ANDRE KING V. BRIAN KENDALL, WARDEN

No. 20-7005

BRIEF IN OPPOSITION

ATTACHMENTS

A-1 December 9, 2019 Order, District Court

(Denying 2019 Motion to Alter or Amend)

A-2 May 31, 2019 Order, District Court

(Denying Motion to Reopen the Petitioner['s] Time to File an Appeal")

A-3 August 18, 2015 Order, District Court

(Granting 2015 Motion to Alter or Amend, Accepting Objections as Timely)

A-4 2015 Motion to Alter or Amend, filed January 26, 2015, with Attachments

A-1

December 9, 2019 Order, District Court
(Denying 2019 Motion to Alter of Amend)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Andre King,	)	Civil Action No. 1:14-cv-00091-JMC
	)	
Petitioner,	)	
v.	)	
	)	**ORDER AND OPINION**
Warden McFadden,	)	
	)	
Respondent.	)	
	)	

Petitioner Andre King filed the instant action against Respondent Warden McFadden seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.)

This matter is before the court on Petitioner's Motion to Alter and Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.[1] (ECF No. 54.) Specifically, Petitioner seeks to alter and amend the court's May 31, 2019 Order (the "May Order") in which the court denied Petitioner's "Motion to Reopen the [] Time to File an Appeal." (ECF No. 52 (referencing ECF No. 51).) For the reasons set forth below, the court **DENIES** the Motion to Alter and Amend.

I. JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 2254, which provides

[1] The court observes that also pending is Petitioner's Motion to Correct the Clerical Error of the Court pursuant to Rule 60(a) of the Federal Rules of Civil Procedure. (ECF No. 61.) In this Motion, Petitioner alleges that a clerical error exists on the court's electronic docket because his "Motion to Reopen the Petitioner['s] Time to File an Appeal" (ECF No. 51) was not docketed by that title. Instead, the Clerk of Court labeled the "Motion to Reopen" on the docket as a "Motion for Extension of Time to Appeal/Reopen the Petitioner's Time to File an Appeal and Notice of Address Change." (*Id.*) Rule 60(a) allows the court to "correct a clerical mistake or a mistake . . . found in . . . the record." Fed. R. Civ. P. 60(a). Upon its review, the court observes that Petitioner has not established any basis for a finding that the docket title chosen by the Clerk is a clerical error. Moreover, docket titles for motions do not have any legal force or effect and the granting of Petitioner's Motion would have little practical significance. Therefore, Petitioner's Motion to Correct the Clerical Error of the Court (ECF No. 61) is **DENIED**.

that a federal district court has jurisdiction to entertain a § 2254 petition when the petitioner is "in custody pursuant to the judgment of a State court . . . in violation of the Constitution or laws or treaties of the United States. *Id.*

II. LEGAL STANDARD AND ANALYSIS

In the May Order, the court made the following observations in denying Petitioner's Motion to Reopen the Time to File an Appeal:

> Although Petitioner titled his Motion as "Motion to Reopen [] Petitioner['s] Time to File an Appeal," and he requests that the court "reopen the . . . time to file an appeal to this court regarding his writ of habeas corpus," the court liberally construes Petitioner's Motion as a motion to accept his notice of appeal as timely. . . . Reopening the time to file an appeal is governed by Federal Rule of Appellate Procedure 4(a)(6), which does not appear anywhere in Petitioner's Motion. (*See* ECF No. 51.) Instead, Petitioner cites Federal Rule of Appellate Procedure 4(c)(1) and *Houston v. Lack*, 487 U.S. 266 (1988), arguing his Notice of Appeal was filed when he "handed [it] to prison officials to be mailed to this [c]ourt."
>
> . . .
>
> 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.)
>
> . . .
>
> 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. (*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.").

(ECF No. 52 at 2–4, 6–8.) Petitioner seeks to alter and amend the foregoing pursuant to Rule 59.

A. Applicable Standard under Rule 59(e)

Rule 59 allows a party to seek an alteration or amendment of a previous order of the court. Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may "alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of these three grounds in order to obtain relief. *Loren Data Corp. v. GXS, Inc.*, 501

F. App'x 275, 285 (4th Cir. 2012). The decision whether to reconsider an order under Rule 59(e) is within the sound discretion of the district court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). A motion to reconsider should not be used as a "vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind." *Lyles v. Reynolds*, C/A No. 4:14-1063-TMC, 2016 WL 1427324, at *1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)).

B. Petitioner's Arguments

In his Motion, Petitioner argues that the court should reconsider the May Order because it results in the commission of either a clear error of law or a manifest injustice to him. (ECF No. 54 at 8.) In support of his argument, Petitioner asserts that he timely submitted his Notice of Appeal based on the language in Rule 4(c) of the Federal Rules of Appellate Procedure.[2] (ECF No. 54 at 3.) Moreover, Petitioner asserts that Appellate Rule 4(c) protects him because "in his Affidavit to this [c]ourt the petitioner specifically had informed this [c]ourt that on September 21, 2015 he handed his [N]otice of Appeal regarding his habeas corpus to [L]ieber C.I. prison officials." (ECF No. 54 at 3.) Based on the foregoing, Petitioner contends that by not granting his right to appeal when he handed his notice to prison officials, the court committed error and/or

[2] Rule 4(c) of the Federal Rules of Appellate Procedure provides:

> 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; or (B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

Fed. R. App. P. 4(c).

manifest injustice by (1) disregarding the requirements of Appellate Rule 4(c) and the precedent set forth in *Houston v. Lack*, 487 U.S. 266 (1988) and *United States v. McNeill*, 523 F. App'x 979 (4th Cir. 2013); and (2) not holding "an evidentiary hearing regarding when the [P]etitioner had deposited his [N]otice of Appeal to prison officials." (ECF No. 54 at 5–8.)

C. The Court's Review

Petitioner is seeking to alter and amend the May Order on the basis that the court's decision was either a clear error of law or resulted in a manifest injustice to Petitioner. Clear error occurs when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F.3d 326, 336 (4th Cir. 2008) (internal quotation marks omitted); *see also United States v. Martinez–Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) ("[C]lear error occurs when a district court's factual findings are against the clear weight of the evidence considered as a whole.") (internal quotation marks omitted); *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 n.5 (4th Cir. 1983) (explaining that a district court's factual finding is clearly erroneous if "the finding is against the great preponderance of the evidence") (internal quotation marks omitted). Manifest injustice occurs where the court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension . . . ." *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (citations omitted).

Upon review of the instant Motion, the court observes that Petitioner's arguments add very little new substantive argument to what he has already presented on the aforementioned issues. (*See, e.g.*, ECF Nos. 51, 51-1, 51-2, 54, 54-1, & 54-2.) A Rule 59(e) motion should not be used as an opportunity to rehash issues already ruled upon because a litigant is displeased

with the result. *See Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993) (stating that "mere disagreement does not support a Rule 59(e) motion"); *see also Consulting Eng'rs, Inc. v. Geometric Software Solutions & Structure Works LLC*, 2007 WL 2021901, at *2 (D.S.C. July 6, 2007) ("A party's mere disagreement with the court's ruling does not warrant a Rule 59(e) motion, and such motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted."). 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. Accordingly, the court must deny Petitioner's Motion to Alter and Amend Judgment.

III. CONCLUSION

For the reasons set forth above, the court hereby **DENIES** Petitioner Andre King's Motion to Alter and Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (ECF No. 54.)

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

December 9, 2019
Columbia, South Carolina

A-2

May 31, 2019 Order, District Court

(Denying Motion to Reopen the Petitioner['s] Time to File Appeal)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Andre King,	)	
	)	
Petitioner,	)	Civil Action No.: 1:14-cv-00091-JMC
	)	
v.	)	
	)	
Warden McFadden,	)	**ORDER AND OPINION**
	)	
Respondent.	)	
	)	

Before the court for review is Petitioner Andre King's "Motion to Reopen the Petitioner['s] Time to File an Appeal" (ECF No. 51). Petitioner requests that the court reopen the time to file an appeal of this court's Order accepting the Magistrate Judge's Report and Recommendation ("Report"). (ECF No. 51 at 1.) The court **DENIES** Petitioner's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 26, 2015, the court accepted the Magistrate Judge's Report and granted Respondent Warden McFadden's ("Respondent") Motion for Summary Judgment (ECF No. 19), denied Petitioner's Motion to Hold in Abeyance (ECF No. 23), and denied Petitioner's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus (ECF No. 1). (ECF No. 48 at 9.) On that same day, the court mailed its Order accepting the Magistrate Judge's Report to Petitioner. (ECF No. 50.) On May 24, 2019, Petitioner filed the instant "Motion to Reopen the Petitioner['s] Time to File an Appeal." (ECF No. 51.) Petitioner asserts that on September 21, 2015—within thirty (30) days of this court's August 26, 2015 Order accepting the Magistrate Judge's December 9, 2014 Report—he "deposited [a] notice of appeal of [the court's August 26, 2015 Order] in the prison mailing system to the District Court of South Carolina." (ECF No. 51 at 2.) In support of his Motion, Petitioner provided the court with an affidavit in which he asserts that he received the

court's August 26, 2015 Order on September 9, 2015, and "on September 21, 2015[,] . . . handed [his] legal mail to the [L]ieber Correctional Institution Mail Room officials to be mailed to th[e] [c]ourt." (ECF No. 51-1 at 2.) Petitioner also states that "on November 17, 2016[,] [he] . . . sent th[e] [c]ourt a letter regarding [his] notice of appeal," but did not receive a response. (*Id.* at 2.) Petitioner provided the court with a copy of this November 17, 2016 letter, in which Petitioner "inquire[s] about the status of [his] appeal," asserts that he "deposited a Notice of Appeal in the institutional mailbox," "never received a response from the District Court or the Fourth Circuit Court of Appeals," and "made two (2) inquiries to the Office of the Clerk of Court in the interim with no response to either query," and "formally request[s] that the District Court reopen the time in which to file the Notice of Appeal." (ECF No. 51-2 at 1.) Petitioner further states in the letter that he attached a copy of the Notice of Appeal that he deposited in the Lieber Correctional Institution mailbox, but he did not submit a copy of that Notice of Appeal with the copy of the November 17, 2016 letter he filed with the instant Motion. (*See id.*)

