

FILED: January 22, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7038
(6:16-cv-02554-HMH)

JACQUELINE TEDDER

Petitioner - Appellant

v.

WARDEN LEATH CORRECTIONAL INSTITUTION

Respondent - Appellee

and

LEATH CORRECTIONAL INSTITUTION

Respondent

J U D G M E N T

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

This judgment shall take effect upon issuance of this court's mandate in

accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

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

No. 17-7038

JACQUELINE TEDDER,

Petitioner - Appellant,

v.

WARDEN LEATH CORRECTIONAL INSTITUTION,

Respondent - Appellee,

and

LEATH CORRECTIONAL INSTITUTION,

Respondent.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:16-cv-02554-HMH)

Submitted: January 18, 2018

Decided: January 22, 2018

Before GREGORY, Chief Judge, and SHEDD and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Jacqueline Tedder, Appellant Pro Se. Donald John Zelenka, Deputy Attorney General,
Sherrie Ann Butterbaugh, OFFICE OF THE ATTORNEY GENERAL OF SOUTH

CAROLINA, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jacqueline Tedder seeks to appeal the district court's order denying as untimely her 28 U.S.C. § 2254 (2012) petition. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) (2012). The magistrate judge recommended that relief be denied and advised Tedder that failure to file timely, specific objections to this recommendation could waive appellate review of a district court order based upon the recommendation.

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. *Wright v. Collins*, 766 F.2d 841, 845-46 (4th Cir. 1985); *see also Thomas v. Arn*, 474 U.S. 140 (1985). Tedder has waived appellate review by failing to file specific objections after receiving proper notice. 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

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

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Jacqueline Tedder

Petitioner

v.

Leath Correctional Institution; Warden Leath

Correctional Institution

Respondent

Civil Action No. 6:16-cv-2554-HMH

SUMMARY 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*) _____.

☒ other: The Respondents motion for summary judgment is granted. Leath Correctional Institution previously terminated on 8/4/2016.

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.

☒ decided by the Honorable Henry M. Herlong, Jr.

Date: July 26, 2017

CLERK OF COURT

s/Kathy Rich, Deputy Clerk

Signature of Clerk or Deputy Clerk

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

Jacqueline Tedder,	)	
	)	
Petitioner,	)	C.A. No. 6:16-2554-HMH-KFM
	)	
vs.	)	OPINION & ORDER
	)	
Warden, Leath Correctional Institution,	)	
	)	
Respondent.	)	

This matter is before the court with the Report and Recommendation of United States Magistrate Judge Kevin F. McDonald, made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 of the District of South Carolina.¹ Jacqueline Tedder ("Tedder") is a pro se state prisoner seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. In his Report and Recommendation, Magistrate Judge McDonald recommends granting Respondent's motion for summary judgment and denying Tedder's petition because the petition is untimely and she has failed to demonstrate grounds for equitable tolling.

Tedder filed objections to the Report and Recommendation. Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir.

¹ The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1) (2006).

1984). In the absence of specific objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

Upon review, the court finds that Tedder's objections are non-specific, unrelated to the dispositive portions of the magistrate judge's Report and Recommendation, or merely restate her claims. Therefore, after a thorough review of the magistrate judge's Report and the record in this case, the court adopts Magistrate Judge McDonald's Report and Recommendation and incorporates it herein.

It is therefore

ORDERED that Respondent's motion for summary judgment, docket number 12, is granted and the petition, docket number 1, is denied. It is further

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

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
July 25, 2017

NOTICE OF RIGHT TO APPEAL

The Petitioner is hereby notified that she has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

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

Jacqueline Tedder, #318474,

Petitioner,

vs.

Warden Leath Correctional Institution,

Respondent.

Civil Action No. 6:16-2554-HMH-KFM

REPORT OF MAGISTRATE JUDGE

The petitioner, a former state prisoner proceeding *pro se*, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. 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.), this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

BACKGROUND

At the time she filed the petition, the petitioner was incarcerated at Leath Correctional Institution in the South Carolina Department of Corrections ("SCDC").¹ The petitioner was indicted by the Oconee County Grand Jury in January 2006 for cocaine trafficking, 400 grams or more (app. 129–30)². William B. Long, Jr., represented the petitioner on the charge. On October 30–31, 2006, the petitioner pled guilty before the Honorable John C. Few to trafficking in cocaine, 28 to 100 grams, first offense (app.1, 4).

