No. _____

In the
Supreme Court of the United States

ALAN LANE HICKS,

Petitioner,

v.

JONATHAN FRAME,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires state prisoners to exhaust all available state remedies prior to filing a federal habeas petition, unless "circumstances exist that render such [state-court] process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). Below, Petitioner Alan Lane Hicks argued that a 27-year delay, during which the state court assigned his case to a conflicted judge for 15 years and lost his case file, amounted to circumstances that rendered the state's process ineffective. The Fourth Circuit recognized that Hicks's "journey through West Virginia's state court system" was "Kafkaesque," and "no doubt offend[ed] basic notions of how a state should treat its prisoners," and the state was therefore entitled to no comity. App. 3a, 20a, 15a n.7. But the Fourth Circuit held that a one-sentence order from the state court dismissing Hicks's state petition—issued a week after oral argument in the Fourth Circuit—precluded excusing non-exhaustion under § 2254(b)(1)(B)(ii).

This Court has never directly interpreted § 2254(b)(1)(B)(ii), and circuits are irreconcilably split on whether such eleventh-hour, state-court movement is dispositive when analyzing whether inordinate delay warrants excusing non-exhaustion under § 2254(b)(1)(B)(ii).

The question presented is:

Whether 28 U.S.C. § 2254(b)(1)(B)(ii)'s exception to the exhaustion requirement for "circumstances" that render state proceedings "ineffective" can apply when a state court reanimates inordinately delayed proceedings after a petitioner files in federal court.

RELATED PROCEEDINGS

Putnam County Circuit Court:

State v. Hicks, Nos. 86-F-59 and 88-F-2 (judgments of guilt and sentencing entered on Oct. 25, 1988; order denying petitioner's postconviction Rule 35 motion challenging sentence entered Jan. 18, 2019)

Hicks v. Trent, No. 97-C-369 (judgment dismissing petitioner's state postconviction relief claim entered Apr. 22, 2025)

Supreme Court of West Virginia:

State v. Hicks, No. 89-1404 (Jan. 10, 1990) (refusing direct appeal from conviction)

State v. Hicks, No. 19-0123 (Jan. 13, 2020) (affirming dismissal of Rule 35 motion)

United States District Court for the Southern District of West Virginia:

Hicks v. Ames, No. 3:21-cv-00618 (Mar. 30, 2023) (dismissing petitioner's federal habeas petition for failure to exhaust)

United States Court of Appeals for the Fourth Circuit:

Hicks v. Frame, No. 23-6447 (July 23, 2025) (affirming dismissal of petitioner's federal habeas petition) (decision on appeal)

Supreme Court of the United States:

Hicks v. West Virginia, No. 20-5992 (Nov. 16, 2020) (denying certiorari regarding the SCAWV's Jan. 13, 2020, decision dismissing Rule 35 motion)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alan Hicks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 145 F.4th 408 and is reproduced in the appendix to this petition at App. 1a–20a. The Fourth Circuit's decision rejecting rehearing en banc is unreported but reproduced at App. 62a. The district court's opinion is unpublished but is available at 2023 WL 2711634 and is reproduced at App. 22a–60a.

JURISDICTION

The Fourth Circuit entered its judgment on July 23, 2025. App. 21a. That court denied rehearing en banc on August 19, 2025. App. 62a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254(b)(1) of Title 28, U.S. Code, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> >
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT

A. Legal background.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires state prisoners to exhaust all adequate and available state remedies before filing a habeas petition in federal court. 28 U.S.C. § 2254(b)(1). Federal courts may entertain unexhausted claims only when (i) "there is an absence of available State corrective process" or (ii) "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(i)–(ii).

"In understanding [AEDPA's] statutory text, a page of history is worth a volume of logic." *Jones v. Hendrix*, 599 U.S. 465, 472 (2023) (cleaned up). The principle of exhaustion (and its exceptions) long predate AEDPA, and evolved as an equitable, judicially created doctrine grounded in comity for state courts. See *Ex parte Royall*, 117 U.S. 241, 253 (1886) (first articulating the exhaustion principle and its exception for "any special circumstances requiring immediate action"). Critically, exhaustion has never been an absolute requirement; it could be excused "where resort to state court remedies has failed" to provide a full adjudication of a petitioner's claims, either "because the state affords no remedy . . . [or] the remedy afforded by state law proves in practice unavailable or seriously inadequate." *Ex parte Hawk*, 321 U.S. 114, 118 (1944). *Ex parte Hawk* thus stands for the principle that a federal court should defer to state corrective processes—unless they are unavailable or ineffective.

In 1948, Congress codified this longstanding common-law doctrine—including its primary concern with comity—in 28 U.S.C. § 2254(b), "citing *Ex parte Hawk*

as correctly stating the principle of exhaustion." *Rose v. Lundy*, 455 U.S. 509, 516, 516 n.8 (1982) (discussing Reviser's Notes in the appendix of the House Report).[1] This Court's decisions concerning exhaustion continue to look to pre-AEDPA common law for interpretative guidance. See, *e.g.*, *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999); *Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *Rhines v. Weber*, 544 U.S. 269, 276–77 (2005); *Davila v. Davis*, 582 U.S. 521, 527 (2017).

While this Court has never directly interpreted the text of § 2254(b)(1)(B)(ii), it has held that, consistent with the common-law basis of the doctrine, rules of exhaustion are "not rigid and inflexible." *Granberry v. Greer*, 481 U.S. 129, 136 (1987) (cleaned up). Rather, they require "a factual appraisal by the court in each special situation." *Id.* (cleaned up). This Court has also noted, without holding, that state-court delay might constitute "circumstances rendering such [state] process ineffective to protect the rights of" state prisoners challenging their convictions. *Preiser v. Rodriguez*, 411 U.S. 475, 496–97 (1973); see also *Redd v. Chappell*, 574 U.S. 1041, 1041 (2014) (Sotomayor, J., joined by Breyer, J., statements respecting denial of certiorari) (suggesting § 2254(b)(1)(B)(ii) may excuse non-exhaustion for a petitioner experiencing delay in state proceedings). But this Court has never squarely addressed the issue. And as explained below, lower courts are floundering.

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[1] Congress updated § 2254 in 1966 and later with AEDPA in 1996, but the relevant text has remained substantively the same. Compare Act of June 25, 1948, ch. 646, 62 Stat. 869, 967; with Act of November 2, 1966, 80 Stat. 1104, 1105; and AEDPA, 110 Stat. 1214, 1218.

B. Factual and procedural background.

Hicks has spent the past 37 years fighting for a chance to challenge his conviction and sentence on the merits in state court. The Fourth Circuit described his decades-long, state-court journey as fraught with "forgotten motions, improperly appointed judges, and inattentive counsel." App. 3a.

1. In 1988, a West Virginia jury convicted Hicks of murder, conspiracy, and grand larceny. App. 3a. He is currently serving a life sentence without the possibility of parole. *Id.* He directly appealed to the Supreme Court of Appeals of West Virginia (SCAWV), which affirmed his conviction. *Id.*

2. Shortly after his conviction, in 1989, Hicks challenged his sentence under West Virginia Rule of Criminal Procedure 35. App. 5a. The state trial court did not rule on Hicks's motion for nearly 30 years. App. 7a.

After eight years of radio silence on his Rule 35 motion, in 1997, Hicks submitted a *pro se* habeas petition, also in the state trial court. App. 5a–6a. That court did not rule on Hicks's petition for nearly 27 years. App. 9a.

The decades of intervening state proceedings on both of Hicks's cases were, as the Fourth Circuit described, "a Kafkaesque journey." App. 3a. For the first 15 years, Hicks's petition was assigned to a judge who had been the lead prosecutor in Hicks's underlying trial.[2] App. 5a. And for 15 years the court failed to take

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[2] Notably, this Court held that if a state postconviction-relief petition is assigned to a judge who served as the petitioner's former prosecutor, the "unconstitutional failure to recuse constitutes

any action on Hicks's request for counsel. App. 6a. After 15 years, the state court eventually reassigned the case and appointed counsel for Hicks, but in the meantime, the state court lost Hicks's legal file, including his trial transcript. *Id.* In the ensuing years, Hicks cycled through five different court-appointed attorneys, most of whom never communicated with him. App. 6a–8a. More recently, the state court reassigned his case—again—to a different judge who had also formerly prosecuted Hicks's underlying criminal trial. App. 9a.

In the meantime, Hicks did what he could to get the state court to make meaningful progress on his Rule 35 motion and state habeas petition. Hicks wrote numerous letters to the courts and filed two unsuccessful petitions for a writ of mandamus with the SCAWV. App. 24a, 6a. In 2019, in response to a Rule to Show Cause issued by the SCAWV pursuant to Hicks's second mandamus petition, the state trial court dismissed Hicks's Rule 35 motion because the motion was "untimely." App. 25a. Regarding Hicks's state habeas petition, the state trial court indicated that it had appointed new counsel and set a briefing schedule. App. 7a–8a. The SCAWV then dismissed Hicks's mandamus request and denied his petition for rehearing. App. 36a. This Court denied certiorari. *Hicks v. West Virginia*, 141 S. Ct. 862 (2020). It is not clear that anything happened in Hicks's state habeas

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structural error even if the judge . . . did not cast a deciding vote." *Williams v. Pennsylvania*, 579 U.S. 11, 14 (2016). The Fourth Circuit declined to consider the implications of the potential due-process violation in Hicks's proceedings, concluding that a "defect" in Hicks's certificate of appealability required the court to consider only the length of the state court's delay. App. 11a–12a.

petition between July 2019 and July 2022. App. 32a–33a.

3. In November 2021, Hicks filed a habeas petition *pro se* in federal court under 28 U.S.C. § 2254. App. 4a. The state moved to dismiss the petition, arguing that Hicks failed to exhaust state remedies. *Id.* Hicks admitted he had not completely exhausted the state's procedures under § 2254(b)(1)(A), but argued that the 27-year, state-caused delay rendered the state court's proceedings "ineffective to protect" his rights, excusing non-exhaustion under § 2254(b)(1)(B)(ii). *Id.*

The district court adopted the magistrate judge's recommendation and dismissed Hicks's federal habeas petition, concluding he had to completely exhaust his state-court remedies. App. 59a. But the district court also held that the length of delay in the state's proceedings, of which the "vast majority" was attributable to the state, justified a certificate of appealability. App. 43a, 4a. The district court acknowledged "delays could resume at a future point" since the case would continue in the same state court that "allowed proceedings to drag on for literal decades." App. 57a–58a. Hicks timely appealed. App. 4a.

4. One week before oral argument in the Fourth Circuit, West Virginia submitted a Rule 28(j) letter indicating the state had moved to dismiss Hicks's state-court petition, after years of inactivity. App. 8a–9a. And one month after the Fourth Circuit oral argument, the state court summarily granted the state's motion to dismiss, in a one-sentence order: "Motion to Dismiss filed by Kanawha County Prosecuting Attorney is hereby **GRANTED**." *Hicks v. Trent*, No. 97-C-369 (W. Va. Cir. Ct. Apr. 22, 2025).

After being notified of the state court's summary disposition, the Fourth Circuit affirmed the district court's dismissal of Hicks's federal habeas petition on exhaustion grounds. App. 10a. The court acknowledged that the 27-year delay rendered any comity interest owed to West Virginia "unwarranted." App. 14a. Regardless, relying on the state court's "last-minute" dismissal alone, the Fourth Circuit reasoned that 28 U.S.C. § 2254(b)(1)(B)(ii) did not permit a federal court to entertain Hicks's habeas petition. App. 18a n.8. The Fourth Circuit observed that the state court's late-breaking movement allowed the federal appellate court to avoid the "hard questions" about how "considerations like length of delay, blame for delay, and diligence by petitioner in pursuing his rights factor into whether the exhaustion requirement has been excused." *Id.* The Fourth Circuit denied Hicks's petition for rehearing. App. 62a.

REASONS FOR GRANTING THE PETITION

This Court has never interpreted § 2254(b)(1)(B)(ii) or explained what is necessary for a federal court to excuse a petitioner from the exhaustion requirement under that provision. In the absence of this Court's guidance, the lower courts have embarked on divergent and conflicting paths, especially on whether and when inordinate delay in state court can excuse non-exhaustion, including when "last-minute action" in the state court categorically requires exhaustion. App. 18a n.8. See *Johnson v. Bauman*, 27 F.4th 384, 391–95 (6th Cir. 2022) (describing the "judicial decision making (and confused decision making at that)" various circuit courts have adopted in applying § 2254(b)(1)(B)(ii)). An entrenched and deepening

circuit split has plagued the lower courts on these questions.

Less than two months before the Fourth Circuit's decision below, the Seventh Circuit reached the opposite conclusion on materially identical—and even less compelling—facts. See *Lindsey v. Neal*, 138 F.4th 1039, 1043–45 (7th Cir. 2025) (holding that six years of state-court delay rendered that process ineffective under § 2254(b)(1)(B)(ii), even when a Rule 28(j) letter notified the court of a pending motion to dismiss filed in the state court within a month of the federal appellate oral argument). While *Hicks* and *Lindsey*'s irreconcilable outcomes provide the latest example of the divide, as illustrated below, the courts of appeals' conflicting approaches rival in age Hicks's state-court proceedings.

Only this Court can resolve the divide on this question of paramount importance, and this case provides an ideal vehicle to do so. Given the extreme delay, this case uniquely isolates the purely legal issue of the significance of last-minute, state-court movement when applying § 2254(b)(1)(B)(ii). The petition should be granted.

I. The courts of appeals are split over whether last-minute, state-court movement forecloses excusing non-exhaustion under § 2254(b)(1)(B)(ii).

Seven circuits are split two ways over the question presented. In the Third, Sixth, Seventh, and Eighth Circuits, inordinate delay is sufficient to excuse non-exhaustion under § 2254(b)(1)(B)(ii), even if state-court proceedings suddenly reawaken during the pendency of federal proceedings. But the First, Fourth, and Tenth Circuits disagree, holding that

§ 2254(b)(1)(B)(ii)'s pathway to federal court is foreclosed if a state court's last-minute movement resurrects inordinately delayed proceedings (although even these circuits diverge about under what circumstances delay may excuse exhaustion). Meanwhile, the Fifth, Ninth, Second, and Eleventh Circuits do not appear to have addressed the last-minute-state-court-movement issue, but they employ different inordinate-delay frameworks under § 2254(b)(1)(B)(ii), indicating an even deeper split. Only this Court can resolve it.

A. In four circuits, § 2254(b)(1)(B)(ii) may excuse non-exhaustion even when state-court movement resurrects inordinately delayed proceedings.

Four circuits recognize that § 2254(b)(1)(B)(ii) may excuse non-exhaustion of state remedies when they are inordinately delayed, even when last-minute, state-court movement signals an end to the delay.

1. The Seventh Circuit held, in stark contrast to (and just two months earlier than) the Fourth Circuit's decision below, that last-minute, state movement does not foreclose excusing non-exhaustion under § 2254(b)(1)(B)(ii) when a petitioner demonstrates "both that the delay is 'inordinate' and that it is 'attributable to the state.'" *Lindsey v. Neal*, 138 F.4th 1039, 1043 (7th Cir. 2025) (citing *Evans v. Wills*, 66 F.4th 681, 682 (7th Cir. 2023)). As such, the Seventh Circuit recognizes that inordinate delay can constitute circumstances that render state remedies ineffective, even if the state moves to dismiss a state-court, post-conviction-relief petition while the same petitioner's federal petition is pending. *Id.* at 1045.

In *Lindsey*, the petitioner's *pro se*, state-court petition "virtually stalled" for six years. *Id.* at 1041. The

petitioner then filed a *pro se* habeas petition in federal court, invoking § 2254(b)(1)(B)(ii) and arguing the state's delay "blocked his path" and rendered the state's processes "ineffective to protect" his rights. *Id.* The district court dismissed the federal petition for failure to exhaust. *Id.*

The Seventh Circuit vacated the dismissal. *Id.* at 1045. The court held that the six-year delay in state court was inordinate under Seventh Circuit precedent, and that the state was responsible for a significant portion of the delay, "[e]ven if [the petitioner] bore some responsibility." *Id.* at 1043–45. The law demands "steady movement that shows [a state's] judicial processes are effectively 'protect[ing] the rights of the applicant,'" the court explained. *Id.* at 1043 (citing § 2254(b)(1)(B)(ii)).

Notably, the court rejected the state's attempt to point to buzzer-beating movement in the state court. *Id.* at 1045. One month after the Seventh Circuit's oral argument, the state filed a Rule 28(j) letter informing the court of its state-court motion to dismiss the state petition for failure to prosecute. *Id.* But the Seventh Circuit held that § 2254(b)(1)(B)(ii) excused the petitioner from exhausting those reanimated state-court proceedings. *Id.* The court explained that the state's "[r]ecent actions" only demonstrated its "intent on dodging review rather than confronting the merits," and thus "serv[ed] as yet another illustration of the [s]tate's unwillingness to give [the petitioner] a fair shake." *Id.*

Long before *Lindsey*, the Seventh Circuit has excused non-exhaustion under § 2254(b)(1)(B)(ii) when it observed inordinate delay at "a high level," even in the face of resurrected state proceedings. *Evans*, 66

F.4th at 685 (20-year delay excused non-exhaustion, even when the state scheduled an evidentiary hearing eight months after petitioner filed his federal habeas petition); accord *Smith v. Kansas*, 356 F.2d 654, 656–57 (7th Cir. 1966) (one-year delay excused non-exhaustion, despite state-court movement after petitioner filed his federal petition). Even in cases that do not involve reawakened state proceedings, the Seventh Circuit takes a holistic view of "circumstances," including the length of delay, that can excuse non-exhaustion. See *Carter v. Buesgen*, 10 F.4th 715, 723 (7th Cir. 2021) (four-year delay excused non-exhaustion); *Lowe v. Duckworth*, 663 F.2d 42, 43 (7th Cir. 1981) (same, with three-and-a-half year delay); *Dozie v. Cady*, 430 F.2d 637, 638 (7th Cir. 1970) (same, with 17-month delay).