II. DISCUSSION

Although Petitioner titled his Motion as "Motion to Reopen [] Petitioner['s] Time to File an Appeal," and he requests that the court "reopen the . . . time to file an appeal to this court regarding his writ of habeas corpus," the court liberally construes Petitioner's Motion as a motion to accept his notice of appeal as timely. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed," and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))). Reopening the time to file an appeal is

governed by Federal Rule of Appellate Procedure 4(a)(6),[1] which does not appear anywhere in Petitioner's Motion. (*See* ECF No. 51.) Instead, Petitioner cites Federal Rule of Appellate Procedure 4(c)(1) and *Houston v. Lack*, 487 U.S. 266 (1988), arguing his Notice of Appeal was filed when he "handed [it] to prison officials to be mailed to this [c]ourt." (*Id.* at 3.) Federal Rule of Appellate Procedure 4(c) provides that

> (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:

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[1] Under Rule 4(a)(6) of the Federal Rules of Appellate Procedure,

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> > (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
> >
> > (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
> >
> > (C) the court finds that no party would be prejudiced.

The court notes that under Rule 4(a)(6), the district court can reopen the time to file an appeal in a civil case only if *all* the conditions of the Rule are met. *See* Fed. R. App. P. 4(a)(6) ("The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but *only if all the following conditions are satisfied* . . . ." (emphasis added)). The first of those conditions is "the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry." Fed. R. App. P. 4(a)(6)(A). Petitioner, by his own admission in the affidavit he submitted with the instant Motion, received the court's August 26, 2015 Order "at [L]ieber Correctional Institution on September 9, 2015," (ECF No. 51-1 at 1), which is within twenty-one (21) days of the Order's entry. *See id.* Therefore, because Petitioner received the court's August 26, 2015 Order within twenty-one (21) days of its entry, the court could not reopen the time for Petitioner to file an appeal of that Order under Rule 4(a)(6), as non-receipt of the order sought to be appealed is a necessary condition for reopening the time to file an appeal under Rule 4(a)(6). *See* Fed. R. App. P. 4(a)(6)(A).

> (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; or
>
> (B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i)

Fed. R. App. P. 4(c)(1)(A)–(B). And under *Houston v. Lack*, a pro se inmate is entitled to the benefit of the "prison mailbox rule," under which the court regards a pro se inmate's petition or motion as having been filed upon delivery to prison authorities for mailing to the court. 487 U.S. 266, 276 (1988). *See also United States v. McNeill*, 523 Fed. App'x 979, 981 (4th Cir. 2013) ("A pro se litigant's legal papers are considered filed upon 'delivery to prison authorities, not receipt by the clerk.'" (quoting *Houston*, 487 U.S. at 275)). Therefore, the court construes Defendant's Motion as requesting that the court find Defendant filed a Notice of Appeal on September 21, 2015, when he claimed he "deposited [it] in the prison mailing system," and allow him to proceed with an appeal of the court's August 26, 2015 Order denying his Habeas Corpus Petition. (*Id.* at 2, 3.) *See Erickson*, 551 U.S. at 94.

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.) In *United States v. McNeill*, confronted with a similar situation, the United States Court of Appeals for the Fourth Circuit, in an unpublished opinion, determined that "where a prisoner claims to have submitted a legal document to prison mail authorities, but no document arrives or is filed at the district court," the district court must make factual findings "as to whether the legal documents in question were actually delivered to the prison mail system on time." 523

F. App'x at 982. The appellant in *McNeill* was mistakenly told by another inmate to file his 28 U.S.C. § 2255 petition with the district court in the district where the petitioner was incarcerated instead of with the the district court in the district where the petitioner was sentenced. *Id.* at 980. Appellant McNeill claimed "he filled out a standard . . . form to set out his claims for relief, and then hand delivered his petition with first-class postage to prison mailroom staff." *Id.* Later, McNeill conferred with another inmate, who told McNeill that he sent his petition to the wrong court. *Id.* Appellant McNeill wrote a letter to the district court where he had sent his petition, requesting confirmation that it had been filed, but received no response. *Id.* Appellant McNeill then sent a second letter to the court, to which he received a response informing him that his petition would be returned to him because it had been filed in the wrong court. *Id.* Appellant McNeill then filed a motion in the proper district court, the Eastern District of North Carolina, requesting that the court "accept his petition as timely filed along with a 'Sworn and Incorporated Memorandum of Law as Timely Filed' pursuant to 28 U.S.C. § 1746." *Id.* at 981. The court denied McNeill's motion, and denied his motion for reconsideration, finding "the prison mailbox rule did not apply because the envelope in question was not correctly addressed to the proper recipient." *Id.*

The Fourth Circuit began its analysis by recognizing that "McNeill's case presents a matter of first impression for the Fourth Circuit, but the disposition and reasoning of other circuits in similar cases is informative." *Id.* at 981. Specifically, the court considered the United States Court of Appeals for the Ninth Circuit's decision in *Huizar v. Carey*, 273 F.3d 1220 (9th Cir. 2001), and the United States Court of Appeals for the Eleventh Circuit's decision in *Allen v. Culliver*, 471 F.3d 1196 (11th Cir. 2006) (per curiam). *Id.* at 981–82. The Fourth Circuit held that when "a prisoner claims to have submitted a legal document

to prison mail authorities, but no document arrives or is filed at the district court," the district court must make "clear factual findings" that the prisoner did or did not submit the legal documents at issue. *See id.* at 982. Because the district court in *McNeill* did not make clear factual findings, the Fourth Circuit remanded the case to the district court with the following instructions:

> On remand, the district court must answer two narrow questions. First, the court must determine whether McNeill sent his petition on time. The petitioner's diligence after a timely submission of his petition is irrelevant. There is nothing in § 2255, nor any corresponding rule, requiring that a pro se litigant diligently monitor his petition after it has been submitted. Nor did the Supreme Court require diligence in *Houston.* The district court here should not consider petitioner's diligence in making its factual determinations. This inquiry is strictly limited to what transpired before June 21, 2011, when the statute of limitations for filing the petition ended.

Id. at 983. Accordingly, the court "must [first] determine whether [Petitioner] sent his [Notice of Appeal] on time." *Id.* at 983. *See also id.* at 982 ("*Huizar* and *Allen* illustrate the *fact-bound nature* of the inquiry where a prisoner claims to have submitted a legal document to prison mail authorities, but no document arrives or is filed at the district court." (emphasis added)); *Allen*, 471 F.3d at 1198 ("[I]t is clear from the district court's order that it did not actually find as a fact that Allen had delivered a notice of appeal to the prison authorities on March 28, 2004; rather, the district court merely assumed that fact. Accordingly, on remand, the district court may inquire further as to the actual facts concerning whether or not, and when, a notice of appeal was delivered to the prison authorities."). 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.[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

[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.)

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.").

III. CONCLUSION

The court **DENIES** Petitioner's "Motion to Reopen the Petitioner['s] Time to File an Appeal" (ECF No. 51).

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

May 31, 2019
Columbia, South Carolina

A-3

August 1, 2015 Order, District Court

(Granting 2015 Motion to Alter or Amend, Accepting Objections as Timely)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Andre King, Petitioner, v. Warden McFadden, Respondent.	)	Civil Action No. 1:14-cv-00091-JMC **ORDER AND OPINION**

Petitioner Andre James King, proceeding *pro se*, brought this action seeking relief pursuant to 28 U.S.C. § 2254. This matter is before the court on Petitioner's Motion to Alter/Amend Judgment (ECF No. 42) pursuant to Fed. R. Civ. P. 59(e) (the "Rule 59(e) motion") requesting that the court reexamine its Order of December 31, 2014 (the "December Order") (ECF No. 38), which adopted the Magistrate Judge's Report and Recommendation ("Report"). (ECF No. 36.) The Report recommended denying Petitioner's Motion to Hold in Abeyance (ECF No. 23) and granting Respondent Warden McFadden's Motion for Summary Judgment. (*See id.*) For the reasons stated below, the court **GRANTS** Petitioner's Rule 59(e) motion and **VACATES** the December Order (ECF No. 38) and respective Judgment (ECF No. 39).

I. JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 2254, which states that a federal district court has jurisdiction to entertain a § 2254 petition when the petitioner is in custody of a state court in violation of the Constitution, laws, or treaties of the United States.

II. RELEVANT BACKGROUND TO PENDING MOTION

Petitioner filed the instant habeas petition (ECF No. 1) on January 7, 2014, and Respondent filed a Motion for Summary Judgment (ECF No. 19) on May 22, 2014. On

December 9, 2014, United States Magistrate Judge Shiva V. Hodges issued the Report recommending that the court grant summary judgment to Respondent and deny Petitioner's Motion to Hold in Abeyance. (ECF No. 36.) Pursuant to the Notice of Right to File Objections to Report and Recommendation attached to the Magistrate Judge's Report (ECF No. 36 at 21), Petitioner was notified that any objections to the Report "must be filed within fourteen (14) days of the date of service" or by December 29, 2014. (*Id.*) When objections had not been docketed in the record on December 31, 2014, the court issued the December Order adopting the Report. (*See* ECF No. 38.) On January 5, 2015, Petitioner's Objection to Magistrate's Report and Recommendation ("Objections") was received by the court and docketed into the record. (*See* ECF No. 41.) The envelope attached to Petitioner's Objections bore a "RECEIVED" stamp from the mailroom at Lieber Correctional Institution, which was dated as received on December 29, 2014. (ECF No. 41-2 at 1.)

On January 26, 2015, Petitioner filed the pending Rule 59(e) motion asserting that he timely filed his Objections to the Report on December 29, 2014, when he placed the Objections "into the hands of the appropriate prison officials, *i.e.*, Mail Room personnel . . . ." (ECF No. 42 at 5.)

III. LEGAL STANDARD AND ANALYSIS

A. Rule 59(e) Motions

The decision whether to reconsider an order pursuant to Rule 59(e) is within the sound discretion of the district court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). Under Rule 59(e), a court may "alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration*

Corp., 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of these three grounds in order to obtain relief under Rule 59(e). *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 285 (4th Cir. 2012).

B. The Court's Review

In his Rule 59(e) motion, Petitioner does not allege any intervening change in the controlling law nor does he offer new evidence. Therefore, the court construes Petitioner's Rule 59(e) motion to allege that he has suffered a manifest injustice due to the court's failure to review his Objections in the context of the Report.

Manifest injustice occurs where the court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension . . . ." *Campero USA Corp v. ADS Foodservice LLC*, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (citations omitted). As an inmate, Petitioner benefits from the "prison mailbox rule." *Houston v. Lack*, 487 U.S. 266, 270 (1988) ("[A] defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if he delivers such notice to prison authorities for forwarding to the clerk of the District Court.").

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 the resulting Judgment (ECF No. 39).

IV. CONCLUSION

For the foregoing reasons, the court **GRANTS** Petitioner's Motion to Alter/Amend Judgment (ECF No. 42) pursuant to Fed. R. Civ. P. 59(e). The court hereby **VACATES** its December Order (ECF No. 38) and respective Judgment (ECF No. 39). The court will review Petitioner's Objections (ECF No. 41) as they relate to the Magistrate Judge's Report (ECF No. 36) and will issue an appropriate order.

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

August 18, 2015
Columbia, South Carolina

A-4

2015 Motion to Alter or Amend, filed January 26, 2015
With Attachments

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA

Andre James King, #258599, Petitioner,	)	#1:14-cv-91-JMC
vs.	)	PETITIONER'S NOTICE OF MOTION AND MOTION TO ALTER/AMEND JUDGMENT
Joseph McFadden, Warden, Respondent.	)	

This matter comes before this District Court were, on December 9,2014, the Magistrate Judge issued it's Report and Recommendation ("Report"), recommending that the Respondent's be granted summary judgment. A copy of the Report was served upon this Petitioner, via Institutional Legal Mail Services, on December 16,2014.

This matter originally came before the Court by way of a petition for habeas corpus, which was filed, January 7,2014, seeking the court to review the allegations of deprivations of a federally protected Constitutional right relating to the manner that Petitioner was convicted and the changes of those standards

from that time. On May 22,2014, the Respondent's filed a Return and Motion For Summary Judgment. The position taken by Respondent's was one that Petitioner's claims and issues should be procedurally barred or defaulted.

On December 29,2014, Petitioner filed his objection to the Report, after being placed through many obstacles. Although the legal documents were placed into the prison officials hands, on December 29,2014, Petitioner can only guess as to the exact date those legal documents were placed into the United States Postal Services possession, or on what date this Court actually took receipt of them.

On December 31,2014, this District Court issued an Order holding that this Petitioner failed to file an objection to the Report, and thereby, declined to address the issues that were before it in the objection and/or Report. This Order was served this Petitioner, via Institutional Mail Services, on January 6,2014.

Petitioner is currently before this District Court in a matter seeking it's reconsideration and have this District Court to alter/amend or reconsider it's judgment, in recognition of facts and evidence (in the form of sworn testimony) that supports Petitioner timely filing his objection to the Report, and where Petitioner has not intentionally nor knowingly waived any right to object to the Report; and issue an Order demonstrating this District Court's ruling as to the Report and/or Petitioner's objection. Petitioner is of the belief and position that this pleading warrants the relief sought within, and this District Court should grant Petitioner said relief.

JURISDICTION

This District Court has competent jurisdiction in which to entertain this matter pursuant to Rule 59(e), of the Federal Rules of Civil Procedure, Fed.R.Civ.Proc., and grant the relief sought herein.

ARGUMENT

A prisoner must file a pleading by placing it in the prison officials hands prior to the deadline having expired. Such a failure to place the legal documents into the hands of the appropriate prison officials will lead to the dismissal, or the court rejecting those pleadings. Coleman v. Johnson, 184 F.3d 398, 399-403 (5th Cir. 1999)(court lacked jurisdiction over appeal from prisoner proceeding pro se because appeal filed after deadline). But, once legal documents have been placed into the hands of the appropriate prison officials, for the purpose of service and filing, those legal documents are deemed to have been filed with the court. Keeling v. Warden, Lebanon Corr. Inst., 673 F.3d 452, 456 (6th Cir. 2012)(prisoner's pro se habeas petition considered filed once provided to prison officials); Ingram v. Jones, 507 F.3d 640, 644 (7th Cir. 2007)(prisoner's notice of appeal was timely as a result of mailbox rule); United States v. Moore, 24 F.3d 624, 626 (4th Cir. 1994)(prison mailbox rule valid for both pro se and represented appellants who are incarcerated).

Courts have recognized that prisoner's face practical difficulties in exercising their rights of legal access and have relaxed procedural hurdles in most circumstances to permit prisoners to file and prosecute claims: for example, the "prison

mailbox rule" deems legal materials to be filed on the date of delivery to prison officials for many purposes. Casanova v. Dubois, 304 F.3d 75, 79 (1st Cir. 2002)(prison mailbox rule applies for purpose of the statute of limitations if prisoner complies with prison's procedures for sending mail, and filing date for purposes of the statute of limitations will be on the date on which prisoner commits mail to custody of prison authority); United States v. Fiorelli, 337 F.3d 282, 288-90 (3rd Cir. 2003)(prison's actual delay or interference in delivery of final motion to prisoner excluded from calculation of timeliness of motion for reconsideration); Brand v. Motley, 526 F.3d 921, 925 (4th Cir. 2008)(prison mailbox rule applied to civil claims, despite district court stamp on claim 3-days over 1-year statute of limitation, because inmate signed and handed claim to prison officials on last day of limitations period); Dole v. Chandler, 438 F.3d 804, 811 (7th Cir. 2006)(prison mailbox rule applied when prisoners properly followed procedure and prison officials responsible for the mishandling of grievance). Furthermore, had Petitioner utilized the general/regular system mail system, instead of the legal mail system as he did, the legal documents would have been timely filed, because it had been delivered to the appropriate prison officials for filing and service. United States v. Gray, 182 F.3d 762, 765-66 (10th Cir. 1999)(mailbox rule applied though inmate used prison's regular rather legal mail system).

On December 9,2014, the Magistrate Judge issued it's Report recommending that this District Court adopt the recommendation granting Respondent's with summary judgment relief. Petitioner was served a copy of this Report, via Institutional Mail Services, on December 16,2014. And as this District Court is well aware, Petitioner is pro se in this matter, and within the custody and control of a state penal

facility.

The Magistrate Judge ordered that Petitioner had fourteen (14) days in which to file and serve any objection he had to the Report. Petitioner interpreted the 14-days to run from the time he received the Report, and believed that the 14-days would end on December 30,2014, or December 31,2014, whichever this District Court found appropriate for this circumstance.