¹ The respondent provided a copy of SCDC internet records showing that the petitioner's projected release date was January 6, 2017 (doc. 11-21). On March 16, 2017, the petitioner informed this court that she had been released and provided a change of address (doc. 21). This action remains before the court because it is only necessary that the petitioner satisfy that "in custody" requirement at the time action was filed. *Spencer v. Kemna*, 523 US 1, 7 (1998).

² The Appendix can be found at Docket Entry Number 11-1, the Supplemental Appendix can be found at Docket Entry Number 11-2, and the Second Supplemental Appendix can be found at Docket Entry Number 11-3.

Judge Few sentenced the petitioner to 12 years in prison (app. 53). The petitioner did not file a direct appeal (app. 56).

Underlying Case Facts

On October 11, 2005, a deputy was on patrol on Interstate 85 in Oconee County when he noticed a trailer hitch on the petitioner's vehicle partially obscuring the license plate number (app. 12, 14). The deputy ran the number and discovered the tag was registered to a different vehicle, and he stopped the petitioner (app. 12). The deputy ran his narcotics-trained canine around the vehicle, as a second deputy wrote the petitioner a warning ticket for improper tag display (*id.*). The dog alerted to the back of the vehicle, and a search revealed a five-gallon paint bucket (app. 12–13). The deputy found three one-kilo packages of cocaine shrink-wrapped inside the bucket (app. 13). The drugs had an estimated street value of \$75,000 (app. 44).

At the plea hearing, the deputy stated he ran the petitioner's license plate number for two reasons (app. 18). First, the petitioner initially swerved across the white line before moving back into her lane, and second, the large trailer hitch obscured part of the tag (*id.*). The officer stated that his dash camera showed the petitioner's improper lane travel. The petitioner admitted at her plea hearing that the cocaine was in her possession, and that she was taking it to someone for a friend (app. 41). The petitioner also told the judge she had “the utmost remorse for the mistake” she made (app. 50).

PCR

On April 10, 2007, the petitioner filed an application for post-conviction relief (“PCR”) (app. 55). The petitioner alleged evidence was not properly introduced, including video of the incident, and she “was illegally stopped and subjected to an illegal search and seizure,” which led to the trafficking in cocaine charge (app. 57).

According to the order of dismissal, an evidentiary hearing was held before the Honorable Alexander S. Macaulay on August 13, 2007³ (supp. app. 1). The petitioner was present and represented by Bradley Norton, and the State was represented by Daniel E. Grigg of the Office of the Attorney General (*id.*). The petitioner and prior plea counsel were the only two witnesses to testify at the hearing (*id.*). The petitioner proceeded on the claims enumerated in her *pro se* application (supp. app. 2).

By order dated September 7, 2007, Judge Macaulay denied all of the petitioner's claims and dismissed her application with prejudice (supp. app. 8). The judge noted that he reviewed the entire record, heard testimony presented at the hearing, observed the witnesses who testified, and closely passed upon their credibility and weighed their testimony accordingly (supp. app. 2). Judge Macaulay specifically found the petitioner's testimony not credible, while finding plea counsel's testimony to be credible (supp. app. 6). The judge found that the petitioner failed to meet her burden of proof and had not established any constitutional violations to warrant relief (supp. app. 6–8). The petitioner did not appeal.

Second PCR

On April 21, 2009, the petitioner filed her second PCR application (app. 62; 2d supp. app. 3–7). The petitioner alleged ineffective assistance of counsel, including failure to “properly question” the use of the narcotics canine, conduct a suppression hearing, and “undertake a competent analysis of the case” (2d supp. app. 6). The petitioner alleged plea counsel's advice led to “an unknowing illogical and irrational plea” (*id.*).

