UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7614

JOHN RODNEY JOHNSON,

Petitioner - Appellant,

v.

DONNIE AMES, Superintendent,

Respondent - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Thomas E. Johnston, Chief District Judge. (2:19-cv-00487-TEJ)

Submitted: February 23, 2021 Decided: February 26, 2021

Before MOTZ, KEENAN, and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

John Rodney Johnson, Appellant Pro Se. Lindsay Sara See, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

John Rodney Johnson seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely Johnson's 28 U.S.C. § 2254 petition. *See Gonzalez v. Thaler*, 565 U.S. 134, 148 & n.9 (2012) (explaining that § 2254 petitions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2244(d)(1)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez*, 565 U.S. at 140-41 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Johnson has not made the requisite showing. Accordingly, although we grant Johnson's motion for leave to use the district court record, we deny Johnson's motions to supplement the record and for a certificate of appealability, and we dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: February 26, 2021

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JUDGMENT

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

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

/s/ PATRICIA S. CONNOR, CLERK

FILED: July 30, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7614
(2:19-cv-00487-TEJ)

JOHN RODNEY JOHNSON

Petitioner - Appellant

v.

DONNIE AMES, Superintendent

Respondent - Appellee

O R D E R

The court denies the petition and amended petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Keenan, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JOHN RODNEY JOHNSON,

Petitioner,

v. CIVIL ACTION NO. 2:19-cv-00487

DONNIE AMES,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending before the Court is Respondent Donnie Ames's Motion for Summary Judgment, (ECF No. 9), on Petitioner John Rodney Johnson's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, (ECF No. 2). By Standing Order, this matter was referred to United States Magistrate Judge Cheryl A. Eifert for submission of proposed findings and a recommendation for disposition ("PF&R"). (ECF No. 3.) On April 2, 2020, Magistrate Judge Eifert filed a PF&R, (ECF No. 19), recommending that this Court grant Respondent's Motion for Summary Judgment, dismiss Petitioner's Amended Petition for Writ of Habeas Corpus, and dismiss this matter from the Court's docket. After an extension was granted, Petitioner filed an objection to the PF&R on May 8, 2020. (ECF No. 22.)

Also pending before the Court is Petitioner's Motion for Supplemental Record, (ECF No. 23), which Petitioner filed on June 24, 2020. This Court entered an order on July 21, 2020, (ECF No. 24), in which it directed Respondent to file a response to Petitioner's motion. Respondent filed his response on July 31, 2020. (ECF No. 25.)

For the reasons discussed herein, the Court **OVERRULES** Petitioner's objection, (ECF No. 22), **ADOPTS** the PF&R, (ECF No. 19), **DENIES** Petitioner's Amended Petition for a Writ of Habeas Corpus, (ECF No. 2), **DENIES** Petitioner's Motion for Supplemental Record, (ECF No. 23), and **DISMISSES** this action from the docket of the Court.

I. BACKGROUND

On March 12, 2004, Petitioner was convicted upon a jury verdict in the Circuit Court of Cabell County, West Virginia, for one count of murder in the first degree. (ECF No. 9–5 at 54.) Thereafter, the trial court sentenced Petitioner to life in prison, without mercy. (ECF No. 9–11 at 2–3.)

The complete factual and procedural history of Petitioner's direct appeal and habeas proceedings in state court, as well as a review of Petitioner's claims in his federal habeas petition are set forth in detail in the PF&R and need not be repeated here. The Court will provide a discussion of any relevant facts from Petitioner's original criminal case as necessary throughout this opinion to resolve Petitioner's objections. This § 2254 Petition claims the following grounds for relief:

1. Petitioner asserts prosecutorial misconduct based on racial, inflammatory, prejudicial, and improper comments that prejudiced the jury and violated Petitioner's due process rights.

2. Petitioner assets the trial court abused its discretion by allowing the State to introduce improper 404(b) character evidence, which was irrelevant, highly prejudicial, and improper.

3. Petitioner asserts the trial court violated his Fifth and Fourteenth Amendments rights to due process by providing a burden shifting jury instruction which shifted the burden of proof to Petitioner for malice and specific intent to kill.

4. Petitioner asserts the trial court abused its discretion by failing to remove an impartial juror and failed to set aside the verdict due to juror misconduct.

5. Petitioner asserts the trial court abused its discretion and violated his rights by presenting Petitioner in restraints and prison attire at critical stages of the trial.

(ECF No. 2 at 7–11.) The PF&R thoroughly analyzes each of Respondent's arguments contained within his motion for summary judgment and recommends this Court grant Respondent's Motion for Summary Judgment, (ECF No. 9); deny Petitioner's Petition for Writ of Habeas Corpus, (ECF No. 2); and dismiss this matter from the Court's docket.

II. STANDARD OF REVIEW

A. Review of Magistrate Judge's Findings and Recommendations

The Court is required to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). In addition, this Court need not conduct a de novo review when a plaintiff "makes general and conclusory objections that do not direct the Court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In reviewing those portions of the PF&R to which Plaintiff has objected, this Court will consider the fact that Plaintiff is acting *pro se*, and his pleadings will be accorded liberal construction. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978).

B. Habeas Corpus Standard of Review

A federal court may grant habeas relief for a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §

2254(a). "Therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review." *Weeks v. Angelone*, 176 F.3d 249, 262 (4th Cir. 1999), *aff'd*, 528 U.S. 225 (2000).

Section 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides for a deferential standard of review to be applied to any claim that was "adjudicated on the merits" in state court proceedings. In such a case, a federal court may grant habeas relief only if the adjudication of the claim in state court

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d)(1) describes the standard of review to be applied to claims challenging how the state courts applied federal law. "A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Id.* The latter inquiry focuses on whether the state court's application of clearly established federal law was "unreasonable," as distinguished from whether it was "correct." *See Renico v. Lett*, 559 U.S. 766, 773 (2010); *Bell*, 535 U.S. at 694; *Williams v. Taylor*, 529 U.S. 362, 410 (2000).

Section 2254(d)(2) describes the standard to be applied to claims challenging how the state courts determined the facts. "[A] determination of a factual issue made by a State court [is] presumed to be correct," and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The phrase 'adjudication on the merits' in section 2254(d) excludes only claims that were not raised in state court, and not claims that were decided in state court, albeit in a summary fashion." *Thomas v. Taylor*, 170 F.3d 466, 475 (4th Cir. 1999); *see also Harrington v. Richter*, 562 U.S. 86, 98 (2011) (recognizing that § 2254(d) applies even if the state court issued a summary decision unaccompanied by an explanation). The state court determination will be upheld so long as "fairminded jurists could disagree" on its correctness. *Yarbrough v. Alvarado*, 541 U.S. 652, 664 (2004).

C. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure applies to habeas corpus proceedings. *Blackledge v. Allison*, 431 U.S. 63, 81 (1977). This rule provides, in relevant part, that summary judgment should be granted if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Summary judgment is inappropriate, however, if there exist factual issues that reasonably may be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010). When construing such factual issues, the Court may neither weigh the evidence, *Anderson*, 477 U.S. at 249, nor make

determinations of credibility. *Sosebee v. Murphy*, 797 F.2d 179, 182 (4th Cir. 1986). Rather, the Court must view the evidence "in the light most favorable to the [party opposing summary judgment]." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *see also Liberty Lobby*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." (citation omitted)).

The moving party may meet its burden of showing that no genuine issue of fact exists by use of "depositions, answers to interrogatories, answers to requests for admission, and various documents submitted under request for production." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984). Once the moving party has met its burden, the burden shifts to the nonmoving party to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If a party fails to make a sufficient showing on one element of that party's case, the failure of proof "necessarily renders all other facts immaterial." *Id.* at 323.

"[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 256. "The mere existence of a scintilla of evidence" in support of the nonmoving party is not enough to withstand summary judgment; the Court must ask whether "the jury could reasonably find for the plaintiff." *Id.* at 252.

III. DISCUSSION

Petitioner submitted his objections to the Magistrate Judge's PF&R on May 8, 2020. (ECF No. 22.) Thereafter, on June 24, 2020, Petitioner filed a motion for supplemental record, in

which he submits new evidence which he argues supports a finding of "actual innocence." (ECF No. 23.) The Court addresses each of these filings in turn, beginning with Petitioner's objections.

A. Petitioner's Objections to the PFR

Petitioner has raised four objections to the Magistrate Judge's PF&R. First, Petitioner argues that a "state-caused impediment" should have tolled the statute of limitations under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (ECF No. 22 at 3–4.) Next, Petitioner argues that his 2011 resentencing should have restarted the statute of limitations under the AEDPA. (*Id.* at 6–8.) Petitioner also asserts that Respondent, by not raising the issue of timeliness in his Answer, has waived that argument such that it cannot serve as a basis for summary judgment. (*Id.* at 8–10.) Finally, Petitioner argues that because he pursued his rights of appeal with reasonable diligence, he is entitled to equitable tolling because the delays in his appeal were the result of being actively misled by the State. (*Id.* at 10–13.) The Court takes up each of these arguments in turn.

1. Tolling of the AEDPA Statute of Limitations through a State-Caused Impediment

Petitioner's first objection asserts that a "state-caused impediment" should have tolled the statute of limitations under the AEDPA. Petitioner argues that a "pro se petition and letter of collateral review" sent to the Circuit Court of Cabell County, West Virginia on March 19, 2007 should have tolled the AEDPA's statute of limitations. (ECF No. 22 at 3–4.) Yet, Petitioner asserts that only an order appointing counsel and the letter were filed. (*Id.* at 4.) Petitioner contends that "the State interfered by not filing his pro se petition," either through the Circuit Court Judge's failure to submit the petition or the clerk of court's failure to file the "pro se document."

(*Id.*) These failures, according to Petitioner, created a state-caused impediment that should have tolled the statute of limitations imposed by the AEDPA.

The AEDPA establishes that a person in custody pursuant to a judgment by a state court has a one-year period in which to apply for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The AEDPA also provides that the one-year statute of limitations shall be tolled during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending[.]" *Id.* at § 2244(d)(2). Relevant to Petitioner's objection here, the one-year period begins to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action[.]" *Id.* at § 2244(d)(1)(B).

Factually and procedurally, however, Petitioner's objection fails. Petitioner contends the letter sent on March 19, 2007, and filed in the Circuit Court of Cabell County on March 27, 2007, contained a pro se petition. It did not. That letter reads, in its entirety, as follows:

> Your Honor,
>
> I [*sic*] pro se, My request to you is to please appoint me counsel, to process and file my state habeas corpus, and
>
> Furthermore to stop the time on the processing of my Federal habeas corpus, seeing I am without counsel.