On December 29,2014, Petitioner placed into the hands of the appropriate prison officials, i.e., Mail Room personnel, a copy of the following: (1) Petitioner's Objection To The Magistrate's Report And Recommendation; and (2) Certificate Of Service. (See attached hereto and incorporated herewith, a true and accurate copy of these matters). If this District Court would take the time to examine the attached Affidavits of this Petitioner and Stephen Horace Francois #345325, it will be apprised of information and sworn testimony that would assist this trier of facts and cause this trier of facts to discern that these prison officials, here at Lieber Correctional Institution (LCI), were handed the legal documents dated December 29,2014, and processed by additional postage for service upon this District Court and Respondents.

On December 31,2014, this District Court issued it's Order holding that "Petitioner was advised of his rights to file objections to the Report and Recommendation, this Court is not required to provide an explanation for adopting the recommendation."

At no time has this Petitioner failed in his efforts to preserve nor pursue any rights afforded him during these proceedings. The Report was issued at a time of year in which the mail service suffers from excessive amounts of cards, letters and packages. It took from December 9,2014, until December 16,2014, to reach this Petitioner. The facility takes a hiatus between the

dates of December 22,2014, through January 2,2015. The Mail Room had opened, on December 29,2014, to serve legal mail that had collected during the period of time that it was closed. Petitioner had to go through many obstacles and hurdles to finally have the legal documents accepted. And, Petitioner is of the belief that those legal documents accepted by the Mail Room personnel remained unserved or unmailed until January 2,2015. Petitioner does not believe that this District Court will hold him responsible for the failure of these custodians to act promptly or responsibly.

The standards which govern these circumstances are in favor of Petitioner, where the court recognize the restraints that are placed upon him due to the various forms of security restrictions. Petitioner believes that this District Court should examine this record, these Affidavits, legal pleadings and, reconsider the holding or ruling in the Order dated December 31,2014. To fail to do so imposes an extreme hardship and great prejudice to Petitioner's rights, such as: (1) an incorrect application and/or assessment of law due to the Petitioner having conformed and submitted to the court's requirements of timely filing of an objection to the Report; (2) where this District Court has held that it is not required to provide an explanation why it has adopted the Report, causes a deprivation to issue preservation in the next stage of appellate review that will surely cause a miscarriage of justice where the limits set forth in these proceedings were not intended to be interpreted in that way; and (3) this District Court has held that Petitioner has intentionally and knowingly waived any objection to the Report, where such a ruling is incorrect due to the record now before this District Court refuting that possibility of a knowing and intelligent waiver.

Petitioner is of the belief and stance that the Order should be withdrawn and that this District Court should

reconsider it's holding as to the Belcher issue that has been the main issue and complaint as to the manner the state courts refuse to apply it to the case, sub judice, or address it during the collateral proceedings, and provide a written order establishing the basis of this District Court's ruling upon that issue. With this mindset, Petitioner would seek to have this District Court reverse/withdraw it's original Order, dated December 31,2014, where it was held that Petitioner failed to file a timely objection to the Report; and this District Court consider in light of the attached legal pleadings, Affidavits, and arguments, dated December 29,2014, and those for the purpose of this instant motion to alter/amend, and reach a judicial determination that is fundamentally fair and impartial, and within the realms of well settled standards of law.

CONCLUSION

WHEREFORE, Petitioner seeks of this District Court to alter/amend it's judgment in the following particulars: (1) withdrawing/altering the Order dated December 31,2014, where the facts and evidence supports this relief; and (2) take judicial notice of the legal documents, dated December 29,2014, into consideration, along with those matters attached hereto, and reach a judicial determination that is impartial and fundamentally fair.

January 20,2015

Respectfully Submitted,

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA

Andre James King, #258599, Petitioner,	)	#1:14-cv-91-JMC
vs.	)	CERTIFICATE OF SERVICE
Joseph McFadden, Warden, Respondent.	)	

I certify that I have served the: (1) Petitioner's Notice Of Motion And Motion To Alter/Amend Judgment; (2) Petitioner's Objection To Magistrate's Report And Recommendation (dated December 29,2014); (3) Petitioner's Affidavit In Support Of Motion To Alter/Amend Judgment and Objection To Magistrate's Report And Recommendation; (4) Affidavit Of Stephen Horace Francois #345325; (5) Affidavit Of Ronald De'Ray Skipper #138244; (6) Petition For Certificate Of Appealibility; and (7) Certificate Of Service, upon counsel of record, Clerk of Court, and District Court, by depositing a copy of the same in the United States Mail, First Class Postage affixed thereon, and addressed as follows:

AK

SOUTH CAROLINA ATTORNEY GENERALS OFFICE
J. Anthony Mabry, Esquire
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina
29211-1549;

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA
J. Michelle Childs, District Court Judge
901 Richland Street
Columbia, South Carolina
29201-2431; and

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA
CLERK OF COURTS OFFICE
Robin L. Blume, Clerk
901 Richland Street
Columbia, South Carolina
29201-2431.

January 20,2015

Respectfully Submitted,

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

AK

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA
CLERK OF COURTS OFFICEstrict Court Judge
Robin L. Blume, Clerk
901 Richland Street
Columbia, South Carolina
29201-2431

RE: RECONSIDERATION PLEADING
King v. McPadden, #1:14-cv-91-JMC

Judge Childs,

Enclose for filing, and your consideration are the following:

(1). Petitioner's Notice And Motion To Alter/Amend Judgment;
(2). Petitioner's Objection To Magistrates Report And Recommendation, w/Cover Letter and original Certificate Of Service attached;
(3). Petitioner's Affidavit In Support Of Motion To Alter/Amend Judgment And Objection To Magistrate's Report And Recommendation;
(4). Affidavit Of Stephen Horace Francois #345325;
(5). Affidavit Of Ronald De'Ray Skipper #138244;
(6). Petition For Certificate Of Appellability; and
(7). Certificate Of Service.

If this Petitioner may be of any further assistant to this Court, in these matters, please do not hesitate to contact him. Thank you for this Court's time and attention to these matters.

January 20,2015

Respectfully Submitted,

Andre King

rds/AJK

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

cc: FILE
CLERK
MABRY
JUDGE CHILDS

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

UNITED STATED DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA
CLERK OF COURTS OFFICE
Robin L. Blume, Clerk
901 Richland Street
Columbia, South Carolina
29201

RE: OBJECTION TO REPORT AND RECOMMENDATION
King v. McFadden, #1:14cv-91-JMC-SVH

Clerk,

Enclosed for filing are the following:

1). Petitioner's Objection To Magistrate's Report and Recommendation; and
2). Certificate of Service.

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 petitioner twenty (20) days in which to file their objection. In this notice this Magistrate has only provided me with fourteen

(14) days in which to file my objection. 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 required additional time, as long as I am within the time periods allowed by this Court and it's Rules.

If I may be of any further assistance to this Court, in these matters, please do not hesitate to contact me. Thank you for this Court's time and attention to these matters.

December 29,2014

Respectfully Submitted,

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

cc: FILE
CLERK
MABRY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Andre James King, #258599, Petitioner,	)	#1:14-cv-91-JMC-SVH
vs.	)	PETITIONER'S OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION
Joseph McFadden, Warden, Respondent.	)	

This matter comes before this Court where, on December 9,2014, the Magistrate Judge had filed it's report and recommendation relating to the Respondent's summary judgment motion. A copy of this report and recommendation was served upon Petitioner, via Institutional Legal Mail Services, on December 16,2014.

This matter came before this Court by way of a petition for habeas corpus filed January 7,2014, seeking this Court to review the federal claims relating to Petitioner's State conviction.

On May 22,2014, the Respondent's filed a Return and Motion For Summary Judgment. In this summary judgment pleading the Respondent's assert a defense that these matters and claims should be procedurally barred or defaulted.

In Petitioner's opposition motion to the summarily dismissal motion, he has attempted to present a colorable position that he should be afforded an evidentiary hearing upon the merits of a denial to a federally protect right; or remanding for a new trial and/or to a collateral proceedings in state-court; or an evidentiary hearing with this Court. Petitioner believes that the relief sought is not unreasonable in light of the facts in this case, nor are the facts of this case consistent with a state prisoner who has simply abandoned his claims in the collateral proceedings and begs this Court to intervene and rescue him by examining the issues the Respondents argue are abandoned in the state proceedings. Petitioner simply requests that this Court examine the record, weigh heavily the misapplications of law of the pcr court in his Order of Dismissal, and the manner that the State Supreme Court chose to apply the "new rule", or "watershed" ruling, and that Petitioner was still in the direct appeal stages of the criminal proceedings at the time this State's Supreme Court created the "new rule".

It is the assertion of this Petitioner that the failure to recognize the facts and circumstances of this particular case will surely cause this Petitioner to be further deprived his due process rights afforded him by the Fourteenth Amendment to the United States Constitution. And for the foregoing reasons, Petitioner is of the belief that he is due the relief sought herein.

STATEMENT OF THE CASE

On September 10-13, 2007, this Petitioner was tried upon the criminal allegations of: (1) Murder [#2005-GS-38-1395]; (2) Assault and Battery With intent to Kill (ABWIK) [#2005-GS-38-1393; and (3) Possession of a Weapon During the Commission of a Violent Crime [#2005-GS-38-1394]. The Honorable Royce Knox McMahon, Circuit Court Judge, presided over this trial, and upon a finding of guilt sentenced this Petitioner to Life Without Possibility of Parole (LWOP)(Murder), twenty (20) years (ABWIK); and five (5) years for the Weapon charge, and ordered that all sentences be ran concurrently.

