No. 20-7005

IN THE
SUPREME COURT OF THE UNTED STATES

ANDRE KING,

Petitioner,

v.

BRIAN KENDALL, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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PETITIONER'S QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeal erred as a matter of law in allowing the district court to summarily dismiss the petitioner motion to reopen the appeal pursuant to Houston v. Lack 487 US 266 (1988) without either an evidentiary hearing or to expand the record, especially when a question of fact is involved in the petitioner case

2. Whether the Court of Appeals erred as a matter of law in allowing the district judge to abuse its discretion to deny the petitioner the right to appeal pursuant to Houston v. Lack 487 US 266 (1988) when he handed his notice of appeal to prison mailing officials to be mailed off to the district court

3. Whether the Court of Appeals erred as a matter of law in allowing the district court to abuse its discretion in applying Habeas Rule 3(d) and Rule 4(c)(1)(a)(i) of the Federal Rules of Appellate Procedure in an unconstitutional manner where it has implicated the Due Process Clause

(Petition for Writ of Certiorari) (errors in original).

LIST OF PARTIES

Respondent agrees with Petitioner that the caption reflects the parties to the proceeding.

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Andre King, is a South Carolina inmate. A jury convicted King of murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. After receiving no relief from review in the state system, King turned to the federal district court for 28 U.S.C. § 2254 review. That review did not afford King relief either. However, his petition to this Court is not seeking a review of the district court's ruling on any of the individual allegations; rather, King complains that the district court did not accept his notice of appeal as timely filed. The problem is that King never filed a notice of appeal – at least one was never received. Therein lies the problem.

The district court had no mailroom stamp, no postage mark, no declaration or certificate of service accompanying a late filing. The district court was left with a lone affidavit, over three years after the time to appeal, that King timely delivered a notice to the prison authorities for filing. Consequently, the nub of the matter, contrary to King's questions presented, relates to a determination of credibility, not application of *Houston v. Lack*.

In finding King's assertion not credible, the district court considered the record, especially those prior filings where the mailbox rule was at issue. For instance, the district court had issued its first order denying relief on December 31, 2014. (ECF No. 38), but King's objections had not been timely received for review. The district court vacated that order on August 18, 2015, to allow consideration of King's late objections. (ECF No. 44). In contrast to having never received a notice of

appeal, the objections did arrive at the clerk's office. Further, King submitted a response close in time to the objections, with accompanying affidavits, that he had timely provided the objections to the prison authorities for mailing. Notably the objections that arrived at the court had a certificate of service and a letter from King explaining how he had timely submitted the document to the prison authorities for filing. (See ECF No. 41 at 16-17 and 41-1) (BIO Attachment, A-4). The district court found the indicia from the envelope with the late objections supported that the document was timely and vacated the prior order. (ECF No. 44 at 3-4) (BIO Attachment A-3). The district court, after considering those objections, issued its second order denying relief on August 26, 2015. (ECF No. 48). The clerk mailed a copy of the order and the judgment to King that same day. (ECF No. 50). The matter appeared completed.

However, on May 24, 2019, the clerk received King's motion to reopen the time to appeal. (ECF No. 51). It remains a mystery why well over three years lapsed. Even so, the district court (twice) carefully considered King's arguments – in light of the record before it – and assessed King's very late assertion of timely service by delivery to prison officials *was not credible*, not summarily but *in light of the record before the court* including the prior filings, and having considered the specific assertions made in King's motion.

The Fourth Circuit correctly affirmed because the record supports that there is no reversible error. Simply, the district court did not abuse its discretion in deciding the matter on the record and filings, and there is no clear error in the factual findings

and there was not clear error in making its credibility determination which, in turn, supports the ruling. King's petition is without merit.

CITATIONS TO OPINIONS BELOW

The district court's August 26, 2015 order granting the Warden's motion for summary judgment and denying habeas relief is unreported, but available at 2015 WL 5036941 (D.S.C. Aug. 26, 2015). The district court's order denying the "Motion to Reopen the [] Time to File an Appeal" is unpublished, but available in the attached Appendix at A-2. The district court's order denying the motion to alter or amend the "Motion to Reopen the [] Time to File an Appeal" is unpublished, but available at 2019 WL 6700157 (D.S.C.), and is available in the attached Appendix at A-1. The Fourth Circuit Opinion is unpublished but available at 806 Fed.Appx. 242 (4th Cir. 2019), and the substance is reproduced, verbatim, *infra* at pp. 19-20.

JURISDICTION

The Fourth Circuit's opinion finding no reversible error from the district court's denial of King's motion to reconsider the denial of his motion to extent or reopen the time to appeal the August 26, 2015 decision in King's 28 U.S.C. § 2254 action was entered on May 27, 2020. (Brief in Opposition, A-1). King's untimely petition for rehearing, dated June 22, 2020, was rejected on June 29, 2020. (Brief in Opposition, A-2 and A-3). King filed his petition in this Court on October 13, 2020. With extended time limits during the pandemic considered, the petition was timely filed.