(ECF No. 22, Appx. 2-1.) Even a liberal reading of this letter indicates that Petitioner had not yet initiated state habeas proceedings, but rather was requesting counsel in order to initiate a habeas action. The docket entry for this letter confirms as much. The entry for March 27, 2007, states "Order app't Ron Salmons to rep. resp. for purposes of filing a Habeas Corpus petition on his

behalf." (*Id.*, Appx. 1-5.) Furthermore, the request to "stop the time" on Petitioner's federal habeas corpus action was procedurally ineffective: This time is not tolled by request, but is rather automatically tolled upon the filing of a *proper petition*. *See* 28 U.S.C. § 2244(d)(2).

This determination is further supported by the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia. Rule 2 states that all petitions for habeas corpus relief "shall specify: (1) all the grounds for relief which are available to the petitioner; (2) a summary of the facts supporting each of the grounds specified; and (3) a specific statement of the relief requested." W. Va. R. Habeas, R. 2. Petitioner's letter only states that he is requesting counsel for the purpose of filing his petition and to toll the federal statute of limitations.[1] Under the Rules Governing Post-Conviction Habeas Corpus Proceedings, Petitioner's letter was not a proper petition. Because it was not a properly filed petition, the AEDPA statute of limitations was not tolled. This was not a state-caused impediment, but rather a failure by Petitioner to file a proper habeas action.

For the foregoing reasons, Petitioner's objection regarding state-caused impediments and the AEDPA statute of limitations is **OVERRULED**.

2. The Resentencing Order

Next, Petitioner objects to the Magistrate Judge's conclusion that because the resentencing order here was not the result of a successful challenge to the validity of the underlying conviction or sentence, the resentencing order did not operate to restart the one-year period in which Petitioner could file a federal habeas petition. (ECF No. 22 at 6.) Petitioner argues that the resentencing

[1] Rule 2(b) of the Rules Governing Post-Conviction Habeas Corpus Proceedings also provides that if the clerk of a circuit court receives a petition that does not comply with Rule 2 requirements, the clerk may return the petition with a statement of the reason for its return. A plain reading of Petitioner's letter supports that the clerk did not and could not consider the letter a petition, even a poorly-drafted one.

order was the result of "delays, misfilings, and poor handling of Petitioner's State appeal by the lower court[.]" (*Id.*) Petitioner asserts that this resentencing was not ordered "to extend the time for a habeas appeal" because "there was an extension of time order already in place." (*Id.* at 7.)

To begin, Petitioner apparently misconstrues or conflates the nature of the "Order Extending Time to Appeal Conviction," and the resentencing order that allowed him to appeal the denial of his habeas petition in the first place. Admittedly, the procedural history of this specific appeal is somewhat convoluted. The resentencing order, (ECF No. 9–29), however, served to extend the statutorily-granted time in which Petitioner could file an appeal. *See* W. Va. Code § 58-5-4 (providing four months in which to appeal a judgment). The "Order Extending Time to Appeal Conviction," (ECF No. 22, Appx. 4-1), was made by a motion pursuant to the latter portion of § 58-5-4, which provides that judge of the circuit court may "extend or reextend" the original four-month period "for good cause shown, if the request for preparation of the transcript was made by the party seeking such appellate review within thirty days of the entry of such judgment, decree or order." The motion for this extension, filed by Petitioner's counsel, reflects this language: "Petitioner's counsel represents to this Court that transcripts were requested in a timely manner but delivery to counsel was delayed . . . [and] that counsel has had insufficient time to prepare and perfect Petitioner's appeal." (ECF No. 22, Appx. 4-2.)

The Magistrate Judge was correct in her assessment that the resentencing order was issued to provide a reset on the four-month period in which an appeal was to be perfected. The order granting an extension of time merely served as a procedural device by which the original four-month period was extended. This is further evidenced by the Index provided by the Circuit Court of Cabell County, West Virginia. (ECF No. 22, Appx. 10-3–10-6.) Petitioner's original Notice

of Intent to Appeal was filed on August 6, 2010. (*Id.* at Appx. 10-3.) From that point on, the docket is a smattering of various motions and orders to extend time until the resentencing order is reached in May 2011, well over the four-month appeal period and subsequent extensions as allowed by statute. Petitioner did not file his Petition for Appeal from the Circuit Court until June 17, 2011, which was several weeks beyond the Order Extending Time to Appeal Conviction. (*Id.* at Appx. 4-1.) The resentencing order, however, reset the original four-month period to reestablish Petitioner's appellate rights regarding the Circuit Court's order denying his habeas petition.

Furthermore, and again as correctly identified by the Magistrate Judge, Petitioner's resentencing allowed Petitioner to pursue an appeal of a habeas petition, well after his direct appeal had concluded. Courts have generally looked to the nature of the resentencing to determine whether the time period in which a petitioner may raise a challenge to his conviction restarts. *See, e.g.*, *Frasch v. Peguese*, 414 F.3d 518, 522 (4th Cir. 2005) (analyzing whether proceeding employed by the petitioner was "collateral review" as opposed to "direct review" for purposes of determining whether his petition was timely); *Woodson v. Mirandy*, Civ. Action No. 2:15-16254, 2016 WL 7366956 at *6 (S.D. W. Va. Nov. 3, 2016) *report and recommendation adopted* 2016 WL 7366571 (S.D. W. Va. Dec. 19, 2016); *Daniels v. Waid*, No. 2:09-CV-00244, 2011 WL 1043490, at *3 (S.D.W. Va. Mar. 18, 2011). If the nature of the resentencing substantively alters the sentence or otherwise calls into question the validity of the underlying conviction or sentence, courts have generally treated the resentencing as restarting this time period. *Clement v. Ballard*, No. 2:15-CV-02320, 2015 WL 6690158, at *11 (S.D. W. Va. Sept. 22, 2015), *report and recommendation adopted*, 2015 WL 6680893 (S.D. W. Va. Nov. 2, 2015) (finding that where an

amended sentencing order "*substantively* altered" the petitioner's sentence, the period of time within which the petitioner could seek direct review was reopened) (emphasis in original); *Daniels*, 2011 WL 1043490 at *3 (noting that if the petitioner was successful in challenging his sentence under habeas review, a subsequent resentence may "reopen his right to direct review"). Conversely, if the resentencing was merely procedural or unrelated to the merits of the original sentencing and the prisoner's underlying convictions, courts generally decline to extend the statutory deadline. *See, e.g.*, *United States v. Olvera*, 775 F.3d 726, 730 (5th Cir. 2015) ("Because the sentence reduction has no impact on the finality of Olvera's conviction, his motion was untimely[.]"); *Eberle v. Warden, Mansfield Correctional Inst.*, 532 Fed. App'x 605, 610 (6th Cir. 2013) (finding that technical error in original sentence corrected in resentencing did not pertain to underlying conviction nor relate to the basis of plea bargain and therefore did not restart AEDPA statute of limitations); *United States v. Ragin*, 460 F. App'x 282, 282–83 (4th Cir. 2012) ("The district court's amended judgment sentencing [the defendant] to time served does not affect the finality of the court's initial judgment of conviction."); *Murphy v. United States*, 634 F.3d 1303, 1309 (11th Cir. 2011) ("Therefore, a district court's reduction of a term of imprisonment . . . has no impact on the 'finality' of a defendant's 'judgment of conviction' and does not alter the 'date on which the judgment of conviction becomes final' for the purposes of the statute of limitations."); *United States v. Sanders*, 247 F.3d 139, 143 (4th Cir.2001) ("The plain text of § 3582(b) clearly states that [a later sentencing] modification does not affect the date on which [a defendant's] judgment of conviction [becomes] final 'for all other purposes.'"); *Mercer v. Ballard*, No. 2:12-CV-40, 2013 WL 1442841, at *5 (N.D.W. Va. Apr. 9, 2013) ("'However, when . . . the habeas

petition does not challenge the resentencing and only challenges his original conviction, the statute of limitations begins to run from the date that the original judgment of conviction became final.'").

Here, Petitioner's resentencing was solely to permit him more time in which to complete his appeal. Petitioner himself recognizes this, which in effect contradicts his own argument: "[T]he W. Va. Supreme Court ordered the lower court to *re-establish Petitioner's appeal rights*. . . . The Circuit court [*sic*] resentenced Petitioner on an amended judgment on May 20, 2011[.]" (ECF No. 22 at 11 (emphasis added).)

For the foregoing reasons, Petitioner's objection as to the nature of his resentencing order is **OVERRULED.**

3. Waiver of Untimeliness Argument by the State

Petitioner next argues that the State has waived its argument as to untimeliness because it failed to raise the issue in its Answer. (ECF No. 22 at 9.) Further, Petitioner argues that the Magistrate Judge abused her discretion because she "ignore[d] the pro se collateral attack; the compliance with W. Va. Rules Governing Post-conviction habeas proceedings; and the [*sic*] concedes of the State's judgment not to argue, accepting the statutory tolling." (*Id.*)

Petitioner is mistaken on this argument. First, the Ninth Circuit decision upon which Petitioner relies does not support his position. In *Sossa v. Diaz*, the petitioner argued that he relied on a magistrate judge's extension of time to file his habeas petition such that he was entitled to equitable tolling of the statute of limitations. 729 F.3d 1225, 1230 (9th Cir. 2013). While timeliness was indirectly at issue, the heart of that dispute was whether the petitioner had been misled by the magistrate judge's opinion. *Id.* Furthermore, as to the issue of timeliness, the Ninth Circuit stated, "[n]onetheless, the district court could have raised the statute of limitations

issue *sua sponte*, and therefore the State's untimely motion is of no consequence in this case." *Id.* at 1230, n.4. Even if Petitioner was correct in *Sossa*'s holding and application to the matter before the Court, the Court could still raise the timeliness of his petition *sua sponte*.

Regardless, Petitioner is incorrect that the State waived the argument on timeliness and his argument is without merit. In his Answer, Respondent clearly raises the issue of timeliness: "As discussed in the contemporaneously filed Memorandum in Support of Motion for Summary Judgment, Petitioner's § 2254 Petition appears is [*sic*] untimely and should be dismissed pursuant to 28 U.S.C. § 2244(d)." (ECF No. 11 at 1.) Of course, Respondent clearly argued that the statute of limitation had expired in the motion for summary judgment. (*See* ECF No. 14 at 13–16.) Moreover, the Court itself has the authority to raise timeliness *sua sponte*. *See Gleason v. Janice*, No. 3:13-CV-61, 2013 WL 5724066, at *4 (N.D. W. Va. Oct. 21, 2013) ("The statute of limitations is an affirmative defense, but may also be raised by the Court *sua sponte*[.]") (citing *Day v. McDonough*, 547 U.S. 198 (2006)).