2. The Sixth Circuit similarly recognizes that a state court's last-minute movement can be "too late" to foreclose excusing non-exhaustion under § 2254(b)(1)(B)(ii). *Turner v. Bagley*, 401 F.3d 718, 725 (6th Cir. 2005). Excusing non-exhaustion is especially appropriate when "the state clearly is responsible for the delay." *Workman v. Tate*, 957 F.2d 1339, 1344 (6th Cir. 1992).

In *Turner*, while the petitioner's direct appeal was pending in state court for over eight years, he filed a habeas petition in federal court. *Turner*, 401 F.3d at 720. The district court dismissed for failure to exhaust. *Id.* at 723. After that, the state court dismissed the petitioner's direct appeal for failure to prosecute. *Id.* at 755. The Sixth Circuit vacated the district court's dismissal, notwithstanding the developments in the state court. *Id.* at 727–28. The Sixth Circuit explained that § 2254's exhaustion requirement is rooted in "the presumption that states maintain

adequate and effective remedies to vindicate constitutional rights." *Id.* at 724. And it would undermine the comity and federalism principles underscoring the exhaustion requirement to deny federal review to claims long ignored by state courts, the court reasoned. *Id.* Even though the state court had disposed of the petitioner's direct appeal while his federal proceedings were pending, the petitioner was "not required to take further futile steps" in state court in order "to be heard in federal court." *Id.* (cleaned up). Rather, after languishing for years in state court, he was entitled to seek habeas relief in a federal forum. *Id.* at 725. Plus, the state court did not exercise any diligence as to the petitioner's appeal until after he filed a federal habeas petition, the Sixth Circuit noted. *Id.* at 727. As such, the state court's recent movement was "too late" to foreclose relief under § 2254(b)(1)(B)(ii). *Id.* at 725.

Turner hardly stands alone in the Sixth Circuit's body of precedent applying § 2254(b)(1)(B)(ii). See, *e.g.*, *Phillips v. White*, 851 F.3d 567, 576 (6th Cir. 2017) (six-year delay excused exhaustion); *Workman,* 957 F.2d at 1344 (same, with four-year delay).

But even within the Sixth Circuit, there is tension around how to approach questions of inordinate delay under § 2254(b)(1)(B)(ii). As Judge Readler has suggested, the Sixth Circuit's (and other circuits') longstanding "inordinate delay" standard "in many respects is unfaithful to Congress's formulation in § 2254(b)(1)(B)(ii)." *Johnson*, 27 F.4th at 391. Judge Readler acknowledged some circuits excuse non-exhaustion where the petitioner shows an inordinate delay in state proceedings alone, rather than asking whether the state-court process is "ineffective to protect the rights of the applicant." *Id.* at 393 (cleaned up). But while the "inordinate delay" standard "on its

face" appears to displace the statutory text, upon closer inspection, the Sixth Circuit's formulation is consistent with the exhaustion doctrine's history and tradition codified in § 2254(b) because it requires a showing that the delay is both inordinate and "attributable to the state," the court explained. *Id.* at 394.

In the wake of the incongruity explained in *Johnson*, district courts within the Sixth Circuit are struggling with how to analyze whether inordinate delay justifies excusing non-exhaustion under § 2254(b)(1)(B)(ii)—especially when there is late-breaking, state-court movement while federal proceedings are pending. See, *e.g.*, *Peyton v. Akers*, 2024 WL 1530804, at *11–12 (E.D. Ky. Apr. 9, 2024) (noting *Workman* and *Johnson* standards differ and holding exhaustion was required despite six-year delay in state court because of recent movement).

3. The Third Circuit also recognizes that some state-court delays are incurable by "any amount of progress" in state proceedings, applying a two-part inquiry. *Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004) (eight-year delay unjustified). First, the court determines if the delay is inordinate, considering all relevant factors but emphasizing the length of the delay, any degree of progress, and who bears responsibility for the delay. *Morton v. Dir. V.I. Bureau of Corr.*, 110 F.4th 595, 601–02 (3d Cir. 2024). Second, if inordinate delay "has stymied a petitioner's state case," the burden of persuasion shifts to the state to demonstrate why exhaustion should be required. *Id.* at 598, 601–02. Thus, in the Third Circuit, when a state court fails to act on a petitioner's claims, comity does not require exhaustion. *Hankins v. Fulcomer*, 941 F.2d 246, 249–50 (3d Cir. 1991) (11-year delay excused non-exhaustion because "comity weighs less heavily" when

the state has had "ample opportunity to pass upon the matter" and cannot justify the delay).

In *Burkett v. Cunningham*, the Third Circuit excused the petitioner's non-exhaustion because of the state court's continuing five-and-a-half-year delay. 826 F.2d 1208, 1218–19 (3d Cir. 1987). The court pithily held: "It is the legal issues that are to be exhausted, not the petitioner." *Id.* (cleaned up). In the face of such a delay, the Third Circuit reasoned that the state court was owed no further deference or comity. *Id.* at 1218. The court further explained that even if the cause of state-court delay was removed, the petitioner had already waited long enough and could therefore properly seek relief in federal court. *Id.* at 1218 n.31.

The Third Circuit has consistently excused non-exhaustion based on inordinate state-court delays, even in the face of recent activity on the state-court docket. See, *e.g.*, *Morton*, 110 F.4th at 595 (six-year delay inordinate, even though state-court status conference occurred); *Story v. Kindt*, 26 F.3d 402, 406 (3d Cir. 1994) (nine-year delay excused non-exhaustion despite state-court movement after filing federal habeas petition); *Codispoti v. Howard*, 589 F.2d 135, 141–42 (3d Cir. 1978) (same, with 12-year delay, despite state's assertion it would review petition in a future hearing, because "once the state has been afforded full opportunity to adjudicate," the exhaustion requirement has been met (cleaned up)); *U.S. ex rel Geisler v. Walters*, 510 F.2d 887, 890–91, 893 (3d Cir. 1975) (same, with three-plus-year delay despite state court denying petitioner's motion for a new trial after prompting by the federal district court); see also *Lee*, 357 F.3d at 342 (same, and noting "it is difficult to imagine any amount of progress justifying an eight-year delay in reaching the merits of a petition").

4. The Eighth Circuit employs a slightly different analysis but agrees that § 2254(b)(1)(B)(ii) may excuse non-exhaustion even if state-court movement resurrects inordinately delayed proceedings. See *Mucie v. Missouri State Dep't. of Corr.*, 543 F.2d 633, 635–36 (8th Cir. 1976). To determine whether delay excuses non-exhaustion, the court considers "the history of a petitioner's attempts to obtain state remedies, including the length of the delay, whether there has been any activity or progress in the state court action, and whether the delay is attributable to the state or petitioner." *O'Neal v. Kenny*, 49 F. App'x 84, 85 (8th Cir. 2002) (summarizing precedent regarding the application of § 2254(b)(1)(B)(ii)).

In *Mucie*, after three years of delay on his state-court motion to vacate his conviction, the petitioner filed a habeas petition in federal court. 543 F.2d at 635. A month later, the state court denied his motion, and the petitioner appealed to the state appellate court. *Id.* In federal court, the petitioner argued that the delay in state proceedings (including the additional time it would take the state appellate court to hear the case) allowed him a more immediate remedy in federal courts. *Id.* The district court disagreed and dismissed his federal petition for failure to exhaust. *Id.* But the Eighth Circuit reversed, holding the state-court delay rendered further exhaustion unnecessary. *Id.* Exhaustion is a doctrine of comity, and after the state failed to file a response to the petitioner's state-court motion for over a year, its comity interest had expired, the Eighth Circuit reasoned. *Id.* at 636. The state appeared to have been "unnecessarily and intentionally dilatory," so precluding the petitioner from a federal habeas forum would "reduce[] the Great Writ to a sham and mockery." *Id.* at 636. The court was also

concerned that if exhaustion were required, the petitioner would be forced to wait another year before the state court passed on his appeal, thus furthering the delay. *Id.*

However, Eighth Circuit precedent indicates that in some cases, state-court delay is not sufficient alone, but rather requires "the existence of some additional factor," such as intentionally dilatory conduct by the state, to justify excusing non-exhaustion. *Jones v. Solem*, 739 F.2d 329, 331 (8th Cir. 1984) (exhaustion required despite over-one-year delay in postconviction proceedings where state court issued final order after petitioner filed federal habeas petition and petitioner failed to show an additional factor). But cf. *O'Neal*, 49 F. App'x at 85 (noting the Eighth Circuit does "not always" require showing an additional factor before intervening (cleaned up)).

B. In three circuits, § 2254(b)(1)(B)(ii) cannot excuse non-exhaustion when state-court movement resurrects inordinately delayed proceedings.

The First, Tenth, and now Fourth Circuits appear to categorically prohibit excusing non-exhaustion under § 2254(b)(1)(B)(ii) if there is last-minute, state-court movement, even after an inordinate delay. Yet even those circuits cannot agree on when state-court delays can constitute circumstances rendering proceedings ineffective.

1. The First Circuit proscribes excusing non-exhaustion when last-minute movement resurrects state-court proceedings, even after a state court inordinately and unjustifiably delays review of a petitioner's claims. *Layne v. Gunter*, 559 F.2d 850, 851–52

(1st Cir. 1977); see also *Odsen v. Moore*, 445 F.2d 806, 807 (1st Cir. 1971) (three-year delay may excuse non-exhaustion unless in the meantime the state court "move[s] petitioner's state proceedings effectively forward").

In *Layne*, the petitioner filed a federal habeas petition, arguing the state's three-year delay on his motion for authorization of a transcript in his direct appeal excused non-exhaustion. *Id.* at 851. After the federal proceedings were instituted, the state court granted his motion for a transcript. *Id.* The federal district court dismissed on exhaustion grounds, despite the long delay. *Id.* The First Circuit affirmed, holding that it was inappropriate for federal courts to excuse non-exhaustion under § 2254(b) whenever state-court processes were presently available, even in the face of delay. *Id.* at 851. In its view, once a federal habeas petition is filed, a state may (and should be incentivized to) remedy the delay at the earliest moment, citing the delicacy of comity. *Id.* at 851–52.

Since *Layne*, the First Circuit has consistently held that exhaustion is required whenever state proceedings are presently available, notwithstanding delay. See, *e.g.*, *Johnson v. Moran*, 812 F.2d 23, 23 (1st Cir. 1987) (requiring exhaustion despite 19-month delay when "at the time the district court reviewed the federal habeas petition, the state court had acted, if arguably somewhat tardily, on the state postconviction petition"); *Wells v. Marshall*, 1998 WL 1085784, at*1 (1st Cir. Mar. 29, 1996) (exhaustion required despite four-year delay because of recent state-court movement); *L'Heureux v. Pine*, 1998 WL 1085784, at *1 (1st Cir. Nov. 10, 1998) (same); *Branco v. Massachusetts*, 2021 WL 8692680, at *1 (1st Cir. Nov. 22, 2021) (denying certificate of appealability because,

inter alia, state court dismissed direct appeal while petitioner's § 2254 petition was pending).

2. The Tenth Circuit similarly declines to excuse non-exhaustion under § 2254(b)(1)(B)(ii) whenever state-court dockets show recent signs of life. See, *e.g.*, *Vreeland v. Davis*, 543 F. App'x 739, 742 (10th Cir. 2013).

In *Vreeland,* shortly after the petitioner filed his federal habeas petition, the state court affirmed his conviction on direct appeal—after six years of delay. *Id.* at 740. The district court dismissed his petition for failure to exhaust because he was concurrently petitioning the state supreme court for discretionary review. *Id.* The Tenth Circuit affirmed, emphasizing that non-exhaustion cannot be excused by § 2254(b)(1)(B)(ii) on the basis of a delay that had since ended. *Id.* at 742. The court reasoned that when state-court movement resurrects proceedings, comity interests compel federal courts to allow state litigation to "run its course," even after state-court delays. *Id.*

That said, the Tenth Circuit has its own idiosyncratic rules for excusing non-exhaustion based on "excessive and inexcusable" state-court delays. *Jones v. Crouse*, 360 F.2d 157, 158 (10th Cir. 1966). For direct appeals in state courts, a two-year delay gives rise to a presumption that state processes are ineffective. *Harris v. Champion*, 15 F.3d 1538, 1546 (10th Cir. 1994). But the Tenth Circuit has declined to extend a burden-shifting approach to the collateral-postconviction context, and instead weighs the state's responsibility for the delay. See *White v. McKinna*, 1998 WL 39656198, at *1 (10th Cir. July 16, 1998) (refusing to extend *Harris* to delayed collateral proceedings); *Body v. Watkins*, 51 F. App'x 807, 811–12 (10th Cir. 2002)

(requiring exhaustion despite nine-year delay); *Coleman v. Watkins*, 52 F. App'x 442, 443–44 (10th Cir. 2002) (same, with six-year delay).

3. The Fourth Circuit, historically, held "state remedies may be rendered ineffective by inordinate delay or inaction in state proceedings." *Ward v. Freeman*, 1995 WL 48002, at *1 (4th Cir. Feb. 8, 1995); accord *Plymail v. Mirandy*, 671 F. App'x 869, 870–71 (4th Cir. 2016) (vacating district court's exhaustion-based dismissal because 20-year delay was partially attributable to the state).

But in Hicks's case, as explained above, the court broke new ground on the question and effectively held that federal courts are not permitted to intervene under § 2254(b)(1)(B)(ii) if a state's "last-minute" dismissal ends the delay, even a delay covering three decades wherein the state lost its comity interest. App. 18a n.8.

C. Four other circuits have not addressed last-minute, state-court movement, but apply distinct legal analyses under § 2254(b)(1)(B)(ii), indicating an even deeper split.

Other circuit courts have yet to directly confront whether § 2254(b)(1)(B)(ii) forecloses excusing non-exhaustion in the face of last-minute, state-court movement. But they employ distinct frameworks to assess when delay can constitute circumstances rendering state processes ineffective. These frameworks diverge from the other circuits', further highlighting the need for this Court's authoritative voice.

1. The Fifth Circuit's stance on the issue is elusive, previously requiring exhaustion after a last-minute, state-court dismissal ended a delay, *Reynolds v. Wainwright*, 460 F.2d 1026, 1027 (5th Cir. 1972),

while suggesting (unlike the Fourth Circuit) that "at some point in time exhaustion need not be further exhausted," *Dixon v. State of Florida*, 388 F.2d 424, 425–26 (5th Cir. 1968). It is unclear how the Fifth Circuit would assess a state court's dismissal in the circumstances of an extreme delay, such as Hicks's.

In *Reynolds*, after the petitioner filed his *pro se* federal habeas petition, the state court ended its nearly one-year delay and denied his motion to vacate. 460 F.2d at 1027. The district court dismissed his federal habeas petition for failure to exhaust. *Id.* at 1026. The Fifth Circuit affirmed, rejecting the petitioner's argument that the court should only consider whether he had effective state avenues at the time of filing. *Id.* Balancing the "federalism interests of comity" with "the rights of the petitioner," the court concluded that the state courts, "now available" to review an appeal of the denied motion, should hear the issue before federal intervention. *Id.* at 1027. At the same time, the Fifth Circuit acknowledged that exhaustion can be excused by an unreasonable delay, "at some point." *Id.*; see, *e.g.*, *Shelton v. Heard*, 696 F.2d 1127, 1128–29 (5th Cir. 1983) (16-month delay excused non-exhaustion); *Breazeale v. Bradley*, 582 F.2d 5, 6 (5th Cir. 1978) (same, over one-year delay).

This peculiarity may chalk up to the Fifth Circuit's unique approach: delay can qualify as an "exceptional circumstance of peculiar urgency" that allows a federal habeas forum *only* if the delay is wholly the fault of the state. *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993) (cleaned up). State-court delay cannot excuse a failure to exhaust when the petitioner contributed to the delay, even minimally. *Id.* Therefore, the exhaustion inquiry is often concentrated on whether the petitioner contributed to the delay, and

not necessarily on whether there has been recent state progress. See *Taylor v. Stephens*, 577 F. App'x 285, 287 (5th Cir. 2014) (exhaustion required despite three-year delay when delay was partially attributable to state's inability to contact petitioner's attorney).