King apparently seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (allowing petitions from matters arising from the courts of appeals).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

King submits that "Habeas Rule 3 (d)," and Rule 4, are applicable. Rule 3(d), of the *Rules Governing Section 2254 Cases in the United States District Courts* provides:

> A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Rule 4 provides, in part:

> The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

King further submits that Federal Rule of Appellate Procedure 4(c)(1)(A)(i) through (ii) applies. This portion of the rule provides:

> **(c) Appeal by an Inmate Confined in an Institution.**
>
> > **(1)** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:
> >
> > > **(A)** it is accompanied by:
> > >
> > > > **(i)** a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or

> **(ii)** evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; ….

Lastly, King submits that the Fifth Amendment applies to the extent it "prohibits the [ ] government from depriving any person 'of life, liberty, or property, without due process of law…" U.S. Cost. Amend. V.

STATEMENT OF THE CASE

A. General Facts of the State Crimes:

On June 9, 2005, King murdered Matthew Jenkins by shooting him in the head with a 9mm pistol. (R. 93-96, 473, Tr. pp. 76, 150-153, 530). The bullet traveled through Jenkins' brain, lacerating it, and causing his death. (R. 232, Tr. p. 289). King then fired at Monique Green, a former girlfriend. (R. 94, Tr. p. 151). This bullet went into her face and exited the back of her skull. (R. 96-97, 146, Tr. pp. 153-154, 203). She was subsequently emergency airlifted to Charleston, SC and survived the bullet wound. (R. 96, Tr. p. 153). Matthew Jenkins died at the scene. (R. 96, Tr. p. 153).

The murder and assault and battery with intent to kill rose out of King's ill feelings toward his former girlfriend. (R. 331- 34, Tr. pp. 388-391). He and Green had lived together for approximately five (5) years, but had recently broken up. (R. 82-85, Tr. pp. 139-142). King told one witness prior to the shooting that Green had "played him and she had to die." (R. 167-69, Tr. pp. 224-226).

The crimes occurred at a nightclub in Eutawville, SC. (R. 75-76, Tr. pp. 132-133). King was part-owner of the club and Green had previously worked there as a

bartender. (R. 85-86, Tr. pp. 142-42). On the night of the murder, Green, then estranged from King, went to the club with friends. (R. 85-86, Tr. pp. 142-43). After Green and her friends arrived, King told one of her friends that he did not want Green there. (R. 111-12, Tr. pp. 168-169). Green and her friends left and went to another nightclub, but returned later that night. (R. 88, 113, Tr. p. 145. 170). Green did not enter the night club, but sat in the car until her cousin, and other victim, Matthew Jenkins, arrived. Only then did she exit the car. Jenkins took her by the hand and entered the club after obtaining permission from the other owner of the club. (R. 97-98, Tr. pp. 154-155). When the two tried to enter the club, King stood in the doorway. Jenkins told him to "move." King moved and Jenkins and Green entered together. (R. 90-92, Tr. pp. 147-149).

King either went to his car and grabbed his nine millimeter (9mm) pistol or already had the gun on his person. (R. 93, 159, 367, Tr. pp. 150, 216, 424). At any rate, King entered the club and pushed past several patrons, raised his gun, and fired two shots – one into Jenkins' brain and the other into Green's face. (R. 133-34, 137-38, 93-94, 116, 122-24, 146-150, Tr. pp. 190-191, 194-195, 150-151, 173,179-181, 203-207). King later told police that he did not intend to shoot or kill Jenkins, and that the shooting occurred because he was angry at Green. (R. 331-34, Tr. pp. 388-391).

B. State Procedural History.

An Orangeburg County grand jury indicted King in 2005 for murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. A jury trial was held September 10-13, 2007, before the Honorable

Knox McMahon. King was represented by Michael Culler, Esq. and Andrew Brown, Esq. The jury convicted as charged, and the judge sentenced King to life imprisonment for murder, twenty (20) years for the assault and battery with intent to kill, and five (5) years for the weapon charge, all concurrent. King appealed.

On direct appeal, Robert M. Dudek, Esq., with the South Carolina Office of Appellate Defense, represented King. Counsel filed a merits brief contesting an impeachment matter. On April 26, 2010, the South Carolina Court of Appeals affirmed in an unpublished Opinion. *State v. King*, Op. No. 2010-UP-254 (Ct. App. filed April 26, 2010). King did not seek further direct appeal review, but turned to post-conviction relief (PCR).

King filed a PCR application on August 9, 2012. An evidentiary hearing was convened on March 8, 2011, at the Orangeburg County Courthouse before the Honorable Edgar W. Dickson. King was present and represented by Charles T. Brooks, III, Esq. King raised several issues, (1) that counsel was ineffective in closing argument and conceded guilt; (2) that counsel should have objected to argument and the jury instructions regarding the inference of malice from use of a deadly weapon; (3) that counsel was ineffective in failing to request a charge that if the jury had any doubt between the greater and lesser offenses as charged, the defendant is entitled to have doubts resolved in his favor, and (4) that counsel was ineffective in failing to challenge the self-defense charge as burden-shifting. By Order filed July 18, 2011, the PCR Court denied and dismissed the application with prejudice. King appealed the denial of relief.

On appeal, Katherine Hudgins, Esq., from the South Carolina Office of Appellate Defense, represented King. Counsel filed a merits petition for writ of certiorari, asking the Supreme Court of South Carolina for review of one issue, whether counsel was ineffective in failing to object to the wording of a jury instruction on inference compared to presumption of malice. On July 25, 2013, the Supreme Court of South Carolina denied and dismissed the petition. King then turned to the federal courts for review.

