

FILED: September 8, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6089
(6:20-cv-03336-DCN)

KEVIN HERRIOTT

Petitioner - Appellant

v.

WARDEN, MCCORMICK CORRECTIONAL INSTITUTION

Respondent - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Diaz, Judge Quattlebaum, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-6089

KEVIN HERRIOTT,

Petitioner - Appellant,

v.

WARDEN, MCCORMICK CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. David C. Norton, District Judge. (6:20-cv-03336-DCN)

Submitted: May 25, 2021

Decided: May 28, 2021

Before DIAZ and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Kevin Herriott, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin Herriott seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing Herriott's 28 U.S.C. § 2254 petition for lack of exhaustion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

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

DISMISSED

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

Kevin E. Herriott,)	C/A No. 6:20-cv-3336 DCN
)	
Petitioner,)	<u>ORDER</u>
)	
vs.)	
)	
Warden McCormick Correctional,)	
)	
Respondent.)	
_____)	

The above referenced case is before this court upon the magistrate judge's recommendation that the petition be dismissed without prejudice and without requiring respondent to file a return. It was further recommended that a copy of the order and judgment adopting this recommendation be sent to the South Carolina Court of Appeals.

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend for the district court to review the factual and legal conclusions of the magistrate judge. Thomas v Arn, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).¹ **Objections to the magistrate judge's report and**

¹In Wright v. Collins, 766 F.2d 841 (4th Cir. 1985), the court held "that a pro se litigant must receive fair notification of the consequences of failure to object to a magistrate judge's report before such a procedural default will result in waiver of the right to appeal. The notice must be 'sufficiently understandable to one in appellant's circumstances fairly to appraise him of what is required.'" Id. at 846. Plaintiff was advised in a clear manner that

recommendation were timely filed on December 14, 2020.

A de novo review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report and recommendation is **AFFIRMED**, and the petition is **DISMISSED** without prejudice and without requiring respondent to file a return. **The Clerk is directed to send a copy of this order and the judgment to the South Carolina Court of Appeals.**

IT IS FURTHER ORDERED that petitioner's motion to compel is **DEEMED MOOT**.

IT IS FURTHER ORDERED that a certificate of appealability is denied because petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(b)(2).

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

December 16, 2020
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure

his objections had to be filed within ten (10) days, and he received notice of the consequences at the appellate level of his failure to object to the magistrate judge's report.

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

UNITED STATES DISTRICT COURT

for the
District of South Carolina

Kevin E Herriott

Petitioner

v.

Warden of McCormick Correctional Institution

Respondent

Civil Action No. 6:20-cv-03336-DCN

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

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

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

XX other: The petition is **DISMISSED** without prejudice and without requiring respondent to file a return

This action was (check one):

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

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

XX decided by the Honorable David C. Norton

Date: December 17, 2020

CLERK OF COURT

s/Kathy Rich, Deputy Clerk

Signature of Clerk or Deputy Clerk

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

Kevin E. Herriott,

Petitioner,

vs.

Warden McCormick Correctional,

Respondent.

C/A No. 6:20-cv-03336-DCN-KFM

REPORT OF MAGISTRATE JUDGE

The petitioner, proceeding *pro se* and *in forma pauperis*, brings this action pursuant to 28 U.S.C. § 2254 for habeas relief. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the District Court. For the reasons set forth below, it is recommended that the petitioner's § 2254 petition be summarily dismissed.

ALLEGATIONS

The petitioner seeks habeas relief regarding convictions for carrying or concealing a weapon as an inmate and attempted armed robbery (doc. 13). The court takes judicial notice of the petitioner's criminal proceedings in the Lee County Court of General Sessions as well as the corresponding appeal of the convictions pending in the South Carolina Court of Appeals.¹ See Lee County Public Index, <https://publicindex.sccourts.org/Lee/PublicIndex/PISearch.aspx> (enter the petitioner's name and 2018A3110100194, 2018A3110100195) (last visited November 20, 2020); See *South Carolina v. Herriott*, C/A No. 2019-000969 (S.C. Ct. App.).

