ALAN WILSON
ATTORNEY GENERAL

August 29, 2023

VIA Email – ctappfilings@sccourts.org
Ms. Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Carnie Norris v. State*
Case No. 2019-000334

Ms. Kitchings,

I am not a party to the above-captioned PCR appeal that was transferred to your court in February of 2020. However, I was instructed by the Honorable Mary G. Lewis, United States District Court Judge for the District of South Carolina, to provide a copy of a recent Order issued in Mr. Norris' federal habeas corpus case to the Court of Appeals. Please find it attached.

Respectfully,

s/Julianna E. Battenfield
Assistant Attorney General

cc: Sarah Elizabeth Shipe, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

CARNIE NORRIS, Petitioner,	§ § §	
vs.	§	CIVIL ACTION NO.8:21-3353-MGL-JDA
CHARLES WILLIAMS, *Warden*, Respondent.	§ § §	

ORDER ADOPTING THE REPORT AND RECOMMENDATION TO THE EXTENT PROVIDED HEREIN

Petitioner Carnie Norris (Norris) filed this 28 U.S.C. § 2254 petition against Respondent Charles Williams, Warden (Williams). Norris is representing himself.

The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting Williams's motion to dismiss, construed as a motion for summary judgment, Norris's motion for an appeal bond, and Norris's motion for summary judgment all be denied without prejudice. The Magistrate Judge further recommends this action be stayed, and that Williams be directed to file periodic updates concerning the appellate proceedings in Norris' state court case. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo

determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on July 27, 2023; and the Clerk of Court entered Norris's objections on August 15, 2023. The Court has carefully reviewed the objections, but holds them to be without merit. It will therefore enter judgment accordingly.

A brief recitation of the factual background of Norris's state court cases, both his criminal and his application for post-conviction relief (PCR), will be helpful in explaining the Court's decision below.

On September 2008, a grand jury indicted Norris for armed robbery. After a July 6–7, 2009, jury trial, the jury found Norris and his co-defendant guilty. The trial court judge sentenced Norris to twenty-eight years in state prison. Norris filed a direct appeal, which the South Carolina Court of Appeals dismissed on April 18, 2012.

Norris filed a pro se application for PCR on November 7, 2012, almost eleven years ago, alleging his trial and appellate counsel had provided ineffective assistance. On September 15, 2014, almost two years later, Judge Roger L. Couch (Couch), the judge presiding over Norris's PCR case, held a hearing on Norris's application. Couch then asked for additional briefing.

Approximately three years after the hearing, in an September 6, 2017, order, Couch granted Petitioner's PCR application, vacated his conviction, and remanded his charges for a new trial. The state then filed a motion to alter or amend judgment pursuant to Rule 59(e), dated September 19, 2017. Couch denied the state's motion on February 15, 2019, approximately a year-and-a-half after it was filed. Thus, Norris's PCR was pending with Couch for around four-and-a-half years.

The state thereafter filed a notice of appeal, dated March 1, 2019, and a petition for a writ of certiorari, dated September 20, 2019. The notice of appeal stayed the PCR court's vacatur of Norris's conviction such that he remains in custody. *See* SCACR Rule 241(a) ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.").

On August 19, 2022, almost three-and-a-half years after the state filed its appeal, almost three years after the state filed its petition for a writ of certiorari, and approximately five years after Couch granted Norris relief, the Court of Appeals granted certiorari. As of the date of this Order, the state's notice of appeal has been pending for approximately four-and-a-half years.

According to the South Carolina Appellate Case Management System, briefing and the record were complete as of February 28, 2023. https://ctrack.sccourts.org/public/caseView.do?csIID =69375 (last accessed on August 22, 2023).

Normally, one must exhaust all state remedies before filing a Section 2254 petition with this Court. *See Spencer v. Murray*, 18 F.3d 237, 239 (4th Cir.1994) (denying certain claims on exhaustion principles where claims were not raised on direct appeal to the state's supreme court). But, there is an exception to the exhaustion requirement when there is an inordinate delay in the state court's consideration of a petitioner's habeas claims. *See Ward v. Freeman*, 46 F.3d 1129 at *1 (4th Cir. 1995) (unpublished table decision) ("State remedies may be rendered ineffective by inordinate delay or inaction in state proceedings.").

As the Court noted earlier, Norris filed his PCR application on November 7, 2012, almost eleven years ago. But, consideration of the state's appeal of the PCR court's granting Norris's PCR

application is still pending. Approximately two years of the delay is attributable to the South Carolina Attorney General, who was responsible for scheduling the initial hearing in this matter. The remaining nine years are attributable to delays by Couch and the South Carolina Court of Appeals. These inordinate delays are deeply concerning and troubling to the Court as they tend to fray the judicial fabric on which a petitioner such as Norris should be able to rely.