C. Section 2254 Federal Habeas Action History.

1. District Court Proceedings.

On January 7, 2014, King filed an action pursuant to 28 U.S.C. § 2254 for review of claims from his state convictions.[1] The court instructed King to bring the action into proper form, which he did, and the court authorized service on Respondent Warden on February 3, 2014. (ECF Nos. 5 and 10). In his petition, King alleged the following grounds of error:

> **Ground one**: Whether the court erred by ruling appellant could be impeached with his prior conviction for being an accessory after the fact of armed robbery since the unduly prejudicial effect of allowing this impeachment evidence outweighed its probative value under Rule 601(a)(1). SCRE and Rule 403 SCRE.
>
> Supporting facts: (Same)
>
> **Ground two**: (a) Ineffective assistance of counsel. (b) Denial of 6th Amendment. (c) Denial of 14th Amendment.

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[1] Pursuant to *Houston v. Lack,* 487 U.S. 266 (1988), and the mailroom stamp on the petition envelope. (See ECF No. 1-2 at 1 and 10-1 at 18). (See also ECF No. 36 at 4 n. 2, Report and Recommendation, "Because Petitioner is incarcerated, he benefits from the 'prison mailbox rule." *Houston v. Lack*, 487 U.S. 266 (1988). The date stamp on the envelope containing the petition reflects January 7, 2014, as the date the SCDC mailroom received the envelope.").

> Supporting facts: (A) For conceding Petitioner's guilt in closing argument to the jury? (B) For failing to object to trial court's jury instructions that shifted the burden of proof in violation of due process? (C) For failing to object when the trial court failed to instruct the jury they could accept or reject the inference of malice from the use of a deadly weapon? (D) For failing to request a King instruction? (E) For failing to object to the court's jury instruction on self-defense that shifted the burden of proof in violation of due process?
>
> **Ground three**: Whether PCR Judge erred in refusing to find counsel ineffective for failing to object to jury charge in regard to the inference of malice from the use of a deadly weapon when the charge was mandatory presumption rather than permissive inference.
>
> Supporting facts: (Same).

(ECF 10-1 at 5-9).

The Warden filed a return to the application and moved for summary judgment on May 22, 2014. (ECF Nos. 19 and 20). On that same day, the district court issued an Order directing a response from King. (ECF No. 21).

On June 16, 2014, King moved to hold the action in abeyance. (ECF No. 23).[2] Then on June 27, 2014, he moved for an extension of time in which to respond to the Warden's motion for summary judgment. (ECF Nos. 23). The Magistrate granted an extension on June 27, 2014, and ordered the response to be filed on or before July 28, 2014. (ECF No. 25). On July 25, 2014, King asked for a second extension, which the Magistrate granted, allowing the response to be filed on or before August 28, 2014. (ECF Nos. 27 and 30).

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[2] King asked the Court to grant a stay to "stop the one (1) year period of limitations" and to allow proper exhaustion of claims through additional state action. (ECF No. 23). It is unclear why he sought the stay as his petition was timely, and he exhausted his ordinary state court remedies, however, the individual claims, apart from Grounds Two (C) and Three, were defaulted for failure to raise the claims to the state's highest court available for review. (See ECF No. 36 at 5 and 14-16).

On September 2, 2014, having received no response from King, the Magistrate issued an Order that advised that since King failed to respond, "it appears to the court that he does not oppose the motion and wishes to abandon this action." (ECF No. 32). Even so, the Magistrate granted additional time to respond, up to and including September 16, 2014, but "advised that if [King] fails to respond, this action will be recommended for dismissal with prejudice for failure to prosecute." (ECF No. 32). Also on September 2, 2014, the clerk received King's response to the Warden's summary judgment motion, so the action continued. (See ECF No. 34).

On September 15, 2014, the Clerk received and filed a letter from King. (ECF No. 35). King wrote: "

> On September 8, 2014, I was served an Order from this Court stating that I had until September 16, 2014, in which to respond to Respondent's summary judgment motion. I believe that the holiday of Labor Day caused the mail to slow down, thereby, not promptly receiving pleadings already mailed to this Office. We must be mindful of the mail box rule. Houston v. Lack 487 U.S. 266, 276 (1978) ("[N]otice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk"); see, e.g., Fernandez v. Arluz, 402 F.3d 111 (2nd Cir. 2005); Causey v. Cain, 450 F.3d 601 (5th Cir. 2006); Campbell v. Henry, 614 F.3d 1086 (9th Cir. 2010); and McCloud v. Hooks, 560 F.3d 1223 (11th Cir. 2009). It is with this presumption that I state a position in which, once I placed the pleadings into the "hands" of the Institutional Mail Room, i.e., prison authorities, the matters have been "served" consistent with recognizable standards.
>
> At this office's earliest convenience, could you please respond to this request for the disposition of the opposition motion, dated August 27, 2014, has been received and filed in this Clerk's office.

(ECF No. 35).