¹ *Phillips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (courts "may properly take judicial notice of matters of public record."); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that '[t]he most frequent use of judicial notice . . . is in noticing the content of court records.'").

The petitioner's sentence for these charges is set to begin after expiration of his current sentence, with the petitioner receiving six years for attempted armed robbery to run concurrent with a five year sentence for carrying or concealing a weapon as an inmate. See Lee County Public Index (enter the petitioner's name and 2018A311010019, 2018A3110100195) (last visited November 20, 2020). The petitioner appealed his convictions by notice of appeal filed with the South Carolina Court of Appeals on June 11, 2019. See *South Carolina v. Herriott*, C/A No. 2019-000969 (S.C. Ct. App.). To date, the petitioner's direct appeal has not been resolved. *Id.* The appeal was held in abeyance on September 28, 2020, following the petitioner's filing of the instant matter. *Id.*

The petitioner's amended petition seeks habeas relief based upon an inordinate delay in his direct appeal, a violation of his due process rights, a violation of his equal protection rights, lack of subject matter jurisdiction, lack of personal jurisdiction; *Brady* violations, ineffective assistance of counsel, and destruction of evidence by the state of South Carolina (docs. 13 at 7–8; 13-1).²

For relief, the petitioner seeks to have his convictions vacated and to be released from prison (doc. 13 at 15).³

² The petitioner has been warned previously that arguments concerning state law, such as subject matter jurisdiction, may not be raised in § 2254 proceedings. See *Herriott v. McCabe*, C/A No. 6:19-cv-00803-DCN, at doc. 24 pp. 3–4 (D.S.C. May 13, 2019) (citing *Wilson v. Cocoran*, 562 U.S. 1, 5 (2010)), *Report and Recommendation adopted by doc. 30* (D.S.C. June 4, 2019).

³ Of note, as mentioned, the petitioner is currently serving a sentence unrelated to the charges complained of herein; as such, even if entitled to relief, the petitioner is not entitled to be released from custody. See Lee County Public Index (enter the petitioner's name and 2018A3110100194, 2018A3110100195) (noting that the sentence does not commence until expiration of the petitioner's current sentence); See South Carolina Department of Corrections Incarcerated Inmate Search, <https://public.doc.state.sc.us/scdc-public/> (enter the petitioner's first and last name) (last visited November 20, 2020).

STANDARD OF REVIEW

The undersigned has reviewed the petition pursuant to the Rules Governing Section 2254 Cases in the United States District Courts; the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214; and other habeas corpus statutes. As a *pro se* litigant, the petitioner's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. See *Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*). The mandated liberal construction means that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so. However, the requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

DISCUSSION

As noted above, the petitioner filed this case pursuant to § 2254, seeking dismissal of his charges and release from prison. The instant matter, however, is subject to summary dismissal because it is premature.⁴

Exhaustion Requirement

The petitioner's habeas petition is subject to summary dismissal because he has failed to exhaust his state court remedies. Title 28, United States Code, Section 2254(b) provides that "[a]n application for writ of habeas corpus . . . shall not be granted unless it appears that [] the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances

⁴ To the extent the petitioner asserts removal jurisdiction, there is no basis for removal jurisdiction in this matter. Any civil action brought in state court may be removed to federal court if the district court has original jurisdiction over the action. 28 U.S.C. § 1441(a). Federal question jurisdiction, as alleged herein, arises when the case arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. Here, however, there is no basis for removal jurisdiction so the matter has been treated as a habeas case brought pursuant to 28 U.S.C. § 2254.

exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1). In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, and (2) if the direct appeal turns out to be unsuccessful, by filing an application for PCR. “The habeas statute generally requires a state prisoner to exhaust state remedies before filing a habeas petition in federal court.” *Woodford v. Ngo*, 548 U.S. 81, 92 (2006); See 28 U.S.C. § 2254. Here, at the time of the filing of the instant petition, as recognized by the petitioner, his direct appeal remained pending (see doc. 13). As such, he has not exhausted his state court remedies, as the state appellate court may still provide the remedy he seeks.