A timely Notice of Appeal was filed. Robert M. Dudek, Esquire, of the Appellate Division for South Carolina was appointed to develop the issues for appeal. After briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Petitioner's conviction and sentence. State v. King, Unpublished Opinion No. #2010-UP-254 (S.C.App.Ct. filed April 26,2010). The Remittitur was sent down on May 13,2010.

On August 9,2010, Petitioner filed an Application seeking Post-Conviction Relief (PCR). The allegations raised in this application were: (1) Ineffective assistance of counsel. (a) "Counsel failed to perform pre-trial investigation and object to numerous trial errors that denied Petitioner his right to a fair trial"; (2) "Denial of 6th Amendment"; and (3) "Denial of 14th Amendment". On March 8,2011, an evidentiary hearing was held before the Honorable Edgar W. Dickson, Circuit Court Judge. in this hearing Judge Dickson entertain the following matters: (1) counsel was ineffective in regard to his closing argument; (2) that counsel failed to object to the jury charge on malice; and

(3) counsel failed to object to the jury charge on self-defense. During this evidentiary hearing Petitioner introduced an amendment to the original PCR application, without objection of these Respondents. The following claims were amended into the record: (a) was counsel ineffective for conceding Petitioner's guilt in closing argument to the jury?; (b) was counsel ineffective for failing to object to the trial court's jury instruction that shifted the burden of proof in violation of due process?; (c) was counsel ineffective for failing to object when trial court failed to instruct the jury they could accept or reject the inference of malice from the use of a deadly weapon"; (d) was counsel ineffective for failing to request a King instruction?; and (e) was counsel ineffective for failing to object to the court's jury instructions on self-defense that shifted the burden of proof in violation of due process?

On July 8,2011, Judge Dickson dismissed this PCR application, with prejudice. The Order of Dismissal was not finalized until July 18,2011, when it was filed with the Clerk of Courts' Office.

On July 27,2011, A Notice of Appeal was filed with the South Carolina Supreme Court, seeking appellate review of the matters within the record and the Order of Dismissal. The issues raised in this appeal was: The PCR Judge erred in refusing to find counsel ineffective for failing to object to the pre-Belcher jury charge in regard to the inference of malice from the use of a deadly weapon when the charge was a mandatory presumption rather than a permissive inference." On August 2,2012, Respondents filed their Return. In this return the Respondents chose a position that trial counsel was not expected to be a clairvoyant whom might anticipate changes in the law.

On July 25,2013, this State's Supreme Court issued an order denying the petition for certiorari. On August 13,2013, the Remitittur was sent down to the lower court. King v. State, #2011-196592.

On January 7,2014, Petitioner filed in the United States District Court, District For South Carolina, a petition seeking habeas corpus review.

On May 22,2014, Respondents filed their Return and Motion for Summary Judgment, asserting the affirmative defense of procedural default or bar.

On August 26,2014, Petitioner served: (1) Petitioners' Opposition To Respondent's Return And Motion For Summary Judgment; (2) Petitioner's Affidavit In Support Of Respondent's Return And Motion For Summary judgment; (3) Exhibit(s) (1) and (2); and (4) Certificate Of Service.

On December 9,2014, the Magistrate Judge issued it's report and recommendation adopting the argument and position of the Respondents in their summarily dismissal pleadings. A copy of this report and recommendation was served upon Petitioner, via Institutional Legal Mail Services, on December 16,2014.

Petitioner serves this objection to the report and recommendation attempting to have this Court review these matters, and to decline to adopt the Magistrate's report and recommendation. Petitioner would request that this Court carefully review the records and this Petitioner's stance in these matters, and give a finding that Petitioner is entitled to relief. And that summary judgment is inappropriate at this stage where there are questions of fact and conclusions of law which do not warrant summarily dismissal.

ARGUMENT

This Court is governed by the statutes that are applicable to habeas corpus proceedings. 28 U.S.C. §2254(b)(1)(B) and (3).

28 U.S.C. §2254(b)(1) provides in pertinent part: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted unless it appears that ... (B)(i) there is an absence of available State corrective process"; or "(ii) circumstances exist that render such process ineffective to protect the right of the applicant" ... "(c) An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this section, if he has the right under the law of the State, to raise, by any available procedure the question presented."

If this Court would examine the argument that has been brought forth by Respondents, and seemly adopted by the Magistrate Judge in it's report and recommendation, there exists a total and complete deprivation to accessibility to the State court that is being overlooked in this opinion. A careful examination of the Statement of the Case would disclose to this Court that this Petitioner has diligently attempted to have the State court review and judicially determine the Belcher issue. The problem has been that, since Petitioner was in the direct appeal stages of the criminal proceedings, and there was no finality in the direct appeal process, he remained within the "pipeline", and should have been afforded the opportunity in which to have his claim exhausted. At the time Petitioner traveled through the State court proceedings there was no form of

review made available to him because he was foreclosed by this State Supreme Court's holding in Belcher. Respondents would lead this Court to believe that Petitioner simply abandoned his claim, but, that is far from the issue. Especially where this claim rests in well settled law and is protected by a Fourteenth Amendment due process rights. Petitioner believes the following is relevant to his argument and stance.

When basing it's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the United States Supreme Court found that a jury instruction which created a mandatory presumption of malice by the use of a deadly weapon caused the defendant to shoulder the burden of proof in establishing his innocence, and failed to permit consideration that the crime was deserving of a lesser-included-offense; and freed the prosecutions burden to establish and prove the defendants guilt. The Sandstrom Court held that the Fourteenth Amendment forbade such an applicability of law, and as such, deprived the defendant of due process that should be afforded him consistent with Fourteenth Amendment standards. See also Francis v. Franklin, 471 U.S. 307, 325 (1985)(jury instruction shifting burden of proof to defendant is unconstitutional).

The procedural default or bar that the Respondents seek to have this Court impose should fail for several reasons. First, it is argued that the "new rule" is a "watershed" rule of criminal procedure which implicates the fundamental fairness and accuracy of the proceeding. Secondly, Teague is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on State-courts. The opinion's text and reasoning also illustrates that the rule was meant to apply only to federal courts considering petitions challenging State-court criminal convictions. The federal interest in uniformity in the

application of federal law does not out weigh the general principles that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees. The Teague rule was intended to limit federal court's authority to overturn State convictions not to limit a State's authority to grant the relief for violations of new constitutional law rules when reviewing it's own States convictions. See Beard v. Banks, 542 U.S. 406, 412, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004).

In Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029 (2008), Justice Stevens delivered the opinion for this Court holding, "New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the State to proscribe as well as "watershed" rules of criminal procedure, must be applied in all future trials, all cases pending on direct review, and all federal habeas corpus proceedings. All other new rules of criminal procedure must be applied in future trials and cases pending on direct review, but may not provide the basis for a federal collateral attack in a State-court conviction. This is the substance of the 'Teague rule' described by Justice O'Connor in her plurality opinion in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)." Id., 128 S.Ct. at 1032.

Since the ratification of the Fourteenth Amendment which radically changed the federal courts relationship with State-courts. That Amendment, one of the post-Civil Reconstruction Amendments ratified in 1868, is the source of the Supreme Court's power to decide whether a defendant in a State proceeding received a fair trial - i.e., whether his deprivation of liberty was "without due process of law". See United States Constitution Amendment 14, §1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of

law"). In construing that Amendment, the Supreme Court has held that it imposes minimum standards of fairness on the States, and requires State criminal trial to provide defendants with protections "implicit in the concept of ordered liberty." Id., 128 S.Ct. at 1034.; also Palko v. Conn., 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed.2d 288 (1937).

The United States Supreme Court has consistently recognized the safeguards afforded by the Bill of Rights which incorporate the Due Process Clause of the Fourteenth Amendment, and therefore, make it binding upon the States. C.f., Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)(applying the Sixth Amendment right to counsel to the States). It has been a long standing rule of law that due process does not permit the burden to be shifted to the Petitioner in establishing his own innocence. The malice instruction which has been overruled by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), demonstrates just that fact ... prior to Belcher the malice instruction of use of a deadly weapon shifted such burden. That was the essence of the Belcher court's holding. The District Court's of these United States have had the same view concerning that form of jury instruction which creates an undue presumption of guilt and requiring reversal. See, e.g., Moore v. Poole, 186 F.3d 26, 33-34 (1st Cir. 1997)(instruction requiring inference of malice from absence of circumstance showing justification or excuse unconstitutionally relieved prosecution of burden of proving beyond reasonable doubt each element of murder); Gilbert v. Moore, 134 F.3d 642, 647 (4th Cir. 1998)(instruction charging that "malice is implied or presumed from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse" and from use of a deadly weapon unconstitutionally relieved the prosecution of proving beyond a reasonable doubt each elements of capital murder charge); Caldwell v. Bell, 288

F.3d 838, 843-44 (9th Cir. 2002)(instruction that use of a deadly weapon resulting in death established presumptive evidence of malice unconstitutionally relieved prosecution of proving all elements of first-degree murder).