The Honorable J. Cordell Maddox, Jr., dismissed the application by conditional order dated July 31, 2009, and filed August 11, 2009 (app. 74–77). Judge Maddox found the application was successive and barred by the statute of limitations (*id.*).

³ There is no transcript from the first evidentiary hearing. As discussed in further detail below, the petitioner sought belated review of her first PCR application, and her PCR appellate attorney attempted to obtain a transcript during the certiorari process; however, the tapes had been destroyed (see doc. 11-12).

In objections to the conditional order of dismissal, the petitioner alleged that she was entitled to belated review of her PCR issues because she “only recently discovered” that plea and prior PCR counsel “failed to raise the issue that improperly seized evidence should have been suppressed, consequently the issue was not adequately raised in prior proceedings before this court” (app. 78–79).

In an order filed May 5, 2010, Judge Macaulay found the petitioner raised a genuine issue of material fact and ordered an evidentiary hearing be scheduled (2d supp. app. 8–9). An evidentiary hearing was held on October 3, 2011, before Judge Maddox (app. 80–115). The petitioner was present and represented by Samuel W. Weldon, and the State was represented by Kaelon E. May of the Office of the Attorney General (app. 80).

At the hearing, the petitioner stated she told her prior PCR counsel to file an appeal from the denial and dismissal of her first PCR action, but he failed to do so (app. 94–95). Prior PCR counsel testified that the PCR court “ruled from the bench and didn't take it under advisement. And it's possible [the petitioner] said, 'I want you to appeal it.' If she had told me to appeal it, I would think that I would have appealed it” (app. 114).

By order dated January 4, 2012, Judge Maddox denied all of the petitioner's claims and dismissed her application with prejudice (app. 117–128). The judge noted that he heard the testimony presented, observed the witnesses, and reviewed the record (app. 122). Specifically, Judge Maddox found the petitioner's testimony not credible, while finding prior PCR counsel's testimony credible (app. 127). The judge found the petitioner failed to meet her burden of proof as to all allegations (app. 122–28).

Appeal of Second PCR

The petitioner's PCR counsel filed a notice of appeal (doc. 11-4). Robert M. Pachak filed a *Johnson*⁴ petition for writ of certiorari, which raised the sole issue of “[w]hether there was sufficient evidence to support the PCR judge's finding that petitioner

⁴ A *Johnson* petition is the state PCR appeal analogue to an *Anders* brief; a brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), effectively concedes the appeal lacks a meritorious claim. See *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (S.C. 1988).

was not entitled to a belated appeal of the denial of her first application for post-conviction relief" (doc. 11-5 at 3). Pachak also petitioned to be relieved as counsel (doc. 11-5 at 9). The petitioner filed a *pro se* petition (doc. 11-6).

In an order filed November 7, 2013, the South Carolina Court of Appeals denied PCR appellate counsel's motion to be relieved and ordered counsel to address the merits of the issue raised in the *Johnson* petition (doc. 11-7). Pachak filed a petition for writ of certiorari on December 6, 2013 (doc. 11-8 at 4–5). The Court of Appeals granted the petition for certiorari in an order filed January 13, 2015, and ordered the parties to brief the issues (doc. 11-9).

Pachak filed a brief pursuant to *Austin v. State*, 409 S.E.2d 395 (S.C. 1991) (recognizing the right to a belated review of previous PCR claims in certain circumstances). Pachak argued plea counsel was ineffective in failing to request a suppression hearing based on an illegal stop prior to the petitioner's guilty plea (doc. 11-10 at 4).

On August 7, 2015, the Court of Appeals sent a letter to Pachak requesting the transcript from the first PCR hearing (doc. 11-11). In a letter dated August 22, 2015, the court reporter in Oconee County informed Pachak that a transcript was unavailable because "all untranscribed records are destroyed after five years per the Court Administration Manual for Court Reporters" (doc. 11-12 at 2).

In an unpublished opinion filed April 20, 2016, the Court of Appeals affirmed the PCR court's order denying relief and dismissing the petitioner's second PCR application⁵ (doc. 11-13). The court issued the remittitur on May 6, 2016, which was then filed with the Oconee County Clerk of Court on May 9, 2016⁶ (doc. 11-16).