Nevertheless, it appears the appeal may be decided soon. As the Court stated above, the Court of Appeals granted certiorari on August 19, 2022, and briefing and the record were complete as of February 28, 2023. According to the Magistrate Judge, Williams "indicates that the state appellate courts move rather quickly once certiorari has been granted and contends that [Norris's] case is now currently and actively before the state appellate courts, indicating [Norris's] state remedies will soon be exhausted." Report at 19 (citation omitted) (internal quotation marks omitted) (internal alteration marks omitted).

As per persuasive legal authority, even though Norris has established that there has been an inordinate delay in the state court's final decision on his PCR application, the Court will, for now, wait for the South Carolina Court of Appeals to render a decision in the matter. *See e.g., Wallace v. Dragovich*, 143 Fed. Appx. 413, 418 (3rd Cir. 2005) ("Where . . .previously-stalled state proceedings have resumed, we have instructed district courts to stay their consideration of habeas petitions."); *Walker v. Vaughn*, 53 F.3d 609, 614 (3rd Cir. 1995)) (stating that even if a petitioner can show unreasonable delay, a federal court should "stay its hand if there is evidence that the state court action . . . has been reactivated.").

In Norris's objections, he primarily argues that the exhaustion requirement should be set aside in this case based on the inordinate delay. Except that it appears a decision in his case may be

coming soon, the Court would agree. But, given that "there is evidence that the state court action . . . has been reactivated[,]" the Court will "stay its hand" for now. *Id.* But, as provided below, the Court will revisit this decision each month when Williams files his status report as to the pending appeal.

Norris also quibbles with some of the Magistrate Judge's factual recitations. But, even if Norris is correct, they are of no moment in the Court's decision in this matter.

Additionally, Norris argues he should be released pending the Court of Appeals' decision concerning his PCR application.

To prevail on a motion for release on bail in a habeas case, the appellant must show that his petition presents a substantial constitutional claim upon which he has a high probability of success, and that extraordinary circumstances warrant his release. *See Aronson v. May*, 85 S. Ct. 3, 5 (1964) ("[I]t is . . . necessary to inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice."). But, Norris has neglected to demonstrate any such extraordinary circumstances are present here.

For all these reasons, the Court will overrule Norris's objections.

Finally, Norris requests a hearing and the appointment of counsel. But, he fails to offer any factual or legal basis to make the granting of such relief proper. Therefore, the Court will deny the two requests.

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court overrules Norris's objections, adopts the Report to the extent it does not contradict this Order, and incorporates it herein. It is therefore the judgment of this Court Williams's

motion to dismiss, construed as a motion for summary judgment, Norris's motion for an appeal bond, and Norris's motion for summary judgment are all **DISMISSED WITHOUT PREJUDICE**. Norris's requests for a hearing and for the appointment of counsel are both **DENIED**.

Williams should immediately inform the South Carolina Court of Appeals of the Court's concerns detailed in this Order, as well as the Report. In doing so, he should provide it a copy of this Order and the Report, both which set forth those concerns. He shall file a certification with this Court that he has done so not later than August 30, 2023.

This case is **STAYED** pending further order of the Court. Not later than the fifteenth day of each month, Williams shall file a status report concerning the appeal of Norris's PCR. Williams shall also file a status report not later than one day after the Court of Appeals issues its decision in the state's appeal.

. To the extent Norris moves for a certificate of appealability, such request is **DENIED**.

IT IS SO ORDERED.

Signed this 25th day of August, 2023, in Columbia, South Carolina.

s/ Mary G. Lewis
MARY G. LEWIS
UNITED STATES DISTRICT JUDGE

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NOTICE OF RIGHT TO APPEAL

Norris is hereby notified of the right to appeal this Order within thirty days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Carnie Norris, Petitioner, v. Charles Williams, Warden, Respondent.	)	C/A No. 8:21-cv-03353-MGL-JDA **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This matter is before the Court on Petitioner's motion for appeal bond [Doc. 35] and motion for summary judgment [Doc. 38] and on Respondent's motion to dismiss [Doc. 43]. Petitioner is a state prisoner who seeks relief under 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

Petitioner filed this Petition for writ of habeas corpus on October 12, 2021.[1] [Doc. 1.] Petitioner's motion for appeal bond was entered on the docket on November 28, 2022. [Doc. 35.] Respondent filed a response in opposition on December 12, 2022 [Doc. 36], and Petitioner replied on December 19, 2022 [Doc. 41]. Petitioner's motion for summary judgment was entered on the docket on December 19, 2022. [Doc. 38.] Then, on December 21, 2022, Respondent filed a motion to dismiss and accompanying return and

[1]A prisoner's pleading is considered filed at the moment it is delivered to prison authorities for forwarding to the court. *See Houston v. Lack*, 487 U.S. 266, 270 (1988). Viewing the filing date in the light most favorable to Petitioner, the Court deems this Petition as having been filed on October 12, 2021. [*See* Docs. 1 at 14 (Petition, signed by Petitioner on October 12, 2021); 1-1 (cover letter, signed by Petitioner on October 12, 2021).]

memorandum. [Docs. 42; 43.] The following day, the Court issued an Order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the summary judgment/dismissal procedure and the possible consequences if he failed to adequately respond to the motion. [Doc. 44.] Petitioner's response in opposition to the motion to dismiss was entered on the docket on January 3, 2023. [Doc. 49.]