Petitioner appears to take issue with Respondent's argument as to untimeliness itself. Petitioner states as follows:

> The critical assessment of the credibility contest against Petitioner shifts the burden by the Magistrate judge [*sic*] without allowing an evidentiary hearing. The State made a strategical decision to argue from the period of resentencing order and conceded to the proper filing of Petitioner's pro se petition.

(ECF No. 22 at 9.) Petitioner then cites to Respondent's argument that his petition is untimely, which, again, is raised directly in Respondent's answer to the petition. Regardless, even if the date of the resentencing order is used, Petitioner's petition would still be untimely, as will be

detailed in the next section. Here, however, because Respondent clearly raised the issue of timeliness in his answer, Petitioner's objection is without merit.[2] (*See* ECF No. 11 at 1.)

For the foregoing reasons, Petitioner's objection as to the nature of his resentencing order is **OVERRULED**.

4. Equitable Tolling

Petitioner's last objection is to the Magistrate Judge's finding that his petition was untimely. (ECF No. 22 at 12.) Petitioner asserts that the delay in filing was due not to his lack of diligence but rather to the "State clerk actively misle[ading] Petitioner with the wrong information concerning the status of his State appeal." (*Id.* at 13.) Petitioner adds that a "state-created impediment" also contributed to this delay because the court failed to notify his counsel, himself, and even the state attorney of the resentencing order. (*Id.* at 11–12.) Because of these "undisputed" failures, (*see id.* at 13), Petitioner asserts that he is entitled to equitable tolling. (*Id.*)

Petitioner again raises the argument that his March 21, 2007 letter served as his pro se habeas petition and that this petition was never filed. (*Id.* at 11.) As the Court has already addressed, this letter did not constitute a properly-filed habeas petition, and therefore did not function to toll the statute of limitations under the AEDPA. Therefore, the time period in which Petitioner could have filed a federal habeas petition expired on June 4, 2007. Beyond arguing that his letter constitutes a habeas petition for the purposes of tolling the statute of limitations, Petitioner does not appear to offer further arguments as to why he should be entitled to equitable

[2] As a final note, Petitioner is not automatically entitled to an evidentiary hearing. Under Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts, the presiding judge retains discretion to determine whether a hearing is warranted if the petition is not dismissed. *See Maynard v. Dixon*, 943 F.2d 407, 411–12 (4th Cir. 1991). *See also Schriro v. Landrigan*, 550 U.S. 465, 468 (2007). Petitioner has failed to demonstrate a factual dispute such that a hearing would be necessary. *See Maynard*, 943 F.2d at 412.

tolling as to the June 4, 2007 deadline. Instead, Petitioner focuses his attention on the May 2011 resentencing order.

Petitioner asserts that neither he nor his counsel was notified of his 2011 resentencing, which he again maintains restarted the AEDPA statute of limitations. In support of this argument, Petitioner submits correspondence between himself and his former counsel—now a judge in the Tenth Family Court Circuit of West Virginia—from 2019. (*Id.* at Appxs. 8, 9.) Notably, this correspondence does not establish that Petitioner or his former counsel were not notified of the resentencing order. Instead, Petitioner states that he has "no recollection" of the resentencing order and asks his former counsel to provide an affidavit stating that notification was not delivered. (*Id.* at Appx. 8–3.) Petitioner's former counsel responded that he was "unable to recall details" of Petitioner's case, would be unable to assist Petitioner on his current claims, and would not answer any further correspondence based on his judgeship. (*Id.* at Appx. 8–1.)

Petitioner argues that the Clerk of Court for Cabell County failed to notify him of this resentencing order. (*Id.* at 12.) In support of this argument, Petitioner attaches a letter from the Clerk. (*Id.* at Appx. 9.) The letter from the Clerk, similar to Petitioner's correspondence with his former counsel, does not advance Petitioner's cause. The Clerk responded to Petitioner as follows:

> In the last line of the order it directs the clerk's office to send certified copies of the order to ALL counsel of record. Attached to the order are FAX confirmation sheets where the order was sent to the facilities where you were being held as well as WV Department of Corrections. The order was sent to your attorney by first class mail and we do not have a notation in your file where it was returned to us because they couldn't deliver it to him. There was no directive to send you a copy.

(*Id.* (emphasis in original).) Petitioner did not attach the fax confirmation sheets or any notification that delivery of the order to his counsel had failed. Instead, he asserts that the

"mailing stamp" affixed to the corner of the Clerk's copy of the order shows that it was not mailed. (*Id.* at 12.) Petitioner further asserts that the index sheet only shows an entry for an order "extending time" on May 20, 2011, and not a resentencing order. (*Id.* at 12; Appx. 10–6.)

The AEDPA statute of limitations may be equitably tolled in limited circumstances. *Holland v. Florida*, 560 U.S. 631 (2010). To show his entitlement to equitable tolling, a petitioner must generally show "(1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstances stood in his way and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The Fourth Circuit has explained that equitable tolling should apply as follows:

> We believe, therefore, that any resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 20000).

Petitioner, however, does not satisfy either prong of the above analysis. First while Petitioner maintains that he was reasonably diligent in pursuing his right to appeal his conviction, Petitioner fails to explain how a nearly 12-year delay in filing his federal petition is reasonable or how any of the alleged failures to notify would constitute extraordinary circumstances that prevented his timely filing. In particular, Petitioner focuses on the May 2011 resentencing order and the alleged failure-to-provide-notice by the clerk of the circuit court. Yet, in making this argument, Petitioner seemingly ignores the procedural timeline following the entries of the Order Extending Time to Appeal Conviction and the resentencing order, which practically undermines his own argument. As already detailed, the Order Extending Time to Appeal Conviction extended the time in which to perfect his appeal to May 31, 2011. (*Id.* at Appx. 4–1.) Petitioner's appeal,

however, was not filed until June 17, 2011, which itself would have been untimely if made pursuant to the Order Extending Time. (ECF No. 19 at 6.) Instead, the appeal was timely filed because of the resentencing order, which reestablished Petitioner's appellate rights on his state habeas petition. Thus, it becomes difficult to see how Petitioner or his counsel lacked notice of a resentencing, when his habeas appeal was filed pursuant to the newly reestablished deadline set by his 2011 resentencing.

Still, Petitioner's argument fails to explain how an alleged failure to notify in May 2011—already nearly five years past the expiration of his federal habeas rights—would entitle him to equitable tolling for eight years, all the while his first state habeas appeal was litigated and while he proceeded with a second state habeas petition. Even if this Court were to accept that the resentencing order restarted the statute of limitations under the AEDPA, Petitioner's habeas was denied on March 7, 2014, nearly three years after the resentencing. (ECF No. 9–39 at 2.) Petitioner was notified of this final decision on his habeas petition on April 9, 2014. (ECF Nos. 6–10 at 2; 17–4 at 59–60.) Petitioner did not take any further action until 2017, when he initiated his second habeas petition in the Circuit Court on May 18. (ECF No. 9–41 at 6.) The instant federal petition was not filed until June 21, 2019. (ECF No. 2 at 16.) Therefore, even if this Court assumes that the resentencing order did restart the statute of limitations under the AEDPA, and even if the Court further assumes as true that Petitioner did not receive notice of his May 2011 resentencing order, Petitioner has still failed to explain how either of those two events would have prevented him from timely filing the instant petition between the period of April 8, 2014, and April 7, 2015, when the statute of limitations under the AEDPA would have expired, or why he waited until 2019 to file his federal habeas. Not only does this demonstrate a lack of diligence on

Petitioner's part, it also fails to explain how an extraordinary circumstance prevented him from timely filing his petition. Simply, Petitioner's objection is without merit.

For the foregoing reasons, Petitioner's objection as to his entitlement to equitable tolling of the statute of limitations under the AEDPA is **OVERRULED**.

B. Petitioner's Motion for Supplemental Record

On June 24, 2020, Petitioner filed a Motion for Supplemental Record. (ECF No. 23.) In this motion, Petitioner requests that the Court supplement the record for Petitioner's habeas corpus petition with an affidavit provided by a witness who had testified against Petitioner at his trial. (*Id.* at 2.) Petitioner asserts that the affidavit, which outlines a witness "under the threat of the Prosecuting attorney" providing false testimony, introduces evidence that the false testimony was so critical to the State's case that without it "no reasonable jury would have convicted [Petitioner] of this crime." (*Id.*)

Pursuant to an order by this Court, Respondent responded to Petitioner's motion. (ECF No. 25.) Respondent argues that the Court should deny Petitioner's motion because Petitioner cannot establish actual innocence based on this affidavit. (*Id.* at 5.) Furthermore, Respondent advises the Court that other courts have viewed recantations of testimony with suspicion. (*Id.* at 3–4, n.1.) Regardless, Respondent contends that even absent this evidence, numerous other witnesses testified at trial, including an eyewitness to the shooting, such that Petitioner cannot establish "actual innocence." (*Id.* at 4–5.)

The Supreme Court of the United States has recognized a limited actual innocence exception to otherwise procedurally barred claims. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986). "[I]n an extraordinary case, where a constitutional violation has probably resulted in the

conviction of one who is actually innocent, a federal habeas court may grant the writ [of habeas corpus] even in the absence of a showing of cause for the procedural default." *Id.* "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). This standard requires a greater showing than simply establishing prejudice. *Id.*

This standard ensures that a "petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." *Id.* (internal citations omitted). A claim of actual innocence "is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). The Supreme Court extended the actual innocence exception to overcome the untimeliness of a petition under the habeas statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) ("[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* . . . or, as in this case, expiration of the statute of limitations.").

Petitioner's motion relies on "newly discovered" evidence in the form of an affidavit from the State's witness, Virginia Heffner, née Bias ("Heffner"), purporting to recant her testimony that Petitioner had told her he had shot and killed someone. (ECF No. 23–1.) Heffner is Petitioner's ex-wife. (*Id.* at ¶ 1.) Heffner states that on or about 2:00 a.m. on January 3, 2003, Petitioner arrived at her home because he needed to speak with her. (*Id.* at ¶ 2.) Heffner states that she "could tell something was wrong with him and that he had been drinking." (*Id.*) Petitioner then asked Heffner if she had "watched the news or anything," to which Heffner replied that she had

not because she was not feeling well and had been at the hospital. (*Id.* at ¶ 3.) Heffner asserts that Petitioner then said, "I think... I... someone was shot because of me and they are dead." (*Id.* at ¶ 4.) Petitioner left a few hours later. (*Id.* at ¶ 5.)

