit denied the Motion on June 22, 2010, finding the motion was unnecessary because Petitioner's previous federal habeas petition was dismissed without prejudice. *Staton*, 2:01-cv-2487-PMD, Doc. 15. Because Petitioner's first federal habeas action was dismissed as Petitioner's direct appeal was ongoing and his claims were unexhausted, the undersigned does not include that action as one of Petitioner's federal habeas actions in its analysis here.

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> corpus or § 2255 motion to vacate sentence without first receiving permission to do so from the appropriate circuit court of appeals.

In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997) (citations and footnote omitted). The gatekeeping mechanism created by the AEDPA amended § 2244(b) to provide:

> The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. § 2244(b)(3)(A). A three-judge panel has 30 days to determine whether "the application makes a prima facie showing that the application satisfies the requirements of" § 2244(b). § 2244(b)(3)(c); *see* §§ 2244(b)(3)(B), (D).

Felker v. Turpin, 518 U.S. 651, 657 (1996). To be considered "successive," the second or subsequent petition must be an attack on the same conviction attacked in the first petition, and the first petition must have been adjudicated on the merits. *See In re Williams*, 444 F.3d 233, 236 (4th Cir. 2006).

This action qualifies as a second or successive § 2254 action because Petitioner's first § 2254 action filed in this Court in 2011, pertaining to the same convictions for which he is serving his sentence, was decided on the merits as time barred. *See Staton v. Warden Kershaw Corr. Inst.*, No. 8:11-cv-745-TMC, 2012 WL 33214, at *1 (D.S.C. Jan. 6, 2012). Further, § 2244(b)(2) provides that in some circumstances a petitioner may bring a second or successive § 2254 action. That statute permits a court of appeals to determine whether to authorize a successive petition. Thus, the United States Court of Appeals for the Fourth Circuit—not the district court—is the proper tribunal to decide whether to authorize a successive § 2254 petition. *See United States v. Winestock*, 340 F.3d 200, 205–06 (4th Cir. 2003). Because it appears that Petitioner did not obtain authorization from

the Fourth Circuit Court of Appeals to file this petition, this Court does not have jurisdiction to consider it. *Id.*

The Petition is time-barred

Even if the instant Petition were not considered successive, it would still be subject to dismissal as time-barred. A federal court may raise the issue of the timeliness of a habeas petition sua sponte. *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002); *Wright v. Anderson*, No. 8:18-cv-00191-JMC, 2019 WL 1170821, at *2 (D.S.C. Mar. 13, 2019). As the Fourth Circuit has noted,

> [A] district court has the discretion, but not the obligation, to consider on its own motion the timeliness of a habeas petition under AEDPA if (1) the parties have fair notice and an opportunity to be heard; (2) the state has not waived the limitations defense; (3) the "petitioner is not significantly prejudiced by the delayed focus on the limitation issue"; and (4) the court "determine[s] whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred."

Gray v. Branker, 529 F.3d 220, 241 (4th Cir. 2008) (quoting *Day v. McDonough*, 547 U.S. 198, 209–11 (2006)). Once the court has raised the issue, it "must accord the parties fair notice and an opportunity to present their positions" on the issue.[2] *Day*, 547 U.S. at 210.

Under the AEDPA, petitioners have one year to file a petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application

[2]Petitioner's right to file objections to this Report and Recommendation constitutes Petitioner's opportunity to object to a dismissal of this Petition based on the statute of limitations. The undersigned concludes that because Petitioner has addressed the timeliness issue in his Petition, he has already had an opportunity to explain his position prior to dismissal; however, this Report and Recommendation is further notice and opportunity for Petitioner to explain his position on the timeliness of the Petition. *Hill*, 277 F.3d at 707; *Bilal v. North Carolina*, 287 F. App'x 241, 248–49 (4th Cir. 2008).

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for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."). However, the statute tolls the limitations period during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2). While the limitations period is tolled during the pendency of a properly filed collateral attack on the subject conviction, the one-year statute of limitations begins to run on the date a petitioner's conviction becomes final, not at the end of collateral review. *Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000).