The Magistrate issued a report and recommendation on December 9, 2014. (ECF No. 36). The Magistrate noted the response in opposition to the Warden's

motion was received and considered. (ECF No. 36 at 1 and 19). After a thorough discussion, the Magistrate recommended denial of King's motion for a stay of proceedings, and that the court grant the Warden's motion for summary judgment. (ECF No. 36 at 20). The clerk mailed a copy of the Magistrate's report to King on December 10, 2014. (ECF No. 37). The Order also had attached a notice that objections must be filed within fourteen (14) days, and a caution that failure 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." (ECF No. 36 at 21).

It having appeared that King did not file timely objections, the Honorable J. Michelle Childs, United States District Court Judge, issued an Order on December 31, 2014, adopting the Report and Recommendation, denying King's motion for a stay, and granting the Warden's motion for summary judgment. (ECF No. 38). The clerk mailed a copy of the Order and accompanying judgment to King on December 31, 2014. (ECF No. 40).

On January 5, 2015, the clerk received and filed King's objections. (ECF No. 41). In his cover letter, King asserted:

> Please take note that the Magistrate's Report and Recommendation was served upon me, via Institutional Legal Mail Services, on December 16, 2014. Since that time I have been diligently attempting to meet the time lines afforded me in these matters. I would like to state that, of all the report and recommendations which I have seen the Magistrate generally gives the petition twenty (20) days in which to file their objections. In this notice this Magistrate has only provided me with fourteen (14) days in which to file my objections. And where this objection has fallen within the festive season, i.e., Christmas time, I have been hard put to have it in the mail box by December 29,

> 2014. Everything at this facility has been closed or made unavailable since Monday, December 22, 2014. Even the Mail Room Services have shut down since December 22, 2014. The only mail made available was legal Mail being served upon an inmate … not the mail being mailed that was legal mail oriented. I do not require[] additional time, as long as I am within the time periods allowed by this Court and it's Rules.

(ECF No. 41-1).

On January 26, 2015, the clerk received and filed King's motion to alter or amend. (ECF No. 42). The motion is eight pages, outlines his specific attempts to comply with timely filing objections, and has three affidavits in support of those assertions. (ECF No. 42) (BIO Attachment, A -4).[3] Two affidavits were from other inmates who asserted that there were mail room closures during the holidays, and King had attempted to mail "legal pleading," though he could not due to closures. (ECF No. 42 at 4 and 5)(BIO Attachment, A-4). By Order dated August 18, 2015, Judge Childs granted the motion and vacated the prior order, finding:

> The envelope in which Petitioner's objections were mailed reflects that it was deposited in the prison mailing system on December 29, 2014, the day the Objections were due (*See* ECF No. 41-2 at 1). Under the holding in *Houston v. Lack*, Petitioner's Objections are considered timely filed. Therefore, the court finds it would be a manifest injustice to grant Respondent summary judgment on Petitioner's claims without consideration of his timely filed Objections. Accordingly, the court vacates the December Order (ECF No. 38) adopting the Magistrate Judge's Report and resulting Judgment (ECF No. 39).

(ECF No. 44 at 3-4) (BIO Attachment, A-3).

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[3] King, in his petition appendix, presents a copy of his personal affidavit from this 2015 motion. However, the copy he presents has a header indicating a 2020 filing, as apparently a copy of the January 2015 filing was filed again during the 2020 appeal in the Fourth Circuit. Since the affidavit actually goes with the January 2015 motion to alter or amend and not the motion to alter or amend filed July 1, 2019 – the motion at issue in King's petition to this Court – Respondent Warden has attached the full document for clarity.

On August 26, 2015, after consideration of those objections, Judge Childs again accepted the report, denied the motion for stay, and granted the Warden's motion for summary judgment. (ECF No. 48). Judgment was entered that same day. (ECF No. 49). Also that same day, the clerk mailed a copy of the order and judgment to King. (ECF No. 50).

Nothing occurred in the case for *over three years*. Then, on May 24, 2019, King filed a document titled, " Motion to Reopen the Petitioner Time to File an Appeal," which the clerk entered as a "Motion for Extension of Time to Appeal/Reopen the Petitioner's Time to File an Appeal and Notice of Address Change by Andre King." (ECF No. 51). King alleged that "he had deposited his notice of Appeal in the lieber Correctional Institution within thirty (30) days from the Honorable J. Michelle Childs final decision …." (ECF No. 51 at 1). He specifically acknowledged that he received the district court's order dated August 26, 2015 on September 9, 2015. He then asserted that "[o]n September 21, 2015, the petitioner had deposited his notice of appeal of his writ of habeas corpus in the prison mailing system to the District Court" and cited to Rule 4(c)(1) of the Federal Rules of Appellate Procedure and *Houston v. Lack*. (ECF No. 51 at 2-3). King included an affidavit **dated May 20, 2019** asserting that he "handed" the "legal mail" to the mail room officials on **September 21, 2015** for mailing to the district court; that on November 17, 2016 he sent letter requested the status of same; and also advised that he had been moved from Lieber Correctional to McCormick Correctional; and, that he was filing to "reopen" the appeal. (ECF No. 51-1 at 2). A copy of an unsigned letter dated November 17, 2016 was included. (ECF

No. 51-2). Neither a notice of appeal nor a November 2016 letter arrived at the district court.