Later that day, Heffner contacted a family friend who, to her knowledge, was "inactive from the Huntington Police Department," and told this individual that she thought "[Petitioner] had shot someone." (*Id.* at ¶ 6.) This individual told her to contact the police. (*Id.*) Heffner was interviewed by a detective after placing the call to the police. (*Id.* at ¶¶ 6–7.) Heffner told the detective that Petitioner had "insinuated" that he had been involved in a shooting. (*Id.* at ¶ 7.) The detective asked Heffner what Petitioner had told her, and she responded that "[Petitioner] said someone had gotten shot and that they were dead." (*Id.*) The detective asked her again, and Heffner responded that Petitioner said he had "shot someone and they are dead." (*Id.*)

Heffner told both the detective and the prosecuting attorney that she did not want to testify. (*Id.* at ¶ 8.) Heffner states that she was not sure what Petitioner had said, and she tried to contact Petitioner's attorney to inform him that her statement to police "wasn't right." (*Id.* at ¶¶ 8, 10.) She further states that she tried to ignore calls from the Prosecutor's office. (*Id.* at ¶ 10.) However, on March 11, 2004, the Prosecutor's office contacted her again, and she told the office that she did not want to testify because "[she] did not believe the statements [she] made were true." (*Id.* at ¶ 11.) Heffner asserts that, in response, the Prosecutor told her that she would be incarcerated and her daughter taken away from her if she refused to testify. (*Id.*)

Then, on March 12, 2004, officers from the Huntington police department served Heffner a subpoena and threatened to "lock her up" if Heffner refused to testify. (*Id.* at ¶ 12.) Under "Police [*sic*] escort," Heffner testified against Petitioner as to the previous statement she had given

detectives. (*Id.*) Heffner states that she had been "afraid and angry" towards Petitioner and that testifying against him "was a way [she] could get even with him and out of my life for good." (*Id.*) Heffner says she was not truthful. (*Id.*) Heffner further states that, through therapy, she was encouraged to forgive herself and to seek forgiveness from others she had hurt, which is why "[she] felt [she] had to write this affidavit." (*Id.*)

Petitioner's motion fails because he cannot establish that the recantation of Heffner's testimony, even if accepted as true, would be sufficient to show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. In this case, Heffner's recantation of testimony consists of retracting "Petitioner said he shot someone," and instead asserting "Petitioner said someone was shot because of him." (ECF No. 23–1 at ¶ 4.) This cannot be said to be an exceptional change of circumstance or an extraordinary change of position. Moreover, this recantation comes over 16 years after the trial and is brought by someone with whom the Petitioner has had a close, personal relationship.[3] Finally, the Court notes that, on cross-examination, Heffner stated that Petitioner had never told her that he shot someone. (ECF No. 9–4 at 137.) Considering this admission during the actual trial, the Court can hardly call Heffner's affidavit a recantation at all.

Still, even if the Court accepts the affidavit, then accepting Petitioner's argument would summarily discard the other evidence upon which the jury could have reasonably concluded that

[3] Furthermore, post-trial recantations of testimony are "looked upon with utmost suspicion." *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973). Suspicion appears to be warranted in this case. A review of the trial transcript reveals several instances of domestic violence in which Petitioner allegedly threatened Heffner with a firearm, and even suggestions by Petitioner that Heffner should not testify. (ECF No. 9–4 at 107–09, 130–31.) Additionally, some behavior from observers within the courtroom prompted Judge Ferguson to issue a warning from the bench to not intimidate witnesses, "[Heffner] especially." (*Id.* at 115.) While the Court does not outright disregard this recantation, it remains leery of the circumstances surrounding this witness and the recantation. *See Johnson*, 487 F.2d at 1279 ("Where the circumstances surrounding the recantation suggest it is the result of coercion, bribery, or misdealing the district court is justified in disregarding it.")

Petitioner was guilty of the alleged crime, including testimony of an eyewitness to the shooting that identified Petitioner as the shooter. Again, establishing "actual innocence" means a petitioner showing "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. For example, State witness Shawn Elmore testified as follows:

> Q: Okay. Now, did anything happen as you come across that curve – around that corner at the Bazaar?
>
> A: Yeah. I seen [*sic*] [Petitioner]. He was walking in front of us and he turned and pulled a black revolver out of his top of his outfit he had on and started shooting.

(ECF No. 9–4 at 154.) Beyond this positive identification of the Petitioner—in the midst of committing the crime—prosecutors also presented evidence to the jury of the Petitioner appearing at the bar near where the shooting took place and being involved in an altercation with the bouncers outside of the establishment, (ECF No. 9–3 at 123); a previous altercation involving the victim and Petitioner, (ECF No. 9–4 at 99); witnesses hearing gunshots, (ECF No. 9–3 at 128, ECF No. 9–4 at 156); an acquaintance of Petitioner contacting him because of the victim's presence at the bar, as well as others with whom Petitioner had fought in the previous altercation, (ECF No. 9–3 at 145–46); an apparent apology from the Petitioner to his acquaintance for shooting while Petitioner's acquaintance was on the scene, (*Id.* at 172);[4] and numerous ballistic, medical, and crime scene reports from the professionals and law enforcement officers working the case. (*See generally* ECF No. 9–3.)

[4] At trial, there was considerable debate between the prosecution and the defense as to the precise meaning of this apology. (*See* ECF No. 9–3 at 150–61.) Regardless, this is simply another piece in a long list of evidence for the jury to consider.

This is not an "extraordinary" case. *See Schlup*, 513 U.S. at 327. The recantation presented by Heffner is hardly a recantation at all, and merely confirms an admission which the defense garnered during trial. In fact, this recantation does not change anything substantively, and it has no effect on the remaining evidence, as demonstrated above. Furthermore, even if this recantation were accepted, it is not of the sort where Petitioner can "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* Heffner's Affidavit simply cannot support Petitioner's claim of actual innocence.

For the foregoing reasons, Petitioner's Motion for Supplemental Record, (ECF No. 23), is **DENIED**.

IV. CONCLUSION

Accordingly, the Court **DENIES** Petitioner's Motion for Supplemental Record, (ECF No. 23); **OVERRULES** Petitioner's objections, (ECF No. 22); **ADOPTS** the PF&R, (ECF No. 19); **GRANTS** Respondent's Motion for Summary Judgment, (ECF No. 9); **DENIES** Petitioner's Amended Petition for a Writ of Habeas Corpus, (ECF No. 2); and **DISMISSES** this action from the docket of the Court. The Court **DIRECTS** the Clerk to remove this case from the Court's active docket.

The Court has also considered whether to grant a certificate of appealability. *See* 28 U.S.C. § 2253(c). A certificate will be granted only if there is "a substantial showing of the denial of a constitutional right." § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this Court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. *See Miller–El v. Cockrell*, 537 U.S. 322, 336–38 (2003); *Slack v. McDaniel*, 529 U.S. 437, 484 (2000); *Rose*

v. Lee, 252 F.3d 676, 683–84 (4th Cir. 2001). Because Petitioner has not made a substantial showing of the denial of a constitutional right in the § 2254 Petition and objections to the PF&R, the Court **DENIES** a certificate of appealability. Pursuant to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254, Petitioner may not appeal the Court's denial of a certificate of appealability, but he may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: September 29, 2020

THOMAS E. JOHNSTON, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JOHN RODNEY JOHNSON,

Petitioner,

v. CIVIL ACTION NO. 2:19-cv-00487

DONNIE AMES,

Respondent.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered on September 29, 2020, the Court **GRANTS** Respondent Donnie Ames's Motion for Summary Judgment, (ECF No. 9), on Petitioner John Rodney Johnson's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, (ECF No. 2). Accordingly, the Court **DISMISSES** this case and **DIRECTS** the Clerk to remove this case from the Court's active docket.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: September 29, 2020

THOMAS E. JOHNSTON, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JOHN RODNEY JOHNSON,

Petitioner,

v. **Case No. 2:19-cv-00487**

DONNIE AMES, Superintendent,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATION

Pending before the Court are the Petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, (ECF No. 2), and Respondent's Motion for Summary Judgment. (ECF No. 9). This matter is assigned to the Honorable Thomas E. Johnston, Chief United States District Judge, and is referred to the undersigned United States Magistrate Judge for submission of proposed findings of fact and recommendations for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B).

After thorough consideration of the record, the undersigned conclusively **FINDS** that Petitioner is not entitled to the relief requested. Therefore, for the reasons that follow, the undersigned respectfully **RECOMMENDS** that the presiding District Judge **GRANT** Respondent's Motion for Summary Judgment, (ECF No. 9); **DENY** Petitioner's Petition for a Writ of Habeas Corpus, (ECF No. 2); and **DISMISS** and **REMOVE** this case from the docket of the court.

I. Relevant Facts and Procedural History

Following a three-day jury trial in the Circuit Court of Cabell County, West Virginia, ("Circuit Court"), on March 12, 2004, Petitioner, John Rodney Johnson ("Johnson"), was found guilty of one count of murder in the first degree in violation of West Virginia Code § 61-2-1. (ECF No. 9-5 at 54). Four days later, the jury was asked to consider whether Johnson should receive a recommendation of mercy, which would allow him to be eligible for parole after serving 15 years in prison. (ECF No. 9-9). The State presented evidence of Johnson's criminal history and testimony from the victim's mother and former girlfriend. (*Id.*, at 33-59). Johnson also presented a number of witnesses in his defense and took the stand to testify regarding the issue of mercy. (*Id.* at 60-79). After retiring for deliberation, the jury returned a verdict declining to grant a recommendation of mercy. (*Id.* at 92). In accordance with the jury's verdict, Johnson was sentenced to life in prison without the possibility of parole, which was memorialized in a sentencing order entered on March 17, 2004. (ECF No. 9-11 at 2-3).

On November 5, 2004, the Circuit Court entered an Order extending the period of time for Johnson to perfect an appeal with the Supreme Court of Appeals of West Virginia ("WVSC"). (ECF No. 9-12). On January 18, 2005, the Circuit Court entered an Order again extending the time within which Johnson could file an appeal. (ECF No. 9-13). On June 6, 2005, the Circuit Court resentenced Johnson in order to allow him to file a timely appeal. (ECF No. 9-14 at 2). Johnson was once more sentenced to life in prison without mercy and additionally ordered to pay a fine of $2,818.20. (*Id.* at 2-3). The resentencing order was entered on June 23, 2005. (*Id.* at 2).