It is evident by the report and recommendation that this Court is simply brushing aside the facts of this particular case, and now the standards of law would support a different outcome. We must be mindful of the fact that at the time that Petitioner was in the direct review stages, this State's Supreme Court made a ruling that severely altered the manner that jury instructions would be given to the jurors at the time of their deliberations. And the Belcher issue is the same exact issue as in presently before this Court in this case. The only difference in Belcher and this case is the time periods. By that Petitioner means, from September 13,2007, until the Court of Appeals sent down the Remittitur on May 13,2010, this case had not reached it's finality. In reality, Petitioner was still in the "pipeline" at the time the "new rule" was handed down. Harris v. State, 543 S.E.2d 716, 171-18 (Ga. 2001)(reversing a murder conviction and overruling precedent that had approved inference of intent to kill from the use of a deadly weapon and applying new rule "to all cases in the 'pipeline' - i.e., cases which are pending on direct review or not yet final"); and Griffith v. Kentucky, 479 U.S. 314, 328 (1987)("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final").

A conviction becomes final once the judgment is rendered, the defendant exhausts all direct appeals, and the time for filing a petition for certiorari on direct review lapses. This is the Teague rule. Id., 489 U.S. at 295 (citing Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986)(per curiam); Penry v.

Lynaugh, 492 U.S. 302, 314-15 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)(conviction became final when certiorari denied); Drew v. MacEachern, 620 F.3d 16, 20 (1st Cir. 2010)(conviction final after affirmation of conviction on direct appeal and time to seek certiorari lapsed); Epps v. Poole, 687 F.3d 46, 49-50 (2nd Cir. 2012)(conviction final after Appellate Division affirmed conviction, leave to appeal was denied, and 90 days expired); Reinhold v. Rozum, 604 F.3d 149, 154 (3rd Cir. 2010)(conviction final after affirmed on direct appeal and successive state relief petitions denied); Scott v. Hubert, 635 F.3d 659, 663 (5th Cir. 2011)(conviction not final for AEDPA purposes until both conviction and length of sentence became final); Sherwood v. Prelesnik, 579 F.3d 581, 585 (6th Cir. 2009)(conviction final when petitioner did not pursue direct appeal to state supreme court and could no longer seek review for that court); Thompson v. Lea, 681 F.3d 1093, 1094 (9th Cir. 2012)(conviction final 90 days after state supreme court denied petition for review on direct appeal); Sigala v. Bravo, 656 F.3d 1125, 1127 (10th Cir. 2011)(state conviction final 30 days after amended judgment and sentence entered); and McCloud v. Hooks, 560 F.3d 1223, 1229 (11th Cir. 2009)(conviction final when time to appeal expired). As the record before this Court clearly demonstrates, the Belcher decision was heard on May 2,2009, and decided on October 12,2009. Although this decision was handed down approximately 13½ months, after, Petitioner was convicted and sentenced ... the direct appeal proceedings would not become final until approximately 19 months after the Belcher decision. This raises a question that should be resolved in Petitioner's favor due to the fact that he was in the "pipeline" at the time that this "new rule" became final. To hold any other way would deprive Petitioner of the very core of the Fourteenth Amendment.

This stance is taken due to this State's Supreme Court's abandonment of the malice charge relating to the use of a deadly weapon.

Petitioner would take the position that, if, the Belcher Court's clear break analysis was to correct a constitutionally deficient jury instruction ... the very essence of Petitioner's stance hinges on that very claim. A careful examination of this record where the jury instruction was given by the trial judge would disclose that the instruction in Belcher are exactly like the one given in his trial. The question is, how could Belcher's jury instruction create a burden shifting scenario, and not create the same scenario in this Petitioner's case? That would be impossible. And then, where the Supreme Court in Belcher held that the "new rule" would not be available in collateral proceedings, unless preserved at trial, without some form of intentional waiver ... this further infringes on the constitutional right to fairness, not only in the jury trial, but, in an available remedy providing this Petitioner with access to the court, a meaningful opportunity to be heard, and judicial review. These are the very principles of due process. See Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivisions), 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998)(due process requires at a minimum: (1) notice; (2) opportunity to be heard; and (3) judicial review); S.C. DSS ex rel. State of Texas v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995)(same); and Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565 (2007)(four elements of due process are: (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; (4) the right to confront and cross-examine witnesses); and Wolff v. McDonnell, 418 U.S. 539, 563-69 (1974). This should raise serious concerns in this matter.

Furthermore, it was not as if Petitioner did not put any effort into attempting to raise this issue. Far from the point and facts. Once he became aware that the "new rule" existed, he brought it before the pcr court's attention. And Petitioner believes that the analogy used by the pcr court in failing to competently address the claim was severely defective and contrary to existing federal standards available at the time. It is evident that Petitioner's criminal proceedings did not become final until May 13,2010, when the issuance of the Remittitur finalized the direct appeal process.

To hold that procedural default or bar is applicable to this current case would be to strip the very foundation of the Fourteenth Amendment from protecting the rights of this Petitioner. When faced with a mandatory presumption or inference in a jury instruction, our United States Supreme Court in Sandstrom held that the Fourteenth Amendment afforded criminal defendants the due process right not to be placed into the position that they must prove their innocence; due to the fact the burden would shift from the prosecution to establish every element of the crime. To permit any other manner of analogy of this circumstance would defeat the very values our founding father's embedded in the provisions of our Constitution which safeguard our citizenry. The Fourteenth Amendment safeguards Petitioner's rights in this matter, and therefore, it should provide sufficient cause to, either: (1) grant Petitioner relief in the form of remanding for a hearing in a collateral proceeding, and development of the record relating to the Belcher "new rule" issue; (2) a new trial where Petitioner's jury instruction has deprived Petition of the full panoply of Constitutional protections afforded in jury proceedings; and/or (3) grant Petitioner an evidentiary hearing as to the Belcher

issue, due to it's decision coming during the course of his direct appeal and it created a "watershed", or "new rule' of law that should have applied to Petitioner's circumstances. See Barkell v. Crouse, 468 F.3d 684, 694-95 (10th Cir. 2006)(petitioner entitled to evidentiary hearing because diligently sought to develop factual basis for ineffective assistance in state court); and Simpson v. Norris, 490 F.3d 1029, 1035 (8th Cir. 2007)(petitioner entitled to an evidentiary hearing because new federal mental retardation claim unavailable at time of trial, and therefore, impossible to determine defendant lacked diligence). Petitioner would assert that summary judgment is inappropriate due to the facts in the record that demonstrates the attempts on the part of Petitioner to raise the issue of the "new rule", but the State court forestalled his efforts which would create a genuine material issue of fact in dispute that would defeat summary judgment. Secondly, the claims raised require further inquiry by the Court and Petitioner provided a meaningful opportunity to be heard and present evidence of the claim of deprivation or impediment to a (1) fair and impartial trial; (2) impediment to a full and impartial collateral proceeding and appellate review, when the subject matter embraces the protections, previously established by the United States Supreme Court, and guaranteed this Petitioner. With this mindset, Petitioner would assert that this Court should refuse to adopt the report and recommendation and grant the relief sought herein.

CONCLUSION

WHEREFORE, the Petitioner would respectfully make

demand that relief be granted in one of the following particulars: (1) where a fair and impartial trial, collateral and appellate proceedings were deprived, this matter should be remanded to the pcr court for an evidentiary hearing as to the applicability of the Belcher issue, and it's effect on Petitioner's trial; (2) retrial; or, (3) an evidentiary hearing in this Court relating to the "watershed', "new rule" where Petitioner diligently sought to exhaust and raise the matter in the State courts, but was foreclosed.

December 29,2014

Respectfully Submitted,

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

PRO SE PETITIONER

UNITED DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA

Andre James King, #258599,
Petitioner,

vs.

Joseph McFadden, Warden,
Respondent.

#1:14-cv-91-JMC-SVH

CERTIFICATE OF SERVICE

I certify that I have served the: (1) Petitoner's Objection To The Magistrate's Report and Recommendation; and (2). Certificate of Service, upon counsel of record by depositing a copy of the same in the United States Mail, First Class postage affixed thereon, and addressed as follows:

SOUTH CAROLINA ATTORNEY GENERALS OFFICE
J. Anthony Mabry, Esquire
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina
29211-1549; and

UNITED STATES DISTRICT COURT
DISTRICT COURT OF SOUTH CAROLINA
CLERK OF COURTS OFFICE
Robin L. Blume, Clerk
901 Richland Street
Columbia, South Carolina
29201.

December 29,2014

Respectfully Submitted,

Andre King

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

PRO SE PETITIONER

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA

Andre James King, #258599, Petitioner,	)	#1:14-cv-91-JMC
vs.	)	PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION TO ALTER/AMEND JUDGMENT
Joseph McFadden, Warden, Respondent.	)	

PERSONALLY appeared before me, Andre James King #258599, Petitioner, who being duly sworn under penalty of perjury, deposes and says:

1). I am, Andre James King #258599 (hereafter, "Petitioner"), the pro se Petitioner offering this sworn testimony in the form of an Affidavit.