On May 31, 2019, Judge Childs issued a detailed order denying the motion. Judge Childs "liberally construe[d]" the motion as one seeking to have the court "accept [King's] notice of appeal as timely." (ECF No. 52 at 2) (BIO Attachment, A-2). She noted that though the original title requested the time be "reopened" that the relevant rule, Federal Rule of Appellate Procedure 4(a)(6), was neither cited nor relied upon (nor for that matter applicable given that King admitted receiving a copy of the court's Order). (ECF No. 52 at 3 and n. 1) (BIO Attachment, A-2). The district court acknowledged both *Houston v. Lack* and Fed. R. App. P. 4(c)(1)(A)–(B), but found the record insufficient: "The trouble here is that the court never received a Notice of Appeal from Petitioner, or any of the letters he claims to have sent inquiring about the status of his appeal. (*See* ECF Nos. 51, 51-1, 51-2.)." (ECF No. 52 at 4) (BIO Attachment, A-2). Judge Childs reasoned the first factual finding to be made was whether King actually timely deposited his notice with the prison authorities for mailing to the court. (ECF No. 52 at 6) (BIO Attachment, A-2). Her order reflects:

> Based on the facts before the court, the court cannot conclude that Petitioner delivered a Notice of Appeal to the prison authorities on September 21, 2015. First, Petitioner has not provided the court with any documentation supporting his claim that he delivered a Notice of Appeal to the Lieber Correctional mail room on September 21, 2015. *See* Fed. R. App.P. 4(c)(1)(A) ("If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and: (A) it is accompanied by: (i) a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or (ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and

that postage was prepaid."). This is particularly curious given that with the instant Motion, Petitioner provided the court with a copy of the November 17, 2016 letter he asserts he sent to the court inquiring about the status of his appeal. (*See* ECF No. 51-2.) In that letter, Petitioner stated that he attached a copy of the Notice of Appeal he sent on September 21, 2015, to the letter. (*See id.* at 1.) However, though Petitioner provided the court with a copy of the November 17, 2016 letter, he did not provide the court with a copy of the Notice of Appeal. Moreover, between January 10, 2014, when Petitioner filed his Habeas Petition with the court, and September 21, 2015, when Petitioner claims to have delivered his Notice of Appeal to prison officials, the court received eight (8) other filings from Petitioner, including some in which the prison mailbox rule was at issue. [FN 2], (*See* ECF Nos. 23, 24, 27, 34, 35, 41, 42, 43.) These eight (8) other successful filings call into question Petitioner's claim in his affidavit that he delivered four (4) filings (a Notice of Appeal and three (3) letters) to the Lieber Correctional Institution mailroom that were never received by the court, because up until that point, it appears that every mailing Petitioner deposited in the Lieber Correctional Institutional mail room were received by the court. *See Westberry v. United States*, No. 4:10-CR-00093-RBH-1, 2013 WL 5914399, at *1 (D.S.C. Oct. 31, 2013) ("Conclusory allegations contained within affidavits do not require a hearing. 'Thus, no hearing is required if the petitioner's allegations 'cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statement of fact.'" (citation omitted) (quoting *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999))). Accordingly, as Petitioner has submitted no independent proof of the mailing of his Notice of Appeal, and the court received several other mailings from Petitioner prior to when Petitioner claims to have delivered his Notice of Appeal to prison officials, the court finds Petitioner did not deliver a Notice of Appeal on time, and must deny Petitioner's Motion. *See Roberts v. McKenzie*, No. AW-12-CV-2474, 2013 WL 3179102, at *4 (D. Md. June 20, 2013), *aff'd*, 566 F. App'x 226 (4th Cir. 2014) ("When a court does not receive a pleading within a reasonable time after the date upon which an inmate claims to have mailed it, it is appropriate to require independent proof of the mailing date, such as mail logs, prison trust fund records, or receipts for postage, before giving the inmate the benefit of the prison mailbox rule.").

> [FN 2] On December 9, 2014, the Magistrate Judge issued a Report recommending that the court grant summary judgment to Respondent and deny Petitioner's Motion to hold his Habeas Petition in Abeyance. (ECF No. 36.) Because the court did not receive any objections by the

> December 29, 2014 deadline, the court adopted the Magistrate Judge's Report. (ECF No. 38.) On January 5, 2015, the court received from Petitioner objections to the Report. (ECF No. 41.) The envelope in which Petitioner's objections had been sent bore a "RECEIVED" stamp from the mailroom at Lieber Correctional Institution dated December 29, 2014. (ECF No. 41-2 at 1.) On January 26, 2015, Petitioner filed a Motion to Alter Judgment based on the prison mailbox rule, arguing his objections were timely filed under *Houston*. (ECF No. 42.) On August 18, 2015, the court agreed with Petitioner and granted his Motion to Alter Judgment. (ECF No. 44.)

(ECF No. 52 at 6-8)(BIO Attachment, A-2).

The clerk mailed a copy of the Order to King on June 3, 2019. (ECF No. 53). On July 1, 2019, King filed a motion to alter or amend, and a notice of appeal. (ECF No. 54 and 55). Respondent Warden filed a response opposing the motion to alter or amend noting the district court's "thorough and detailed analysis" and "careful fact finding supported by the record" with "legally correct conclusions." (ECF No. 60, citing ECF No. 52). Respondent asserted King had "failed to point to any intervening change in the law or some sound basis for the granting of a Rule 59 Motion." (ECF No. 60). In a reply, King maintained *Houston v. Lack* controlled, and the district court erred by misapplying Federal Appellate Court Rule 4(c) by requiring him to show both an affidavit and a postmark or other date stamp. (ECF no. 62).