On October 3, 2005, Johnson, through counsel, D. Scott Tyree, submitted an appeal challenging his criminal conviction. (ECF No. 9-15). The appeal raised six

assignments of error:

> 1. The trial court erred by permitting the State to introduce highly prejudicial and improper 404(b) character evidence.
>
> > a. The admission of improper character evidence effectively denied [Johnson] of [sic] a meaningful opportunity to have the jury recommend mercy during the sentencing phase of trial.
>
> 2. The prosecuting attorney stepped outside the boundaries of his quasi-judicial role by making improper, prejudicial and highly inflammatory statements in the presence of the jury.
>
> 3. [Johnson] was denied his Fourteenth Amendment right of due process where the State failed to timely disclose potential[ly] exculpatory evidence.
>
> 4. The [Circuit Court] erred by failing to set aside the verdict due to juror misconduct.
>
> 5. The [Circuit Court] erred by allowing an in-court identification of [Johnson] from an improperly suggestive photographic array: the [Circuit Court] erred by permitting an in court identification of [Johnson] while the witness lacked an independent basis for making the identification.
>
> 6. The [Circuit Court] erred in allowing improper testimony from a fact witness in violation of Rule 602 and 702 of the West Virginia Rules of Evidence.

(ECF No. 9-15 at 15-16). On March 2, 2006, the WVSC refused Johnson's appeal. (ECF No. 9-16 at 2).[1] On August 1, 2007, Johnson filed a petition for writ of habeas corpus in the Circuit Court. (ECF No. 9-18 at 59). On August 5, 2008, Johnson submitted a Renewed Petition for Writ of Habeas Corpus. (ECF No. 9-19 at 2, 73). On January 5, 2009, Johnson, through appointed counsel, Ronald G. Salmons, filed an Amended Habeas Petition, a checklist detailing the claims raised and waived, and a Memorandum in

[1] In a dissenting opinion, two Justices argued that the WVSC should hear the appeal on the merits. Confusingly, the dissenting Justices asserted that the order addressed not a direct appeal, but an "appeal from denial of habeas corpus relief where the original direct appeal was refused." (ECF No. 9-16 at 6-7). The WVSC later described its March 2, 2006 order as an order denying Johnson's "direct appeal." *Johnson v. Ames*, No. 17-0843, 2019 WL 855698, at *1 (W. Va. Feb. 22, 2019). Thus, it appears the dissent's characterization of the nature of the appeal addressed in the March 2, 2006 order was simply an error.

Support of the Amended Habeas Petition. (ECF Nos. 9-20, 9-21, 9-22). Johnson also submitted, without the assistance of counsel, numerous additional claims in a 150-page *pro se* habeas petition. (ECF No. 9-23). Johnson's habeas counsel raised the following claims in the Amended Habeas Petition:

> [1.] [Johnson's] State and Federal due process rights were violated when the State failed to timely disclose potential[ly] exculpatory evidence.
>
> [2.] The cumulative effect of numerous errors committed during trial prevented [Johnson] from receiving a fair trial by an impartial, objective jury as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States and Constitution of West Virginia.
>
> [3.] [Johnson] did not receive effective assistance of counsel as required by both the Constitution of the United States and the Constitution of West Virginia.

(ECF No. 9-22 at 8). Johnson asserted that, with respect to claim 2, the Circuit Court erred in permitting improper character evidence to be admitted; the prosecutor made improper and prejudicial statements during the trial; a juror acted inappropriately by failing to disclose his relationship to Johnson's family; the Circuit Court permitted a defective in-court identification of Johnson; and a witness was allowed to testify as an expert without the necessary qualifications. (*Id.* at 14, 17, 23, 27, 28-29). With respect to claim 3, that his attorney provided defective assistance, Johnson asserted that his attorney failed to conduct a reasonable investigation; neglected to interview crucial witnesses; failed to obtain an independent examiner to study the videotape evidence; failed to obtain telephone records from a State witness; and failed to obtain Johnson's telephone records. (*Id.* at 34).

An evidentiary hearing on Johnson's habeas petition was held in the Circuit Court on March 16, 2010. (ECF No. 9-24 at 2). At the hearing, Johnson presented testimony from Paul A. Billups, his counsel at trial. (*Id.* at 8-9). Mr. Billups testified that, prior to

the trial, he never received records related to cellular phone calls made by a State witness, George Newman. (*Id.* at 12). Mr. Billups further testified regarding various tactics and trial strategies he employed, or declined to employ. (*Id.* at 19-40). Mr. Billups also testified regarding his competency, asserting that he was competent to act as Johnson's attorney during the time of the trial, although he suffered from depression, which affected his ability to act as an attorney at a later date in his career. (*Id.* at 40-42).

Johnson next called Joseph John Holderby, who had served as a juror during Johnson's trial. (*Id.* at 64-65). Mr. Holderby explained that when initially asked during *voir dire* if he knew Johnson, he believed he did not; however, after seeing Johnson's family members he realized he had been friends with Johnson's older brother as a child. (*Id.* at 66-67). Mr. Holderby described a brief conversation he had with Johnson's brother when they met outside the courthouse during Johnson's trial. (*Id.* at 72-75). Mr. Holderby stated that, although he and Johnson's brother discussed the trial, the brother did not attempt to influence Mr. Holderby's decision. (*Id.* at 75). Mr. Holderby asserted that his relationship with Johnson's family made it more difficult to reach a verdict of guilty, and did not prejudice him against Johnson. (*Id.* at 80-84).

Finally, Johnson called Jeffrey Ash, a police officer and former employee at the Wild Dawg Saloon in Huntington, West Virginia. (*Id.* at 88). Mr. Ash testified about statements he made at Johnson's trial regarding what was depicted on a videotape that was entered into evidence at the trial. (*Id.* at 91-97). The matter was then recessed and scheduled to continue on April 7, 2010, for a second day of hearing. (*Id.* at 107).

Following the filing of several discovery motions by Johnson, the hearing was rescheduled. (ECF Nos. 9-17 at 5, 9-25 at 2-12). A second day of evidentiary hearing in the Circuit Court began on June 9, 2010. (ECF No. 9-26 at 2). Johnson first called George

Newman to the stand. (*Id.* at 5). Mr. Newman stated that he gave testimony favorable to the State at trial because he feared he would be charged with perjury if he did not provide the narrative desired by the State. (*Id.* at 6-7). Johnson also offered testimony by Tim Murphy, who was an investigator for the Cabell County prosecutor's office during Johnson's trial. (ECF No. 17-4 at 2-3).

The parties then discussed the pending motions, which included a Motion to Allow Discovery, a Motion to Direct Expansion of the Record, and a Motion for the Court to Facilitate the Hiring of an Expert. (*Id.* at 9). Johnson's counsel explained that the record needed to be expanded in order to show that Johnson's counsel was unfit to practice law at the time of the trial and provided constitutionally defective assistance, as well as to demonstrate that a lay witness supplied an improper expert opinion. (*Id.* at 10-12). After discussing the relevant law, the Circuit Court determined that Johnson had failed to establish that his attorney provided deficient performance, and orally denied Johnson's habeas petition, as well as his pending motions. (*Id.* at 16-20).

On July 8, 2010, the Circuit Court entered an Order denying Johnson's habeas corpus petition. (ECF No. 9-27 at 4). The Circuit Court explained that Johnson had failed to demonstrate he was entitled to relief on any of his claims. (*Id.* at 3). On August 6, 2010, Johnson appealed the Circuit Court's order, contending that the Circuit Court had erred in dismissing his claims. (ECF No. 9-28 at 2-3).

On May 20, 2011, the Circuit Court entered an Order resentencing Johnson in order to allow him to complete his appeal. (ECF No. 9-29 at 2). On June 17, 2011, Johnson submitted a Petition for Appeal from the Circuit Court, arguing that the Circuit Court had erred in denying his habeas petition and had failed to state specific findings of fact and conclusions of law as required by governing state law. (ECF No. 9-30 at 2-3). On

September 19, 2011, the State submitted a brief in response, asserting that the Circuit Court had not erred in dismissing Johnson's habeas petition. (ECF No. 9-31 at 2-4).

On January 12, 2012, the WVSC entered an Order remanding Johnson's habeas petition to the Circuit Court so that it might enter a final order, which contained adequate findings of fact and conclusions of law in accordance with the rules governing habeas corpus proceedings in the State of West Virginia. (ECF No. 17-4 at 35-36). On July 30, 2012, the Circuit Court entered an Amended Final Order denying Johnson's habeas petition. (ECF No. 9-32 at 2). The Circuit Court first determined that, as to Johnson's claim the State improperly withheld exculpatory evidence in the form of Mr. Newman's cellular phone records, the claim was unavailing because the State did disclose the records during the trial and the exculpatory value of the records was insubstantial as Mr. Newman provided favorable testimony for Johnson. (*Id.* at 2-3). Next, the Circuit Court determined that Johnson was not prejudiced by Mr. Holderby's failure to disclose he knew Johnson's family and was not entitled to relief based on this claim. (*Id.* at 3).

Turning to Johnson's assertion that a witness at his trial had offered an improper expert opinion, the Circuit Court found that "as a matter of law" the witness's opinion regarding how colors appear on a black and white videotape was not an expert opinion. (*Id.* at 3-4). Finally, the Circuit Court stated that Johnson had failed to establish that his counsel provided ineffective assistance as he "introduced no evidence whatsoever that call[ed] into questions [sic] the quality of [trial counsel's] representation." (*Id.* at 4). The Circuit Court additionally found that Johnson had failed to show how disciplinary issues facing his defense counsel, which arose from a civil dispute at the time of trial, impaired counsel's ability to present a defense in Johnson's case. (*Id.*).

On October 25, 2012, the Circuit Court entered an identical Second Amended Order denying Johnson's habeas petition. (ECF No. 9-33 at 3-6). A Third Amended Order was entered on February 21, 2013. (ECF No. 9-34 at 2). This order expanded on the reasoning behind the Circuit Court's denial of Johnson's petition, addressing Johnson's claims that improper character evidence was admitted; that the prosecutor made inflammatory statements; and that an improper identification of Johnson was admitted at trial, and finding the claims without merit. (*Id.* at 4-5). The Circuit Court additionally discussed the numerous claims raised by Johnson in a *pro se* brief and found that they too lacked merit. (*Id.* at 7-8).

On March 20, 2013, Johnson submitted a Notice of Appeal to the WVSC. (ECF No. 9-35 at 2). On September 30, 2013, Johnson, through counsel Steven S. Wolfe, submitted his appeal of the Circuit Court's denial of his habeas petition. (ECF No. 9-37 at 2). Johnson raised the following assignments of error:

> [1.] [Johnson's] State and Federal Due Process rights were violated when the State failed to timely disclose potential[ly] exculpatory evidence.
>
> [2.] The cumulative effect of numerous errors committed during [the] trial prevented [Johnson] from receiving a fair trial by an impartial, objective jury as guaranteed by the Sixth and Fourteenth Amendment of the Constitution of the United States and Constitution of West Virginia.
>
> (a). Improper admission of 404(b) evidence[;]
> (b). The prosecuting attorney was permitted to make improper, prejudicial, and highly inflammatory statements in front of the jury[;]
> (c). Juror misconduct[;]
> (d). The [Circuit] Court permitted improper identification of [Johnson;]
> (e). The [Circuit] Court permitted improper testimony from a fact witness[.]
>
> 3. [Johnson] did not receive effective assistance of counsel as required by both the Constitution of the United States and the Constitution of West Virginia.