⁵ The petitioner sent a *pro se* petition for rehearing to the Court of Appeals that she did not sign (doc. 11-14). The court declined to accept the petition as the petitioner was represented by counsel (doc. 11-15).

⁶ Following the issuance of the remittitur, the petitioner sent a handwritten notice of appeal to the Supreme Court of South Carolina dated May 25, 2016 (doc. 11-17). The Supreme Court construed the notice as a petition for certiorari, found the Court of Appeals properly sent the remittitur, which ended appellate jurisdiction over the action, and dismissed the petition (doc. 11-18). Subsequently, the petitioner sent a *pro se*, unsigned

FEDERAL PETITION

On July 13, 2015, the petitioner filed the Section 2254 petition now at issue (doc. 1). On September 26, 2016, the respondent filed a motion for summary judgment (doc. 12) and a return and memorandum (doc. 11). By order filed the same date, pursuant to *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975), the petitioner was advised of the summary judgment procedure and the possible consequences if she failed to adequately respond to the motion (doc. 13). On October 21, 2016, the petitioner filed her response in opposition (doc. 15). The respondent filed a reply on October 31, 2016 (doc. 17). On November 14, 2016, the petitioner filed a sur reply (doc. 18). On November 17, 2016, and November 28, 2016, the petitioner filed additional documents to the sur reply (docs. 19, 20).

In the federal habeas corpus petition, the petitioner makes the following claims:

- | | |
|--------------------------|--|
| Ground One: | Ineffective Assistance of Counsel |
| Supporting Facts: | The lawyer failed to object to traffic stop being illegal, and Prosecutor withholding evidence. Lawyer failed to appeal decision of Court. |
| Ground Two: | Illegal Traffic stop and search seizure. |
| Supporting Facts: | Local traffic Officer, I-85 claimed that I crossed over the white line and ball on trailer hitch was blocking to inner numbers of tag. The dog was used doing the search was different from the dog that I received document on in my motion of discovery. |
| Ground Three: | Prosecutorial Misconduct |

"Motion for Jurisdiction, Etc." to the Supreme Court, asking it to compel the Court of Appeals to take further action or to accept jurisdiction and "censure[] the Court of Appeals for remitting the record to the circuit court after failing to reach a final decision after it had acquired jurisdiction" (doc. 11-19). The Supreme Court denied the motion on June 22, 2016 (doc. 11-20).

Supporting Facts: Prosecutor has continually refused to release that video of the traffic stop and dog search.

(Doc. 1).

APPLICABLE LAW AND ANALYSIS

Summary Judgment Standard

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "The court shall 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). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary

judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.*

Exhaustion

Before seeking habeas corpus relief, the petitioner first must exhaust her state court remedies. 28 U.S.C. § 2254(b)(1)(A). In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds be stated in the direct appeal or PCR application. Rule 203, SCACR; S.C. Code Ann. §§ 17–27–10,–90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C.1976). If the PCR court fails to address a claim as is required by South Carolina Code § 17–27–80, counsel for the applicant must make a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP to preserve the issue for appellate review. *Marlar v. State*, 653 S.E.2d 266, 267 (S.C. 2007).⁷

The South Carolina Supreme Court has held that the presentation of claims to the state court of appeals without more is sufficient to exhaust state remedies for federal habeas corpus review. *State v. McKennedy*, 559 S.E.2d 850 (S.C. 2002); *see also In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E.2d 454 (S.C. 1990). In *McKennedy*, the South Carolina Supreme Court specifically held that *In re Exhaustion* had placed discretionary review by the South Carolina Supreme Court “outside of South Carolina’s ordinary appellate review procedure pursuant to *O’Sullivan [v. Boerckel]*, 526 U.S. 838 (1999).” 559 S.E.2d at 854. Accordingly, a claim would not be procedurally barred from review in this court for failure to pursue review in the South Carolina Supreme Court after an adverse decision in the South Carolina Court of Appeals, either after a direct appeal or after pursuing relief in a PCR petition.