By Order filed December 9, 2019, the district court denied the 2019 motion to alter or amend. (ECF No. 52) (BIO Attachment, A-1). Judge Childs resolved:

> In the May Order (ECF No. 52), the court cited to appropriate substantive case law and provided specific reasoning to support its decision to find that Petitioner did not deliver a Notice of Appeal on time. The May Order expressly explains why (1) petitioner's Affidavit lacks credibility, (2) an evidentiary hearing is unnecessary, and (3) Appellate

> Rule 4 (C) is inapplicable based on the record before the Court. (See ECF No. 52 at 6-8). As a result, the court is not persuaded that entry of the May Order resulted in the commission of either clear error of law or manifest injustice. According, the court must deny Petitioner's Motion to Alter or Amend Judgment.

(ECF No. 64) (BIO Attachment, A-1).

On January 8, 2020, King filed another notice of appeal. (ECF No. 67).

2. Fourth Circuit Court of Appeals Review.

As noted above, King filed two separate notices from the post-decision motions and orders that resulted in two separate opinions from two separate panels.[4] On December 23, 2019, the Fourth Circuit issued an unpublished opinion, *per curiam*, opinion which reads:

> Andre King appeals the district court's order denying his motion to extend or reopen the period to note an appeal from the order denying his 28 U.S.C. § 2254 (2012) petition. We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm for the reasons stated by the district court. *King v. McFadden*, No. 1:14-cv-00091-MC (D.S.C. May 31, 2019). 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.

King v. McFadden, 788 F. App'x 237 (4th Cir. 2019) (USCA4 Appeal: 19-6955).

In the second appeal, after the motion to alter or amend, in its unpublished, *per curiam* opinion issued May 27, 2020, the Fourth Circuit ruled:

> Andre King appeals the district court's order denying his motion to reconsider the denial of his motion to extend or reopen the period to note

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[4] The notices, most likely, should have been joined after the decision on the 2019 motion to alter or amend. *See* Rule 4(a)(4)(B)(i), Fed.R.App.P. ("If a party files a notice of appeal after the court announces or enters judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) [which includes a Rule 59 motion] – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered"). However, that was neither requested nor done.

> an appeal from the order denying his 28 U.S.C. § 2254 (2018) petition. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *King v. Warden McFadden*, No. 1:14-cv-00091-JMC, 2019 WL 6700157 (D.S.C. Dec. 9, 2019). 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.

King v. McFadden, 806 Fed.Appx. 242 (4th Cir. 2019) (USCA4 Appeal: 20-6062).

King appeals the May 27, 2020 opinion.

REASONS WHY CERTIORARI SHOULD BE DENIED

This Court should deny the petition primarily because the district court made a routine, albeit determinative, credibility determination. This credibility determination was carefully made and fully supported by the record. The district court, based on the totality of the circumstances before it, did not credit King's assertion that he gave a notice of appeal to prison authorities for mailing to the district court before the expiration of the required 30 days. In fact, such a document never arrived at the court at all during the nearly four years he claims to have sent it and his motion to "reopen." The Fourth Circuit properly and quite reasonably "found no reversible" error and affirmed. This Court should deny the petition.

I. King failed to show that the protections of *Houston v. Lack* applied as there was no credible evidence that he had actually delivered a notice of appeal to prison authorities for mailing to the district court.

a. The Federal Rules of Appellate Procedure set out two methods for prompting the protections. King failed to show by either method that he timely filed a notice of appeal by placing a notice in the prison mail room.

Pursuant to Federal Rules of Appellate Procedure 4(a)(1)(A), a civil action litigant seeking to appeal from a district court judgment or other final order has thirty days in which to file a notice of appeal unless the district court extends the time under Fed.R.App.P. 4(a)(5), or reopens the period under Fed.R.App.P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell,* 551 U.S. 205, 214 (2007).

Pro se prisoners are afforded some leniency due to their confinement. *"Pro se* prisoners can file notices of appeal to the federal courts of appeals only by delivering them to prison authorities for forwarding to the appropriate district court." *Houston v. Lack,* 487 U.S. 266, 268 (1988). Thus, the "prison mailbox rule" was established to ensure prisoners, who must necessarily rely on prison authorities to convey their notices, would not be denied an appeal through no fault of their own. It is enough to hand their notices to prison authorities for mailing through the established prison mail system.

The leniency afforded only goes to a notice handed to the authorities within the time to file, not the failure to take timely action to appeal. Consequently, *pro se* prisoners are required to take modest steps to rely on the prison mailbox rule. A prisoner's notice of appeal will be considered timely deposited, thus timely filed, if "it is accompanied by: (i) a declaration in compliance with 28 U.S.C. § 1746 – or a notarized statement – setting out the date of deposit and stating that first-class postage is being prepaid; ***or*** (ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid…." Fed.R.App.P.

4(c)(1)(A) (emphasis added). Simply put, King had neither. His purported filing never reached the court at all.

