

State Of South Carolina)
County Of Richland)
)

In The Court Of Common Pleas
For The Fifth Judicial Circuit

Albert Scruggs, #136701)
Applicant,)

C/A NO. 2014-CP-40-02099

v.)

CERTIFICATE OF SERVICE AND SWORN
AFFIDAVIT OF APPLICANT

State Of South Carolina)
Respondent.)

I Albert Scruggs # 136701, Applicant do hereby swear under the penalty of perjury that the facts contained in this Notice of Intent to Appeal is true and correct to the best of my knoweldge and beliefs and the original was mailed to the clerk of court Jeanette McBride P.O. Box 2766, Columbia, SC 29202-2766.

and a copy was mailed to the S.C. supreme court Honorable Clerk's office P.O. Box 11330, Columbia, S.C. 29211

Respectfully Submitted,

sworn and subscribed before me
this 28 day of September 2016

Albert Scruggs #136701

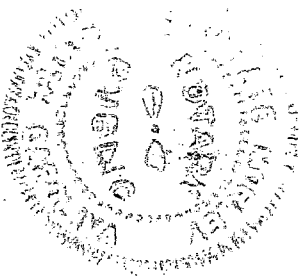
[Signature]
Notary Public For South Carolina

s/ Albert Scruggs

My Commission Expires: 9/28/16

Pro se Applicant

Murray #138 BRCI
4460 Broad River Rd.
Columbia, S.C. 29210



RECEIVED

OCT 03 2016

S.C. SUPREME COURT

Dear Honorable clerk of court

Please find enclosed applicants notice of intent to appeal pursuant to S.C. App. Ct.R 243 (g) and 227 and requests for appointment of counsel pursuant to Rule 71.1 (f) and (g) SCRCF to and a pro-se applicant in this appeal.

Please send the applicant a clocked stamped copy back to the applicant. Thank you for your time.

Respectfully Requested

Albert Scruggs #136701

s/ Albert Scruggs.

State Of South Carolina) In The Court Of Common Pleas
County Of Richland) For The Fifth Judicial Circuit
)

Albert Scruggs, #136701) C/A NO. 2014-CP-40-02099
Applicant,) NOTICE OF INTENT TO APPEAL pursuant
) to S.C. APP. Ct. Rule 243 (g)
V.) and Ruel 227 SCACR for Appointment
) of counsel pursuant to Rule 71.1
State Of South Carolina) (f) SCRPC and Rule 71.1 (g) SCRPC
Respondent.) and First: Eight: and Fourteenth,
Amens, U.S. const.

Comes now before this court pursuant to the applicants Notice Of Intent To Appeal the erroneous conclusion of the Honorable DeAndres G. Benjamin chief Administrative Judge for the Fifth Judicial circuit court, in clear violation of Coats v. State, Supra, S.C. code Ann. § 17-27-45 (c) the Federal court gave applicant leave to seek this review and give the state it's fair opportunity to hear these issues in which it waived by not affording a pro-se applicant a full and fair and meaningful opportunity to present his claims in a evidentiary hearing citing Sharper v. State supra. citing also S.C. code Ann. § 17-27-80 (2003) violating the applicants First. Eighth and Fourteenth Amendments under the U.S. constitution.

The final order was filed on August 31, 2016, and was received on September 26, 2016, and the remittitur was sent on

RECEIVED

OCT 03 2016

S.C. SUPREME COURT

Therefore, the applicant appeals this erroneous conclusion
and moves this court to appoint appellate counsel to aid the
applicant in this appeal.

Respectfully Requested

Albert Scruggs #136701

s/ Albert Scruggs
Applicant.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Albert Scruggs, #136701,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2014-CP-40-02099

FINAL ORDER OF DISMISSAL

JAMETTE B. HARRIS
C.C.P. & G.S.

2016 SEP 15 PM 3:26

RICHLAND COUNTY
FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 31, 2014. Respondent made its Return and Motion to Dismiss on or about August 19, 2015, requesting that the Application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed August 27, 2014 and filed August 31, 2015, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated September 21, 2015, serving the aforementioned Conditional Order of Dismissal on the Applicant.