Having carefully considered the parties' submissions and the record in this case, the Court recommends that all motions be denied without prejudice and that this action be stayed pending resolution of the state-court PCR appeal.

BACKGROUND

Petitioner alleges that he is confined in the South Carolina Department of Corrections pursuant to an order of commitment of the Spartanburg County Clerk of Court. [Doc. 1 at 1.] In September 2008, Petitioner was indicted for armed robbery. [App. 528–29.[2]] On July 6–7, 2009, Petitioner, represented by Beverly D. Jones, proceeded to a jury trial. [App. 1–345.] The jury found Petitioner and his co-defendant guilty, and Petitioner was sentenced to 28 years in prison. [App. 335–44.]

Direct Appeal

Petitioner appealed his conviction, and Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense filed an *Anders* brief on his behalf,[3] raising one issue:

> In this armed robbery case, did the judge err in failing to instruct the jury on S.C. Code §§ 17-13-10, 20 dealing with the right of citizens to make arrests when appellant testified that he

[2]The Appendix can be found at Docket Entry Numbers 42-1 through 42-3.

[3]A brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), effectively concedes the appeal lacks a meritorious claim.

> was making a citizen's arrest and not committing an armed robbery?

[App. 352.] Petitioner filed a pro se brief in support of his appeal, asserting additional issues, mostly concerning the admission of evidence of prior bad acts and prior convictions. [*See* App. 362–75.] The South Carolina Court of Appeals dismissed Petitioner's appeal on April 18, 2012. [App. 377.] The matter was remitted to the lower court on June 19, 2012. [App. 379.]

Post-Conviction Relief Proceedings

Petitioner filed a pro se application for post-conviction relief ("PCR") on November 7, 2012, alleging his trial and appellate counsel had provided ineffective assistance. [App. 380–94.] The State filed a return dated February 28, 2014. [App. 395–403.]

A hearing was held on September 15, 2014, and Petitioner was represented at the hearing by J. Brandt Rucker. [App. 404–83.] At the conclusion of the hearing, the PCR judge took the matter under advisement. [App. 482.] The PCR court subsequently asked the parties to brief whether the State should have been allowed to introduce Petitioner's prior convictions for impeachment purposes and whether the introduction of that evidence was harmless error. [*See* App. 484–97.] In an order filed on September 6, 2017,[4] the PCR

[4]Petitioner notes the date on the order has been changed from 2015 to 2017 and states that "[t]his change of date was not initialed or made known that the judge changed the date thereby calling into question the PCR court's jurisdiction of the state's untimely 59(e) motion and untimely Notice of Appeal." [Doc. 49 at 8 (citing App. 510).] However, the date "9/6/17" also appears lower on the same page accompanied by the PCR judge's signature and on the following page accompanied by his initials. [App. 510–11.] The certificate of service is also dated September 6, 2017. [App. 512.] Thus, there is no evidence to suggest the order was not in fact signed and filed in September 2017.

court granted Petitioner's PCR application, vacated his conviction, and remanded his charges for a new trial. [App. 498–512.]

The State filed a motion to alter or amend judgment pursuant to Rule 59(e), dated September 19, 2017. [App. 513–23.] The PCR court denied the State's motion to alter or amend judgment on February 15, 2019. [App. 526.]

The State then filed a notice of appeal, dated March 1, 2019.[5] [Doc. 42-4 at 2–3.] Petitioner filed a pro se motion to dismiss the appeal, asserting that the Supreme Court of South Carolina lacked jurisdiction because the State's motion to alter or amend judgment and notice of appeal were not filed within the time limits prescribed by South Carolina court rules. [Doc. 42-5 at 5–18.] The State filed its petition for a writ of certiorari on September 20, 2019, and presented one issue:

> Did the PCR court err in granting post-conviction relief due to the unobjected introduction of Norris' prior convictions for burglary and robbery in a trial for armed robbery where the law at the time of trial established the prior convictions were crimes of dishonesty, where Norris was caught in possession of the victims' property and the knife they described mere yards away from the scene of the crime, and where . . . Norris' testimony was an inconsistent, self-serving fabrication?

[Doc. 42-6 at 3.] Through counsel Susan B. Hackett, Petitioner filed a return on February 3, 2020. [Doc. 42-7.] The matter was transferred to the South Carolina Court of Appeals on February 18, 2020, and the Court of Appeals granted certiorari on August 19, 2022. [Docs. 42-8; 42-9.]

[5]The notice of appeal stayed the PCR court's vacatur of Petitioner's conviction such that he remains in custody. *See* Rule 241, SCACR.