Here, it appears from the face of the Petition that the action is time barred. Indeed, this Court previously evaluated the timeliness of Petitioner's prior habeas action as follows:

> In December 1996, Petitioner was indicted for murder, kidnapping, first degree criminal sexual conduct ("CSC"), and criminal conspiracy. After Petitioner was tried and convicted by a jury, he was sentenced on March 19, 1997, to life imprisonment for the murder, a consecutive sentence of thirty (30) years imprisonment for the CSC 1st, and a concurrent sentence of five (5) years for the criminal conspiracy. Petitioner timely filed a direct appeal. On November 8, 2001, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Staton*, No. 2001–UP–00478 (S.C. Ct. App. filed Nov. 8, 2001). Petitioner's petition for a rehearing was denied and on November 21, 2002, the South Carolina Supreme Court denied the petition for a writ of certiorari to the Court of Appeals. The Court of Appeals issued its Remittitur on November 25, 2002.
>
> As Petitioner was entitled to the ninety (90) days to petition the United States Supreme Court for a writ of certiorari, Petitioner's conviction became final on February 23, 2003, and the AEDPA one-year statute of limitations began to run on February 24, 2003. When Petitioner filed his state PCR action on November 19, 2003, 268 days of the 365 days in which Petition had to file a federal habeas action had already lapsed. Thus, Petitioner had 97 days remaining within which to timely file a federal habeas petition.

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> The South Carolina Supreme Court issued its remittitur from the appeal from the denial of the PCR action on April 8, 2009. Thus, the one-year statute of limitations began to run again on April 9, 2009, and Petitioner had 97 days, or until July 15, 2009, to file a federal habeas action. As noted above, Petitioner filed this action on March 24, 2011, almost two years too late.
>
> On March 18, 2010, Petitioner also filed a petition for a writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court. By then, however, the federal statute of limitations had expired and the pendency of the state habeas proceeding could not toll the limitations period.

Staton v. Warden Kershaw Corr. Inst., No. 8:11-cv-745-TMC, 2012 WL 33214, at *2–3 (D.S.C. Jan. 6, 2012) (footnotes omitted), *appeal dismissed*, 474 F. App'x 129 (4th Cir. 2012). The instant Petition is time-barred for the same reasons as Petitioner's prior action.

Petitioner filed the instant habeas action on June 25, 2019, which is the date the Petition was delivered to the prison authorities for forwarding to the District Court. [Doc. 1-2 at 2 (envelope stamped as received in the Lee Correctional Institution Mail Room on June 25, 2019)]; *see Houston v. Lack*, 487 U.S. 266, 270–76 (1988) (explaining that a prisoner's pleading is filed at moment of delivery to prison authorities for forwarding to District Court). Accordingly, the undersigned concludes based on the face of the pleadings that Petitioner's § 2254 Petition is barred by the applicable one-year limitations period. The undersigned finds that the interests of justice would not be better served by addressing the merits of the Petition.

Petitioner contends that the one-year statute of limitations should not apply to this case because he is actually innocent. However, he has failed to make a sufficient showing of actual innocence. If a § 2254 petitioner makes a "credible showing of actual innocence," he may pursue his habeas claims even if the statute of limitations has expired. *McQuiggin*

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v. Perkins, 569 U.S. 383, 392 (2013). This exception to the time bar applies only if a petitioner demonstrates that in light of new and reliable evidence not presented at trial "'it is more likely than not that no reasonable juror would have convicted him.'" *Id.* at 399 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). "Moreover, a petitioner must show factual innocence and not merely legal insufficiency." *Hutley v. Warden, Lieber Corr. Inst.*, No. 9:17-cv-2962-TMC, 2018 WL 3303283, at *3 (D.S.C. July 5, 2018) (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998)).

With regard to his claim of actual innocence, Petitioner alleges that he

> WAS FALSELY CONVICTED OF RAPE AND MURDER. THE DECEDENT WAS FOUND ONE MONTH AFTER HER SUFFOCATION DEATH IN A BROOK. THE DECEDENT WAS FULLY CLOTHED AND DUCT TAPED IN HER CLOTHES TO THE POINT OF BEING RAPE-PROOF.
>
> THE EXAMINING PHYSICIAN FOUND NO EVIDENCE THAT SHE HAD BEEN RAPED.
>
> . . . PETITIONER WAS CONVICTED ON THE THEORY THAT THERE WAS A GANG RAPE AND MURDER TO COVER THE CRIME.
>
> SINCE THERE WAS NO RAPE NOR GANG RAPE, THERE WAS NO GANG MURDER, AND THERE WAS NO EVIDENCE . . . PETITIONER WAS GUILTY OF A MURDER OR ANY CONSPIRACY TO RAPE OR MURDER.
>
> PETITIONER, BEING NOT GUILTY IS ENTITLED TO EQUITABLE TOLLING.

[Doc. 1 at 1.]