Petitioner is an inmate currently confined to the Lieber Correctional Institution (LCI), assigned to the Wando Unit-C-167, upon commitment of the Clerk of Court upon a sentence on Life Without Parole (LWOP).

2). On December 9,2014, the Magistrate Judge issued it's Report and Recommendation (Report) relating to the issues and claims presently before this Court. In this Report, the Magistrate Judge adopted the Respondent's request for summary judgment. A copy of this Report was served upon Petitioner, on December 16,2014.

Petitioner would attest for this record that the Magistrate Judge gave Petitioner fourteen (14) days in which to prepare and serve his objection to the Report. It has always been Petitioner's understanding of procedural law and applicable standards that when informing an inmate as to the time period prescribed for the filing of the Report, generally as the rule goes, the inmate would have twenty (20) days.

As is apparent by this record, had the 14 days began to run on December 9,2014, and Petitioner not being served until December 16,2014, this would have created a severe hardship in perfecting, preparing, copying and serving the required objection.

Petitioner is of the belief that this would undermine the evolving standards which give guidance in these types of circumstances. Especially where this Petitioner is limited in his accessibility to critical portions of this facility, i.e., Law Library, copying services, mailing services, and where there are specified times and days for the use of these portions of the facility, causes him to be placed under more strenuous and severe limitations that essentially thwart the only opportunities available to him. Also, this Court is aware that security is a blanket that is recognized by the Court, and can have extreme applications that further impeded Petitioner's moveability.

3). On December 29,2014, Petitioner reported to the Educational Building, (where copies are made), and was afforded the opportunity to have his objection pleadings photocopied.

After leaving the Educational Building, Petitioner reported to the Mail Room so that he could serve and mail the objection pleadings.

Once at the Mail Room window, Ms. Bryant, Mail Room Supervisor, LCI, informed Petitioner that the mail room was closed and she would not accept nor debit his inmate account so that the legal pleadings could be served and postage added for that purpose.

For an hour Petitioner attempted to get Ms. Bryant to understand that his last day for filing and/or mailing was December 30,2014, and he desperately needed her to take possession of these legal pleadings so that he could have the court to recognize them as timely served. She was adamant in her refusal to take possession of these pleadings.

4). Petitioner returned to the Wando Unit where he is assigned, and had an opportunity in which to speak with Lt. Terrence Forde (Unit Supervisor), Cpl. Collins, Ofc. Rapley, and Classification Case Worker (CCW) Turner concerning his inability to have his legal documents served.

CCW Turner went into her office and stated she would contact Captain Clark, Administrative Captain/Supervisor for all shifts, and get him to intervene so that access may have been granted to this Petitioner in mailing these documents.

5). Captain Clark informed CCW Turner to have Petitioner to report back to the Mail Room and he would ensure the legal documents would be accepted and documented.

Petitioner had to wait for several moments for movement because there had been a "[FIRST REPONSE]" in one of the living units on the yard. This generally means that there has arisen a situation in a specific area that requires additional security personnel. Once the FIRST RESPONSE had cleared, Petitioner was permitted to move to the Mail Room. At this time, Ms. Bryant accepted the legal documents and debited Petitioner's inmate account for the additional amounts required to adequately served these documents.

6). As a general rule, once the Mail Room accepts legal documents, although those documents may not be delivered to the United States Postal Service until the next day, the Mail Room Staff stamps the back of the envelope "RECEIVED" and the date received.

Due to Petitioner's incarceration, he can only place these documents into the "hands" of the appropriate staff members and hope that they perform their duties as should be done.

Petitioner has attached a copy of the original documents and pleadings with this Affidavit so that the Court may have these matters in it's possession, and be aware of the date that they were served.

Petitioner is further aware that as a pro se litigant he is held to the same standards as a licensed attorneys in accordance with Rule 11(a), Federal Rules of Civil Procedure, Fed.R.Civ.Proc., and if he should attempt to defraud the court or file frivolous pleadings he can face severe sanctions, to include the dismissal of his claim, with prejudice. Petitioner would never place his case in such jeopardy as that.

7). Petitioner is of the belief that these exists a [special rule] for pro se prisoner litigants who file legal

papers by mail. The United States Supreme Court has held that a pro se prisoner's pleadings are deemed filed, for the purpose of deadlines, when delivered to the prison authorities, rather than the usual rule that it is filed the day it arrives at the court. This is due to the litigant losing control over the documents as soon as he turns them over to the prison personnel. See Houston v. Lack, 487 U.S. 266, 273-76, 108 S.Ct. 2379 (1988); Stoot v. Cain, 570 F.3d 669, 671-72 (5th Cir. 2009)(rule applies to papers given timely to prison authorities for mailing, even if they never reach the court).

Petitioner further believes that once he places the legal documents into the "hands" of these prison authorities, even if [they] do not serve them until some time later, i.e., a week or more, that he cannot be held accountable because of the prison authorities negligent act. Davis v. Woodford, 446 F.3d 957, 960 (9th Cir. 2006)(sworn proof of service form stating that another prisoner placed plaintiff's notice of appeal in the prison system timely was sufficient despite the fact that the mail did not go out for a week); United States v. Ceballas-Martinez, 371 F.3d 713, 715-18 (10th Cir. 2004); also Grady v. United States, 269 F.3d 913, 918 (8th Cir. 2001). Furthermore, the only postage permitted when mailing and serving any court and/or agency must have First Class Postage affixed thereon, and that is usually the reasoning for debiting an inmate's account for additional postage. The legal documents that were mailed or taken possession of by the Mail Room Staff were served by First Class Mail. United States v. Craig, 368 F.3d 738, 740-41 (7th Cir. 2004); United States v. Smith, 182 F.3d 733, 735 n.1 (10th Cir. 1999).

Petitioner would attest that he has followed all the requirements that are essential to a timely filing of his

legal documents, on December 29,2014, to include sufficient postage so that they are delivered by First Class Mail; placed the legal documents in the "hands" of the prison authorities whom are designated and authorized for providing Mail Room services, and should be given the benefit of the "mail box rule" in this circumstance.

8). As to the matters within the objection to the Report, it would seem that this Court, as well as the Magistrate Judge, has turned a "[b]lind eye" to the facts, standards and evidence that have been presented to this court.

At the time that the Belcher decision was settled, Petitioner was within in the ambiance of the Court of Appeals, upon those matters which are relevant and available only on direct appeal. As the record clearly demonstrates, the Belcher's "new rule" of law would not be finalized until October 12,2009. Petitioner's direct appeal was not dismissed until April 26,2010. (See State v. King, Unpublished Opinion No. #2010-UP-254). The Remittitur was sent down on May 13,2010.

Petitioner was caught in a "crux" where he was already in the direct review process; the matters had already been briefed. Appellate counsel apparently failed to take recognition of the "new rule", and did not seek to invoke the Court of Appeals authority to pursue the matter at that point and time. This effectively left this Petitioner in a position to: (1) abandon the direct appeal process, which as a general rule would be with prejudice; (2) attempt to return to the Court of General Sessions to have that court entertain the matter; but, consider this aspect more carefully, (3) a direct denial of this Petitioner's ability to even have the Court of Appeals to consider any form of abandonment because of the "hybrid representation" doctrine.

As this Court is aware, Petitioner has no right to "hybrid representation", once counsel has attached under South Carolina precedence. "Hybrid representation" has been defined as "partial by counsel - partial by pro se". Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); and Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010).

The courts have gone as far as to apply the "hybrid representation" standard to criminal proceedings. State v. Cabrera-Pena, 350 S.C. 517, 567 S.E.2d 472 (Ct.App. 2002), reh. denied, cert. granted, aff'd in part, remanded in part, 361 S.C. 372, 605 S.E.2d 522 (2004)(no entitlement to hybrid representation in criminal matters); Whechel v. Bazzle, 489 F.Supp.2d 523, appeal dismissed, 251 Fed.App'x 166 (2002)(WL3024457)(Under South Carolina law, defense counsel cannot serve as mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation).

Where Petitioner was upon direct appeal at the time the decision in Belcher was handed down, direct appeal had yet to be finalized. This should cause serious concern where the "new rule of law' should have become available to this Petitioner once the direct appeal process was over. Yet, it seems that this Court, with all the other proceedings that there has been a diligent attempt to pursue this claim, have completely disregarded these facts. It is not as if this Petitioner is tempting this Court to apply the new standard of a Federally protected Constitutional right without due cause or justification.

The facts are supported by the record. There is evidence that provides cause to apply the "watershed", "new

rule" of criminal procedure to this instant case. Especially where such matters as have been raised impeded the fundamental fairness of the judicial process; shifts the burden of proof from the prosecution to this Petitioner; where the jury charge has been invalidated and discarded as failing to be permissible under modern precedence; and where Petition was in the "pipeline" at the time that the decision was rendered. We must be mindful that direct appeals are hybrid proceedings ... partial criminal and partial civil, so much so that until such time the Court of Appeals hands down a determination in the appellate proceedings, the criminal portion remains in tact.

9). Petitioner seeks of this Court that it carefully examine the pleadings relating to the objection to the Reports arguments, and that it reconsider it's position in the Order dated, December 31,2014.