> 4. The [Circuit] Court erred in denying [Johnson's] Habeas Corpus Petition after two evidentiary hearings on the record elicited support and evidence for [Johnson's] grounds in his Habeas Petition.
>
> 5. The Third Amended Order Denying Habeas Corpus Petition Fails to State Specific Findings of Fact and Conclusions of Law Relating to each contention advanced by [Johnson] in violation of W.Va. Code § 53-4A-7(c) and W.Va. Post-Conviction Habeas Corpus R. 9(c).

(ECF No. 9-37 at 3). In addition, Johnson attached a *pro se* petition in which he presented other arguments asserted without the support of counsel. (*Id.* at 42-43). On November 12, 2013, the State submitted a Brief in Response to Johnson's habeas petition, arguing that the Circuit Court had not erred in dismissing Johnson's petition. (ECF No. 9-38 at 2-5).

The WVSC issued a Memorandum Decision denying Johnson's appeal on March 7, 2014. (ECF No. 9-39 at 2). The WVSC found that, as to Johnson's first claim, he had failed to demonstrate any prejudice stemming from the State's failure to disclose the cellular phone records of Mr. Newman. (*Id.* at 3). With respect to Johnson's claim of cumulative error, the WVSC concluded that the Circuit Court had not erred in determining that the various claims of error did not entitle Johnson to relief when considered either in isolation or cumulatively. (*Id.* at 4). Addressing Johnson's claim that he received ineffective assistance of counsel, the WVSC held that Johnson had failed to demonstrate that his counsel's performance was "deficient under an objective standard of reasonableness or that there was a reasonable probability that but for counsel's errors, the result of the proceedings would have been different." (*Id.*). Finally, the WVSC found that the Circuit Court had not erred in denying Johnson's habeas petition and had provided adequate factual findings and conclusions of law in its Third Amended Order with respect to the claims raised by Johnson's counsel, as well as Johnson's "*pro se* contentions." (*Id.* at 5).

More than three years later, on May 18, 2017, Johnson submitted a second petition for habeas corpus relief in the Circuit Court. (ECF No. 9-41 at 6). In the petition, Johnson asserted the following claims:

> 1. Improper 404(b) Evidence.
> Supporting Facts: Where the [Circuit Court] assisted the prosecution in determining the use of the evidence failed [in] his role as a neutral arbiter, by relieving the State's burden to present 404(b) evid[ence] and ruled arbitrar[ily] [and] unjust[ly] without [finding a] preponderance of evidence to dictate the probative value.
>
> 2. Burden Shifting Jury Instruction.
> Supporting Facts: The [Circuit Court] and State's prosecuting attorney shifted the burden to [Johnson] by inferring that [Johnson] must present an alibi that would [contest] the State's theory of the crime at trial.
>
> 3. Prosecutorial Misconduct.
> Supporting Facts: The State's attorney violated [Johnson's] rights to a fair trial by interjecting race and improper comments to prejudice the jury against [Johnson] for the sole purpose [of] inflam[ing] the jury for conviction.

(ECF No. 9-41 at 4). Johnson additionally raised claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. (*Id.* at 4-5). On August 24, 2017, the Circuit Court entered an Order denying Johnson's second habeas petition. (ECF No. 9-42 at 2). The Circuit Court concluded that all of Johnson's claims, with the exception of his claim of ineffective assistance of appellate counsel, were subject to dismissal under the doctrine of *res judicata* as they were known, or with reasonable diligence could have been known, by Johnson at the time of his initial habeas petition and omnibus hearing. (*Id.* at 5). Addressing Johnson's claim that both his habeas and direct appellate attorneys provided ineffective assistance of counsel, the Circuit Court concluded that Johnson's allegations regarding his attorneys' unresponsiveness did not rise to the level of a constitutional violation. (*Id.* at 5-6). Finding that Johnson's claims plainly did not entitle him to relief, the Circuit Court denied the petition without holding a hearing. (*Id.* at 7).

On September 22, 2017, Johnson filed with the WVSC a Notice of Appeal of the Circuit Court's order denying his second habeas petition. (ECF No. 9-43 at 2). Subsequently, Johnson submitted a brief to the WVSC raising the following claims:

> [1.] The [Circuit Court] abused its discretion, arrived at a clearly erroneous finding, and disregarded the law, by summarily dismissing grounds (1) through (9) and (11) of [Johnson's] Habeas Corpus Claim for Relief.
>
> [2.] The [Circuit Court] abuse[d] its discretion by permitting the State to introduce highly prejudicial and improper character evidence against [Johnson] under the guise of evidence necessary under Rule 404(b).
>
> [3.] The [Circuit Court] violated [Johnson's] Fifth and Fourteenth Amendment rights to due process by an abuse of discretion by giving an insufficient jury instruction which shifted the burden of proof on malice and specific intent to kill.
>
> [4.] [The] prosecutorial misconduct[,] [consisting of] interjecting racial, inflammatory, prejudicial and improper comments, violating federal and state constitutional due process rights, [resulted in] [Johnson's] trial [being] fundamentally unfair.
>
> [5.] The [Circuit Court] abuse[d] its discretion by failing to remove an impartial [sic] juror and setting aside the verdict due to juror misconduct where disqualifying information was intenti[on]ally withheld from the [Circuit Court].
>
> [6.] The [Circuit Court] abused its discretion in presenting [Johnson] before the jury in handcuffs, shackles[,] and prison attire during the litigation's [sic] of trial and the sentencing phase of his trial.
>
> [7.] Where a fair cross-section of community on jury selection was in direct violation of West Virginia Constitutional, Article III, § 10; [Johnson] was denied his constitutional right to equal protection, mandating reversal of his conviction.
>
> [8.] [Johnson] was denied effective assistance of counsel [when] the defense counsel[] fail[ed] to investigate, interview witnesses, disclose evidence[,] and [gave] misadvise that led to a plea offer's lapse[;] [this deficient performance] violated [Johnson's] due process rights of equal protection.
>
> [9.] [Johnson] was denied effective assistance of post[-conviction] counsel where the appellate counsel denied [Johnson] the right to assist in the production on his habeas corpus petition of appeals.

> [10.] The cumulative effect of numerous errors committed during trial and post-trial prevented [Johnson] from receiving a fair trial by an impartial, objective jury and full post-conviction habeas corpus appeals as guaranteed by the Sixth and Fourteenth Amendments of the United States and West Virginia Constitution.
>
> [11.] The Order denying Omnibus Habeas Corpus Petition fails to state specific findings of fact and conclusions of law relating to each contention advanced by [Johnson] in violation of W.Va. Code § 53-4A-7(c) and W.Va. Post-Conviction Habeas Corpus Proc. R. 9(c).

(ECF No. 9-44 at 3-4). The State submitted a brief in response on January 31, 2018, contending that Johnson failed to demonstrate that the Circuit Court's dismissal of his second habeas petition should be overturned. (ECF No. 9-45 at 2-4). Johnson filed a reply brief on February 23, 2018, disputing the State's contentions and asserting that he was entitled to relief. (ECF No. 9-46 at 2, 9).

On February 22, 2019, the WVSC issued a Memorandum Decision, affirming the decision of the Circuit Court. (ECF No. 9-47 at 2). The WVSC found that "the doctrine of *res judicata* generally bars [Johnson] from re-raising the grounds for relief from his first proceeding." (*Id.* at 3). The WVSC further determined that the only claims not barred by the application of this doctrine were Johnson's claims that (1) his habeas counsel provided ineffective assistance; (2) the jury venire was not drawn from a fair cross-section of the community; and (3) Johnson was improperly shackled and made to wear prison attire during the sentencing phase of his trial. (*Id.*).

The WVSC held that Johnson's claim regarding a racially unbalanced jury pool was unavailing as he failed to demonstrate that the representation of African Americans in the jury venire was not proportional to the number present in the community and failed to show that any under-representation was due to "systemic exclusion" orchestrated by the State. (ECF No. 9-47 at 3-4). The WVSC also rejected Johnson's claim that he was

improperly shackled and forced to wear prison attire at the penalty phase of his trial, pointing out that the record clearly showed the necessity of restraints given Johnson's outburst and struggle with courthouse security following the jury's verdict. (*Id.* at 4). Finally, the WVSC turned to Johnson's claim that his habeas attorneys provided ineffective assistance noting that "the crux of [Johnson's] ineffective assistance claims is that his habeas attorney and his habeas appellate attorney failed to adequately consult with him in the prior proceeding." (*Id.* at 5). The WVSC determined that, as to both habeas counsel and habeas appellate counsel, the record revealed that the Circuit Court did not err in finding the attorneys' performance was constitutionally sufficient. (*Id.* at 5). The WVSC accordingly affirmed the judgment of the Circuit Court denying Johnson's second habeas petition. (*Id.*).

On June 21, 2019, Johnson submitted the instant § 2254 petition in this Court. (ECF No. 2 at 16). In the petition, Johnson raised five grounds for relief, while reserving "the right to add a full memorandum of law to fully support his contentions of error." (*Id.* at 6). The grounds raised are as follows:

> **Ground One:** Prosecutorial Misconduct[:]
> Supporting Facts: Where the prosecutor's misconduct interjecting racial, inflammatory, prejudicial and improper comments, violating federal and state constitutional due process rights, [resulted in Johnson's] trial [being] fundamentally unfair. The State's Attorney violated [Johnson's] rights to a fair trial by interjecting race and making improper comments to prejudice the jury against [Johnson] for the sole purpose to inflame the jury [and obtain a] conviction by accusing [Johnson of being] racist.
>
> Ground Two: Improper 404(b) Evidence[:]
> Supporting Facts: The [Circuit] Court abused its discretion by permitting the [S]tate to introduce irrelevant, highly prejudicial and improper character evidence against [Johnson] under the guise of evidence necessary under rule 404(b) evidence. Where the [Circuit Court] assisted the prosecution in determining the use of the evidence failed [in] his role as a neutral arbiter, by relieving the State's burden to independently present 404(b) evidence and ruled arbitrar[ily] [and] unjust[ly] without [finding by

> the] preponderance of evidence [that] the probative value outweighed the prejudice of the evidence.
>
> Ground Three: Burden Shifting Jury Instruction[:]
> Supporting Facts: The [Circuit Court] violated [Johnson's] [F]ifth and [F]ourteenth amendment rights to due process [in] an abuse of discretion by giving an insufficient jury instruction which shifted the burden of proof of malice and specific intent to kill. The [Circuit Court] and State's prosecuting attorney shifted the burden to [Johnson] by inferring that [Johnson] must present an alibi testimony, that would [contest] the State's theory of the crime at trial.
>
> Ground Four: Juror Misconduct[:]
> Supporting Facts: The [Circuit Court] abuse[d] its discretion by failing to remove an impartial [sic] juror and setting aside the verdict due to juror misconduct where disqualifying information was intentionally withheld from the [Circuit Court]. Where a juror had []knowledge that he had connections with [Johnson's] family and informed the other jurors on the panel of this information, but ... failed to disclose this information to the [Circuit Court] to remain on the juror panel.
>
> Ground Five: Unconstitutionally Presented in Restraints and Prison Attire During Critical Stages of Trial[:]
> Supporting Facts: The [Circuit Court] abused its discretion in presenting [Johnson] before the jury in handcuffs, shackles[,] and prison attire during the litgation's [sic] of trial and the sentencing phase of his trial. Where before the completion of reading the verdict of [Johnson's] trial he was placed in restraints and the [Circuit Court] order[ed] the jur[y] to continue to deliberate. And, following over an objection by [Johnson] he was placed in restraints and clothed in prison attire during the sentencing phase of trial.