2. The Ninth and Second Circuits both look to the *Barker v. Wingo*, 407 U.S. 514, 530 (1972), factors when determining whether inordinate delay satisfies § 2254(b)(1)(B)(ii): "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *Gay v. Ayers*, 262 F. App'x 826, 827–28 (9th Cir. 2008) (citing *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) (exhaustion required despite 19-month delay in state habeas petition)); see also *Jackson v. Jackson*, 2025 WL 2741643, at *1 (9th Cir. Sept. 17, 2025) (exhaustion required despite 13-month delay in personal-restraint petition). While the Ninth Circuit has yet to clearly address how last-minute, state-court movement affects the application of the *Barker* factors, presumably, recent progress would not be dispositive, consistent with the circuits that apply a multi-factor analysis to determine when circumstances render state processes ineffective under § 2254(b)(1)(B)(ii).

The Second Circuit imports the *Barker* factors, plus a "fifth consideration" of "federal-state comity," to determine whether inordinate delay excuses non-exhaustion. *Brooks v. Jones*, 875 F.2d 30, 31–32 (2d Cir. 1989). So far, the court has reached the question only as to delayed direct appeals and not as to delayed collateral, postconviction proceedings. See, *e.g.*, *Roberites v. Colly*, 546 F. App'x 17, 19 (2d Cir. 2013). Assuming the Second Circuit applies the *Barker* factors to delayed collateral proceedings, late-breaking state progress would likely not be dispositive, especially if there

was no state decision when the petitioner filed his federal habeas petition. See *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990).

In *Simmons*, a petitioner suffered a six-year delay in his state-court direct appeal before filing a habeas petition in federal court. *Id.* at 866. While the federal proceedings were pending, the state court affirmed his conviction on direct appeal, ending the six-plus-year delay. *Id.* at 867. Still, the district court applied § 2254(b)(1)(B)(ii) and excused the petitioner's failure to exhaust state remedies. *Id.* The Second Circuit affirmed, explaining that the petitioner "was not required to take further futile steps in state court in order to be heard in federal court." *Id.* at 868.

3. The Eleventh Circuit has not determined whether late-breaking movement by state courts categorically forecloses § 2254(b)(1)(B)(ii)'s application, but the court does consider "recent progress" in state proceedings when determining if circumstances exist that render state processes ineffective. *Keinz v. Crosby*, 2006 WL 408686, at *2 (11th Cir. Feb. 23, 2006) (exhaustion required despite two-year delay, partially due to scheduled evidentiary hearing); accord *Slater v. Chatman*, 147 F. App'x 959, 960 (11th Cir. 2005) (exhaustion required despite 14-month delay in appointment of counsel because the state courts are "now moving forward," but also acknowledging exhaustion "can be reached by the lapse of time at some point" (cleaned up)). The court does not appear to have answered the question directly because the focus of the court's inquiry is whether the state can justify the delay. See *Keinz*, 2006 WL 408686, at *2 (first finding petitioner was responsible for the delay before addressing state-court movement); see also, *e.g.*, *Cook v.*

Fla. Parole & Prob. Comm'n, 749 F.2d 678, 680 (11th Cir. 1985) (citing *Reynolds*, 460 F.2d 1026);[3] *Thomas v. Macon SP Warden*, 2024 WL 1092510, at *2 (11th Cir. Mar. 13, 2024) (15-month delay may excuse non-exhaustion if unjustified).

While the Eleventh Circuit theoretically recognizes state progress as a factor, in practice, it appears to have never excused non-exhaustion whenever recent state movement occurred. Accordingly, district courts applying the Eleventh Circuit's precedents have held that last-minute, state-court progress functionally forecloses excusing non-exhaustion. See, *e.g.*, *Schwindler v. Holt*, 2018 WL 2091364, at *1–2 (S.D. Ga. Mar. 27, 2018), *report and recommendation adopted*, 2018 WL 2087248, at *1 (S.D. Ga. May 4, 2018) (requiring exhaustion despite 14-year delay when state petition was decided and pending appeal after filing federal habeas petition).

* * *

The circuits' conflicting interpretations of § 2254(b)(1)(B)(ii) are exhausting to puzzle. This Court's absence from the arena has produced fundamental confusion over the meaning and purpose of § 2254(b)(1)(B)(ii)—especially when it comes to late-breaking action in pending state proceedings—that only this Court can resolve.

This question need not percolate longer. Over the past seventy years, numerous courts have addressed inordinate delay under § 2254(b), and no clarity has

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

emerged. If the question goes unanswered, the status quo will continue to promote disparate treatment of identical claims.

Take Hicks's case. In the Seventh and Sixth Circuits, Hicks's inordinate 27-year delay, predominantly attributable to the state's mismanagement, would excuse non-exhaustion. The same result would obtain under the factors the Third Circuit considers. Even the Ninth Circuit's *Barker* factors would weigh heavily in Hicks's favor. If Hicks were imprisoned not in West Virginia but just across the state border in Pennsylvania, Ohio, or Kentucky, he would be free to challenge his conviction in federal court. AEDPA's exhaustion rules should not hinge on the fortuity of circuit boundaries.

II. The question presented is recurring and critically important.

Questions regarding AEDPA's procedural hurdles, those gatekeeping the "great constitutional privilege" of the writ of habeas corpus, *Ex parte Bollman,* 8 U.S. 75, 95 (1807), are a fixture of this Court's docket. *S*ee, *e.g.*, *Bowe v. United States*, 2024 WL 4038107 (11th Cir. June, 27, 2024), *cert granted*, 145 S. Ct. 1122 (Jan. 17, 2025) (No. 24-5438) (§ 2244(b)); *Rivers v. Guerrero*, 605 U.S. 443 (2025) (§ 2244(b)(2)); *Jones v. Hendrix*, 599 U.S. 465 (2023) (§ 2255(e)); *Shinn v. Ramirez*, 596 U.S. 366 (2022) (§ 2254(e)(3)). Surprisingly, however, this Court has never interpreted § 2254(b)(1)(B)(ii).

The lower courts are constantly struggling to figure out when § 2254(b)(1)(B)(ii) excuses non-exhaustion, especially within the context of inordinate delay in state-court proceedings. That is no wonder, given the prevalence of habeas petitions. In the past year or

so, about one out of every twenty civil cases commenced in federal district courts was a § 2254 petition. See Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending June 30, 2024 and 2025, https://perma.cc/8LKX-WPGR (showing 14,106 non-capital habeas petitions filed in district courts, out of a total of 287,441 civil cases commenced, in the 12 months preceding July 31, 2025); see also N. King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 57 (2007), https://perma.cc/65GA-MMYF (concluding at the time of the study that approximately 11% of habeas cases were dismissed on exhaustion grounds). And in every one of those cases, the petitioner had to show that any available state remedies were exhausted or that § 2254(b)(1)(B)(ii)'s exception applies. See 28 U.S.C. § 2254(a)–(b).

Accordingly, the lower courts are frequently tasked with interpreting § 2254(b)(1)(B)(ii) in the absence of this Court's guidance. See, *e.g.*, *Merrifield v. Frame*, 2025 WL 2851879, at *1 (S.D. W. Va. Oct. 8, 2025); *Kendall v. Quiros*, 2025 WL 2930906, at *5 (D. Conn. Oct. 15, 2025); *Brown v. Warden, London Corr. Inst.*, 2025 WL 2531463, at *2 (S.D. Ohio Sept. 3, 2025), *report and recommendation adopted*, 2025 WL 2734242, at *1 (S.D. Ohio Sept. 25, 2025); *Lombardo v. Zanelli*, 2025 WL 2940758, at *1 n.1 (E.D. Pa. Aug. 26, 2025); *Torres v. Reis*, 2025 WL 1488490, at *5–6 (D. Conn May 23, 2025); *Paige v. Holloway*, 2025 WL 337997, at *2 (M.D. Tenn. Jan. 29, 2025) ("[T]he Sixth Circuit in its prior cases has failed to 'explicitly define' what an inordinate delay means . . . .") (citing *Johnson*, 27 F.4th at 394); *Jackson v. Howard*, 2025 WL 66051, at *4–5 (E.D. Mich. Jan. 10, 2025).

On top of that, the phenomenon of state-court delays in postconviction proceedings holds grave consequences for all involved. For states, delay disrupts needed finality "essential to both the retributive and deterrent functions" of criminal law. *Shinn*, 596 U.S. at 391 (citing *Calderon v. Thompson*, 523 U.S. 538, 555 (1998)). Even more significant are the stakes for petitioners. Hicks's experience with inordinate delay, though extreme, is all too common, as the previous discussion illustrates. When postconviction proceedings crawl through state courts, even the most diligent petitioners are left in harrowing conditions. Time impedes zealous representation, witnesses forget information or pass away, and case files and transcripts are lost—all of which happened to Hicks during the decades-long delays he has experienced in state court. Sadly, Hicks's experience, though out of the ordinary, is far from unique.

III. The Fourth Circuit wrongly allowed last-minute, state-court movement to supplant the totality-of-the-circumstances, comity-focused inquiry § 2254(b)(1)(B)(ii) requires.

The Fourth Circuit thought § 2254(b)(1)(B)(ii) was so limited as to require the dismissal of Hicks's petition as unexhausted solely "on account of late-breaking developments in Hicks's state postconviction proceedings." App. 10a. That was wrong. As other circuits have correctly concluded, the statute is not so circumscribed as to prevent federal courts from considering the totality of the "circumstances" that render state proceedings "ineffective," even when state courts awaken dormant proceedings. The Fourth Circuit has thus broken with the Seventh, Sixth, Third, and

Eighth Circuits, and joins the First and Tenth Circuits on the wrong side of the circuit split.

A. The Fourth Circuit's decision is at odds with the statute's plain text.

In interpreting Congress's command in § 2254(b)(1)(B)(ii), courts must begin with the statute's text, giving the words used their "ordinary, contemporary, common meaning." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 408 (2017). However, the inquiry "is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Id.* As the Fourth Circuit noted, the interpretive inquiry ends "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." App. 16a.

Here, the statutory text requires courts to ascertain whether "circumstances" exist that "render" state processes "ineffective" to protect the rights of the petitioner. 28 U.S.C. § 2254(b)(1)(B)(ii). While the Fourth Circuit made much of the fact that this provision is written in the present tense, App. 16a–17a, it neglected to grapple with the words themselves. Both operative terms—"circumstances" and "ineffective"—are broad and functional.

"Circumstances," in its ordinary usage, means "condition[s], fact[s], or event[s] accompanying, or determining the occurrence of another fact or event." *Circumstance*, Webster's Collegiate Dictionary 183 (5th ed. 1947). This word speaks to the real-world conditions surrounding a petitioner's pursuit of relief, and invites a holistic assessment of all facts and conditions that may tend to "render" the state process ineffective. Accordingly, the Fourth Circuit erred in deciding to leave unresolved the "hard questions," such as "the

extent to which considerations like length of delay, blame for delay, and diligence by the petitioner . . . factor into whether the exhaustion requirement has been excused." App. 18a n.8. Those considerations are precisely the "circumstances" the text requires courts to analyze.

"Ineffective" must likewise be read in its ordinary sense: "not effective; productive of no effect; ineffectual." *Ineffective*, Webster's Collegiate Dictionary 513 (5th ed. 1947); see also *Ineffectual*, Webster's Collegiate Dictionary 513 (5th ed. 1947) ("not effectual; not producing the proper or usual effect"). As its definition suggests, this term does not require a showing of absolute futility (which would collapse the "absence of available state court processes" and "ineffective" exceptions provisions into each other), nor does it license premature resort to federal court. Rather, it empowers federal judges to apply their equitable judgment to determine whether state procedures afford a meaningful—or effective—avenue of redress. In this ordinary usage, a proceeding may be understood to be "ineffective" even if a resolution now seems near, because ineffectiveness turns on whether the state process has functioned as a meaningful avenue for relief—not merely on whether it may someday reach a resolution. For example, a drive-through car wash that should ordinarily take a couple of minutes would be "ineffective" if it instead lasted a couple of hours, because it is not performing efficiently or as expected, regardless of whether a car ultimately emerges clean at the end. In this sense, "ineffective" is not a switch that can be flipped back and forth—it is a quality that attaches after a certain (high) threshold of accumulated inefficiency and abnormal operation.

The Fourth Circuit incorrectly treated the ineffectiveness of Hicks's state-court proceedings as a purely prospective determination, "regardless of whether they were ineffective before." App. 17a. Indeed, the court concluded that because "West Virginia is finally addressing Hicks's case" after "much prodding and way too much time," it "no longer appear[ed]" that state processes were ineffective. *Id.* This concedes the key point: that the "decades of delay that have plagued Hicks's case" had already made "West Virginia's postconviction system . . . ineffective to protect Hicks's rights." *Id.* If the Fourth Circuit's interpretation were correct, a state would face a perverse incentive to drag out its postconviction proceedings as long as possible, in hopes that the petitioner's case (or worse, the petitioner himself) weakens in the meantime. And all it would have to do to foreclose a federal forum is make a pump fake towards progress at the last minute (or, as in Hicks's case, just summarily dismiss the petition). The statute simply does not require federal courts to abide this kind of jurisdictional gamesmanship.

B. The Fourth Circuit's decision is expressly inconsistent with the common-law tradition codified by the statute.

As explained above, Congress codified the exhaustion doctrine's flexible common-law tradition, retaining its core equitable balance: federal courts must defer to available state corrective processes, but not where they are ineffective. See pp. 2–3, *supra*. And the exhaustion doctrine's central inquiry, as this Court has recognized since 1886 in *Ex parte Royall*, 117 U.S. at 252–53, is comity.

Despite nodding to these principles and cases, the Fourth Circuit expressly broke from the tradition they stand for. App. 18a. The Fourth Circuit (correctly) held that, "given West Virginia's failure to resolve Hicks's claim for such an extended duration, comity towards any interest it might have in being the first to answer Hicks's claim is unwarranted." App. 14a; see also App. 15a n.7 (concluding, again, "no comity is warranted"). But as this Court has repeatedly acknowledged, comity is the singular principle animating the exhaustion doctrine. *Rose*, 455 U.S. at 515. The Fourth Circuit thus misinterpreted § 2254(b)(1)(B)(ii), which, properly understood in light of the longstanding tradition it codified, requires federal courts to equitably balance a petitioner's need for the swift protection of his constitutional rights with any comity owed to state courts. By untethering its strained reading of § 2254(b)(1)(B)(ii) from principles of comity, the Fourth Circuit ran afoul of decades of tradition, common-law principles, and this Court's precedent.

IV. This case is an excellent vehicle to resolve the question.

This case is an ideal vehicle to resolve the circuit split and answer the question that has been beleaguering the lower courts.

First, this case comes at a time when the circuit split is particularly ripe. The narrow issue here has percolated in several circuits, and nearly every circuit has interpreted § 2254(b)(1)(B)(ii) in a different manner, resulting in a messy field that calls for this Court's review. Indeed, the Seventh Circuit's opinion in *Lindsey v. Neal* and the Fourth Circuit's decision below are diametrically opposed and were issued only two months apart.

Second, although Hicks's experience is all too common, his history in the state court, combined with the timing and posture of the Fourth Circuit's decision, uniquely positions this case to answer the difficult questions confounding lower courts. Hicks has been wrongfully denied the opportunity to challenge his sentence in a federal forum, after more than three decades of nonfeasance in state court. Even the Fourth Circuit acknowledged Hicks's "Kafkaesque" experience navigating "West Virginia's nearly three-decade delay," which "no doubt offends basic notions of how a state should treat its prisoners." App. 3a, 16a, 19a. The severity of the delay and the state court's other mishaps help to analytically isolate the impact of the state court's late-breaking movement. In contrast, a later petition with a less-drastic miscarriage of justice (such as a case with the same outcome but a much shorter state-court delay) would make it harder for the Court to parse out the specific significance of the late-breaking state-court movement that served as the singular difference-maker in the Fourth Circuit below (as it appears to be in the First and Tenth Circuits).

Relatedly, this case's facts present the Court with the opportunity to decide the issue as narrowly or broadly as it deems appropriate. Hicks challenges the Fourth Circuit's determination that last-minute movement in state court was a dispositive factor that precluded excusing non-exhaustion under § 2254(b)(1)(B)(ii), but his case would also allow this Court to delve into the broader issue of whether and when the provision can excuse non-exhaustion in the context of state-court delays more generally. Several circuits, for example, will entertain a federal habeas petition in circumstances where an inordinate delay alone has rendered state proceedings ineffective.

Finally, this case presents a pure legal question about the statutory interpretation of a key—and ubiquitously invoked—statutory provision that this Court has never squarely addressed. Whether state-court movement forecloses excusing non-exhaustion under § 2254(b)(1)(B)(ii) depends only on what the clause's text, purpose, and structure mean within § 2254 more generally, and it is dispositive in Hicks's case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 2025

APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 23-6447

ALAN LANE HICKS,
Petitioner – Appellant,

v.

JONATHAN FRAME, Superintendent,
Respondent – Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Robert C. Chambers, United States District Judge. (3:21-cv-00618)

Argued: March 19, 2025 Decided: July 23, 2025

Before THACKER, RICHARDSON, and RUSHING, Circuit Judges

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Thacker and Judge Rushing joined.

ARGUED: Lawson Sadler, WASHINGTON UNIVERSITY SCHOOL OF LAW, St. Louis, Missouri, for Appellant. Caleb Allen Seckman, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee. **ON BRIEF:** Steven J. Alagna, Supervising Attorney, Andrew R. Hilty, Student Advocate, Hannah F. Keidan, Student Advocate, Shawn N. Podowski, Student Advocate, Appellate Clinic, WASHINGTON UNIVERSITY SCHOOL OF LAW, St. Louis, Missouri, for Appellant. John B. McCuskey, Attorney General, Michael R. Williams, Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee.