At the time Respondent filed its return in this matter, only the State's brief had been filed in the pending PCR appeal. [Doc. 42-10.] However, according to the Court of Appeals' case management system, the briefing and record in the PCR appeal were complete on February 28, 2023, and the case is ready for consideration by the court. *See* Case Information: *Norris v. State*, No. 2019-000334, South Carolina Appellate Case Management System, available at https://ctrack.sccourts.org/public/caseSearch.do (search by case number) (last visited July 27, 2023).

Petition for Writ of Habeas Corpus

Petitioner filed this Petition for writ of habeas corpus on October 12, 2021, and raises the following grounds and supporting facts, quoted substantially verbatim:

GROUND ONE: Did the S.C. Supreme Court err in denying Petitioner's motion to dismiss Petitioner's appeal for lack of appellate and/or subject matter jurisdiction.

Supporting facts: State filed an untimely 59(e) motion and notice of appeal.

GROUND TWO: Motion for appeal bond based upon inordinate and inexcusable delay.

Supporting facts: 3 year delay in signing PCR order/17 month delay in signing 59(e) order/state's delay in ordering transcripts/delay in adjudicating state's appeal (31 months and counting) total of 84 months (7 year delay in the PCR process).

GROUND THREE: Did the PCR judge correctly determine trial counsel provided ineffective assistance where trial counsel failed to object to the admission of Respondent's prior convictions of burglary and robbery during his trial for armed robbery based upon the PCR judge's proper analysis of the five factor test for determining the admissibility of the prior convictions pursuant to Rule 609(a), SCRE.

GROUND FOUR: Did the judge err in failing to instruct the jury on S.C. Code 17-13-10-20 dealing with the right of citizens to make arrests when appellant testified that he was making a citizen's arrest and not committing an armed robbery.

[Doc. 1 at 5–8.] The case is now ripe for review.

APPLICABLE LAW

Liberal Construction of Pro Se Petition

Petitioner brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. Even under this less stringent standard, however, the pro se petition is still subject to summary dismissal. *Id.* at 520–21. The mandated liberal construction means only that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the petitioner's legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Summary Judgment Standard[6]

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the

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[6]In § 2254 proceedings, the familiar standards of Rule 12(b)(6) of the Federal Rules of Civil Procedure apply to motions to dismiss. *See Walker v. True*, 399 F.3d 315, 319, n. 1. (4th Cir. 2005); *see also* Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."). If, on a motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56[, and a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). Here, as discussed, the Court considers additional materials and, thus, treats Respondent's motion as one for summary judgment.

allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Further, Rule 56 provides in pertinent part:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
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> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> >
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, he must produce existence of a factual dispute on every element essential to his action that he bears the burden of adducing at a trial on the merits.

Habeas Corpus

Generally

Because Petitioner filed the Petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett,* 134 F.3d 615 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication

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

28 U.S.C. § 2254(d). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision," and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011). Moreover, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Exhaustion

Section 2254 contains the requirement of exhausting state-court remedies and provides as follows:

> (b) (1) 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.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
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> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254. The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. *Id.* § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011). Thus, a federal court

may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds for relief be stated in the direct appeal or PCR application. S.C. App. Ct. R. 203; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C. 1976). Further, strict time deadlines govern direct appeal and the filing of a PCR application in the South Carolina courts. For direct appeal, a notice of appeal must be filed and served on all respondents within ten days after the sentence is imposed or after receiving written notice of entry of the order or judgment. S.C. App. Ct. R. 203(b)(2), (d)(1)(B). A PCR application must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

If any avenue of state relief is still available, the petitioner must proceed through the state courts before requesting a writ of habeas corpus in the federal courts. *Richardson v. Turner*, 716 F.2d 1059, 1062 (4th Cir. 1983); *Patterson v. Leeke*, 556 F.2d 1168 (4th Cir. 1977). Therefore, in a federal petition for habeas relief, a petitioner may present only those issues that were presented to the Supreme Court of South Carolina through direct appeal or through an appeal from the denial of a PCR application, regardless of whether the Supreme Court actually reached the merits of the claim.

DISCUSSION

Respondent's Motion to Dismiss, Construed as a Motion for Summary Judgment

Respondent moves to dismiss the Petition because Petitioner has not yet exhausted his available state court remedies. [Docs. 42; 43.] Petitioner admits the PCR appeal is still pending and, thus, the state's highest court has yet to rule on the merits of his substantive claims. [Doc. 49 at 20.] However, Petitioner argues this Court should excuse the lack of exhaustion based on the state court's inordinate and inexcusable delay in adjudicating his case. [*Id.* at 6, 11, 13–28.]