The petitioner’s petition is not saved by his allegations of inordinate delay by the state of South Carolina in processing his direct appeal. Section 2254 limits a federal court’s power to grant habeas to state prisoners who have not exhausted their state court remedies. 28 U.S.C. § 2254(b)(1)(A). A federal court can grant habeas relief, despite lack of exhaustion, if there is an absence of available state court process, circumstances exist which render the state court process ineffective to protect the rights of the petitioner, or if the state waives the exhaustion defense. *id.* § 2254(b)(1)(B); (b)(3). However, while a truly inordinate and unjustified delay in the state court process may excuse a petitioner from the statutory exhaustion requirement, the petitioner has failed to show that such a delay is present here. Indeed, delay in state court does not, by itself, make the state court process ineffective. *Allen v. Leake*, 328 F. Supp. 292, 294 (D.S.C. 1971). Instead the length of the delay, the reasons for the delay, and the prejudice caused by the delay are all factors for consideration. See *Ward v. Freeman*, 46 F.3d 1129 (4th Cir. 1995) (per curiam table decision) (internal citation omitted). Additionally, the court should consider whether the delay has prejudiced the petitioner. *Id.* Here, the petitioner’s direct appeal has been pending for approximately 16 months (notice of appeal filed on June 1, 2019), and it appears that at least a portion of the delay in the appeal occurred based upon the

petitioner's delay in serving his initial brief and designation of matter to be considered on appeal on the State⁵ after moving to proceed *pro se* in the appeal. See *id.* (letter dated March 12, 2020, noting that "[t]he State never received service of the Initial Brief or Designation of Matter from [the petitioner]; non-dispositional order dated April 29, 2020, from the South Carolina Court of Appeals, directing the petitioner to serve the appropriate briefs on the State, after which the State was directed to file its initial brief and designation of matter to be considered on appeal; letter dated June 22, 2020, seeking^{*} one extension of time to file the State's initial brief; August 14, 2020, order granting a thirty day extension to the State; initial brief and designation of matter to be considered on appeal filed by the State on September 14, 2020). Moreover, even presuming that 16 months could be considered an excessive delay, the petitioner cannot show that the delay has prejudiced him as he has not yet commenced serving his sentence for the convictions complained-of in the appeal.⁶ See Lee County Public Index (enter the petitioner's name and 2018A3110100194, 2018A3110100195) (noting that the sentence does not commence until expiration of the petitioner's current sentence for manslaughter). As such, because it appears that the petitioner's direct appeal is proceeding on its normal course and the petitioner cannot show prejudice, the undersigned finds that there is no evidence of inordinate delay on the part of the State. Thus, the undersigned recommends dismissing the instant petition without prejudice because the petitioner has failed to exhaust his state court remedies.

⁵ The respondent in the appellate case will be referred to as the State to differentiate the respondent in the current matter from the respondent in the appellate case.

⁶ Section 2254 requires that a petitioner be in custody for the complained-of charge. 28 U.S.C. 2254(a). The United States Supreme Court has held, however, that a petitioner is considered in custody for charges that have yet to commence so long as there is a sentence currently being served. *Maleng v. Cook*, 490 U.S. 488, 493–94 (1989) (finding a petitioner in custody for habeas purposes to challenge a sentence running consecutive to a sentence already imposed).

RECOMMENDATION

Accordingly, it is recommended that the petitioner's § 2254 petition be dismissed *without* prejudice and without requiring the respondent to file a return. Additionally, because the South Carolina Court of Appeals entered an order holding the appeal in abeyance based upon the filing of this action, if this recommendation is adopted, it is further recommended that a copy of the district judge's order and judgment be sent to the South Carolina Court of Appeals. ***The petitioner's attention is directed to the important notice on the next page.***

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

November 23, 2020
Greenville, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
300 East Washington Street, Room 239
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *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).