RICHARDSON, Circuit Judge:

Alan Hicks was convicted of murder, conspiracy, and grand larceny in West Virginia in 1988. For his crimes, he was sentenced to life in prison without the possibility of parole. In 2021, Hicks filed a federal habeas petition in the Southern District of West Virginia, collaterally attacking the validity of his imprisonment. The district court dismissed his petition because Hicks had failed to exhaust his state remedies before filing in federal court. On appeal, Hicks contends that he should be excused from this statutory exhaustion requirement.

The story behind Hicks's failure to exhaust, however, begins long before his federal habeas petition in 2021. To understand the fight on appeal, we must retrace his steps along a Kafkaesque journey through West Virginia's state court system that starts in 1989, shortly after his conviction, and ends, for our purposes, more than thirty years later in 2025. Along the way, our journey passes by forgotten motions, improperly appointed judges, and inattentive counsel. At the end, however, we find that the statutory text of 28 U.S.C. § 2254 requires us to affirm the district court's dismissal. So we do.

I. Background

A. Offenses And Direct Review

In November 1986, Alan Hicks was indicted in West Virginia for murder in the first degree. In early 1988, charges were added for aggravated robbery and conspiracy to commit murder. In September 1988, he was convicted of first-degree murder, conspiracy to commit murder, and grand larceny. The state court then sentenced Hicks to life imprisonment.

On October 26, 1989, Hicks appealed to the Supreme Court of Appeals of West Virginia. He asserted that the trial court lacked jurisdiction over his conspiracy charge, that his due process rights were violated by the prosecutor making unsupported allegations in his opening statement, and that the judge's failure to instruct the jury on self-defense violated his fair trial rights. He lost his direct appeal in January 1990, and did not seek review by the Supreme Court of the United States.

B. Collateral Challenges

Since losing his direct appeal, Hicks has collaterally attacked his conviction in three ways. The subject

of this appeal is his third and most recent attack: his November 2021 federal habeas petition, brought under 28 U.S.C. § 2254. We start there.

In the district court below, Hicks asserted that his 1988 trial was riddled with half a dozen errors and constitutional rights violations.[1] West Virginia moved to dismiss Hicks's claim by arguing that he failed to exhaust state remedies before bringing his federal habeas petition. *See* § 2254(b)(1)(A). Hicks admitted that he had failed to exhaust but countered that he was nevertheless permitted to bring his federal petition because of § 2254(b)(1)(B), which excuses a petitioner from satisfying the exhaustion requirement if "there is an absence of available State corrective process" or if "circumstances exist that render such process ineffective to protect the rights of the applicant." The district court sided with West Virginia and dismissed the petition. At the same time, the district court granted Hicks a certificate of appealability under 28 U.S.C. § 2253, and Hicks appealed the dismissal decision. It is this appeal that is before us now.

But to understand Hicks's contention on appeal that the district court erred by not excusing him from the statutory exhaustion requirement, we must take a detour to understand the "circumstances" that he alleges have "render[ed]" West Virginia's state postconviction proceedings "ineffective" to protect him. § 2254(b)(1)(B)(ii). This requires us to go over three

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[1] The errors alleged are not relevant to this appeal but include a violation of the Double Jeopardy Clause, failure to grant a mistrial, failure to instruct the jury on self- defense, giving an improper malice instruction, failure to give a proper verdict forms to the jury, and the absence of trial advocacy from his counsel.

decades back in time and explain Hicks's earlier two collateral attacks on his conviction in state court.

Hicks's first collateral attack began in February 1989, shortly after his conviction, when Hicks moved for a reduced sentence under Rule 35 of the West Virginia Rules of Criminal Procedure. W. Va. R. Crim P. 35. Rule 35(a) allows a West Virginia court to "correct an illegal sentence at any time," and Rule 35(b) allows a sentence reduction "within 120 days after the sentence is imposed . . . or within 120 days after the entry of mandate by the supreme court of appeals." Hicks did not specify which section he was moving under. But rather than seeking clarification, ruling on the motion, or any number of options, the West Virginia trial court did nothing.

After eight years passed by without movement on Hicks's motion for a sentence reduction, he launched his second attack. In November 1997, Hicks petitioned for postconviction relief and moved to appoint counsel in state court.[2] Instead of moving things along though, this only triggered a cascade of errors from all involved.

To start, Hicks's petition and motion were assigned to Judge O.C. Spaulding. The problem? Judge Spaulding had been the prosecutor in Hicks's trial nearly a decade prior. In fact, he had been the "Prosecuting Attorney" in Hicks's case and delivered the opening argument. In other words, the judge that West Virginia assigned to decide whether Hicks's trial had been infected by constitutional errors was one of the main individuals accused of making those errors. Subsequently, for reasons we can only speculate

[2] Hicks's claims for state postconviction relief were largely similar to the claims he later brought in his federal habeas petition.

about, "no activity occurred [on Hicks's petition and motion] for fifteen (15) years." J.A. 433. Hicks also took no steps to force the court to act during that period.

Sometime during those fifteen years, and again for unknown reasons, the case was reassigned from Judge Spaulding to Judge J. Robert Leslie. In 2012, Hicks sent a letter to the court to renew his then-15-year-old motion to appoint counsel. In response, Judge Leslie appointed Shawn Bayliss to be Hicks's lawyer in September of that year. Hicks sent several letters to Bayliss from prison discussing his postconviction petition and his earlier motion for a sentence reduction. But while Bayliss attempted to secure a copy of Hicks's trial transcript and moved to extend filing deadlines several times, he neglected to respond to Hicks's communications. As a result, Hicks filed a complaint with the State Bar and the West Virginia Supreme Court concerning Bayliss's performance. Ultimately, citing struggles to obtain a copy of the transcript, Bayliss moved to be relieved as counsel a year after he was appointed. Judge Joseph Reeder—who took the case from Judge Phillip M. Stowers, who took the case from Judge Leslie—granted Bayliss's motion.

In September 2013, Judge Reeder appointed C. Dascoli, Jr. to replace Bayliss as Hicks's appointed counsel. From the record, Dascoli does not appear to have made any filings or taken any action with respect to Hicks's case for nearly three years.

In May 2016, Judge Reeder appointed Duane Rosenlieb to replace Dascoli as Hicks's appointed counsel. Rosenlieb promptly failed to abide by a court order to file Hicks's amended state postconviction petition by June 21, 2016. His first communication to

Hicks was in November of that year, over half a year later.

In January 2017, Hicks tried to take matters into his own hands and moved to relieve Rosenlieb in order to proceed *pro se*. At a hearing, Rosenlieb informed the postconviction relief court that he was having trouble obtaining Hicks's trial transcript—the same difficulty Bayliss had encountered.[3] Rosenlieb also claimed that Hicks was himself an obstacle in the way of moving his postconviction petition forward because Hicks refused to fill out a so-called *Losh* list, a tool used in West Virginia to delineate the grounds for postconviction relief, and rejected Rosenlieb's proposed strategy to obtain relief. Judge Reeder relieved Rosenlieb of his duties but held Hicks's motion to proceed *pro se* in abeyance, reserving the right to appoint new counsel.

In May 2018, Hicks petitioned for a writ of mandamus in the West Virginia Supreme Court, asking that court to command Judge Reeder to resolve his Rule 35 motion for a sentence reduction and his postconviction petition, which remained pending after 29 and 21 years, respectively. The West Virginia Supreme Court responded in January 2019 by requiring Judge Reeder to show cause why the writ should not issue. In his response to the West Virginia Supreme Court's request to show cause, Judge Reeder finally ruled on Hicks's Rule 35 motion by, ironically, denying it on the grounds that it was filed a single day late back in 1989. As for Hicks's postconviction relief petition, Judge Reeder explained that he had not acted because Hicks had been "unwilling or unable to

[3] During the same hearing, Hicks claimed that he possessed a print version of the full transcript and agreed to make a copy of it on the condition that the court waive his copying fees.

cooperate" with his attorneys. J.A. 436. But Judge Reeder stated that he had, just days prior, appointed one Carl Hostler to serve as Hicks's new counsel, so things were moving along.

In the same January 2019 order that appointed Hostler as counsel, Judge Reeder also scheduled a status hearing, set a final state-habeas petition deadline, and promised that the Court would "issue a final decision on the *Petition for Writ of Habeas Corpus Ad-Subjiciendum* on or before September 6, 2019." J.A. 530. None of these occurred. Only two and a half years later did the Court schedule another status hearing for Hicks's case— this time, for July 2022.

The July hearing was then rescheduled to August due to a scheduling conflict. The August hearing was then rescheduled to September due to a scheduling conflict. At the September 2022 status hearing, Hicks learned for the first time that Hostler had left private practice entirely and was no longer his attorney. Hicks was thus assigned yet another attorney—the fifth, for those counting—Jason Gain.

Between the appointment of Hostler in 2019 and the appointment of Gain in 2022, Hicks filed his federal habeas petition in the district court below. That brings us full circle back to the present appeal. As stated above, the district court dismissed Hicks's federal habeas petition for failure to exhaust, and he appealed that dismissal to this Court. When Hicks filed his opening brief in this case in December 2024, "[n]o further progress ha[d] been made" in resolving his state postconviction relief case. Op. Br. at 9.

This is ordinarily where a facts section would end, as we have reached the point where the appeal before us was docketed—but this is no ordinary case. Hicks's

oral argument date before this court was set for March 19, 2025. Just before oral argument, West Virginia reassigned Hicks's state postconviction case from Judge Reeder to a new judge, Mark Sorsaia. But, incredibly, Judge Sorsaia had *also* been one of Hicks's prosecutors, just like Judge Spaulding. West Virginia 28(j) letter (March 12, 2025). So the case had to be reassigned yet again.

Shortly after oral argument, the state court finally resolved Hicks's nearly thirty- year-old postconviction petition "on the merits" by "summarily dismiss[ing]" the case. Hicks 28(j) letter (April 24, 2025). This determination was made by Judge Stowers, who— it apparently bears mentioning—did not previously prosecute Hicks. *Id.*

With the timeline laid out, we now turn to the legal issue in this case.

II. Discussion

To obtain federal habeas relief, a state prisoner must satisfy the statutory requirements of 28 U.S.C. § 2254. One of those requirements is for the petitioner to have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). In other words, the state prisoner must first go through all available state postconviction proceedings. This requirement is one rooted in comity for state courts and "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The exhaustion requirement is excused, however, if either "there is an absence of available State corrective process," or if "circumstances exist that render such process ineffective

to protect the rights of the applicant." 28 U.S.C. §§ 2254(b)(1)(B)(i)–(ii).

On appeal, Hicks challenges the district court's dismissal of his federal habeas petition. He admits that he has not satisfied the requirement to exhaust under § 2254(b)(1)(A) but offers two arguments for why he is statutorily excused from doing so under § 2254(b)(1)(B). First, he contends that the state proceedings were tainted because Judge Spaulding had served as his prosecutor before presiding over the first 15 years of his postconviction relief proceedings, and that this structural error rendered the state corrective process "[un]available." *See* § 2254(b)(1)(B)(i). Second, he contends that West Virginia's multi-decade delay in adjudicating his 1997 petition for state postconviction relief shows that the state process is "ineffective to protect [his] rights." *See* § 2254(b)(1)(B)(ii).

We decline to address the first argument because it was not included in Hicks's certificate of appealability. We reject the second on account of late-breaking developments in Hicks's state postconviction proceedings. We therefore affirm the district court's dismissal.

A. The Certificate Of Appealability Only Mentions Delay, Not Bias

To succeed in this appeal, Hicks must prove that he satisfies § 2254's statutory requirements. But we begin with a predicate issue: To appeal the district court's resolution of his § 2254 petition in the first place, Hicks needed to obtain a certificate of appealability ("COA") from a judge or court.[4] COAs are

[4] We do not address the unraised question of whether a district court judge may grant a COA. *Compare* § 2253(c)(1), *with Gonzalez v. Thaler*, 565 U.S. 134, 143 n.5 (2012), *and* Fed. R. App. P. 22(b)(1).

essentially permission slips to appeal, governed by their own statutory requirements in § 2253. Because of a defect in his COA, Hicks is limited to one of his two theories and cannot argue on appeal that the bias from Judge Spaulding excused his failure to exhaust.

There are three COA requirements. The first, § 2253(c)(1), simply states that a COA is required for a prisoner to take an appeal in a proceeding under §§ 2254 or 2255.[5] Without a COA, the court of appeals lacks jurisdiction to hear the prisoner's appeal. *See Thaler*, 565 U.S. at 142. The second requirement, § 2253(c)(2), sets forth the substantive standard that the prisoner must meet, mandating that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The third requirement, § 2253(c)(3), obligates the judge or court who grants the COA to "indicate which specific issue or issues" show that denial.

It is the third requirement that bars Hicks's argument regarding Judge Spaulding's involvement. West Virginia has pointed out that the district court granted Hicks a COA on account of "the length of delay in Petitioner's state proceedings." J.A. 686. The state argues that this short explanation of the "specific issue" does not "indicate" a concern with any potential bias that might taint Hicks's proceedings from his prior prosecutor's involvement. § 2253(c)(3). We agree.

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[5] These two statutory provisions, §§ 2254 and 2255, govern prisoners who are in custody pursuant to a judgment from state or federal court, respectively. But in addition to being detained pursuant to the judgment of a court, individuals can also be detained in other ways, such as by executive detention in the hands of the military. Those individuals may petition for a writ of habeas corpus under § 2241, and the requirements laid out in § 2253 do not apply to them.

So while we do not condone the mismanagement that led to Hicks's case being *twice* assigned to judges who were his former prosecutors, we are "precluded from considering" arguments from Hicks that address issues outside of delay. *Lumumba v. Kiser*, 116 F.4th 269, 278 n.4 (4th Cir. 2024).[6]

B. West Virginia's Postconviction System Is Not Presently "Ineffective"

That leaves us with Hicks's second argument that the extremely long delay in his state postconviction proceeding renders it "ineffective to protect [his] rights." § 2254(b)(1)(B)(ii). Before we get to the merits of Hicks's claim, however, we must address another possible issue with Hicks's COA.

1. Hicks's COA does not indicate the constitutional right that is violated by delay, but we choose to address his delay argument anyway.

The district court dismissed Hicks's habeas petition for failure to exhaust, which is a dismissal on procedural grounds. It then granted a COA, indicating that "the length of delay in the Petitioner's state

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[6] Hicks also appears to have waived his bias argument by not raising it below. In his § 2254 petition to the district court, Hicks provided four grounds for habeas relief, none of which raised the theory that Judge Spaulding's involvement in his state postconviction proceeding excused the exhaustion requirement. Hicks's response to West Virginia's motion to dismiss his petition also failed to raise this theory. "When a party in a civil case"—which includes habeas cases, *see Smith v. Bennett*, 365 U.S. 708, 712 (1961)— "fails to raise an argument in the lower court and instead raises it for the first time before us, we may reverse only if the newly raised argument establishes 'fundamental error' or a denial of fundamental justice." *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014). We do not find this standard met, even with West Virginia's admittedly derelict conduct.

proceedings" may permit him to excuse his failure. J.A. 686. Unlike the bias argument regarding Judge Spaulding, the COA identifies this issue. But this only identifies that the procedural dismissal was debatable—not that there was a possible denial of a constitutional right. And even when "the district court denies relief on procedural grounds, the petitioner seeking a COA must show . . . 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right,'" Thaler, 565 U.S. at 140–41 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), and the COA must then "indicate which specific issue or issues" satisfy that showing. § 2253(c)(3).

Though this means Hicks's COA is defective as to his second argument too, the outcome is different from the first. The COA requirements in § 2253(c)(2) and (3) are "mandatory," but they are not "jurisdictional." *Cox v. Weber*, 102 F.4th 663, 673 (4th Cir. 2024) (quoting *Thaler*, 565 U.S. at 146). The "mandatory" piece means that "[i]f a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals panel must address the defect." *Thaler*, 565 U.S. 146. This is why we are "precluded from considering" Hicks's bias argument—West Virginia timely objected in its brief. *Lumumba*, 116 F.4th at 278 n.4. But because the requirements are not "jurisdictional," we are not required to raise them on our own. *See Thaler*, 565 U.S. at 146; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (explaining what is required for jurisdictional defects). When a party does not object to a mandatory-but-nonjurisdictional defect, we are given discretion over whether we wish to address it. *See United States v. Foote*, 784 F.3d 931, 935 n.4 (4th Cir. 2015); *Wood v. Milyard*, 566 U.S. 463, 466

(2012) ("Our precedent establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition.").

West Virginia has not objected to this second defect in Hicks's COA concerning his delay argument. Though we have discretion to raise the defect ourselves, we decline to do so. Given West Virginia's failure to resolve Hicks's claim for such an extended duration, comity towards any interest it might have in being the first to answer Hicks's claim is unwarranted. *Cf. United States v. Oliver*, 878 F.3d 120, 127 (4th Cir. 2017). So "at this late stage, we will not treat this potential defect" as foreclosing Hicks's delay argument. *Foote*, 784 F.3d at 935 n.4.[7]

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[7] This is not the only threshold defect in Hicks's petition that we choose not to consider—Hicks's habeas petition was also untimely when filed in the district court.