Whether Exhaustion Should be Excused

To satisfy the exhaustion requirement, a petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the [s]tate's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). However, "[a] petitioner need not present his claim to the state courts if state court remedies are ineffective to protect[] his rights." *Ward v. Freeman*, No. 94-6424, 1995 WL 48002, at *1 (4th Cir. Feb. 8, 1995). "State remedies may be rendered ineffective by inordinate delay or inaction in state proceedings." *Id.* To determine whether a delay should excuse the exhaustion requirement, a court must consider the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972): "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant" (the "*Barker* factors").[7] *Ward*, 1995 WL 48002, at *1.

[7]Although "[t]he enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions[, it] preserved [the] total exhaustion requirement." *Rhines v. Weber*, 544 U.S. 269, 274 (2005). Thus, even though *Ward* was decided before AEDPA was enacted, courts in this district continue to apply these factors to determine

Regarding the first factor, Petitioner asserts that the purported inordinate delay in this case began in early 2015, when the PCR court had decided to grant Petitioner's PCR application but did not sign the order granting relief until September 6, 2017; continued when it took the PCR court almost 17 months to rule on the State's motion to alter or amend judgment; and continues now because it has been more than four years since the State filed its notice of appeal from the PCR court's order. [Doc. 49 at 11, 15, 24, 25.] The record supports Petitioner's assertion.

Petitioner filed his PCR application on November 7, 2012 [App. 380–94], and an evidentiary hearing was held on September 15, 2014 [App. 404–83]. The PCR court ordered additional briefing from the parties, which was submitted by October 2014. [App.

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whether a delay in state-court litigation excuses the exhaustion requirement. *E.g.*, *Brannon v. Warden of Lee Corr.*, No. 5:20-cv-04476-SAL, 2023 WL 2643817, at *3–4 (D.S.C. Mar. 27, 2023). Some courts, however, apply a slightly different analysis to determine whether the exhaustion requirement should be excused. *See Boyer v. Akinbayo*, No. 17-834-LPS, 2018 WL 5801545, at *4 (D. Del. Nov. 6, 2018) (stating that courts in the Third Circuit generally "have excused a petitioner's failure to exhaust state remedies where the following three factors are present: (1) the delays in the state court proceedings have amounted to three, five, eleven, or twelve years; (2) no meaningful action towards resolution has been taken in the state court; and (3) the delay was not attributable to the petitioner" (footnote omitted)); *Plymail v. Mirandy*, No. 3:14-6201, 2017 WL 4280676, at *7 (S.D.W. Va. Sept. 27, 2017) ("In considering whether a delay is inordinate and unjustified such that exhaustion should be excused, courts look to several factors including: (1) the length of the delay, (2) the significance of any action that has been taken in state court, and (3) the party responsible for the complained-of delay. 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." (footnote and internal citations omitted)); *see id.* at *7 n.3 (noting that, although "the *Barker* factors . . . are undoubtedly the appropriate standard for analysis of [a] substantive claim that [a state-court delay] amounted to a due process violation, the [proposed findings of fact and recommendation] prematurely applied those factors to determine whether exhaustion should be excused" when a petitioner "is not required to make a showing of a due process violation" for a court to find that there has been an inordinate delay in state-court proceedings such that exhaustion should be excused).

484–97.] At that point, the PCR record was complete and the case was ready for resolution. Petitioner has submitted a letter from his PCR counsel dated January 14, 2015, informing Petitioner that the PCR court had planned to grant the PCR application and had asked PCR counsel to submit a proposed order.[8] [Doc. 1-2 at 40.] However, the order granting Petitioner's PCR application, vacating his conviction, and remanding the charges for a new trial was not filed until September 6, 2017. [App. 498–512.] It then took the PCR court almost 17 months to rule on the State's motion to alter or amend judgment. [App. 513–23, 526.] The State's PCR appeal has been ongoing since March 1, 2019. [Doc. 42-4 at 2–3.] The State filed its petition for a writ of certiorari on September 20, 2019 [Doc. 42-6]; Petitioner, through counsel, filed a return on February 3, 2020 [Doc. 42-7]; the matter was transferred to the South Carolina Court of Appeals on February 18, 2020 [Doc. 42-8]; and the Court of Appeals granted certiorari on August 19, 2022 [Doc. 42-9]. As previously noted, the matter has been ripe for review by the Court of Appeals since February 28, 2023.

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[8]Rule 7 of the Rules Governing Section 2254 Cases authorizes a federal habeas court to expand the record to include additional materials in some situations. Section 2254 restricts when a court may hold an evidentiary hearing and accept additional evidence. 28 U.S.C. § 2254(e)(2); *see Fielder v. Stevenson*, No. 2:12-cv-00412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) ("Section 2254(e)(2) limits a petitioner's ability to present new evidence through a Rule 7 motion to expand the record to the same extent that it limits the availability of an evidentiary hearing."). "But when materials from outside the state-court record are offered for [a purpose other than to support the merits of a petitioner's claim]—such as establishing cause and prejudice to excuse a ground's procedural default or proving the petitioner's actual innocence—the court has more latitude to consider them." *Thomas v. Newton*, No. 2:19-cv-3179-MBS-MGB, 2020 WL 8970795, at *4 (D.S.C. July 24, 2020), *Report and Recommendation adopted sub nom. by Thomas v. McKendley Newton, Jr.*, 2021 WL 1134759 (D.S.C. Mar. 24, 2021). Because, for purposes of this Report and Recommendation, the Court considers the referenced letter to determine whether inordinate delay should excuse the exhaustion requirement, the Court will include the additional material.