Applicant filed a document titled "Reply to Conditional Order of Dismissal" on September 29, 2015, in which Applicant argues that PCR counsel was ineffective for failing to file a 59(e) motion concerning the fact that the order of dismissal from Applicant's original PCR did not address whether trial counsel was ineffective for failing to move for a mistrial based on two objections by counsel during closing arguments and therefore Applicant should be entitled to

an Austin review to appeal trial counsel's objections that were not ruled upon in prior application. Applicant then filed a document also titled "Reply to Conditional Order of Dismissal," on October 1, 2015, in which Applicant attaches the exhibit that was inadvertently left out of the previous reply.

This Court has reviewed all pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. Applicant still fails to state a cause of action upon which relief can be granted, and has presented no reason that this application should be reviewed despite its being filed after the expiration of the statute of limitations.

This Court finds that Applicant's claim of ineffective assistance of PCR counsel is dismissed, as it is not a cognizable claim for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). Once a PCR Applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). Further, Kelly v. State explicitly states, "that the holding in *Martinez*¹ is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377 (2013). Consequently, pursuant to Rule 12(b)(6), SCRPC, Applicant's contention that he received ineffective assistance of PCR counsel is not a cognizable claim for relief, nor does it raise any genuine issue of material fact for this Court to consider in evaluating the application.

¹ Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309 (2012) (holding ineffective assistance of collateral counsel may constitute "cause" to excuse procedural default in federal habeas corpus actions under the federal "cause and prejudice" standard)

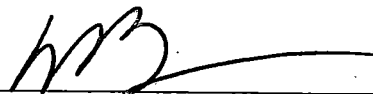
Furthermore, the Court dismisses Applicant's assertion that he is entitled to an Austin²

review because the original order from Applicant's first PCR did not address whether trial counsel was ineffective for failing to move for a mistrial based on two objections during closing argument. Applicant previously raised the issue of the trial counsel's failure to move for a mistrial based on state's closing argument in his Federal Habeas Corpus Petition (5:12-2940-TLW-KDW), filed on October 8, 2012 and dismissed March 11, 2014. Claims raised in prior federal habeas corpus, or which could have been raised there, are barred in subsequent state post-conviction proceedings. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR., for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 31 day of Aug, 2016.



DEANDREA G. BENJAMIN
Chief Judge for Administrative Purposes
Fifth Judicial Circuit

Columbia, South Carolina

² Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). PCR Applicants are entitled to belated appellate review of their PCR actions if they were previously denied this right.

**Richland County Common Pleas
CASE HISTORY FOR CASE 2014CP4002099**

Albert #136701 Scruggs vs State of South Carolina

FILED DATE: 3/31/2014

CASE TYPE: CP/Post Convict Rel 500

STATUS: Dismissed

JUDGE:

CASE PARTIES:

Plaintiff Scruggs, Albert #136701
Broad River Road, 4460 Broad River Road, Columbia, SC 29210

Defendant State of South Carolina

Defendant Attorney Kinard, Jessica Elizabeth
PO Box 11549, Columbia, SC 29211

Plaintiff Pro Se Scruggs, Albert #136701
Broad River Road, 4460 Broad River Road, Columbia, SC 29210

CASE HISTORY FOR CASE 2014CP4002099

Scruggs, Albert #136701
Broad River Road
4460 Broad River Road
Columbia, SC 29210

Age: Unknown
DL#:

DOB: Unknown
SSN: 000-00-0000

COST	ORIGINAL	BALANCE DUE	DISBURSED	PAY PRIORITY
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Total:

DATE	TIME	EVENT DESCRIPTION
3/31/2014	4:42 PM	Filing recorded: Post Conviction Relief
3/31/2014	4:48 PM	Filing recorded: Service/Certificate Of Service
3/31/2014	4:49 PM	Filing recorded: Application to Proceed W/O Payment of Costs and
5/9/2014	3:26 PM	Filing recorded: Verification/Verified
4/2/2015	4:52 PM	Filing recorded: Affidavit of Default
5/7/2015	8:57 AM	Motion to Address All Issues.
5/7/2015	8:57 AM	Motion to Alter or Amend Aad Reconsider Judgment
8/31/2015	12:01 PM	Conditional Order of Dismissal
9/29/2015	9:52 AM	Filing recorded: Reply to Conditional Order of Dismissal
10/1/2015	1:05 PM	Filing recorded: Reply to Conditional Order of Dismissal

Print Date: 09/20/2016

Print Time: 12:07:19PM

Requested By: DAVISJ

CaseHistory.rpt V6.1

Page 1 of 2

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated Atonia Jacobs (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)

AFFIDAVIT OF PERSONAL SERVICE

On this 21 day of September 2015, I served the Conditional Order of Dismissal, on Inmate Albert Scruggs, SCDC Inmate #136701, by delivering personally and leaving a copy of the same at Broad River Correctional Institution. Deponent is not a party to this action.

s/ Atonia Jacobs
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 21 day of September, 2015

[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: 10/10/2018

ADMISSION OF SERVICE

Service of a copy of the within Conditional Order of Dismissal is admitted at the South Carolina Department of Corrections (Broadriver Correctional Institution), Columbia County, SC this 21 day of September, 2015.

s/ Albert Scruggs
Inmate
SCDC Inmate #: 136701

CASE HISTORY FOR CASE 2014CP4002099

5/3/2016	2:31 PM	Motion For Appointment of Counsel
9/15/2016	3:26 PM	Final Order of Dismissal
9/20/2016	12:06 PM	Motion in Opposition to Attemp for PCR Dismissal
11/4/2015	12:00 AM	GUNTERP recorded the following Case Note: Case added to Roster 513 - PCR Master List.
		Roster Begin Date 2016-02-01 - End Date 2016-02-05
2/1/2016	12:00 AM	GUNTERP recorded the following Case Note: Case removed from Roster 513 - PCR Master List.
		Roster Begin Date 2016-02-01 - End Date 2016-02-05
2/1/2016	12:00 AM	GUNTERP recorded the following Case Note: Case added to Roster 540 - PCR MASTER LIST.
		Roster Begin Date 2016-03-14 - End Date 2016-03-18
2/8/2016	12:00 AM	GUNTERP recorded the following Case Note: Case removed from Roster 540 - PCR MASTER LIST.
		Roster Begin Date 2016-03-14 - End Date 2016-03-18
2/8/2016	12:00 AM	GUNTERP recorded the following Case Note: Case added to Roster 543 - STATUS CONFERENCE ROSTER FEBRUARY 19, 2016 COURTROOM 3-A 9:30 AM.
		Roster Begin Date 2016-02-19 - End Date 2016-02-19
2/8/2016	12:00 AM	GUNTERP recorded the following Case Note: Case removed from Roster 543 - PCR STATUS CONFERENCE ROSTER FEBRUARY 19, 2016 COURTROOM 3-A 9:30 AM.
		Roster Begin Date 2016-02-19 - End Date 2016-02-19
2/8/2016	12:00 AM	GUNTERP recorded the following Case Note: Case added to Roster 540 - PCR MASTER LIST.
		Roster Begin Date 2016-03-14 - End Date 2016-03-18
5/18/2016	12:00 AM	GUNTERP recorded the following Case Note: Case removed from Roster 540 - PCR MASTER LIST.
		Roster Begin Date 2016-03-14 - End Date 2016-03-18
5/18/2016	12:00 AM	GUNTERP recorded the following Case Note: Case added to Roster 594 - PCR STATUS CONFERENCE ROSTER JUNE 6, 2016 9:30 AM COURTROOM 2-C.
		Roster Begin Date 2016-06-06 - End Date 2016-06-06
7/15/2016	12:00 AM	GUNTERP recorded the following Case Note: Case removed from Roster 594 - PCR STATUS CONFERENCE ROSTER JUNE 6, 2016 9:30 AM COURTROOM 3-A.
		Roster Begin Date 2016-06-06 - End Date 2016-06-06
7/15/2016	12:00 AM	GUNTERP recorded the following Case Note: Case added to Roster 606 - PCR ROSTER MEETING JULY 25, 2016 COURTROOM AT 2 PM.
		Roster Begin Date 2016-07-25 - End Date 2016-07-25
7/15/2016	12:00 AM	GUNTERP recorded the following Case Note: July 25, 2016 Roster Meeting - Awaiting Final Order of Dismissal
7/26/2016	12:00 AM	GUNTERP recorded the following Case Note: Case removed from Roster 606 - PCR ROSTER MEETING JULY 25, 2016 COURTROOM 2-C at 2 PM.
		Roster Begin Date 2016-07-25 - End Date 2016-07-25
7/26/2016	12:00 AM	GUNTERP recorded the following Case Note: Case added to Roster 613 - PCR ROSTER MEETING COURTROOM.
		Roster Begin Date 2016-10-14 - End Date 2016-10-14
3/31/2014	12:00 AM	DAVISJ recorded the following Case Note: Application to Proceed W/O Payment of Costs and Affidavit In Support Thereof