(ECF No. 2 at 7-11). On July 5, 2019, Johnson submitted a Memorandum Brief of Law in which he expounds upon his grounds for relief. (ECF No. 6 at 2). In the brief, Johnson asserts that his habeas appellate counsel proved unresponsive, and when Johnson attempted to learn the status of his habeas appeal, he was misinformed by state employees that the case was still pending--although it had already been denied—leading to the expiration of the time he had to file a federal habeas petition. (*Id.* at 10). Johnson asserts that due to the numerous errors which occurred during his trial, he was convicted in

violation of due process and asks this Court to reverse his conviction and order a new trial. (*Id.* at 47).

On September 16, 2019, Respondent submitted an Answer to Johnson's petition, as well as a Motion for Summary Judgment and an accompanying Memorandum in support. (ECF Nos. 9, 10, 11). In the supporting memorandum, Respondent argues that Johnson's petition should be dismissed as it was filed after the expiration of the statutory deadline for petitions filed under Section 2254. (ECF No. 10 at 13). Respondent additionally addresses Johnson's arguments on the merits and contends that the decisions of the state courts denying his claims should not be overturned. (*Id.* at 16-32). Respondent subsequently filed an Amended Memorandum in support of the Motion for Summary Judgment. (ECF No. 14).

On January 10, 2020, Johnson submitted a Response in opposition to Respondent's motion for summary judgment.[2] (ECF No. 17). In the response, Johnson asserts that Respondent "has not presented evidence which shows, at minimum, there is no dispute of material fact" with respect to Johnson's alleged failure to file his petition within the statutory deadline. (*Id.* at 2). Johnson also objects to Respondent's reliance on the resentencing order of the Circuit Court, which was entered on May 20, 2011, asserting that the order "has no record that it was delivered nor that [Johnson] was aware of such order." (*Id.* at 3). Johnson states that because he disputes Respondent's contention that the petition is untimely, summary judgment is inappropriate. (*Id.* at 2-3).

II. Standard of Review

Here, Respondent moves for summary judgment. (ECF No. 9). Summary judgment

[2] Johnson refers to an "Opposition of motion for summary judgment and Memorandum in Support" in which he expands on his arguments. (ECF No. 17 at 3). The undersigned was unable to find these referenced documents in the numerous attachments submitted by Johnson.

under Rule 56 of the Federal Rules of Civil Procedure "applies to habeas proceedings." *Brandt v. Gooding*, 636 F.3d 124, 132 (4th Cir. 2011) (quoting *Maynard v. Dixon*, 943 F.2d 407, 412 (4th Cir. 1991)). The court will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] fact or facts are material if they constitute a legal defense, or if their existence or nonexistence might affect the result of the action, or if the resolution of the issue they raise is so essential that the party against whom it is decided cannot prevail." Charles Alan Wright, Arthur R. Miller &, Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2725 (3d ed. 2005). On the other hand, a fact is not material when it is of no consequence to the outcome, or is irrelevant in light of the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Assertions of material facts must be supported by "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). In addition, only genuine disputes over material facts "will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). A dispute is "genuine" when "there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party." *Cox v. Cty. of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001) (citing *Anderson*, 477 U.S. at 248).

Motions for summary judgment impose a heavy burden on the moving party, as it must be obvious that no material facts are in dispute and no rational trier of fact could find for the nonmoving party. *See Miller v. F.D.I.C.*, 906 F.2d 972, 974 (4th Cir. 1990).

Nonetheless, the "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent entry of summary judgment. *Anderson,* 477 U.S. at 252. While any permissible inferences to be drawn from the underlying facts "must be viewed in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting *Anderson*, 477 U.S. at 249–50).

III. Discussion

1. Statute of limitations

The Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which governs state prisoners' ability to raise claims in federal habeas review, contains a one-year statute of limitations within which a state prisoner may file a federal habeas corpus petition. 28 U.S.C. § 2244(d)(1). The one-year limitation period begins to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. Section 2244(d)(2) clarifies that the running of the one-year period is suspended for any time that a "properly filed" state post-conviction proceeding "is pending." *Id.* §

2244(d)(2). The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has construed a state post-conviction proceeding to include all state court proceedings "from initial filing [in the trial court] to final disposition by the highest state court." *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999). Upon final disposition of the state post-conviction proceeding, "the running of the § 2244(d) one-year period resumes." *Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000). In other words, the one-year period begins at the conclusion of direct review, but is statutorily tolled if collateral proceedings are initiated in state court. Once collateral state court proceedings conclude, the limitation period begins to run again from the point at which it was tolled by initiation of the collateral proceedings.

i.) Proceedings following the conclusion of direct review

Johnson's sentence was entered on March 17, 2004. (ECF No. 9-11 at 2-3). His direct appeal concluded on March 2, 2006, when the WVSC denied Johnson's appeal. (ECF No. 9-16 at 2). Johnson then had ninety days in which to seek a *writ of certiorari* from the Supreme Court of the United States. Sup. Ct. R. 13(1). Johnson did not seek such a writ, meaning his conviction became final on June 1, 2006.[3] The AEDPA's statute of limitations thus began to run and expired on June 4, 2007, one year after the conviction became final. Johnson filed a state habeas petition on August 1, 2007, (ECF No. 9-18 at 59); however, because the AEDPA statute of limitations had already expired, this, and any subsequent petition, did not toll the statute of limitations. *See Stutts v. Stevenson*, No. 8:11-CV-00191-TMC, 2012 WL 4479150, at *19 (D.S.C. June 15, 2012), *report and recommendation adopted*, No. CA 8:11-191-TMC, 2012 WL 4479126 (D.S.C. Sept. 28,

[3]Under Federal Rule of Civil Procedure 6(a), the one-year limitation period commences the day after the event triggering the period. *See Hernandez v. Caldwell*, 225 F.3d 435, 439 (4th Cir. 2000).

2012).

While Johnson's statutory period for filing a § 2254 petition expired before he filed his state habeas petition, the issue is complicated by the fact that the Circuit Court resentenced him on May 20, 2011, in order to grant him more time to complete his appeal of the Circuit Court's order denying his habeas petition. (ECF No. 9-29 at 2). West Virginia courts occasionally resentence defendants in order to grant them an additional four months to file an appeal. *Harper v. Ballard*, No. CIV.A. 3:12-00653, 2013 WL 285412, at *4 (S.D.W. Va. Jan. 24, 2013) (citing *Johnson v. McKenzie*, 235 S.E.2d 138 (W.Va.1977)). The AEDPA provides that the statutory limitations period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

This Court has previously considered the effect a resentencing order for the purpose of perfecting a direct appeal has on the AEDPA's statute of limitations. *Harper*, No. CIV.A. 3:12-00653, 2013 WL 285412, at *5. In that case, the petitioner had been resentenced multiple times in the course of a somewhat convoluted path to his direct appeal which was frequently interrupted by *pro se* motions and habeas petitions. *Id.* at *4. If the initial date of sentencing was used, the petitioner's federal habeas petition was clearly untimely. *Id.* However, as the petitioner had been resentenced in order to allow him more time to perfect his appeal, this Court was confronted with the question of whether this resentencing order restarted the running of the statutory period of limitations. *Id.* In holding that the resentencing procedure did have such an effect, this Court noted that:

> Direct review cannot conclude for purposes of this statute until the availability of direct appeal to the state courts, and to the Supreme Court, has been exhausted. Until that time, the process of direct review has not

> come to an end and a presumption of finality and legality cannot yet have attached to the conviction and sentence.

Id. (citing *Jimenez v. Quarterman*, 555 U.S. 113, 119-20 (2009)). Accordingly, this Court concluded that when the state court "resentenced [the petitioner] to give him an opportunity to file a timely direct appeal, that action rendered the judgment not final for purposes of the AEDPA. The statute of limitations began to run at [the petitioner's] last resentencing." *Id.* at *6. This Court has continued to adhere to this determination, holding that a resentencing order permitting a petitioner to complete his direct appeal effectively restarts the clock with respect to AEDPA's statute of limitations. *See e.g. Woodson v. Mirandy*, No. CV 2:15-16254, 2016 WL 7366956, at *6 (S.D.W. Va. Nov. 3, 2016), *report and recommendation adopted*, No. CV 2:15-16254, 2016 WL 7366571 (S.D.W. Va. Dec. 19, 2016) ("The undersigned, however, finds that Respondent's above arguments are incorrect because [the petitioner's] resentencing restarted the clock for purposes of AEDPA's one-year limitation period.").