Based on this timeline, Petitioner's PCR action has been ongoing for almost eleven years and had been ongoing for almost nine years when Petitioner brought this action.[9] The Court concludes that the delays in Petitioner's PCR action are of the magnitude that has been determined to be inordinate. *See United States v. Johnson*, 732 F.2d 379, 382 (4th Cir. 1984) (concluding that a two-year delay in the preparation of a trial transcript to be used on appeal "is in the range of magnitude of delay as a result of which courts have indicated that due process may have been denied" (collecting cases)); *see also United States v. Brown*, 292 F. App'x 250, 253 (4th Cir. 2008) (concluding that a two-year and nine-month delay was "sufficient to trigger the balancing test"); *Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004) ("[I]t is difficult to envision any amount of progress justifying an eight-year delay in reaching the merits of a petition.").

As for the second factor, the exact reasons for the delays are not clear, and there are likely multiple causes. The most significant, unexplained lapses of time occurred in the PCR court during the almost three years between the submission of briefs after the PCR hearing and the filing of the order granting relief and during the almost 17 months between the submission of the motion to alter or amend judgment and the filing of the order denying that motion. Nothing before this Court explains the reasons for these delays; however, nothing supports a finding that these delays are attributable to Petitioner. *See Matthews v. Evatt*, 1995 WL 149027, at *1 n.* (4th Cir. Apr. 6, 1995) (noting that a nearly four-year delay did not excuse exhaustion because some of the delay was attributable to the

[9]Respondent asserts that Petitioner filed his PCR application on October 17, 2017, thus making the delay 47 months. [Doc. 42 at 11.] However, as noted, the record demonstrates that Petitioner's PCR application was filed on November 7, 2012, adding almost five years to Respondent's calculation. [*See* App. 380–94.]

petitioner); *Mitchell v. Warden of Ridgeland Corr. Inst.*, No. 9:21-cv-02121-CMC-MHC, 2022 WL 3146301, at *5 (D.S.C. May 13, 2022) ("Failures of court-appointed counsel and delays by the courts are attributable to the state." (alteration and internal quotation marks omitted)), *Report and Recommendation adopted by* 2022 WL 2712542 (D.S.C. July 13, 2022), *appeal dismissed*, No. 22-6859, 2022 WL 10416514 (4th Cir. Oct. 18, 2022), *cert. denied sub nom. Mitchell v. Cohen*, 143 S. Ct. 803 (2023). The other significant lapse of time occurred between February 2020, when the PCR appeal was transferred from the Supreme Court of South Carolina to the Court of Appeals, and August 2022, when the Court of Appeals granted certiorari and ordered briefing. [Docs. 42-8; 42-9.] Although it is not expressly stated in the record, the Court can safely presume much of this delay is attributable to COVID-19 and its impact on the court system.[10] *See United States v. Pair*, 522 F. Supp. 3d 185, 195 (E.D. Va. 2021) ("[D]istrict courts across the country have concluded that delays related to the COVID-19 pandemic are justified and not attributable to any party or the courts." (citing cases)). Based on a review of the record and considering each of the significant delays, the Court concludes that the second factor generally favors Petitioner.

As to the third factor, Respondent concedes that Petitioner has adequately asserted his right to a speedy appeal. [Doc. 42 at 11.] Thus, the Court concludes that this factor favors Petitioner.

Regarding the final factor, Respondent argues that Petitioner has not suffered any prejudice because AEDPA's statute of limitations is tolled during the pendency of the PCR

[10]February 18, 2020, was approximately one month before shutdowns and general upheaval due to the COVID-19 pandemic.

appeal. [*Id.* (citing *Rogers v. Rushton*, No. 8:08-2883-MBS, 2010 WL 478826, at *4 (D.S.C. Feb. 4, 2010)).] Petitioner, on the other hand, argues he has suffered oppressive pretrial incarceration, anxiety over the outcome of the appeal, and the possibility that the delay could impair potential defenses available to him at retrial. [Docs. 1-2 at 21; 49 at 15, 25.] The *Barker* Court specifically identified oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the defense will be impaired as examples of prejudice, noting that the most serious is the inability of a defendant to adequately prepare his case after a delay. 407 U.S. at 532. Here, the alleged armed robbery occurred around July 16, 2008 [*see* App. 529]; accordingly, 15 years have passed since the alleged crime. Although the record is insufficient for the Court to determine whether witnesses are still available and, if they are, whether they are able to recall accurately the events from July 2008, the Court notes that any memories witnesses have are likely not as clear 15 years later. The *Barker* Court also outlined "the societal disadvantages of lengthy pretrial incarceration." 407 U.S. at 532–33. Since September 2017, Petitioner has been and remains in custody on a sentence that the PCR court ordered to be vacated. The Court does not take the circumstances surrounding Petitioner's state-court delays lightly and cannot agree with Respondent that Petitioner has suffered no prejudice, though the record is currently insufficient to make a specific finding regarding prejudice.