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 ALBERT SCRUGGS, # 136701)
) Plaintiff,)
) vs.)
)
 STATE OF SOUTH CAROLINA)
) Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

CASE NO: 2014-CP-40-2099

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney:
 Albert Scruggs #136701, (Pro Se)
 Address: Broad River Correctional Institution
 4460 Broad River Road
 Columbia, SC 29210
 Phone: _____ Fax _____
 E-mail: _____ Other: _____

Defendant's Attorney:
 Jessica E. Kinard, Bar No.
 Address:
 PO Box 11549
 Columbia, SC 29211
 Phone: 803.734.3737 Fax 803.734.4113
 E-mail: _____ Other: _____

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

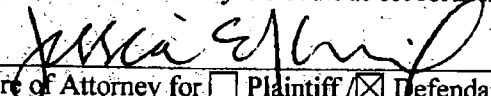
SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant August 29, 2016
 Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: \$ _____
 EXEMPT:
 (check reason) Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRCP)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order. JUDGE CODE _____
 Other: _____ Date: _____

CLERK'S VERIFICATION

- Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHALAND)	CASE NO. 2014-CP-40-02099
ALBERT SCRUGGS, #136701)	
Applicant,)	
v.)	REPLY TO CONDITIONAL ORDER OF
STATE OF SOUTH)	DISMISSAL
CAROLINA,)	
Respondent.)	

PROCEDURAL HISTORY

Applicant agrees with the Procedural History outlined in the Conditional Order of Dismissal ("COD").

STATEMENT OF ISSUES

Whether Petitioner is entitled to an Austin review to appeal trial counsel's objections to Respondent's improper comments during closing arguments in three (3) separate instances. Austin v. State, 304 S.C. 453, 409 S.E.2d 395 (1991).

STATEMENT OF CASE

At trial, trial counsel objected to three (3) separate improper comments to the jury by Respondent during closing arguments.

1. When Respondent asserted that a supervising officer had been fired for not initially taking Petitioner into custody when he was first interviewed near the scene of the incident. App. p. 485 line 10-25).

2. The burden shifting argument that Respondent failed to produce evidence that Petitioner was in Five Points drinking at the time of the incident. (App. p. 475, line 5-25. Petitioner

did not testify at his trial).

3. When the Respondent asserted that defense expert witness, Dr. Cutler, agreed to testify before he even saw the file in this case. Respondent disparaged the expert witness in eye identification process without producing any evidence of those arguments.

The jury returned a verdict of guilty for second degree, kidnapping, and assault with intent to commit criminal sexual conduct. Petitioner was sentenced to life without parole pursuant to S.C. Code 17-25-45.