The undersigned notes that, in Petitioner's first federal habeas action, this Court addressed Petitioner's actual innocence claim and explained

> Neither the United States Supreme Court nor the Fourth Circuit Court of Appeals has held that an actual innocence claim is

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> sufficient to warrant equitable tolling. However, even under an actual innocence exception, the Petitioner's petition falls short of the necessary showing. A petitioner must show reliable evidence of his innocence that was not, and could not have been, presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324–328 . . . (1995).
>
> . . . [Petitioner's] assertions do not constitute the type of new evidence required by *Schlup*, or otherwise, to warrant equitable tolling. *See, e.g., Lee v. Lampert*, 653 F.3d 929, . . . (9th Cir. 2011); *Flanders v. Graves*, 299 F.3d 974, 976–977 (8th Cir. 2002) (holding that an actual innocence claim wouid not equitably toll the period of limitation for filing a habeas petition absent a showing of "some action or inaction on the part of the respondent that prevented him from discovering the facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitation."). Petitioner's claim of actual innocence is based on evidence which was available to him at trial. *Flanders*, 299 F.3d at 978 (requiring a petitioner seeking equitable tolling on actual innocence grounds to show either that a state-created barrier prevented his timely discovery of relevant facts or that a "reasonably diligent petitioner" could not have discovered such facts in time to file within the limitations period). Because he has no new evidence with which to demonstrate his actual innocence, he cannot meet the extremely high burden required for a showing of actual innocence for the application fo equitable tolling, and thus equitable tolling is not warranted. *See Knecht v. Shannon*, 132 F. App'x 407, 409 (3d Cir. 2005). Accordingly, equitable tolling should not be applied in this case. Based upon the foregoing, this habeas petition was not timely filed, and it is barred by the statute of limitations.

Staton v. Warden Kershaw Corr. Inst., No. 8:11-cv-745-TMC, 2012 WL 33214, at *4 (D.S.C. Jan. 6, 2012).

The same is true here. All of the "evidence" that Petitioner references in his actual innocence argument was available to him at the time of his trial. Petitioner has failed to provide any new, reliable evidence. As the Fourth Circuit has recently noted, "[a] valid actual innocence claim 'requires petitioner to support his allegations of constitutional error

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with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial.'" *Hayes v. Carver*, 922 F.3d 212, 216 (4th Cir. 2019) (quoting *Schlup*, 513 U.S. at 324). Petitioner has not offered any new reliable evidence to support an actual innocence claim and has therefore failed to meet this demanding standard. As such, his claim is facially inadequate to require consideration. Accordingly, the undersigned concludes that Petitioner has failed to show actual innocence and therefore is not entitled to equitable tolling on such a basis. In light of all the foregoing, the undersigned finds that the Petition should be dismissed as successive and as barred by the applicable statute of limitations.

RECOMMENDATION

Accordingly, it is recommended that this action be dismissed with prejudice and without requiring the Respondent to file an answer or return because the Petition is successive and is clearly untimely under the one year limitations provision of the AEDPA, 28 U.S.C. § 2244(d).

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IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

August 1, 2019
Greenville, South Carolina

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

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9/26/19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Leroy L. Staton, Petitioner, v. Superintendent Lee Correctional Institution, Respondent.	C/A No. 8:19-1805-TMC **ORDER**

This matter is before the court on Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a magistrate judge. On August 1, 2019, Magistrate Judge Jacquelyn D. Austin filed a Report and Recommendation recommending that this petition be dismissed with prejudice as successive and untimely. (ECF No. 17). Petitioner was advised of his right to file objections to the Report. *Id.* at 15. Petitioner timely filed objections to the Report. (ECF No. 19).[1]

The Magistrate Judge makes only a recommendation to the court. The Report has no presumptive weight and the responsibility to make a final determination in this matter remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). In making that determination, the court is charged with conducting a de novo review of those portions of the Report to which either party specifically objects. *See* 28 U.S.C. § 636(b)(1). Then, the court may accept, reject, or modify the Report or recommit the matter to the magistrate judge. *Id.*

In her Report, the magistrate judge sets forth the background and procedural history relating to

[1]Reviewing the docket, there are two separate documents captioned as objections. (ECF Nos. 19, 22). These documents are essentially the same - except one is signed by Petitioner (ECF No. 22), and the other is not (ECF No. 19). The court notes it appears that someone else may have prepared the objections because they are signed and were mailed to the court by Mark Marvin of Walden, New York. (ECF Nos. 19 at 6; 22 at 6). Mr. Marvin also filed an earlier motion for extension (ECF No. 7), which the magistrate judge denied because she determined that it was filed by a non-attorney, and Petitioner cannot be represented by a non-attorney (ECF No. 9 at 1). As Petitioner ultimately filed and signed his objections (ECF No. 22), the court will address them on the merits.