The statute of limitations—added by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—gives a state petitioner one year after the conclusion of the petitioner's direct review process to file a federal habeas petition. 28 U.S.C. § 2244(d)(1). AEDPA, however, was passed on April 24, 1996—later than when Hicks's direct review process became final in 1990. For habeas petitioners whose direct review ended before the passage of AEDPA, their one-year timer starts on the date of AEDPA's passage. *Wood*, 566 U.S. at 468–69. So Hicks had until April 24, 1997, to file his federal habeas petition— over two decades before he actually filed. *Id.*

But this one-year deadline is tolled if the petitioner lodges "a properly filed application for State post-conviction or other collateral review." § 2244(d)(2). Here, two possible sources of tolling exist: Hicks's state postconviction relief application, and his Rule 35 motion for sentence reduction. *See Wall v. Kholi*, 562 U.S. 545, 555 (2011). Neither help Hicks. He filed his postconviction relief

2. Whether a state's postconviction process is "ineffective" is a forward- looking question.

We finally turn to the merits of Hicks's delay argument. Hicks argues that the district court erred in dismissing his federal habeas petition for failing to satisfy the § 2254(b)(1)(A) exhaustion requirement. He

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application on November 20, 1997, half a year after the limitations period had run. And though Hicks's motion for sentence reduction was filed long before the deadline in 1989, the West Virginia Supreme Court held that Hicks's motion was filed a day late as a matter of state law. *State v. Hicks*, 2020 WL 201222, at *4 (W. Va. Jan. 13, 2020). So the petition was not "properly filed." § 2244(d)(2); *see Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) ("[T]ime limits, no matter their form, are filing conditions." (quotation omitted)).

West Virginia moved below to dismiss Hicks's federal habeas petition based on the statute of limitations, but the district court denied the motion, finding that Hicks's Rule 35 motion was filed timely and thus tolled AEDPA's statute of limitations. This ruling contravened the conclusion of the West Virginia Supreme Court. But West Virginia has not raised any of this on appeal. (Continued) And "[b]ecause the one-year statute of limitations is not jurisdictional, a federal habeas court is not duty-bound to consider the timeliness of a § 2254 petition." *Hill v. Braxton*, 277 F.3d 701, 705 (4th Cir. 2002). Though we may have discretion to do so, we decline to for the same reasons we decline to consider the COA defect with Hicks's delay argument—no comity is warranted. *Cf. Oliver*, 878 F.3d at 127.

In declining to consider Hicks's untimely filing, however, we do not implicitly approve of the district court's denial of West Virginia's timeliness motion. It did so only by ignoring an express decision from the West Virginia Supreme Court issued in this case, on this question, and on a matter of state law. That is not how federal courts typically operate. *See Murdock v. City of Memphis*, 87 U.S. 590, 635 (1874); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958).

asserts that he is excused from that requirement under § 2254(b)(1)(B)(ii) on account of West Viginia's nearly three-decade delay in resolving his state post-conviction petition. We are sympathetic to Hicks's argument and understand that he has been trapped in a procedural morass, largely of West Virginia's making, for some time. But the plain text of the § 2254(b)(1)(B)(ii) exception requires that we affirm the district court. *See Valladares v. Ray*, 130 F.4th 74, 80–81 (4th Cir. 2025) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (quotation omitted)).

The key feature of the statutory text at issue for our purposes is its tense. "Consistent with normal usage, we . . . look[] to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010) (citations omitted). And "a statute's 'undeviating use of the present tense' [is] a 'striking indicator' of its 'prospective orientation.'" *Id.* at 449 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)) (cleaned up). A statutory provision that consistently employs the present tense thus takes account of events and occurrences now and in the future but "does not include the past." *Id.* at 448.

Section 2254(b)(1)(B)(ii) is written in the present tense. It excuses exhaustion if "circumstances exist that render such process ineffective to protect the rights of the applicant." The exception applies not when circumstances *existed* in the past, but when they "*exist*" now. *Id.* (emphasis added). Consistently, the other exhaustion exception is also written in the present tense, applying when there "*is* an absence of available State corrective process." § 2254(b)(1)(B)(i)

(emphasis added). So Hicks is only excused from exhausting if it appears that West Virginia's postconviction process is *presently* ineffective to protect his rights, regardless of whether they were ineffective before.

Despite the decades of delay that have plagued Hicks's case, it no longer appears that West Virginia's post-conviction system is ineffective to protect Hicks's rights. After oral argument in this case had concluded, the parties informed us that West Virginia assigned Hicks's postconviction case to a judge who was uninvolved with his prosecution, and that the judge resolved the case on its merits. So after much prodding and way too much time, West Virginia is finally addressing Hicks's case. Hicks's postconviction petition—which alleges violations of his federal rights—must be evaluated fairly under West Virginia's postconviction laws. *See Williams v. Pennsylvania*, 579 U.S. 1, 13–14 (2016). That is now being done. And although Hicks so far "has been unable to obtain relief," that does not render its system ineffective to protect his rights. *See Farkas v. Butner*, 972 F.3d 548, 555–56 (4th Cir. 2020). And in any case, Hicks may still yet obtain relief on appeal in the state system.

To be sure, past ineffectiveness is not irrelevant in considering present ineffectiveness. If it appeared that the underlying causes of West Virginia's delay between 1997 and 2025 continued to exist such that it was likely Hicks's case would again languish for years, our analysis would be different. But we have no reason to think that such delay will happen again. There is no indication that West Virginia's postconviction process is so generally dilatory that the average petitioner will suffer extreme delay. Hicks's situation, as far as the record shows, is an outlier. So now that there has

been movement in Hicks's case, we expect it to proceed as the average petitioner's case does. West Virginia has failed him in the past, but we are confident and hopeful that it will not continue to fail him moving forward. Accordingly, the text of § 2254(b)(1)(B)(ii) does not permit Hicks to excuse his failure to exhaust. *Cf. Bowles v. Russell*, 551 U.S. 205, 212–14 & n.4 (2007) (noting that even when liberty is on the line, textual strictures must be adhered to).[8]

Our conclusion that past delay alone is insufficient to excuse exhaustion aligns with longstanding habeas precedent and history. "The exhaustion doctrine existed long before its codification." *Rose v. Lundy*, 455 U.S. 509, 515 (1982). It was crafted "as a matter of comity" to "the state[s]." *Id.* "[F]irst announced in *Ex parte Royall*, 117 U.S. 241 (1886)," the doctrine "is now codified" in AEDPA. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). But after codification, the Supreme Court has continued to look to pre-AEDPA common-law applications of the doctrine to resolve modern-day cases. *See, e.g.*, *id.* at 844–45; *Slack*, 529 U.S. at 486; *Rhines v. Weber*, 544 U.S. 269, 276–77 (2005); *Davila v. Davis*, 582 U.S. 521, 527 (2017). But throughout all this history, one fact is striking: before and after AEDPA "no federal court . . . [has]

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[8] Absent West Virginia's last-minute action, many hard questions would abound. For now, we leave unresolved the extent to which considerations like length of delay, blame for delay, and diligence by the petitioner in pursuing his rights factor into whether the exhaustion requirement has been excused. *See Morton v. Dir. Virgin Islands Bureau of Corr.*, 110 F.4th 595, 601 (3d Cir. 2024) (exploring these questions); *Johnson v. Bauman*, 27 F.4th 384, 391 (6th Cir. 2022) (same); *Evans v. Wills*, 66 F.4th 681, 682 (7th Cir. 2023) (same); *Welch v. Lund*, 616 F.3d 756, 760 (8th Cir. 2010) (same).

ever excused a state prisoner's failure to exhaust merely due to delay in state court proceedings." *Bauman*, 27 F.4th at 391. Instead, even after delay, a petitioner has needed to prove that further efforts in state court would be "futile in the face of state dilatoriness or recalcitrance." *Farmer v. Cir. Ct. of Maryland for Baltimore Cnty.*, 31 F.3d 219, 223 (4th Cir. 1994).[9] It is thus no surprise that AEDPA follows this historical throughline.

Hicks has shown past delay—decades of it—in his state postconviction proceeding. What he cannot show, however, is that the state process is presently ineffective. West Virginia's postconviction relief system is now making progress on Hicks's case with no sign of future difficulties. So Hicks cannot excuse his failure to exhaust his state remedies under § 2254(b)(1)(B)(ii).

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West Virginia gets no credit for its narrow victory today. Its past treatment of Hicks no doubt offends basic notions of how a state should treat its prisoners. The Anglo- American legal tradition has for centuries recognized the importance of expedient justice: "To no one will we sell, to none will we deny *or delay*, right or justice." Magna Carta ch. 40 (1215) (emphasis added). That recognition has not faded over time. We still understand today that "justice too long delayed is justice

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[9] The Supreme Court has also excused exhaustion where "a state prisoner's detention impaired the federal government's operations," where "a state prisoner's detention impeded the administration of justice in federal tribunals," and where "a state prisoner's continued detention was detrimental to the federal government's relationship with a foreign nation." *Bauman*, 27 F.4th 384 at 390. But these are unrelated to delay.

denied." Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963).

Hicks is not necessarily entitled to freedom. But if he is to walk free at the end of his state postconviction proceedings, his freedom should not suffer from further undue delay. If he is to stay in prison, he is nevertheless entitled to know that forthwith.

AFFIRMED

APPENDIX B

FILED: July 23, 2025

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 23-6447 (3:21-cv-00618)

ALAN LANE HICKS
Petitioner - Appellant

v.
JONATHAN FRAME, Superintendent
Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

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

/s/ NWAMAKA ANOWI, CLERK

APPENDIX C

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

HUNTINGTON DIVISION

ALAN LANE HICKS,
Petitioner,

v. CIVIL ACTION NO. 3:21-0618

DONNIE AMES, Superintendent,
Respondent.

MEMORANDUM OPINION AND ORDER

Pending before the Court are Petitioner Alan Lane Hicks's Objections to the Proposed Findings and Recommendation ("PF&R") issued by Magistrate Judge Omar Aboulhosn on November 15, 2022. Pet's Objections to the PF&R, ECF No. 41; PF&R, ECF No. 37. The Court has undertaken a thorough review of the Objections and PF&R, as well as pertinent material found elsewhere in the record. For the reasons set forth below, the Court **DENIES** Petitioner's Objections (ECF No. 41) and—consistent with the factual allegations outlined in this Memorandum Opinion and Order—**ADOPTS AND INCORPORATES**

HEREIN the PF&R (ECF No. 37). Accordingly, the Court **GRANTS** Respondent's Motion to Dismiss (ECF No. 28) and **DISMISSES** this action, without prejudice to Petitioner's right to renew the same following exhaustion of state court remedies.

I. BACKGROUND

Petitioner Alan Lane Hicks was charged in the Putnam County Circuit Court of one count of first-degree murder, one count of aggravated robbery, and one count of conspiracy to commit murder. Order in the Putnam Cnty. Cir. Ct., ECF No. 18-3. Following a jury trial, Petitioner was sentenced on October 25, 1988, to (1) life imprisonment without the possibility of parole for first- degree murder, (2) one to five years imprisonment for conspiracy to commit murder, and (3) one to ten years imprisonment for grand larceny, to run concurrently. *Id.* Following a lengthy series of proceedings in state court, Petitioner has now filed an application in this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, ECF No. 1. The Court outlines the proceedings leading to the instant Petition below. Pet's Objections to PF&R, ECF No. 41.

A. Rule 35 Motion

Petitioner first challenged his sentence on February 23, 1989, when he moved under West Virginia Rule of Criminal Procedure 35 to reduce his sentence of life without mercy. Mot. for Reduction of Life Without Mercy Sentence Under Rule 35, ECF No. 18-6. Having filed the motion pro se, he did not specify whether he was moving under subsection (a) to correct an illegally imposed sentence, or subsection (b) to reduce a sentence within 120 days of the sentence being

imposed. *Id.*; W. Va. R. of Crim. P. 35. Petitioner cited the following facts in support of the Rule 35 motion: (1) his lack of a prior criminal record, (2) the trial records allegedly show the jury was without sufficient information to convict Petitioner of first-degree murder and impose a life sentence, (3) the jury acted illegally in not considering mitigating factors (including his lack of a prior criminal record), and (4) that legislative intent reserves a life without mercy sentence for a different "category" of murderers. Mot. for Reduction of Life Without Mercy Sentence Under Rule 35 ¶¶ 3-6, ECF No. 18-6.

The Putnam County Circuit Court did not rule on Petitioner's Rule 35 motion until approximately thirty years later. On March 15, 2013, twenty-four years after filing the Rule 35 motion, Petitioner filed a Petition for a Writ of Mandamus with the Supreme Court of Appeals of West Virginia (SCAWV) to, *inter alia*, compel the circuit court to rule on his Rule 35 Motion. Pet. for Writ of Mandamus at 1, ECF No. 18-11. On June 4, 2013, the SCAWV summarily declined to grant such a writ. June 4, 2013 Order, ECF No. 18-12.

Six years later, on May 16, 2018, Petitioner again filed a petition for a writ of mandamus to, *inter alia*, compel a ruling on his Rule 35 motion. Writ of Mandamus, ECF No. 18-14; Rule to Show Cause, ECF No 18-13; *West Virginia v. Hicks*, No. 19-0123, 2020 WL 201222, at *2 (W. Va. Jan. 13, 2020). The SCAWV granted the petition and issued a Rule to Show Cause Order on January 10, 2019. Rule to Show Cause, ECF No 18-13. Eight days later, on January 18, 2019, the circuit court denied Petitioner's Rule 35 motion. Order Denying Rule 35 Mot., ECF No. 18-15. The circuit court found that it lacked jurisdiction to hear Petitioner's Rule 35 motion because the motion was filed

121 days after Petitioner's sentence was imposed, outside of the 120 days provided by Rule 35. *Id.* ¶ 12. However, the circuit court stated that even if the motion were timely filed, the court would deny the motion on the basis that any reduction or modification of the sentence would "unduly depreciate the seriousness" of Petitioner's crimes. *Id.* at 4. Additionally, the court explained that it had not previously issued a written ruling because the motion was untimely. *Id.* ¶ 7.

On February 12, 2019, Petitioner filed a notice of appeal as to this ruling, arguing both that his sentence was illegal and that it was illegally imposed. Pet. for Appeal at 7, ECF No. 28-15. The SCAWV issued a Scheduling Order, in which it instructed that any assignments of error in the appeal "must relate only to the circuit court's decision not to reduce the petitioner's sentence." Scheduling Order at 1, ECF No. 28-16. Petitioner, acting pro se, then filed a Petition for Appeal citing the same reasons laid out before: that he was both subject to an illegal sentence and that the sentence was imposed illegally. Pet. for Appeal, ECF No. 28-15. In response, the State argued that

Petitioner was improperly challenging the validity of his conviction, and even if he was not, denial of the Rule 35 motion was proper because the motion was filed outside of the 120-day period. Resp's Summ. Resp., ECF No. 28-17. Petitioner filed a Reply, arguing that his motion was timely filed and that, moreover, the State neglected to respond to any assignments of error laid out in the appeal. Reply to Summ. Resp., ECF No. 28-18.

The SCAWV affirmed the denial of Petitioner's Rule 35 motion on January 13, 2020. *Hicks*, 2020 WL 201222, at *4. It construed the motion as arising under

subsection (b) of Rule 35 because it was labelled as a "Motion for Reduction of Sentence," and ultimately sought to reduce Petitioner's sentence. *Id.* Because the motion arose under Rule 35(b), the SCAWV determined that the circuit court had correctly denied it as untimely. *Id.* Additionally, denial was proper because Rule 35 motions are not intended to attack the validity of sentences—rather, such challenges should be raised via timely, direct appeals. *Id.* On April 20, 2020, the SCAWV denied Petitioner's Petition for Rehearing on this matter. April 20, 2020 Order, ECF No. 23-1 at 105. The United States Supreme Court also denied Petitioner's request for a writ of certiorari. Letter to Ms. Lindsay Sara See from the U.S. Supreme Ct. Clerk, ECF No. 28-21.

B. Direct Appeal

On October 26, 1989, six months after filing his initial Rule 35 motion, Petitioner directly appealed his sentence to the SCAWV. Pet. for Appeal, ECF No. 28-3. In this appeal, Petitioner alleged that (1) the trial court's refusal to instruct the jury on self-defense deprived him of his right to a fair trial, (2) the trial court was without jurisdiction to try him for the conspiracy charge, and (3) the prosecution failed to provide evidence to support allegations made during opening statements, again depriving him of his right to a fair trial. *Id.* The SCAWV summarily denied this appeal on January 10, 1990. Order by the Supreme Ct. of Appeals, ECF No. 28-4. Petitioner did not file a petition for certiorari in the United States Supreme Court. Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody at 2, ECF No. 1.