In sum, the *Ward* factors establish that Petitioner has faced an inordinate delay in the PCR process in state court. Moreover, if the delay were ongoing, the Court would agree with Petitioner that state court remedies are ineffective to protect his rights and, thus, exhaustion should be excused. However, when deciding to excuse the exhaustion requirement, courts "generally take into account recent progress in the state court[, and

w]hen a previously stalled state action begins moving again, . . . generally hold that a state remedy is, once again, available, and that the petitioner should exhaust it." *Luckett v. Folino*, 264 F. App'x 171, 173 (3d Cir. 2008) (declining to excuse the exhaustion requirement despite a delay of more than five years where the state-court case was nearing its final stages and appeared to be moving smoothly and quickly); *see Monegain v. Carlton*, 576 F. App'x 598, 602 (7th Cir. 2014) (refusing to excuse the exhaustion requirement despite the state court's two-year delay in resolving the petitioner's post-conviction claims where the state court issued its decision while the federal habeas petition was pending, thus demonstrating that the petitioner had effective state remedies available); *Vreeland v. Davis*, 543 F. App'x 739, 742 (10th Cir. 2013) ("[N]or have we said . . . that failure to exhaust can be excused on the basis of a delay that has already ended. That is the situation we confront here, as the delay [the petitioner] relies upon—i.e., the delay at the [state court of appeals]—is over."); *Slater v. Chatman*, 147 F. App'x 959, 960 (11th Cir. 2005) ("Given that the state courts are now moving forward with [the petitioner's] direct appeal, we cannot say that there is an absence of available State corrective process[ ] or [that] circumstances exist that render such process ineffective to protect the rights of the applicant." (some alterations in original) (internal quotation marks omitted)); *Hicks v. Ames*, No. 3:21-00618, 2022 WL 19544911, at *14 (S.D.W. Va. Nov. 15, 2022) ("Even after inordinate delay, case law indicates that the federal court[] should stay its hand when there is reliable evidence that the state action has been reactivated.") (internal quotation marks omitted) (citing cases), *Report and Recommendation adopted by* 2023 WL 2711634 (S.D.W. Va. Mar. 30, 2023).

Here, Respondent contends that the PCR appeal is now moving forward because the South Carolina Court of Appeals "has granted a writ of certiorari and has set its briefing schedule." [Doc. 42 at 10.] As previously noted, the briefing and record were complete in the PCR appeal on February 28, 2023; therefore, the case is ready for consideration by the Court of Appeals. Respondent indicates that the state appellate courts "move[] rather quickly once certiorari has been granted" and contends that "Petitioner's case is now currently and actively before the [state appellate courts], indicating Petitioner's state remedies will soon be exhausted." [*Id.* at 10–11 (citing *Rogers*, 2010 WL 478826, at *4).]

Based on the recent progress of the PCR appeal in the South Carolina Court of Appeals, the Court concludes that the "state proceedings have been 'reactivated' such that the Court must factor comity into its decision." *Hicks*, 2023 WL 2711634, at *14. "Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. This rule of comity reduces friction between the state and federal court systems by avoiding the unseemliness of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan*, 526 U.S. at 844–45 (alteration, internal citations, and internal quotation marks omitted). Because the PCR appeal has been moving forward and is now in its final stage, these comity concerns compel this Court to allow the state litigation to run its course. *See Monegain*, 576 F. App'x at 602; *Vreeland*, 543 F. App'x at 742; *Hicks*, 2022 WL 19544911, at *14. Indeed, if the South Carolina Court of Appeals affirms the PCR court's ruling, there will be no need for federal review.

Whether to Dismiss or Stay

Although Respondent argues that "[t]his Court should dismiss Petitioner's petition for writ of habeas corpus like it did in *Rogers*" [Doc. 42 at 11], the Court disagrees. Given the multiple delays Petitioner has faced throughout the state PCR litigation, the Court concludes that it should stay, rather than dismiss, the federal proceedings to allow for completion of the state proceedings. *See Coleman v. Benzel*, No. 16-cv-0148, 2022 WL 1092380, at *2 (E.D. Wis. Apr. 11, 2022) (continuing a stay in a § 2254 action to allow the petitioner to exhaust claims in state court where a delay of state-court proceedings had been resolved); *Melvin v. Harlow*, No. 4:08-CV-1818, 2011 WL 1344591, at *13 (M.D. Pa. Mar. 16, 2011) (staying a § 2254 petition pending completion of state litigation following a 14-year delay that appeared to have ended), *Report and Recommendation adopted by* 2011 WL 1344586 (M.D. Pa. Apr. 8, 2011).