As the district court correctly reasoned, the first step to considering whether King's notice of appeal was timely was to determine whether King had delivered a notice to the prison mailroom within the required period. This rested in great part on credibility. After careful consideration, the district court found that the late assertion of timely action was not credible.

b. King fails to show the district court failed to exercise discretion, or that it committed clear error in the determination of facts supporting the decision.

A "district court's factual findings are reviewed for clear error." *McKiver v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1357, 1363 (11th Cir. 2021); *see also* Rule 52(a)(6), Fed.R.Civ.P. ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

The First Circuit acknowledged the deference afforded a district court's similar determination in *Oliver v. Comm'r of Massachusetts Dep't of Corr.*, 30 F.3d 270, 272 (1st Cir. 1994). Specifically, the Court of Appeals resolved that while an inmate "must only show that he submitted the notice of appeal to prison authorities before the filing deadline, whether he did so is a factual finding for the district court." *Id.,* at 272 (citing *Hostler v. Groves,* 912 F.2d 1158, 1162 (9th Cir.1990), *cert. denied,* 498 U.S. 1120, 111 S.Ct. 1074, 112 L.Ed.2d 1180 (1991)). Very much as King would do in this case, Oliver had only "offered … his unsupported affidavit," and did not include "a

copy of the purported notice of appeal" in his motion to file late. *Id.* The Court of Appeals could not conclude "that the district court committed clear error in finding that Oliver did not submit a timely notice of appeal." *Id.* Though unlike Oliver, King did make an assertion that his notice was timely when he first asked to reopen the time for appeal, but King's unsupported affidavit is telling.

As the district court noted, not only had other documents been received, King handled other instances when *Houston v. Lack* was at issue very differently than this one. In other words, the district court did not simply base its decision on a summary rejection of King's assertion; the district court looked to the record and unique shallowness of the assertion for the notice of appeal compared to his other interactions *in the same litigation*. Again, King's purported timely notice never arrived with any indication of timeliness referenced by Rule 4(c)(1)(a) as sufficient proof for timely filing. It neither offends the rule to require more in the absence of these items, nor is the district court in this case alone in its logic. *See Ray v. Clements,* 700 F.3d 993, 1011 (7th Cir. 2012) ("in cases where the purported filing is not received by the court, the petitioner must supply a sworn declaration attesting to these facts *plus* some other corroborating evidence") (emphasis in original); *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006) ("the burden of proof should be placed upon the state *if Allen has satisfied the requirement of Fed.R.App.P. 4(c)(1)*) (emphasis added); *see also Montalvo v. Lavalley*, No. 11-CV-05200 NG, 2014 WL 6909513, at *9 (E.D.N.Y. Dec. 8, 2014) ("Aside from petitioner's own self-serving statements, he has not supplied any evidence to corroborate his claim that he handed

the First Hybrid Petition to Officer Nye on February 18, 2008. It is undisputed that prison officials sent all of his subsequent filings, and Mr. Montalvo offers no explanation for why they would have failed to mail just two of his filings and related letters, one of which was the only document that would make his habeas petition timely."); *Boudreau v. United States*, 622 B.R. 817, 830 (B.A.P. 1st Cir. 2020) ("To obtain the benefit of the prison mailbox rule, the Debtor was required to produce something more than his self-serving declaration of mailing; some kind of corroborating evidence such as a postmark date, use of registered mail, or a prison mail log was required").

The district court reasonably found King's assertion of timely filing was not credible based on the record before the court. Further, King fails to show that it was unfair for the court to decide the matter on the record alone.

c. King fails to show an evidentiary hearing is mandatory upon his assertion.

King is not entitled to further proceedings.[5] He does not agree with the district court, but he cannot show an abuse of discretion for not ordering additional

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[5] Respondent Warden maintains the district court did not abuse its discretion in light of the records before the Court. However, in an abundance of caution, Respondent Warden also caused a review of the institutional records. The South Carolina Department of Corrections does not keep records of the intake of legal mail for posting. However, other records are somewhat instructive and reveal

1) Mr. King had normal access to the mailroom in September 2015;

2) Mr. King had ability and means to buy postage in September 2015, but only two postage purchases are recorded, one on September 3, 2015 ($1.44), and another on September 15, 2015 (48 cents); he had ability, however, to buy envelopes with postage affixed, which would not be recorded

3) there is no record of a medical or disciplinary event that would have hampered access to the mailroom; further, if some unrecorded event should have occurred and

proceedings. Rather than attempt to do so, King asserts, essentially, that once he offered an affidavit in 2019, the district court must convene a hearing. He asks this Court for an extension of Rule 7 (Expanding the Record) and Rule 8 (Evidentiary Hearing) of the *Rules Governing Section 2254 Cases in the United States District Courts*. Implicit in this request is the concession that the district court retains discretion in determining whether a hearing is necessary. Even when a district court exercises its discretion to expand the record, a hearing is still not mandatory. See Rule 8 (a) ("If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 *to determine whether an evidentiary hearing is warranted*.") (emphasis added).