C. State Habeas Petition

On November 20, 1997—seven years after the denial of his direct appeal and prior to a judgment on his Rule 35 motion—Petitioner submitted a petition for a writ of habeas corpus in state court. Pet. Under W. Va. Code § 53-4A-1, ECF No. 28-6. In the initial petition, he asserted six grounds warranting habeas relief: (1) his conviction for murder was foreclosed by collateral estoppel, as it followed an acquittal for aggravated robbery; (2) the court refused to grant his request to give a self-defense instruction; (3) the prosecution failed to provide evidence for statements made during his opening statement; (4) the court gave an allegedly erroneous instruction that malice and intent can be inferred from the use of a deadly weapon; (5) the court gave an allegedly erroneous instructions on malice and premeditation; and (6) the court's failed to issue an instruction on "mercy" and counsel's failed to present any mitigating evidence. Pet. for Writ of Habeas Corpus Ad Subjiciendum, ECF No. 28-5. Petitioner's case appears to have been assigned to Judge O.C. Spaulding, who was a prosecutor in the initial case against Petitioner. Oct. 24, 1988 Order at 1, ECF No. 18-3 (noting O.C. Spaulding was the prosecuting attorney); Pet. for Writ of Habeas Corpus Ad Subjiciendum, ECF No. 28-5 (contains "Spaulding" written on the front page); Order Denying Pet's Mot. for TRO/PI, ECF No. 36-1 (signed by Judge Spaulding). The case was reassigned to Judge Joseph Reeder sometime around 2012. May 24, 2017 Hr'g Tr. 12:19-23, ECF No. 33-5.

During his state habeas proceedings, Petitioner experienced significant difficulty with both appointed counsel and with obtaining his case file. Along with his initial habeas petition, Petitioner had also filed a motion to appoint habeas counsel. Docket, ECF No. 28-8.

In keeping with the pace of Petitioner's Rule 35 proceedings, this motion was not granted until fifteen years later, when the court ordered the appointment of Mr. Shawn D. Bayliss on September 21, 2012. *Id.* Mr. Bayliss's appointment did not solve Petitioner's problems, however—Petitioner alleges that Mr. Bayliss never contacted him, though Petitioner sent two allegedly unanswered letters to Mr. Bayliss inquiring about the status of his case. Letter to Hon. J. Leslie from Alan Lane Hicks, ECF No. 36- 1 at 11-12; Letters to Mr. Bayliss from Alan Lane Hicks, ECF No. 36-1 at 8-9. In a letter to the West Virginia Public Defender's Office on July 21, 2013, Mr. Bayliss inquired about a copy of the trial transcript, as it was apparently absent in Petitioner's file with the clerk's office. Letter from Shawn D. Bayliss to the W. Va. Pub. Def.'s Office, ECF No. 31-1 at 10. Accordingly, on January 16, 2013, April 19, 2013, and July 26, 2013, Mr. Bayliss moved to extend Petitioner's time to file an amended habeas petition. Docket, ECF No. 28-8.

Petitioner filed a complaint with the state bar concerning Mr. Bayliss's counsel, and on September 5, 2013, Mr. Bayliss moved to be relieved as counsel. May 24, 2017 Hr'g Tr. 4:11-18, ECF No. 33-5. Docket, ECF No. 28-8. Though the court then appointed Mr. C. Dascoli Jr. as counsel, it does not appear that Mr. Dascoli submitted any filings in this matter. Docket, ECF No. 28-8. Three years later, on April 5, 2016, Petitioner moved for a status conference. *Id.* On May 3, 2016, the Court appointed Mr. Rosenlieb to represent Petitioner and instructed that any amended petition should be filed by June 21, 2016. *Id.* Petitioner alleges he did not hear from Mr. Rosenlieb for seven months, after which Mr. Rosenlieb contacted Petitioner and asked Petitioner to fill out and return a *Losh* list. Letter to J.

Reeder from Alan Lane Hicks, ECF No. 36-1 at 22-23; Letter from Duane Rosenlieb to Alan Hicks, ECF No. 31-1 at 11. Petitioner refused to fill out the *Losh* list. Pet's Objections to PF&R at 2, ECF No. 41.

On January 20, 2017, Petitioner, acting pro se, filed an Amended Habeas Petition. Pet. Under W. Va. Code § 53-4A-1 for Writ of Habeas Corpus, ECF No. 28-6; Mem. of L. in Supp. of Am. Pet. for Writ of Habeas Corpus Ad-Subjiciendum, ECF No. 28-7. The Amended Petition listed six grounds for relief, four of which were the same as those on his original 1997 habeas petition. Am. Pet. for Writ of Habeas Corpus Ad Subjiciendum, ECF No. 28-6. Grounds five and six differed from the original petition, however. Mem. in Supp. of Pet's Am. Pet. for Writ of Habeas Corpus Ad Subjiciendum at iv, ECF No. 28-7. Instead of alleging that the court erroneously instructed the jury on malice and premeditation, ground five was premised on the court's failure to provide verdict forms distinguishing the prosecution's theory of murder. *Id.* Instead of alleging the court's failure to directly instruct on "mercy" and counsel's failure to present mitigating evidence, ground six instead alleged three specific bases for ineffective assistance of counsel: counsel's failure to object to an unconstitutional malice instruction, counsel's failure to object to the prosecution's closing argument, counsel's failure to object to a remark about evidence, and failing to offer an instruction as to parole eligibility. *Id.*

Shortly after filing the Amended Petition, Petitioner once again moved to relieve appointed counsel and proceed pro se. Mot. to Remove Appointed Counsel and Proceed Pro Se, ECF No. 33- 4. In this motion, Petitioner alleged that he had only received one letter from Mr. Rosenlieb since his appointment. *Id.* ¶ 3.

Petitioner additionally alleged that though the order appointing Mr. Rosenlieb as counsel instructed that an amended petition should be filed by June 26, 2016, no petition had been filed as of January 20, 2017, when Petitioner finally filed his amended petition pro se. *Id.* Additionally, Petitioner notes that he was not aware of counsel requesting any extensions on filing his amended petition. *Id.*

On May 24, 2017, the circuit court held a hearing on this motion. Hr'g Tr., ECF No. 33-5. During the hearing, Mr. Rosenlieb expressed the same difficulty obtaining the court file as Mr. Bayliss—Mr. Rosenlieb reported that he had not been able to obtain a certified copy of proceeding from the clerk of the circuit court, as "only a box full of court reporter notes" could be located in relation to Petitioner's case. *Id.* 7:9-11. Mr. Rosenlieb also noted that Petitioner objected to (or perhaps was offended by) his request to fill out and send a *Losh* list. *Id.* 7:22-24, 8:1-5, 8:17-18. Additionally, Mr. Rosenlieb suggested that Petitioner could seek to get his case dismissed on the basis that the clerk's office did not have an official transcript of his trial. *Id.* 9:9-11. However, Petitioner rejected this proposal, alleging that he had "a signed, sealed copy of the original transcript" in his possession and that "there are issues that not only are going to require my case to be reversed, they're going to require it to be dismissed". *Id.* 9:15-19. Petitioner argued he did not want the case to be dismissed because of a lack of a transcript; rather, he wanted it "to be dismissed because of the transcript." *Id.* 9:19-21 (emphasis added).

During this hearing, Petitioner also claimed he had possession of almost his entire record, including stamped versions of subpoenas for every witness, the pretrial police report, the postmortem examination,

the indictment and summons from November 1986, as well as orders for warrants and for transport. *Id.* 10:3-13, 10:15-18. He noted that after his conviction, he had successfully moved to obtain the records, and the accompanying order stated he could obtain "all" of these records. *Id.* 11:3-6.

Finally, Mr. Rosenlieb stated that he did not think Petitioner would have the ability to represent himself, even if he were allowed to have co-counsel. *Id.* 11:18-23. Petitioner then inquired about the pending Rule 35 motion, noting it needed to be resolved prior to resolution of his state habeas. *Id.* 14:1-12. Petitioner also agreed to make his copy of the record available, so long as the court issued an order allowing him to make copies without payment. *Id.* 15:17-23. The court agreed to take these matters under advisement and issue an order. *Id.* 16:1-5.

In an order filed on May 30, 2017, Judge Reeder held Petitioner's motion to proceed pro se in abeyance but relieved Mr. Rosenlieb as counsel. May 30, 2017 Order, ECF No. 33-6. Additionally, Judge Reeder noted that (1) Petitioner wished to serve as co-counsel with any attorney appointed in the future, and (2) Petitioner was willing to copy the record if the prosecuting attorney had difficulty obtaining it, as long as the court first issued an order waiving copying fees. *Id.* Shortly thereafter, on July 17, 2017, Petitioner moved to prepare the transcripts for the May 24, 2017 hearing. Docket, ECF No. 28-8. These transcripts were not filed until January 17, 2019, almost two years later. *Id.*

On January 18, 2019, the day after the transcripts were filed, the court appointed Carl Hostler as counsel and set a status hearing on February 28, 2019, a final

habeas petition deadline of July 5, 2019, a hearing on the final petition on August 16, 2019, and a deadline for the final ruling on September 6, 2019. Jan. 18, 2019 Order, ECF No. 33-2. Accordingly, the court held a video conference on February 28, 2019 in which it decided to proceed with the original deadlines set out in the January 18, 2019 Order, unless the SCAWV issued an order enjoining it from proceeding due to the pending appeal of Petitioner's Rule 35 motion. March 19, 2019 Order, ECF No. 33-3. On March 13, 2019, Petitioner allegedly sent Mr. Hostler a draft of a motion to recuse Prosecutor Mark Sorsaia, as Mr. Sorsaia had been involved in the trial of Petitioner's co-defendant in September 1988. Letter to Carl Hostler from Alan Hicks, ECF No. 41-1. Mr. Hostler, however, never filed this motion. Pet's Objections to PF&R at 5, ECF No. 41.

Sometime between his appointment and July 8, 2019, Mr. Hostler also visited Petitioner and was allegedly "extremely upset that the Petitioner refused to hand over his entire file to a man he had just met." Pet's Reply and Objection to Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 5, ECF No. 31. Accordingly, on July 8, 2019, Mr. Hostler filed for an additional thirty days to file a final habeas petition, noting that the clerk of the Putnam County Circuit Court did not have Petitioner's trial transcript. Mot. by Alan Hicks for Another 30 Days in Which to File an Am. Habeas Pet., ECF No. 33-7. In this motion, Mr. Hostler noted that he believed the West Virginia Public Defenders' Service had the trial transcript and that counsel would make arrangements with them as soon as possible. *Id.*

It is not clear what happened during the resulting three-year period. However, on July 21, 2022, the

circuit court rescheduled a hearing set for August 16, 2022 due to a scheduling conflict, later setting it for September 14, 2022. July 21, 2022 Order, ECF No. 33-8; Pet's Surreply to Resp's Reply in Supp. of Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 5, ECF No. 36. At this hearing, Petitioner was informed that Mr. Hostler was no longer in private practice and that Jason T. Gain would represent Petitioner instead. Pet's Surreply to Resp's Reply in Supp. of Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 5, ECF No. 36. Petitioner also moved to recuse Prosecutor Sorsaia. Mot. for Recusal of Prosecutor Mark A. Sorsaia, ECF No. 36-1 at 17.

The Court has not received any further information as to the status of these hearings or Petitioner's motion to recuse Mr. Sorsaia. However, Petitioner has since filed an exhibit with the Court in which his new counsel, Mr. Gain, describes similar difficulty accessing Petitioner's file— in a letter to Petitioner, Mr. Gain cites a motion by Respondent to compel Petitioner to provide a copy of the transcript and notes that he has only been able to view Petitioner's habeas petition. Letter from Jason Gain to Alan Hicks, ECF No. 43-1. According to the letter, the Putnam County Circuit Court set a hearing on the motion to compel for January 13, 2023. *Id.* Mr. Gain also proposes scanning Petitioner's copy of the file at the prison, though Petitioner alleges that the administration had failed to provide a proper process to do so. Pet's Objections to PF&R at 9, ECF No. 41.

D. Writs of Mandamus

Petitioner filed two writs of mandamus, relating to both his Rule 35 Motion and his state habeas proceedings. In the first writ of mandamus, filed on

March 13, 2013, Petitioner sought to compel the court to appoint a "competent" attorney to represent him and allow for prepaid phone service with his attorney, schedule a hearing on his Rule 35 motion, and produce an investigative report and grand jury proceedings. Pet. for a Writ of Mandamus, ECF No. 28-10. Petitioner also presented the following questions:

1. Does the failure to produce the Investigation Report of Florida Detective P.L. Lingo, and the Grand Jury Transcripts violate state and federal constitutional rights to due process of law?;
2. Does the failure to adjudicate a Motion, filed under Rule 35 of the Rules of Criminal Procedure, violate Petitioner's state and federal constitutional rights to due process of law?; and
3. Is the Putnam County Circuit Court violating Petitioner's state and federal constitutional rights to due process of law by not responding to a correspondence requesting a hearing on a Rule 35 Motion and informing the Court that counsel appointed to amend his Petition for Habeas Corpus is not responding to communications from the Petitioner?

Id. On March 27, 2013, the SCAWV directed the Putnam County Circuit Court to respond to the petition by April 26, 2013. Scheduling Order, ECF No. 18-10. It is not clear whether the circuit court ever responded. Nonetheless, on June 4, 2013, the SCAWV refused to issue the requested writ. Order, ECF No. 18-12.

Six years later, on May 16, 2018, Petitioner filed another Petition for a Writ of Mandamus. ECF No. 28-12. In it, he asked the SCAWV to compel the circuit court to take action on both his Rule 35 motion and his state habeas petition. *Id.* He also presented the following questions:

1. Does the failure to produce a docket sheet violate state and federal constitutional rights to due process of law?
2. Does the failure to adjudicate a Rule 35 Motion violate petitioner's state and federal constitutional rights to due process of law?
3. Does the failure to hold a hearing or rule on petitioner's Habeas filed in November of 1997 violate petitioner's state and federal constitutional rights?
4. Is the Putnam County Circuit Court violating state and federal constitutional rights to due process by not transcribing the court reporter's shorthand notes after it was revealed that, with the exception of those notes, the file in this case is missing?

Id. The SCAWV issued a rule to show cause requiring the Putnam County Circuit Court to show why a writ should not be awarded against it. Rule to Show Cause, ECF No. 18-13. In this order, however, the SCAWV noted that the issue could be mooted by (1) issuing a ruling on Petitioner's Rule 35 Motion; and (2) ruling on Petitioner's motion to proceed pro se and if granted, ruling on the pending state habeas petition. *Id.*

On January 23, 2019, Judge Reeder responded to Petitioner's petition for a writ of mandamus and answered the four questions presented. Resp.'s Resp. to

Rule to Show Cause, ECF No. 28-13. He first noted that Petitioner's Rule 35 Motion had since been ruled on, so that issue was moot. *Id.* at 6. He next noted "Petitioner has been afforded the assistance of multiple lawyers" but "has been unwilling or unable to cooperate" with them. *Id.* However, Judge Reeder argued any issue as to counsel was moot, because the circuit court had set a briefing schedule on Petitioner's habeas petition and appointed Carol Hostler as counsel. *Id.* On February 4, 2019, the SCAWV denied this Petitioner's request for a writ of mandamus as moot. Dismissal Order, ECF No. 28-14.

E. Federal Habeas Petition

Petitioner, acting pro se, filed the instant petition under 28 U.S.C. § 2254 on November 24, 2021. ECF No. 1. In his initial petition and the supporting memorandum, Petitioner asserts the same grounds for relief as those listed in his amended state habeas petition, with the exception that he does not claim ineffective assistance of counsel via failure to offer an instruction on parole eligibility. *Id.*; Mem. of L. in Supp. of Pet. for Writ of Habeas Corpus Ad-Subjiciendum, ECF No. 15. On November 30, 2021, Magistrate Judge Aboulhosn issued an order directing Respondent to file a limited response by January 28, 2022, as to the timeliness of the petition and attach any records pertinent to such a determination. Nov. 30, 2021 Order, ECF No. 5. Shortly thereafter, on December 9, 2021, Petitioner moved for a temporary restraining order to enjoin Respondent from (1) removing word processor from his cell or ordering it sent out of the facility; (2) refusing to prevent Petitioner from purchasing printer cartridges; and (3) refusing to allow Petitioner's word processor to be sent out for service and returned. Mot. for TRO/Preliminary Injunction with Supp. Mem. of L.,

ECF No. 7. In his Response, Respondent contends that a temporary restraining order was not warranted, noting that Petitioner was still able to access computers in the library, operational procedures at the prison were entitled to deference, and Petitioner had not met the standard set forth for preliminary injunctions. Resp's Resp. in Opp. to Pet's Mot. for TRO/Preliminary Injunction, ECF No. 11.

On January 6, 2022, Respondent asked that the deadline for his response as to timeliness be extended to February 28, 2022. Mot. for Extension of Time to File Resp., ECF No. 13. This motion was granted on January 7, 2022. ECF No. 14. On February 15, 2022, Respondent moved to dismiss the petition with prejudice for untimeliness and filed his limited response as to timeliness. Resp's Mot. to Dismiss with Prejudice, ECF No. 18; Resp's Ltd. Resp. Re. Timeliness and Mem. of L. in Supp. Mot. to Dismiss for Untimeliness, ECF No. 19. The Court then allowed Petitioner until April 28, 2022 to respond. Feb. 15, 2022 Order and Notice, ECF No. 20 (directing Petitioner to respond by March 28, 2022); Pet.'s Mot. for Extension of Time, ECF No. 21 (asking the Court to extend the deadline for a response to April 28, 2022); March 21, 2022 Order, ECF No. 22 (granting Petitioner's request for an extension of time). On April 22, 2022, Petitioner filed his response to Respondent's Motion to Dismiss for Untimeliness and limited response as to timeliness. Pet's Reply to Resp's Ltd. Resp. Re. Timeliness and Resp's Mot. to Dismiss, ECF No. 23. On May 5, 2022, Magistrate Judge Aboulhosn submitted proposed findings and recommendations, recommending that the court deny Petitioner's motion for a temporary restraining order, deny Respondent's motion to dismiss for untimeliness, and refer the matter back to him for

further proceedings. PF&R, ECF No. 24. No objections were filed, and the Court adopted these recommendations via a memorandum opinion and order entered on May 24, 2022. Mem. Op. and Order, ECF No. 26.