The above cases do not squarely address the issue presented here, however, as those cases considered whether a resentencing order which allowed the petitioner to pursue his *direct appeal* had the effect of restarting the statutory period. In this case, the resentencing order at issue was entered to allow Johnson to pursue an appeal of a habeas petition after his direct appeal had concluded, and the AEDPA statute of limitations had expired. Courts confronted with similar questions have generally looked at the nature of the resentencing at issue, as well as the nature of the challenge raised. *See Frasch v. Peguese*, 414 F.3d 518, 523-25 (4th Cir. 2005) (analyzing whether proceeding employed by the petitioner was "collateral review" as opposed to "direct review" for purposes of determining whether his petition was timely). Courts often decline to extend the statutory

time periods where direct review has concluded, and a resentencing order was procedural or unrelated to the merits of the defendant's underlying convictions and sentence. *See Murphy v. United States,* 634 F.3d 1303, 1313 (11th Cir. 2011) (distinguishing resentencing reduction procedure at issue where "it is impossible for the validity of the underlying conviction, and, indeed, of the sentence itself to be at issue" from case which "dealt with a defendant who was resentenced after his sentence was declared invalid") (quotations and citations omitted); *United States v. Ragin,* 460 F. App'x 282, 282–83 (4th Cir. 2012) ("The district court's amended judgment sentencing [the defendant] to time served does not affect the finality of the court's initial judgment of conviction."); *United States v. Sanders,* 247 F.3d 139, 143 (4th Cir.2001) ("The plain text of § 3582(b) clearly states that [a later sentencing] modification does not affect the date on which [a defendant's] judgment of conviction [becomes] final 'for all other purposes.'"); *Mercer v. Ballard,* No. 2:12-CV-40, 2013 WL 1442841, at *5 (N.D.W. Va. Apr. 9, 2013) ("'However, when ... the habeas petition does not challenge the resentencing and only challenges his original conviction, the statute of limitations begins to run from the date that the original judgment of conviction became final.'") (quoting *Williams v. Florida,* 221 Fed. Appx. 867, 870 (11th Cir.2007)).

By contrast, where the resentencing procedure at issue calls into question the validity of the underlying sentence or conviction in some way, courts have generally treated the resentencing as restarting the period of time within which a petitioner may raise a challenge to the conviction in question. *See Daniels v. Waid,* No. 2:09-CV-00244, 2011 WL 1043490, at *3 (S.D.W. Va. Mar. 18, 2011) (noting that if the petitioner were to be successful in challenging his sentence under habeas review and was granted a resentence, the resentence may "reopen his right to direct review"); *Clement v. Ballard,*

No. 2:15-CV-02320, 2015 WL 6690158, at *11 (S.D.W. Va. Sept. 22, 2015), *report and recommendation adopted*, No. 2:15-CV-02320, 2015 WL 6680893 (S.D.W. Va. Nov. 2, 2015) (finding that where an amended sentencing order "*substantively* altered" the petitioner's sentence, the period of time within which the petitioner could seek direct review was reopened) (emphasis original).

The resentencing at issue in this case is fundamentally unlike those which have been held to extend the statutory deadline imposed by the AEDPA. When a defendant is resentenced to allow him to pursue a direct appeal, the judgment has not yet become final, because the "availability of direct appeal" has not yet "been exhausted." *Harper*, No. CIV.A. 3:12-00653, 2013 WL 285412, at *4. Here, by contrast, rather than being imposed to allow Johnson to complete his direct appeal before judgment had become final, the resentencing order was imposed in order to extend the time within which he could complete a habeas appeal *after* the conclusion of direct review, and after the AEDPA deadline had expired. Moreover, the resentencing at issue was not the result of a successful challenge to the validity of the underlying conviction or sentence. Instead, it was imposed solely to grant Johnson more time within which to file a habeas appeal. (ECF No. 9-29 at 2). The fact that West Virginia courts choose to take the somewhat peculiar course of entering a new sentence, rather than merely extending the filing period within which defendants may seek to appeal adverse decisions, does not mean that a resentencing order which takes place well after the conviction became final should be taken to restart the statutory deadline after it has expired. Accordingly, the undersigned **FINDS** that as the statutory deadline within which Johnson could have raised a federal habeas petition expired in June 2007, his petition is untimely.

ii. Proceedings subsequent to May 20, 2011 sentencing order

Both Respondent and Johnson focus their timeliness arguments on the time period following the conclusion of Johnson's first habeas petition. (ECF Nos. 6 at 10, 14 at 14). Respondent assumes that the May 20, 2011 resentencing order restarted the time period within which Johnson could submit a federal habeas petition. (ECF No. 14 at 14).[4] Even assuming that the May 20, 2011 resentencing order did in fact restart the statutory deadline for the purposes of filing a federal habeas petition, Johnson's § 2254 petition would still be untimely. Johnson's first habeas petition was denied on March 7, 2014. (ECF No. 9-39 at 2). Neither party included the Mandate finalizing this decision, however, correspondence between Johnson and Peggy Spalding, assistant clerk within the Office of the Clerk for the Supreme Court of Appeals, reveals that Johnson was informed that his habeas petition had been denied on April 9, 2014. (ECF Nos. 6-10 at 2, 17-4 at 59-60). The documents attached to this correspondence indicated to Johnson that his appeal had been denied on March 7, 2014, and the Mandate had been issued on April 7, 2014. (ECF No. 17-4 at 60).

Johnson did not initiate any subsequent proceeding until more than three years later, when on May 18, 2017, he submitted a second petition for habeas corpus relief in the Circuit Court. (ECF No. 9-41 at 6). Johnson did not file the instant federal petition until June 21, 2019. (ECF No. 2 at 16). Thus, even when assuming that the resentencing order entered on May 20, 2011 restarted the statutory period imposed by the AEDPA, the statute of limitations would have started to run on April 8, 2014 and would have expired on April 7, 2015. Accordingly, the record is clear that Johnson's one-year limitation period

[4] Johnson objects to Respondent's reliance on the resentencing order, but his basis for doing so is unclear. He argues that nothing in the record establishes his receipt of the resentencing order. However, this has little bearing on the issue of timeliness after the conclusion of his first habeas petition. (ECF No. 17 at 3).

under the AEDPA expired well before he filed his second state habeas petition and his federal petiton. As such, the undersigned **FINDS** that Johnson's federal petition was filed after expiration of the one-year statutorily mandated deadline and, consequently, is untimely.

2. Equitable tolling

Johnson asserts that his habeas appellate counsel proved unresponsive, and when Johnson attempted to learn the status of his habeas appeal, he was misinformed by state employees that the case was still pending. (ECF No. 6 at 10). Johnson states that he was subsequently informed of the mistake, but by the time this error was corrected, the time for filing a federal habeas petition had expired. (*Id.*). Although the explanation provided by Johnson regarding why he was unable to submit a timely petition ignores the fact that more than one year elapsed between the conclusion of his direct review and the submission of his first state habeas petition, the undersigned will briefly consider Johnson's assertion that matters outside of his control prevented him from filing a timely federal habeas petition.

The one-year limitations period may be tolled in "'those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation against the party.'" *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (quoting *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003)). The doctrine of equitable tolling is available only in extraordinary cases and only when the petitioner has diligently pursued his rights. Garden variety attorney negligence, lack of knowledge regarding the law, and *pro se* status are all insufficient grounds to justify equitable tolling. *See Lanahan v. Helsel*, No. CV JFM-15-2133, 2016 WL 4742231, at *2 (D. Md. Sept. 8, 2016) (citations omitted); *see also Barrow v. New Orleans S.S. Ass'n*, 932 F. 2d 473, 478

(5th Cir. 1991) (refusing to apply equitable tolling where the delay in filing was the result of petitioner's unfamiliarity with the legal process or his lack of legal representation); *Rouse v. Lee*, 339 F.3d 238,248-49 (4th Cir. 2003) (negligent mistake by party's counsel in interpreting AEDPA statute of limitations does not present extraordinary circumstances warranting equitable tolling); *Smith v. McGinnis*, 208 F.3d 13, 18 (2nd Cir. 2000) (*pro se* status does not establish sufficient ground for equitable tolling); *Felder v. Johnson*, 204 F.3d 168, 171-73 (5th Cir. 2000) (lack of notice of AEDPA amendments and ignorance of the law are not rare and exceptional circumstances that warrant equitable tolling). Moreover, the petitioner must "demonstrate a causal relationship between the extraordinary circumstance on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the circumstances." *Britt v. Commonwealth of Virginia*, No. 1:15CV1581, 2016 WL 1532238, at *3 (E.D. Va. Apr. 14, 2016) (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)).

Johnson asserts that he inquired regarding the status of his habeas appeal and was incorrectly informed that it was still pending. Johnson alleges that, while this misinformation was subsequently corrected, the delay led to the expiration of his time for filing a federal habeas petition. (ECF No. 6 at 10). Johnson attaches a letter from the Assistant Clerk of the WVSC documenting that, at one point, Johnson was inadvertently provided the docket sheet of another prisoner. However, the same letter, dated April 9, 2014, encloses Johnson's docket sheet and the March 2014 Memorandum Decision entered by the WVSC, which definitely informed Johnson that his first habeas petition had been denied and that the Mandate was filed on April 7, 2014. This letter undoubtedly corrected any misapprehension regarding the status of his appeal. (ECF No. 17-4 at 59).

Johnson does not explain why he waited over three years to submit a second state habeas petition, and over five years to submit his federal petition after being informed that his appeal was denied. As the record reveals that any misinformation conveyed to Johnson regarding the status of his appeal was swiftly corrected, Johnson has not demonstrated that he was subject to "extraordinary circumstances beyond [his] control" which prevented him from filing a timely federal habeas petition. *Rouse*, 339 F.3d at 246,

Johnson does not contend that his petition falls under any of the alternative triggering provisions contained in § 2244(d)(1).[5] Accordingly, as Johnson's federal petition is clearly untimely, and he is not entitled to proceed under the equitable tolling exception to the statutory deadline, the undersigned **FINDS** that Johnson's petition should be denied as it is barred by the AEDPA's statute of limitations.

IV. Proposal and Recommendations

The undersigned respectfully **PROPOSES** that the presiding District Judge confirm and accept the foregoing findings and **RECOMMENDS** the following:

1. Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, (ECF No. 2), be **DENIED**;

2. Respondent's Motion for Summary Judgment (ECF No. 9), be **GRANTED**;

3. This action be **DISMISSED, with prejudice.**

The parties are notified that this "Proposed Findings and Recommendations" is hereby **FILED**, and a copy will be submitted to the Honorable Thomas E. Johnston, Chief

[5] Johnson additionally does not contend that he is eligible to overcome the statutory barrier presented by the AEDPA's one-year deadline pursuant to the "actual innocence" exception. To the extent he was to attempt to do so, he would be unable to, as the claims he raises are not "newly discovered" and were known to him years before he submitted the instant § 2254 petition. *See Barnett v. Quintana*, No. 5:18-CV-00279, 2018 WL 7078579, at *12 (S.D.W. Va. Dec. 18, 2018), *report and recommendation adopted*, No. 5:18-CV-00279, 2019 WL 267731 (S.D.W. Va. Jan. 18, 2019), *aff'd*, 770 F. App'x 94 (4th Cir. 2019).

United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and three days (if received by mail) from the date of filing this "Proposed Findings and Recommendations" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendations" to which objection is made and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown. Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to the opposing parties, Chief Judge Johnston, and Magistrate Judge Eifert.

The Clerk is instructed to provide a copy of this "Proposed Findings and Recommendations" to Petitioner and counsel of record.

FILED: April 2, 2020

Cheryl A. Eifert
United States Magistrate Judge

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