⁷ In *Bostick v. Stevenson*, 589 F.3d 160, 162–65 (4th Cir. 2009), the Fourth Circuit found that, prior to the Supreme Court of South Carolina’s November 5, 2007, decision in *Marlar*, South Carolina courts had not been uniformly and strictly enforcing the failure to file a motion pursuant to Rule 59(e), SCRCP, as a procedural bar. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

A habeas petitioner must first present his claim to the court in a manner in which it may be reviewed on the merits. *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). It is well settled in South Carolina that “[i]ssues not raised and ruled upon in the trial court will not be considered on appeal.” *State v. Dunbar*, 587 S.E.2d 691, 693-94 (S.C. 2003). Moreover, it is not enough that the argument presented stems from the same factual scenario; rather, the legal argument must be the same as the argument presented below. See, e.g., *State v. Haselden*, 577 S.E.2d 445, 448 (S.C. 2003) (finding differing ground for objection did not preserve issue presented for review: defendant’s objection on relevancy did not preserve argument the evidence was improper character evidence); *State v. Caldwell*, 662 S.E.2d 474, 482 (S.C. Ct. App. 2008) (“Because the argument raised on appeal does not appear to have been specifically raised below, it may not be preserved on appeal.”).

Here, the petitioner did not file a direct appeal to contest her guilty plea, and any appeal filed now would be untimely. See generally Rule 203(b)(2), SCACR (setting a ten day time limit in which to appeal after a plea and sentencing). Accordingly, the petitioner has no direct appeal remedies available to her.

Further, the petitioner pursued and exhausted her PCR remedy as a matter of right. See *Wade v. State*, 559 S.E.2d 843, 847 (S.C. 2002) (“[A]n applicant must file the PCR application within one year of the final resolution of the criminal conviction.”); *Gibson v. State*, 495 S.E.2d 426, 428 (S.C. 1998) (holding exhaustion of state PCR remedies requires filing of an application, an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review). In this case, the PCR judge denied the petitioner’s first application and, while the petitioner did not appeal that decision, she was later granted a belated review after filing a second PCR application (docs 11-1, 11-3). The state Court of Appeals subsequently granted certiorari and affirmed the PCR judge’s order denying the petitioner relief (docs. 11-4 through 11-10 and 11-13 through 11-16). Therefore, the petitioner has no additional state remedies available to her.

Statute of Limitations

The petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Accordingly, the provisions of the AEDPA apply. *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997). The respondent first argues⁸ that the petition is untimely under the one-year statutory deadline set forth in the AEDPA. This court agrees.

The one-year time period runs 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).⁹ However, "[t]he time during which a properly filed application for State post-conviction or collateral relief with respect to the pertinent judgment or claim that is pending shall not be counted toward any period of limitation under this subsection." *Id.* § 2244(d)(2). State collateral review tolls the one-year statute of limitations under Section 2244(d)(1)(A) for properly filed pleadings, *Artuz v. Bennett*, 531 U.S. 4, 8 (2000), but it does not establish a right to file within one year after completion of collateral review. *Harris v. Hutchinson*, 209 F.3d 325, 328 (4th Cir. 2000).

The petitioner pled guilty and was sentenced on October 31, 2006 (app. 1–53). Thus, her conviction became final on November 10, 2006, ten days after sentencing, upon failure to serve and file a notice of appeal. See Rule 203 (b)(2), SCACR (ten day limit in which to appeal after sentencing). Consequently, the petitioner had one year from November 11, 2006, to file a federal habeas petition. See 28 U.S.C. § 2244(d)(1); *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (holding that a judgment becomes final for purposes of § 2244(d)(1) "when the time for pursuing direct review in [the

⁸ As this court recommends that the petition be dismissed as untimely, the respondent's remaining arguments will not be addressed.

⁹ The statute provides other possible start dates for the one-year time period that are not relevant here. See 28 U.S.C. § 2244(d)(1)(B)–(D).