Two months later, on July 20, 2022, Respondent moved to dismiss the petition for failure to exhaust state remedies. Resp's Mot. to Dismiss for Failure to Exhaust State Remedies, ECF No. 28. In its motion to dismiss, Respondent argues that Petitioner has only exhausted the three grounds for relief he raised in his direct appeal. Resp's Mem. of Law. Supp. Mot. to Dismiss for Failure to Exhaust State Remedies at 10, ECF No. 29. Because Petitioner's federal habeas petition raises more than these three grounds for relief, it should be dismissed or at least stayed and held in abeyance pending resolution of state habeas proceedings. *Id.* at 14. On August 8, 2022, Petitioner responded to Respondent's motion to dismiss—in his Response, Petitioner presents a factual background and criticizes actions taken by Judge Reeder during the state habeas proceedings, arguing that exhaustion should be waived because the circuit court will not be able to rule in a timely or proper manner. Pet.'s Reply and Objection to Resp.'s Mot. to Dismiss for Failure to Exhaust State Remedies at 2-6, ECF No. 31. Petitioner additionally alleges that the last three years of proceedings evidence an intentional delay on part of the state court. *Id.* at 6.

On August 15, 2022, Respondent filed its Reply, arguing that any length of delay should be calculated from the date of Petitioner's Amended Petition (January 20, 2017) rather than the date of his initial Petition (November 20, 1997). Reply in Supp. of Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 2-3, ECF No. 33. Respondent further contends that

Petitioner was largely responsible for any post-2017 delay and lists actions taken by the state court in Petitioner's proceedings since that time. *Id.* at 4-8. Finally, Respondent argues that because the state court was making meaningful progress towards a resolution of Petitioner's state habeas proceedings, this was not "an extreme case" in which exhaustion should be excused. *Id.* at 9-10.

Petitioner was granted leave to file a Surreply, in which he (1) reasserts his double jeopardy concerns; (2) contends that any delay should be calculated as to the original filing of his petition; (3) seems to retract a previous claim that the prosecutor's office admitted to having a court reporter's shorthand notes; and (4) argues that he is not responsible for any delay, as he allegedly made known that he did not intend to file another amended habeas after the amended petition filed in 2017. Pet.'s Surreply to Resp's Reply in Supp. of Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 5-6, ECF No. 36. Additionally, Petitioner complains of the court's inability to provide him with a complete copy of his record and describes a series of infractions allegedly committed by Judge Reeder. *Id.* at 7. Finally, Petitioner notes that his appointed attorney, Mr. Hostler, was no longer in private practice and that another attorney would need to be appointed. *Id.*

On November 15, 2022, Magistrate Judge Aboulhosn submitted proposed findings and recommendation as to Respondent's Motion to Dismiss for Failure to Exhaust State Remedies. ECF No. 37. In the PF&R, Magistrate Judge Aboulhosn undertakes an extensive review of the entire case record, ultimately proposing that (1) the instant petition contains a mix of exhausted and unexhausted claims; (2) the length of delay should be calculated as to the filing of

Petitioner's initial petition on November 20, 1997; (3) state proceedings have been reactivated; and (4) the majority of the delay is attributable to the circuit court's failure to manage its docket, though Petitioner bears a small amount of responsibility due to his litigation decisions refusal to work with appointed counsel. *Id.* Because state proceedings had been reactivated, Magistrate Judge Aboulhosn recommended that the Court "stay its hand" and grant Respondent's motion to dismiss. *Id.* at 35-36. Additionally, Magistrate Judge Aboulhosn recommended that the Court decline to stay the instant petition and hold federal proceedings in abeyance pending a resolution in state court, as when state proceedings conclude, Petitioner will still have a full year to file a federal habeas petition. *Id.* at 38-39. Petitioner filed five objections to the PF&R, later moving for leave to supplement these objections, which the Court granted. Pet's Objections to Proposed Findings and Recommendations, ECF No. 41; Mot. for Leave of Court to Amend by Supp. Pet's Objections to PF&R, ECF No. 43. The Court addresses each of these objections below.

II. LEGAL STANDARD

A. Rule 12(b)(6) Motions

Courts apply the standard set forth in Federal Rule of Civil Procedure 12(b)(6) to motions to dismiss in § 2254 proceedings. *Walker v. True*, 399 F.3d 315, 319 n.1 (4th Cir. 2005). To survive a motion to dismiss, a complaint must contain "a short and plain statement of the claim showing [the plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a)(2). While the facts alleged in the complaint need not be probable, the statement must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550

U.S. 544, 570 (2007). A claim has facial plausibility when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In considering the plausibility of a plaintiff's claim, the Court accepts all factual allegations in the complaint as true. *Id.* Still, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. If the court finds from its analysis that "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'— 'that the pleader is entitled to relief.'" *Id.* (quoting, in part, Fed. R. Civ. P. 8(a)(2)). Nonetheless, a plaintiff need not show that success is probable to withstand a motion to dismiss. *Twombly*, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."). Finally, where a party is proceeding pro se, the Court will liberally construe his pleadings and objections. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

B. Objections to PF&R

While courts possess the wide discretion to "accept, reject, or modify, in whole or in part, the findings or recommendations" of the Magistrate Judge, they must conduct a *de novo* review of those portions of the Magistrate Judge's findings "to which objection is

made." 28 U.S.C. § 636(b)(1)(C). In keeping, courts need not conduct a review of factual and legal conclusions to which a party does not object. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Nor are they tasked with conducting *de novo* review of "general and conclusory" objections—rather, objections must raise specific errors in the PF&R. *McPherson v. Astrue*, 605 F. Supp. 2d 744, 749 (S.D.W. Va. 2009) (citing *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982)) (reasoning that "vague objections to the magistrate judge's findings prevents the district court from focusing on disputed issues and thus renders the initial referral to the magistrate judge useless"). With this framework in mind, the Court turns to a consideration of Mr. Hicks's pending objections.

III. DISCUSSION

A. Petitioner's Objections to the PF&R

Petitioner's objections relate to both findings of fact and legal conclusions as set forth in the PF&R. As laid out, the Court need not review any legal or factual conclusions to which Petitioner does not object, *Thomas*, 474 U.S. at 150—however, because Petitioner is proceeding pro se, the Court will liberally construe any strictly factual objections and reexamine the legal conclusions in light of them. *Gamble*, 429 U.S. at 106. The Court, therefore, begins by addressing each objection in turn.

1. Delay attributable due to lack of filing

First, Petitioner objects to the following finding:

[i]n consideration of the delay occurring up until the appointment of Mr. Rosenlieb as habeas counsel (May 3, 2016), the undersigned finds that the majority of the delay is attributable to the State. Since the date of Mr. Rosenlieb's appointment as counsel, however, it

appears that Petitioner has attributed to the delay by being uncooperative with counsel, focusing his efforts upon his Rule 35 Motion, and failing to file motions or a final Amended Habeas Petition within habeas proceedings in efforts to move the proceedings forward.

PF&R at 35, ECF No. 37. Namely, Petitioner objects to the finding that any amount of the post- 2016 delay should be attributed to him, especially insofar as it is premised on his activities in Rule 35 proceedings. Pet.'s Objections to PF&R at 2-5, ECF No. 41. Petitioner argues that because he was under the impression that a resolution of his Rule 35 motion had to predate a resolution of his state habeas proceedings, any action to resolve the Rule 35 motion should not count against him. *Id.* at 4. Finally, Petitioner argues that any delay during the time he was represented by Mr. Rosenlieb and Mr. Hostler should not be attributed to him, as the State was unable to supply either of these counsel with the record.[10] *Id.* at 4-5.

The Court agrees with the proposed finding that the vast majority of delay is attributable to the State, though Petitioner is responsible for at least a small fraction of delay during the time that he was represented by Mr. Rosenlieb. Delay may also be attributable to a petitioner where the petitioner makes a litigation decision that stalls proceedings. *Peterson v. Ames*, No. 3:19-0126, 2020 WL 2114568, at *6 (S.D.W. Va.

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[10] Petitioner also objects to any suggestion in the PF&R that he received more than one correspondence from Mr. Rosenlieb. Pet.'s Objections to PF&R at 2, ECF No. 41. While the PF&R notes that Petitioner received "additional correspondence" beyond the November 14, 2016, letter from Mr. Rosenlieb, it appears that Petitioner received this letter, and this letter only, from Mr. Rosenlieb. PF&R at 18 n.3, ECF No. 37. The Court takes this into account in considering the other objections.

May 4, 2020) (finding that "some of the delay" was attributable to a petitioner due to his decision to move for a new trial). As an initial matter, the Court does not discount the role the State has played in delaying proceedings. However, whether Petitioner meant to or not, his litigation decisions with respect to the Rule 35 motion did cause some delay. While Petitioner expressed to the circuit court a desire to "have [the Rule 35 motion] out of the way, whether . . . in [his] favor or not" so that he could "move that forward to another court," desire alone is not enough to shift the burden of delay. May 24, 2017 Hr'g Tr. 14:10-12, ECF No. 33-5. As reflected in the PF&R, Petitioner's litigation decisions with regard to both the Rule 35 motion and his habeas petition did contribute to the delay in his habeas proceedings.

Further, as discussed during the May 24, 2017 hearing, Petitioner was unwilling to explore an alternative approach to reducing his sentence—that is, by seeking to have his case dismissed due to the lack of a trial transcript. May 24, 2017 Hr'g Tr.9:19-21, ECF No. 33-5. Throughout the lifespan of this case, Petitioner has expressed a desire to steer the direction of his proceedings.

Mot. to Remove Appointed Counsel and Proceed Pro Se, ECF No. 33-4. No court has denied him this ability. However, in making certain litigation decisions and pursuing his preferred theory of the case—that is, obtaining a sentence reduction because of the transcript, rather than the lack thereof—Petitioner has contributed to the delay in his case.

Regarding Petitioner's alleged lack of cooperation with counsel, this Court has found a delay was partially attributable to a petitioner where he

"consistently acted without regard to his attorneys (e.g., by filing pro se motions while represented) and asked the circuit court judge several times to permit him to proceed pro se, while other times requesting that habeas counsel be appointed." *Harper v. Ballard*, No. 3:12-00653, 2013 WL 285412, at *8 (S.D.W. Va. Jan. 24, 2013). The Court understands that Petitioner has had a frustrating experience with counsel. However, the record supports a finding that Petitioner has made it more difficult for counsel to represent him since the appointment of Mr. Rosenlieb.

Take, for example, Petitioner's refusal to return the requested *Losh* list to Mr. Rosenlieb or to come to an agreement as to how to supply what he had of the record to Mr. Hostler. May 24, 2017 Hr'g Tr. 7:22-24, 8:1-5, 8:17-18, ECF No.33-5; Pet.'s Reply and Objection to Resp.'s Mot. to Dismiss for Failure to Exhaust State Remedies at 5, ECF No. 31. Petitioner alleges that he did not complete the *Losh* list because he "believed Mr. Rosenlieb did not possess the case file." Pet's Objections to PF&R at 2, ECF No. 41. Yet two pages after acknowledging this belief, Petitioner criticizes Mr. Rosenlieb for not telling Petitioner as such in his November 14, 2016 letter. *Id.* at 4. Petitioner cannot have it both ways—he cannot feign ignorance as to the status of his case file and refuse to take a helpful action, filling out the *Losh* list, based on the knowledge that his case file was missing.

Petitioner also could have remedied his counsel's issues obtaining the record. He argues as to his willingness to provide the documents he possessed to the State. Objections to PF&R at 3, ECF No. 41. However, he does not appear to extend this same courtesy to his own counsel. Without diminishing the State's role in misplacing Petitioner's records, the Court cannot

ignore that Petitioner was unwilling to supply his own counsel with crucial, otherwise unavailable files in his possession. Petitioner also argues that the State should bear the totality of delay because the circuit court "could have prevented this problem" by issuing an order allowing him to copy his file. *Id.* at 5. Yet this argument can easily be turned around—delay due to the lack of a record could have been easily remedied by Petitioner handing his case file to Mr. Hostler or informing Mr. Rosenlieb that he had key documents in his possession.

Finally, Petitioner argues that though the PF&R asserts that there was no action in Petitioner's habeas proceedings between May 30, 2017 and January 19, 2019, Petitioner had filed a Motion for Oral Argument and Hearing on His Rule 35 Motion on June 13, 2017 and a Motion to Prepare Transcripts on July 13, 2017. Pet's Objections to PF&R at 3, ECF No. 41. However, Petitioner fails to inform the Court how these filings relate to his habeas, not his Rule 35, proceedings. And even if these filings did qualify as actions in his habeas proceedings, they would do little to change the thrust of the proposed finding. That is, under the more generous view, Petitioner would have taken no actions in his habeas proceedings from July 13, 2017 rather than May 30, 2017. The resulting delay is still somewhat attributable to Petitioner, as he took no other action for over a year-and-a-half to move his case along.

For these reasons, the Court finds in keeping with the PF&R. While the majority of the delay is attributable to the State, Petitioner has contributed to the delay through his own litigation decisions, unwillingness to work with counsel to share necessary files, and failing to move his habeas proceedings along between July 13, 2017 and January 19, 2019.

2. Whether Petitioner "sat on his rights"

Second, Petitioner objects to the following finding:

the record reveals long periods of time where there were no filings by Petitioner or his counsel. Although the Circuit Court is ultimately responsible for managing its docket, a petitioner cannot sit on his rights and then expect to benefit from his lack of diligence. The Circuit Court had a history of acting with reasonable promptness in addressing motions filed by Petitioner, yet Petitioner often waited years before complaining that he was dissatisfied with counsel or any delay. If Petitioner was either dissatisfied with counsel, or did not consent to the delay, Petitioner should have immediately notified the Circuit Court of such and requested action by the Circuit Court.

PF&R at 34, ECF No. 37. Namely, Petitioner argues that he did not sit on his rights—rather, he alleges his oral motion for a hearing on his Rule 35 motion, oral request for an order waiving copying fees, and written motion to prepare transcripts constitute requests for action from the circuit court. Pet's Objections to PF&R at 6, ECF No. 41. Petitioner also alleges that he did not want to complain about Mr. Hostler's performance, as an order by Judge Reeder had previously accused Petitioner of being "unable to work with counsel." *Id.* at 7. Finally, he argues that the State should bear the total burden of delay, as it required Petitioner to supply his own record. *Id.* at 8.

Many of these arguments are the same as those addressed in Objection 1, discussed in Section III.A.1., *supra*. For example, as to the frequency of filings, Petitioner has not pointed to any filings relating to his habeas case made between July 13, 2017 and January 19, 2019, which still constitutes a period in which

Petitioner did not seek to move proceedings along. As to the loss of Petitioner's file, the Court reiterates that Petitioner did not take any steps to mitigate this problem for his own counsel, further contributing to the delay. And while Petitioner may have hesitated to complain about Mr. Hostler's performance in light of Judge Reeder's comments, such hesitation does not tip the scales of attributable delay. Regardless of whether Petitioner was concerned about angering Judge Reeder, his decision not to seek alternate counsel, or even find a way to more effectively work with Mr. Hostler, was just that—his decision.

Finally, Petitioner outlines instances in which he informed the circuit court that he was unhappy with counsel, specifically with Mr. Bayliss and Mr. Dascoli. *Id.* at 7. The PF&R does not attribute delay to Petitioner during this time period. Rather, as seen in the passage highlighted in Objection 1, the PF&R proposes that only delay following Mr. Rosenlieb's appointment is attributable, in part, to Petitioner. PF&R at 35, ECF No. 37. As such, Petitioner's experiences with Mr. Bayliss and Mr. Dascoli are not relevant to the instant analysis.

3. Support for the allegation that the prosecutor blocked relief

Third, Petitioner objects to the PF&R's finding that there are no facts alleged "to support Petitioner's conclusory claim that the prosecutor 'blocked relief.'" PF&R at 21 n.4, ECF No. 37. Petitioner argues that he did provide such a factual basis, citing (1) his initial Petition for Writ of Habeas Corpus Ad Subjiciendum with "Spaulding" written on it; and (2) an order denying his Motion for Temporary Restraining Order/Preliminary Injunction, filed alongside his Petition for

Writ of Habeas Corpus Ad Subjiciendum, that was signed by Judge O.C. Spaulding. Pet's Objections to PF&R at 8, ECF No. 41 (citing ECF Nos. 28-5 and 36-1).