In short, discretion is vested in the district court to determine when a hearing is necessary. *Yeldon v. Fisher*, 758 F. App'x 207, 209 (2d Cir. 2019) (reversing to determine whether the notice of appeal was timely under Rule 4(c), stating "we leave to the discretion of the district court whether these findings can be made based on submissions by the parties or whether a hearing is necessary."); *accord Sigmon v. Stirling*, 956 F.3d 183, 198 (4th Cir. 2020), *as amended* (Apr. 15, 2020), *cert. denied*, 141 S. Ct. 1094, 208 L. Ed. 2d 545 (2021) (" '[w]here documentary evidence

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Mr. King was restricted temporarily to his cell, the facility provides alternate methods to ensure an inmate can post legal mail;

4) The facility does not show any complaint about the mailroom concerning a September 21, 2015 event.

In sum, there is absolutely nothing that undermines the discretionary decision to not credit King's late assertion.

provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing.' ") (*quoting Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016)).

At bottom, the record shows that the district court in this case did not summarily deny additional proceedings, or summarily reject King's assertion of timely delivering a notice. The district court, by virtue of its detailed and well-reasoned order, explained specifically why additional proceedings were not warranted in this discrete case. King cannot show an abuse of discretion on this record. He cannot show that the detailed fact-finding was clearly erroneous. Again, King fails to show he is entitled to any relief.

II. King asserts there is a circuit split as to how a district court must consider due diligence and the burden of proof when a notice is never received; however, there is firm agreement, consistent with the appellate court rules, that an inmate bears the initial burden of production to show a timely attempt to appeal was made.

a. Disagreement in the precedent appears driven in large measure by differing state law on timely state filings when a federal statute of limitations calculation is at issue.

King argues that there is a circuit split as to treatment of documents the inmate claims were timely delivered, but are not received by the court. However, he arrives at this conclusion by a mash of operative facts. The "prison mailbox rule" is applicable in filing a federal notice of appeal in a civil matter. *Houston v. Lack* says so. But not all jurisdictions embrace that rule. His reference to the Ninth Circuit opinion in *Huizar v. Carey*, 273 F.3d 1220 (9thCir. 2001) exemplifies this point.

At issue in *Huizar* was whether a state inmate timely filed his federal habeas petition. "Huizar argue[d] that the period from the date he gave his first *state petition* to prison officials (April 15, 1996) to the date that petition was denied (January 19, 1999) does not count toward AEDPA's one-year period." 273 F.3d at 1223. Under Ninth Circuit precedent, the Court of Appeals extended the mailbox rule to state actions when the state action filing dates affected the federal statute of limitation calculation. *Id.* However, as the Seventh Circuit has observed: "A majority of our sister circuits have held that unless a state clearly rejects it, the *Houston* mailbox rule governs whether a state post-conviction document is 'properly filed' under AEDPA." *Ray v. Clements*, 700 F.3d 993, 1004 (7th Cir. 2012). *See also Bradshaw v. Davis*, 736 F. App'x 457, 461 (5th Cir. 2018) (declining to apply mailbox rule in calculations when the relevant state court declines to do so).

Here, the question does not involve a state court filing, or a decision on whether the prison mailbox rule applies in a state action. The rule at issue in this action applies to filing a notice of appeal from a federal civil action. However, the rule applies only when there is a credible showing by an inmate that he, in fact, timely submitted his notice. When that document is not received, the rule itself indicates that the treatment is different, and late declarations need only be allowed if the court of appeals exercises discretion.

b. Requiring a burden of production before requiring the opposing party to shoulder the burden of proof is largely shared among the circuits.

The Seventh Circuit's *Ray* case also considered the burden of proof as treated in other circuits. The Court of Appeals resolved:

> The state argues that the burden shifting framework is inappropriate in cases like this one, where the court never receives the prisoner's purported filing. The Fifth, Ninth, and Eleventh Circuits have each confronted this issue. *See Huizar v. Carey,* 273 F.3d 1220, 1222 (9th Cir.2001); *Allen,* 471 F.3d at 1198; *Stoot,* 570 F.3d at 671. Not one has abandoned the burden shifting framework under similar circumstances. To the contrary, they each have applied the usual framework, limiting the petitioner's burden to that of making a threshold evidentiary showing of timely delivery to a prison official regardless of whether the purported filing was received by the court. *Allen,* 471 F.3d at 1198. After the petitioner makes this showing, ordinarily via a sworn declaration or notarized statement, the burden shifts to the state to prove untimeliness. *E.g., Huizar,* 273 F.3d at 1223–24; *Allen,* 471 F.3d at 1198.

Ray, 700 F.3d at 1008–09.

Further, the appellate court rules support that if the late-received notice is not accompanied by the required declaration or postmark, it becomes a matter of discretion whether to accept a separate, "later filing of a declaration or notarized statement that satisfied Rule 4(c)(1)(A)(i)." Rule 4(c)(1)(B).

Here, there was not a misunderstanding of the law or inappropriate burden imposed. Rather, the district court did not find the assertion of filing credible. Again, King's case was resolved on credibility of his uncorroborated assertion. Had that assertion been supported (or supportable) and accepted as credible, there may have been sufficient evidence acceptable under the federal rules to shift the burden. King's argument about diligence simply is not applicable in his case at this point. He failed to meet the first step by any credible evidence. *See Allen*, 471 F.3d at 1198 ("Once there has been a finding of fact that a timely notice of appeal was in fact delivered to

the proper prison authorities (proper postage prepaid) for mailing to the district court, there is no room, either in *Houston* or in Fed.R.App.P. 4(c), for the operation of a diligence requirement.").

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully Submitted,

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