Petitioner's convictions. (ECF No. 17 at 1-4). Petitioner has not objected to this section of the Report. Briefly, Petitioner was convicted of murder, kidnapping, criminal sexual conduct ("CSC") in the first degree, and criminal conspiracy. *Id.* at 2. He was sentenced to life imprisonment for the murder, a consecutive sentence of thirty years imprisonment for the CSC, and a concurrent sentence of five years for criminal conspiracy. *Id.* Petitioner was not sentenced on the kidnapping count because under South Carolina law, where a life sentence is imposed on a murder conviction, a sentence is not to be imposed for a kidnapping conviction. *Id.* His convictions and sentences were affirmed on direct appeal, and the denial of his application for post-conviction relief was also affirmed on appeal. *Id.* at 3. On March 24, 2011, Petitioner filed a petition for habeas relief pursuant to § 2254 in this court, which was dismissed with prejudice as time-barred. *Staton v. Warden Kershaw Corr. Inst.*, No. 8:11-cv-00745-TMC-JDA, 2012 WL 33214 (D.S.C. Jan. 6, 2012). The Fourth Circuit Court of Appeals affirmed this dismissal. *Staton v. Warden Kershaw Corr. Inst.*, 474 Fed. App'x. 129 (4th Cir. 2012).

In her Report, the magistrate judge finds that the instant petition is successive and time-barred. (ECF No. 17 at 13). Further, she determines that Petitioner has failed to show actual innocence and, therefore, is not entitled to the application of equitable tolling. *Id.* Accordingly, she recommends that the court dismiss this habeas petition as successive and barred by the applicable statute of limitations. *Id.*

In his objections, Petitioner contends that the magistrate judge erred in finding this petition is successive because he contends that the issues he is now raising were never adjudicated on the merits. (ECF No. 19 at 1). He further argues that the magistrate judge erred in determining that the evidence he now seeks to rely on is not new evidence. *Id.* He contends that the evidence was unknown to him despite his exercise of due diligence. *Id.* He also argues that the time bar "is unconstitutional because it declares defendants permanently guilty by legislative fiat." *Id.* at 3. Finally, he contends that he is actually innocent. *Id.* at 5.

After reviewing the record, the court finds Petitioner's objections to be without merit. Here, as the magistrate judge noted, this petition is successive. Petitioner previously filed a § 2254 habeas petition

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and it was denied on the merits. *See Staton*, 2012 WL 33214, at *1.

> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a stringent set of procedures that a prisoner "in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(a), must follow if he wishes to file a "second or successive" habeas corpus application challenging that custody. § 2244(b)(1). In pertinent part, before filing the application in the district court, a prisoner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." *153 § 2244(b)(3)(A). A three-judge panel of the court of appeals may authorize the filing of the second or successive application only if it presents a claim not previously raised that satisfies one of the two grounds articulated in § 2244(b)(2). § 2244(b)(3)(C); Gonzalez v. Crosby, 545 U.S. 524, 529–530, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005); see also Felker v. Turpin, 518 U.S. 651, 656–657, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996).

Burton v. Stewart, 549 U.S. 147, 153 (2007); *see also In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997) ("Under the ADEPA, an individual may not file a second or successive 2254 petition for a writ of habeas corpus . . . without first receiving permission to do so from the appropriate circuit court of appeals."). Because Petitioner has not obtained authorization from the Fourth Circuit Court of Appeals to file a successive § 2254 habeas petition, this court is without jurisdiction to consider the petition. *Burton*, 549 U.S. at 152.

Based on the foregoing, the court finds that this petition is successive. Accordingly, the court adopts the report (ECF No. 17) as modified, and the Petition is **DISMISSED without prejudice for lack of jurisdiction and without requiring Respondent to file an answer or return.**[2]

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). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the instant

[2]The magistrate judge recommended the court dismiss this action with prejudice. However, because the court lacks subject mater jurisdiction, this action should be dismissed without prejudice. *See S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013) ("A dismissal for . . . [a] defect in subject matter jurisdiction[ ] must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits."). Accordingly, the court modifies the Report only so that this dismissal is without prejudice.

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matter, the court finds that Petitioner has failed to make "a substantial showing of the denial of a constitutional right." Accordingly, the court declines to issue a certificate of appealability.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

Anderson, South Carolina
September 26, 2019

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