Also, that this Court take into consideration the testimony and position provided by the testimony within this Affidavit and reconsider it's holding in light of the fact(s) that; (1) Petitioner should be provided the benefits of the Fourteenth Amendment due to the invalidated, unconstitutional jury instruction of a deadly weapon infers malice, thereby shifting the burden to Petitioner to prove his innocence; (2) where the Petitioner has not been provided the necessary due process protections that are essential to a fundamentally fair and impartial jury proceeding; and/or (3) that this Court should alter/amend it's judgment as to the failure of this Petitioner to serve an timely objection to the Report, in light of the Affidavit(s) (Skipper & Francois)(a true and accurate copy of each is attached hereto and incorporated herewith) and the originally filed and served objection pleadings dated December

29,2014.

Petitioner would never, or as long as it were in his power or control, permit a deadline to pass or mechanism which would be required to preserve his rights and position in these types of proceedings. Furthermore, Petitioner does not believe that this Court would hold him accountable for the actions and/or inactions of this facility or it's staff members.

10). Petitioner is of the belief that he is entitled to an evidentiary hearing for development of the record due to the state court preventing him the opportunity to develop and preserve this claim that alleges caused him an extreme deprivation or impediment to a Fourteenth Amendment claim and issue. Drake v. Portuondo, 321 F.3d 338, 347 (2nd Cir. 2003)(petitioner entitled to evidentiary hearing because diligently sought to develop factual basis underlying habeas petition but prevented by state court from doing so); Winston v. Pearson, 683 F.3d 489 (4th Cir. 2012)(petitioner entitled to evidentiary hearing because did not have opportunity to develop claim in state court, despite due diligence); Simpson v. Norris, 490 F.3d 1029, 1035 (8th Cir. 2007)(petitioner entitled to evidentiary hearing because new federal mental retardation claim unavailable at time of trial, and therefore, impossible that defendant lacked diligence).

To read and interpret the argument by these Respondents one could be led to believe that Petitioner is at fault for the failure to have this claim preserved in state court. Especially where the state court disregarded his rights as relates to the claims presently before this Court. Petitioner was not aware of the Belcher decision until such time he was finalized in the Court of Appeals. Surely this Court realizes that there has been a grave miscarriage of justice and this

Petitioner has not, at a minimum, received the rights associated to these matters.

11). Petitioner would seek of this Court, in reconsideration of the improperly applied circumstances and standards, that it alter/amend it's previous order to demonstrate the matters within this Affidavit and these pleadings served herewith and attached hereto.

12). This Affidavit is submitted as sworn testimony, and development of a record, by this Petitioner consistent with Rule 11(a), Federal Rules of Civil Procedure, Fed.R.Civ.Proc.; 28 U.S.C. §1746; Rule 43(d) and (e), Fed.R.Civ.Proc.; and Rule 603, Federal Rules of Evidence, Fed.R.Evid.

PETITIONER SAYETH NO FURTHER

January 18, 2014

Respectfully Submitted,

Andre King

Andre James King
Wando-C-167 #258599
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA

Andre James King, #258599, Petitioner,	)	#1:14-cv-91-JMC
vs.	)	AFFIDAVIT OF STEPHEN HORACE FRANCOIS #345325
Joseph McFadden, Warden, Respondent.	)	

PERSONALLY appeared before me, Stephen Horace Francois #345325, Affiant, who being duly sworn under penalty of perjury, deposes and says:

1). I am Stephen Horace Francois #345325 (hereafter, "Affiant"), the individual offering this Affidavit as sworn testimony.

Affiant is an inmate within the custody and control of the South Carolina Department of Corrections, currently confined to the Lieber Correctional Institution (LCI), and assigned to the Wando Unit-A-252.

2). Affiant is the Administrative Clerical Assistant, i.e., Inmate Clerk, for Lt. Terrance Forde, Supervisor of the Wando Unit. Affiant is entrusted to perform various duties, to include locate inmates that are required to attend various institutional assignments or programs, or assist in gaining them access to certain areas of the facility.

3). On December 29,2014, Lt. Forde and Cpl. Collins (Wing Officer), made announcements stating that the Mail Room would open at 9:30am, in accordance with the movement schedule for legal mail pick up and sending legal mail out.

4). Affiant located Andre James King #258599 ("Petitioner") and informed him that Lt. Forde had made the announcement concerning the mailing of legal pleadings. Petitioner left the Wando unit with the movement to mail his pleadings.

5). About an hour went by and Petitioner returned to the Wando Unit. Upon returning to this living unit Petitioner approached Lt. Forde, Ofc. Rapley, Classification Case Worker ("CCW") Turner, and Cpl. Collins, complaining that he had attempted to mail out his legal pleadings, but the Mail Room refused to accept them. Ms. Bryant (Mail Room Supervisor) was stating a position that the Mail Room was closed, and all additional postage mail, i.e., legal materials, would have to wait to be sent out.

Petitioner informed Lt. Forde that the legal pleadings should have been mailed out prior to the holidays, according to Ms. Bryant. Affiant was present when these

conversations and statements were taking place.

6). CCW Turner immediately went into her office and called Captain Clark, who is the Administrative Captain for all shifts. CCW Turner came out of her office and informed Petitioner to report back to the Mail Room. Petitioner had to wait for a moment due to a "[F]IRST RESPONSE" having been called in one of the living units on the yard.

Cpl. Collins also contacted Captain Clark concerning the availability of permitting Petitioner the opportunity in which to utilize the Mail Room services.

Per Captain Clark, Ms. Bryant took possession of the legal pleadings that Petitioner required be mailed out. This finally happened around 1:20pm, that day. The Mail Room closes at 11:30am every day.

7). Petitioner returned to the Wando Unit before the 2:00pm count and informed this Affiant that Ms. Bryant had accepted his pleadings and debited his inmate account to mail those matters out.

8). Affidavit would submit this Affidavit as sworn testimony consistent with: 28 U.S.C. §1746; Rule 43(d) and (e), Federal Rules of Civil Procedure, Fed.R.Civ.Proc.; and Rule 603, Federal Rules of Evidence, Fed.R.Evid.

AFFIANT SAYETH NO FURTHER

January 14,2015

Respectfully Submitted,

Stephen Horace Francois
Wando-C-252 #345325
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

UNITED STATES DISTRICT COURT
DISTRICT FOR SOUTH CAROLINA

Andre James King, #258599, Petitioner,	)	#1:14-cv-91-JMC
vs.	)	AFFIDAVIT OF RONALD DE'RAY SKIPPER #138244
Joseph McFadden, Warden, Respondent.	)	

PERSONALLY appeared before me, Ronald De'Ray Skipper #138244, Affiant, who being duly sworn under penalty of perjury, deposes and says:

1). I am, Ronald De'Ray Skipper #138244 (hereafter, "Affiant"), the individual offering this affidavit as sworn testimony.

Affiant is an inmate within the custody and control of the South Carolina Department of Corrections, presently confined to the Lieber Correctional Institution (LCI), Wando Unit-B-141.

2). On December 19,2014, Affiant would be transported to the Florence County Courthouse, Twelfth Judicial Circuit, Court of Common Pleas, where Affiant was in a motions hearing relating to a legal malpractice case pending in the Circuit. (See Skipper v. Biddle etal., #2014-CP-21-1878).

The reason Affiant has such an astute recall of these dates and times is because, on the way out of Operations there was posted a Memorandum which states that the Mail Room would not offer postage or pleading service from the dates of December 22,2014, through January 2,2015, due to the holidays.

Affiant has been placed into a position in which to contact the Presiding Judge over his case in order to have any written orders that may be forthcoming, served initially in the form of a proposed order, and permit a certain amount of time to pass prior to the written order being authorized and filed with the Clerk of Courts Office. The holidays have always had an adverse affect on mail services and getting pleadings out in a timely manner.

Affiant would attest that the portions of this facility which is considered non-essential were closed to the general population due to the seasonal holidays and where this time of year results in the shortage of staff, security wise. The Mail Room, Law Library, Educational Building, etc., are considered non-essential during the holiday times.

3). On December 22,2014, (Monday), through January 2,2015, (Friday), Affiant was informed and made aware by security staff that the only [legal mail] that would be processed would be that legal mail which is coming into this facility from the outside postal mail services, there would be no mail outgoing due to the inability to debit the inmate's account.

As a general rule, the Mail Room Staff, once it accepts legal mail, places it in a container and then [date stamps] the back of the envelope "RECEIVED" to ensure that the Court is aware when the legal mail/pleadings were placed into the "hands" of their custodians.

4). This Affidavit is submitted as sworn testimony consistent with the provisions of: 28 U.S.C. §1746; Rule 43(d) and (e), Federal Rules of Civil Procedure, Fed.R.Civ.Proc.; and Rule 603, Federal Rules of Evidence, Fed.R.Evid.

AFFIANT SAYETH NO FURTHER

January 14,2015

Respectfully Submitted,

Ronald De'Ray Skipper
Wando-B-141 #138244
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

Andre James King
Inmate-C-167 #258589
Lieber Correctional Institution
Post office Box 205
Ridgeville, South Carolina
29472-0205

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FOR DISTRICT of South Carolina
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