In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court held that a district court should stay, rather than dismiss, a mixed petition[11] "if 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." *Id.* at 278. Here, the Court finds that good cause exists for Petitioner's failure to exhaust, namely

[11]A mixed petition is one "in which a state prisoner presents a federal court with a single petition containing some claims that have been exhausted in the state courts and some that have not." *Rhines*, 544 U.S. at 271. Here, Petitioner's Ground Four—"Did the judge err in failing to instruct the jury on S.C. Code §§ 17-13-10-20 dealing with the right of citizens to make arrests when appellant testified that he was making a citizen's arrest and not committing an armed robbery"—was raised in Petitioner's direct appeal [App. 352] and is, therefore, exhausted. However, as stated, the PCR appeal, which presents Petitioner's Ground Three, remains pending before the South Carolina Court of Appeals. Therefore, this petition is a mixed petition, containing both exhausted and unexhausted claims.

the state courts' delays in handling his PCR litigation.[12] Moreover, given that the PCR court granted Petitioner's PCR application, vacated his conviction, and remanded his charges for a new trial [App. 498–512], his unexhausted claim is potentially meritorious. Finally, nothing in the record indicates that Petitioner has engaged in dilatory litigation tactics. Instead, as stated, it does not appear that any delays have been attributable to Petitioner, and Petitioner has adequately asserted his right to a speedy resolution throughout the PCR litigation. Further, as stated in *Rhines*, AEDPA did not deprive district courts of the authority to exercise their discretion to issue a stay but it limited their discretion so as to ensure that any stay is compatible with AEDPA's purposes. 544 U.S. at 276. The *Rhines* Court was concerned that if district courts stay habeas petitions too frequently it will "frustrate[] AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings" and "undermine[] AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition." *Id.* at 277. Neither of these concerns is present in the instant case, as Petitioner has attempted to exhaust all his claims in state court in the first instance but has been left awaiting resolution at numerous steps of the process. Nor is Petitioner attempting to delay resolution in this Court.

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[12]The Supreme Court and the Fourth Circuit have provided limited guidance regarding what constitutes good cause. *Malvo v. Mathena*, 259 F. Supp. 3d 321, 331 (D. Md. 2017); *see also Sena v. Kenneway*, 997 F.3d 378, 385–86 (1st Cir. 2021) (noting that case law regarding what constitutes good cause under *Rhines* is limited); *Priest v. Stirling*, 1:21-2878-MGL-SVH, 2021 WL 9218558, at *4 n.4 (D.S.C. Oct. 21, 2021) ("While the Supreme Court has yet to precisely define 'good cause' as that term is used in *Rhines*, it has suggested that the requirement is not a particularly demanding one."), *Report and Recommendation adopted by* 2022 WL 2663487 (D.S.C. July 11, 2022). But, given that Petitioner has done all that can reasonably be expected to pursue his claims in the state courts, the Court concludes that good cause exists for his failure to exhaust.

The Court has serious concerns regarding Petitioner's remaining in custody years after the PCR court ordered vacatur of his conviction. Although for comity reasons the Court will allow the state-court litigation to run its course now that the PCR appeal is in its final stage and a decision from the Court of Appeals should be forthcoming, given the significant delays at different stages throughout the PCR litigation, this Court should continue to monitor the PCR appeal while this action is stayed to ensure that it continues to move forward and that Petitioner is not again subjected to an inordinate delay. Staying this action will allow the Court to revisit whether to excuse exhaustion and move forward on the merits should the state-court litigation stall again.

Accordingly, for the foregoing reasons, the Court recommends that Respondent's motion to dismiss, construed as a motion for summary judgment, be denied without prejudice; that this action be stayed pending resolution of the state-court PCR appeal; and that Respondent be ordered to provide regular status updates.

Petitioner's Motions for Appeal Bond and for Summary Judgment

Because the Court recommends that this action be stayed pending resolution of the state-court PCR appeal, it is further recommended that Petitioner's motions for appeal bond and for summary judgment be denied without prejudice.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that Respondent's motion to dismiss, construed as a motion for summary judgment [Doc. 43], be DENIED without prejudice; that Petitioner's motion for appeal bond [Doc. 35] be DENIED without prejudice; and that Petitioner's motion for summary judgment [Doc. 38] be DENIED without prejudice. It is further recommended that this action be STAYED pending resolution of the

state-court PCR appeal and that Respondent be directed to file updates in this action regarding the status of the pending PCR appeal every 60 days or within 10 days of the resolution of the PCR appeal, whichever occurs earlier. These status updates will allow the Court to monitor the PCR appeal while this action is stayed to ensure that the PCR appeal continues to move forward and, if it stalls again, the Court may revisit whether to excuse exhaustion and move forward on the merits.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

July 27, 2023
Greenville, South Carolina