The record supports Petitioner's contention that his habeas case was assigned to Judge O.C. Spaulding, the individual who had prosecuted Petitioner's initial charges. *See* ECF Nos. 28-5, 36- 1. While such a conflict of interest is concerning, it does not automatically follow that Judge Spaulding blocked relief. Nor does it appear that Petitioner ever sought to remedy this conflict of interest by asking that his case be transferred to a different judge—rather, Petitioner's record is completely devoid of filings from November 20, 1997 to August 20, 2012, the time in which Judge Spaulding oversaw Petitioner's case. Docket, ECF No. 28-8. Further, Petitioner suggests that it was the transfer of his case from Judge Spaulding that spurred his filing of another motion to appoint counsel in 2012. Pet's Surreply to Resp's Reply in Supp. of Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 2, ECF No. 36. The Court, like Magistrate Judge Aboulhosn, notes that the delay from 1997 until 2012 is largely the fault of the circuit court's failure to control its docket. PF&R at 34, ECF No. 37. But Petitioner took no action in fifteen years besides filing a petition and moving to appoint counsel one time. Docket, ECF No. 28-8. In the absence of evidence beyond the mere presence of a conflict of interest, the Court agrees that Petitioner has not supported the contention that the prosecutor blocked relief.

4. Delay due to the appointment of counsel

Fourth, Petitioner objects to the proposed finding that it was reasonable for some delay to accompany

the appointment of new counsel. Namely, Petitioner points to the statements that:

[t]he appointment of five new attorneys as habeas counsel also resulted in some delay. It is reasonable that some delay would occur as a result of the appointment of new counsel. Each replacement attorney needs time to obtain and review the file and become familiar with the facts and applicable law.

PF&R at 34, ECF No. 37. Petitioner argues that such a delay would not be reasonable here— because the file was missing, there was nothing for each new attorney to review. Pet's Objections to PF&R at 9, ECF No. 41. However, this objection misses the point. That there was no file to review does not change the fact that any new appointed attorney would need additional time to try to locate the file, review whatever case materials they could, meet with Petitioner, and become familiar with any facts and applicable law. A missing file does not erase the delay inherent in appointing a new attorney to a case.

Construing the objection liberally, the Court recognizes that Petitioner may be arguing that none of the delay resulting from the appointment of new counsel should be attributed to him. While the PF&R acknowledges that "[d]elays caused by court-appointed counsel may be attributed to the

State where 'the petitioner has not personally caused the delays nor condoned them,'" it proposes that "Petitioner has attributed to the delay by being uncooperative with counsel." PF&R at 33-34, 35, ECF No. 37 (quoting *Gardner v. Plumley*, No. 2:12-cv-03386, 2013 WL 5999041, at *6 (S.D.W. Va. Nov. 12, 2013)). The Court agrees that Petitioner should not be held responsible for any delay during the time he was

represented by Mr. Bayliss and Mr. Dascoli. PF&R at 35, ECF No. 37. However, as discussed above, Petitioner was at best unhelpful during Mr. Rosenlieb's and Mr. Hostler's tenure as appointed counsel. *See* Section III.A.1., *supra*. The delay due to the appointment of these counsel, therefore, is not solely attributable to the State.

5. Whether state habeas proceedings have been "reactivated"

Fifth, Petitioner objects to Respondent's characterization that state proceedings were "reactivated" in January 2019.[11] Objections to PF&R at 10, ECF No. 41; PF&R at 20, ECF No. 37 (quoting Reply in Supp. of Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 8-9, ECF No. 33). Courts have declined to waive exhaustion where state proceedings have been "reactivated." *Plymail v. Mirandy*, No. 3:14-6201, 2017 WL 4280676, at *9 (S.D.W. Va. Sept. 27, 2017) (citing *Walker v. Vaughn*, 53 F.3d 609, 614 (3d Cir. 1995)). State proceedings have been "reactivated" where meaningful progress has been made in them—for example, where amended petitions have been filed, court-appointed counsel are actively engaged, and state courts are actively holding hearings on the case. *Id.*; see also *Wojtczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986) (waiving exhaustion requirement where almost three years had passed without the petitioner's counsel securing a hearing); *Simmons v. Garman*, No.

[11] Puzzlingly, Petitioner's objections on this issue quote the PF&R's summary of and quotations from Respondent's argument as to state proceedings being "reactivated." Objections to PF&R at 10, ECF No. 41. Because the instant objections were filed pro se, the Court liberally construes them to object to the proposed finding that state proceedings have been reactivated.

16-4068, 2017 WL 2222526 at *3 (E.D. Pa. Feb. 14, 2017) (finding that state proceedings were progressing normally where the court had established deadlines and set a hearing date).

Petitioner points out that state proceedings have not adhered to the deadlines set forth in the January 18, 2019 order, which called for a final petition to be filed by July 5, 2019, scheduled a hearing on the final petition on August 16, 2019, and promised a ruling by September 6, 2019. Objections to PF&R at 10, ECF No. 41. While state proceedings are admittedly off-schedule, that does not prevent them from being "re-activated." Rather, the state proceedings here have checked the boxes described in *Plymail*—an amended petition has been filed (albeit not a final amended petition); hearings and status conferences have been scheduled, including one in January 2023; and appointed counsel is engaged in the matter, as evidenced by the letter attached to Petitioner's supplement to his objections. Letter from Jason Gain to Alan Hicks, ECF No. 43-1. Moreover, the state court and the parties are actively working to deal with the lack of a record, a serious issue that has plagued Petitioner's proceedings up to this point. *Id.*

In this objection, Petitioner also quotes "derisive statements" by Judge Reeder in the January 18, 2019 Order, claiming that these statements indicate an ongoing scheme to contaminate the record with baseless accusations. Objections to PF&R at 10-11, ECF No. 41. Namely, Petitioner objects to the characterization that delays in the matter stem from Petitioner's "inability to work with counsel." *Id.* at 10 (quoting January 18, 2019 Order, ECF No. 33-2). Petitioner ultimately accuses Respondent, and later Magistrate Judge Aboulhosn, of "parroting" these misstatements in

their filings. *Id.* at 10, 12. Again, the Court acknowledges Petitioner's frustration with the slow pace of proceedings. However, the role of this Court is to determine whether exhaustion can be excused, not to quibble with Judge Reeder's findings of fact. Moreover, the Court reiterates the standard set forth in the PF&R—while courts need only consider "the face of the petition and any attached exhibits" in reaching its decision, they may also consider exhibits and matters of public record, such as documents from prior state court proceedings." PF&R at 22- 23, ECF No. 37 (citing *Wolfe v. Johnson*, 565 F.3d 140, 169 (4th Cir. 2009) and *Walker v. Kelly*, 589 F.3d 127, 139 (4th Cir. 2009)). The PF&R in no way parrots proceedings from state court. Rather, it reflects an extensive and independent review of the record—a record that, in addition to orders from Judge Reeder, contains letters between Petitioner and counsel, hearing transcripts reflecting Petitioner's own words, and Petitioner's filings in this matter. Following its own thorough and independent review of the record, this Court finds in accordance with the PF&R.

B. Whether the delay was inordinate and unjustified

With Petitioner's objections in mind, the Court examines (1) whether Petitioner's state habeas proceedings have been subject to inordinate and unjustified delay, thereby warranting waiving the exhaustion requirement; and in the alternative, (2) whether it is appropriate to stay the petition and hold federal proceedings in abeyance while Petitioner exhausts his habeas proceedings in state court. While the Court finds that the delay was inordinate, it does not warrant waiving the exhaustion requirement where state habeas proceedings have been reactivated. Nor it is appropriate

to stay the petition and hold federal proceedings in abeyance pending exhaustion of Petitioner's state habeas claims, as Petitioner will not be barred from filing another federal habeas petition upon resolution of his state proceedings.

Petitioner does not dispute that his habeas petition contains a mix of exhausted and unexhausted claims. Instead, he argues that the exhaustion requirement should be excused following the inordinate delay of habeas proceedings in state court. Pet's Reply and Objection to Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 6, ECF No. 31. 28 U.S.C. § 2254(b)(1) provides that a state prisoner's petition for a writ of habeas corpus shall not be granted unless the petitioner "has exhausted the remedies available in the courts of the State." The Supreme Court has encouraged a "rigorously enforced total exhaustion rule" to (1) protect the state judiciary's role in enforcing federal law, (2) avoid disrupting state judicial proceedings, and (3) ensure that factual records are developed prior to being presented to the federal courts for review. *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982). However, because the exhaustion rule is one of comity, it should be applied flexibly. *Patterson v. Leeke*, 556 F.2d 1168, 1170 (4th Cir. 1977).

Section 2254(b)(1)(B) excuses the exhaustion requirement where "there is an absence of available [s]tate corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant." In keeping, the Fourth Circuit has recognized several circumstances under which federal courts should excuse exhaustion. *See Farmer v. Cir. Ct. of Md. for Balt. Cnty.*, 31 F.3d 219, 223 (4th Cir. 1994) ("There is . . . authority for treating sufficiently diligent, though unavailing, efforts to exhaust as,

effectively, exhaustion, and for excusing efforts sufficiently shown to be futile in the face of state dilatoriness or recalcitrance"). Namely, "[s]tate remedies may be rendered ineffective by inordinate delay or inaction in state proceedings." *Ward v. Freeman*, 46 F.3d 1129, at *1 (4th Cir. 1995) (unpublished table decision); *see also Walkup*, 2005 WL 2428163, at *3 ("[A]n inordinate and unjustified delay may excuse the petitioner from the traditional statutory requirement of exhaustion.").

When determining whether a delay is inordinate and unjustified such it warrants excusing the exhaustion requirement, courts look to the following factors: (1) the length of the delay, *see Farmer*, 31 F.3d at 223; (2) the significance of any action that has been taken in state court, *see Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004); and (3) the party responsible for the complained-of delay, *see Matthews v. Evatt*, 51 F.3d 267 n.1 (4th Cir. 1995) (unpublished decision). If an inordinate delay is found, the burden shifts to the State to provide justification for the delay and to demonstrate why the petitioner should still be required to exhaust his state court remedies before seeking relief in federal court. *Story v. Kindt*, 26 F.3d 402, 405 (3d Cir. 1994).

1) Length of Delay

Petitioner does not—nor has he reason to—object to the proposed finding that the length of delay was inordinate and should be calculated as to the date of his initial filing. PF&R at 28-30, ECF No. 37. Given that Petitioner filed his state habeas petition on November 20, 1997, state habeas proceedings have been ongoing for almost twenty-five years. While there is not a "talismanic number of years or months" that

renders a delay inordinate, *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990), a twenty-five-year delay undoubtedly qualifies as "inordinate" under any reasonable definition. *See Ames*, 2020 WL 2114568, at *4 (listing cases). The Court agrees with the PF&R that the length of delay weighs in favor of Petitioner. PF&R at 30, ECF No. 37.

2) Significance of Actions Taken in State Court

Next, the Court examines the degree of progress made in state court. A federal court should excuse the exhaustion requirement where there is "no indication that a state court case is achieving meaningful progress or nearing disposition." *Plymail*, 2017 WL 4280676, at *9 (citing *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987)). However, exhaustion should not be waived "[w]here a state court case is proceeding normally . . . even if the case's progress . . . is slow." *Id.* (citing *Burkett*, 826 F.2d at 1218). Rather, a federal court should "stay its hand" if it appears that the state court is proceeding normally or that proceedings have been "reactivated." *Ames*, 2020 WL 2114568, at *5 (quoting *Plymail*, 2017 WL 4280676, at *9).

The Court, like Magistrate Judge Aboulhosn, is concerned by the glacial pace of Petitioner's state habeas proceedings. PF&R at 35, ECF No. 37. However, as discussed in Section III.A.5, *supra*, state proceedings have been "reactivated" such that the Court must factor comity into its decision. And where proceedings are no longer experiencing a delay, comity requires that courts allow state litigation to run its course. *Monegain v. Carlton*, 576 F. App'x 598, 602 (7th Cir. 2014); *Horrell v. Downey*, No. 17-cv-02306-CSB, 2018 WL 8899717, at *4 (C.D. Ill. Oct. 16, 2018) (holding that only an ongoing delay warrants excusing the

exhaustion requirement). As this Court and others have held, federal courts should stay their hand where state proceedings are ongoing, even where these proceedings have previously been subject to an unreasonable delay. *Peterson v. Ames*, No. 3:19-00126, 2019 WL 8643741, at *15 (S.D.W. Va. Oct. 30, 2019), *report and recommendation adopted*, 2020 WL 2114568 (listing cases).

3) Party Responsible for the Delay

The Court's findings are in keeping with the PF&R. While part of the delay stemmed from Petitioner's litigation decisions and his relationship with counsel, the Court agrees with the proposed finding that the bulk of these delays are solely attributable to the State. PF&R at 33-35, ECF No. 37. In over thirty years of proceedings, the State has misplaced Petitioner's case files, assigned Petitioner's habeas case to a judge with a conflict of interest, delayed ruling on his Rule 35 motion for approximately thirty years, and failed to expeditiously appoint habeas counsel, to name a few. Though the State is responsible for the bulk of delay, this factor does not weigh solely in favor of Petitioner, as a portion of the post-2016 delay is owed to him. *Peterson*, 2020 WL 2114568, at *6 (citing *Evatt*, 1995 WL 149027, at *1 n.1)). In so finding, the Court refers to its previous discussions of the party responsible for delay in Sections III.A.1 and III.A.2, *supra*. The three factors, therefore, do not weigh in favor of excusing the exhaustion requirement.

While waiving exhaustion is not warranted, the Court is not ignorant of the possibility that delays could resume at a future point in Petitioner's state proceedings. This is not unlikely given that Petitioner's case remains pending in the same court that has

already allowed proceedings to drag on for literal decades. Should delays persist in Petitioner's state habeas proceedings for any inordinate period of time, the Court will again entertain the argument that exhaustion of state remedies should be excused. For now, the Court concludes "the need for a rule encouraging exhaustion of all federal claims" outweighs Petitioner's arguments in favor of excusing exhaustion. *Rose*, 455 U.S. at 519.

C. Whether the petition warrants an abeyance

Petitioner does not object to the proposed finding that staying the petition and holding it abeyance is not warranted. Pet's Reply and Objection to Resp's Mot. to Dismiss for Failure to Exhaust State Remedies at 6, ECF No. 31. However, since Petitioner has filed his objections pro se, the Court construes them liberally and reexamines the PF&R's finding as to a stay and abeyance. Staying a habeas petition is appropriate where "the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278 (2005). However, "a stay and abeyance should be available only in limited circumstances." *Id.* at 277-78. For example, stay and abeyance are not warranted where a petitioner would not be barred from returning to federal court after exhausting claims in state court. *See, e.g.*, *Gordon v. Cartledge*, No. 8:10-CV-2578-MBS-JDA, 2011 WL 4549390, at *5 (D.S.C. Sept. 30, 2011) (holding that stay and abeyance was unnecessary where dismissing the petition would not "unreasonably impair" a petitioner's ability to return to federal court); *Dreyfuse v. Pszczokowski*, No. 3:16-06717, 2017 WL

758950, at *2 (S.D.W. Va. Feb. 27, 2017) (finding that stay and abeyance was not needed where a petitioner still had the entire one-year statute of limitations to file a federal habeas petition). Petitioner has ample time to file a federal habeas petition upon resolution of his state habeas proceedings. A stay and abeyance, therefore, is not warranted.

IV. CONCLUSION

For the reasons above, the Court **ADOPTS AND INCORPORATES** herein the findings and recommendation of the Magistrate Judge. ECF No. 37. Accordingly, the Court **GRANTS** Respondent's Motion to Dismiss for Failure to Exhaust State Remedies (ECF No. 28) and **ORDERS** that the petition be dismissed, without prejudice.

Additionally, the Court **GRANTS** Petitioner leave to refile this action in this Court after he has exhausted his remaining claims before the state court. However, Petitioner's right to refile this action will be subject to the statute of limitation requirements contained in the habeas statute. See 28 U.S.C. § 2244(d)(1) and (2); *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) ("A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition."); *In re Goddard*, 170 F.3d 435, 438 (4th Cir. 1999) (listing cases that do not include petitions dismissed for failure to exhaust state remedies when determining whether a subsequent petition is "second or successive").

The Court **DIRECTS** the Clerk to send a certified copy of this Order to Magistrate Judge Aboulhosn, counsel of record, and any unrepresented parties.

ENTER: March 30, 2023

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

APPENDIX D

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

HUNTINGTON DIVISION

ALAN LANE HICKS,

Petitioner,

v. CIVIL ACTION NO. 3:21-0618

DONNIE AMES, Superintendent,

Respondent.

JUDGMENT ORDER

In accordance with the accompanying Memorandum Opinion and Order, the Court **DENIES** Plaintiff's Objections (ECF No. 41), **ADOPTS** the Proposed Findings and Recommendations (ECF No. 37), and **GRANTS** Respondent's Motion to Dismiss for Failure to Exhaust State Remedies (ECF No. 28). Accordingly, the Court **ORDERS** this case stricken from its docket.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to Magistrate Judge Aboulhosn, counsel of record, and any unrepresented parties.

ENTER: March 30, 2023

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 23-6447 (3:21-cv-00618)

ALAN LANE HICKS
Petitioner – Appellant,
v.
JONATHAN FRAME, Superintendent
Respondent – Appellee.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Thacker, Judge Richardson, and Judge Rushing.

For the Court
/s/ Nwamaka Anowi, Clerk