United States Supreme] Court, or in state court, expires"). Here, the petitioner filed her first PCR action on April 10, 2007, such that 150 days of the one-year limitations period had expired (see app. 55–61). The statute remained tolled until the PCR action concluded on September 11, 2007, when the PCR court filed its order denying and dismissing with prejudice the petitioner's first PCR application and the time to appeal the PCR court's order of dismissal expired¹⁰ (supp. app. 1–8). Therefore, the one-year limitations period began to run again on October 12, 2007, and expired 215 days later on May 14, 2008.

The petitioner filed a second PCR action on April 21, 2009; however, that action could not toll any time because it was filed after the expiration of the one-year limitations period under § 2244(d)(1) (A). To toll the one-year statute of limitations period governing federal habeas petitions, state PCR proceedings must commence prior to the expiration of the federal statutory period. See 28 U.S.C. § 2244(d). Thus, the petitioner's second PCR application did not toll or revive the already expired statute of limitations for filing her federal habeas petition.

Further, the South Carolina Court of Appeals' grant of a belated appeal pursuant to *Austin* from the petitioner's first PCR action does not entitle the petitioner to toll the time between her PCR actions. See *Harris v. Riley*, C.A. No. 0:14-187-MGL, 2015 WL 403202, at *6 (D.S.C. Jan. 30, 2015) (finding second PCR action did not toll federal statute of limitations as it was filed after the expiration of time period despite grant of *Austin* appeal); *Clayton v. Bryant*, C.A. No. 8:12-cv-878-RBH, 2013 WL 1187030, at *3 (D.S.C. March 20, 2013) (same).

¹⁰ The petitioner had 30 days from the PCR court's dismissal order to file a notice of appeal. See Rule 243, SCACR (stating that the notice of appeal from a PCR action shall be served "[i]n the same manner and under the same time limitations as provided for appeals from the Court of Common Pleas in Rules 203 and 207"); Rule 203, SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.").

Thus, the petitioner's 2009 PCR application did not toll or revive the already expired statute of limitations for filing her federal habeas action. The statutory deadline expired on May 14, 2008, and, as a result, the petition—filed on July 8, 2016,¹¹ more than seven years after the expiration of the limitations period—is time barred.

Equitable Tolling

Liberally construing the petitioner's filings, she may argue that she is entitled to equitable tolling (see doc. 20 at 2).¹² As explained below, the petitioner is not entitled to equitable tolling.

To avoid application of Section 2244(d) regarding the timeliness of the instant federal habeas petition, the petitioner must show that the one-year limitations period should be equitably tolled under applicable federal law. See *Holland v. Florida*, 560 U.S. 631 (2010) (concluding that § 2244(d) is subject to the principles of equitable tolling); *Harris*, 209 F.3d 325 (same). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citation omitted); see also *Holland*, 560 U.S. at 649. Equitable tolling is available only in "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*, 209 F.3d at 330. See also *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). Thus, to be entitled to equitable tolling, an otherwise time-barred petitioner must present: "(1) extraordinary circumstances, (2) beyond his control

¹¹ A prisoner's pleading is considered filed at the moment it is delivered to prison authorities for forwarding to the court. See *Houston v. Lack*, 487 U.S. 266, 270 (1988). Here, construing the filing date in the light most favorable to the petitioner, this action was filed on July 8, 2016 (doc. 1 at 15 (the petitioner's signature and date block)).

¹² The undersigned notes that Docket Entry Number 20 is a copy of Docket Entry Number 19; however, the petitioner has added her signature to Docket Entry Number 20 and submitted an accompanying cover sheet.

or external to his own conduct, (3) that prevented him from filing on time." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (*en banc*).

Here, the petitioner has failed to present any evidence in support of equitable tolling. In the attachments to the sur reply, the petitioner cites cases concerning equitable tolling; however, she fails to put forth any facts or reasons explaining why it should apply in her case. As the petitioner has failed to show that she is entitled to equitable tolling of the statute of limitations, the petition should be dismissed as untimely.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, it is recommended that the respondent's motion for summary judgment (doc. 12) be GRANTED and the petition (doc. 1) be DENIED.

IT IS SO RECOMMENDED

s/ Kevin F. McDonald
United States Magistrate Judge

June 15, 2017
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 of Court
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).

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