A timely Notice of Intent to Appeal was filed on Petitioner's behalf. State v. Scruggs, Op. Mp. 2005 UP-537 (SC Ct. App. filed October 5, 2005). However, direct appeal counsel failed to assert the three (3) improper closing arguments outlined above. Odom v. State, 337 S.E.2d 256, 262 S.E.2d 753, 756 (1999). The South Carolina Court of Appeals affirmed Petitioner's conviction in State v. Scruggs, OP. NO. 2005-UP-537. A post-conviction application was filed on September 20, 2004, before the direct had been decided. That case was dismissed without prejudice on October 14, 2005, and was refiled on January 5, 2009. The Respondent file a Return. An evidentiary hearing was held on February 25, 2009, before the Honorable L. Casey Manning.

At the hearing, PCR counsel argued that trial counsel was ineffective for failing to move for a mistrial based on his objection to the Respondent's three improper closing arguments. App. p. 615, line 10-p.616, 617, line 1-9.

However, the written PCR signed by Judge Manning dated June 23, 2009, denying relief only addressed one (1) specific objection to the Respondent's improper closing arguments as follows:

Regarding any allegation that trial counsel was ineffective for failing to move for a mistrial after objecting to State closing argument, the Court finds that Applicant's claim to be without merit. Specifically, during closing argument the State alluding to testimony to testimony of Officer Patterson. Tr. 237 Presumably, the Applicant's claim is that trial counsel should have moved for a mistrial following the objections. This Court finds that the failed to demonstrate how the State's closing warranted such a response by trial counsel and further whether trial court would find grounds for a mistrial. (See PCR Order Case No. 2005-CP-40-05306).

Because PCR order did not specifically address the other two objections by counsel during closing arguments, Petitioner was denied his full and fair one bite at the apple as explained in Austin which includes the right to appeal the denial of a PCR application and the right to assistance of counsel in that appeal. Austin

After Petitioner received the PCR Order, he wrote PCR counsel within ten (10) days to file a 59 (e) motion pursuant in accordance with the SCRCivP regarding the two issues that were not addressed by the PCR Court's Order. S.C. Code Ann. 17-27-80 (2003). Rule 59 (e). Mavlar v. State, 373 S.E.2d 275, 644 S.E.2d 769 (Ct. App. 2007).

PCR Counsel wrote Petitioner back informing petitioner that the issue were preserved for appellate review, and that the PCR Court error in its finding of fact and conclusion of law. (See Applicant's Exhibit 1 attached). Al-Shabazz v. State,

338 S.C. 354, 527 S.E.2d 742, 747 (2000). citing Pruitt v.

State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (S.C. 1992).

PCR counsel then filed a timely notice of appeal on July 17, 2009. The South Carolina Supreme Court granted Writ of Certiorari on November 17, 2011. The petitioner's appellate counsel filed a brief on December 19, 2011, arguing "that PCR judge erred in refusing to find counsel ineffective for failing to move for a mistrial based on three separate improper comment objections during closing arguments "cumulative effect on jury." (See Supreme Court Brief No. 2005-CP-40-05306).

The South Carolina Supreme Court granted certiorari on November 17, 2011. The Petitioner's brief was filed December 19, 2011, arguing "that PCR judge erred in refusing to find counsel ineffective for failing to move for a mistrial based on all three improper comments cumulative effect during closing arguments to jury. (See Applicant's Exhibit 2).

The South Carolina Supreme Court later dismissed the Writ of Certiorari as improperly granted because only one (1) of those three (3) issues was pursued at the PCR hearing or were addressed by the PCR Court's Order of Dismissal and because PCR counsel failed to make a 59 (e) in accordance with SCRCivP even when petitioner requested it from counsel.

Therefore, the other two improper closing argument to the jury are barred from appellate review. Had PCR counsel respectfully filed a 59 (e) Motion to properly preserve the other two (2) issues that were not addressed by the PCR Court

in its Order of Dismissal, the petitioner would have received "a full bite at the apple" on all three (3) improper closing argument issues, and the Writ of Certiorari would not have been dismissed as improperly granted because the issues would have been properly preserved for appellate review. Therefore, Petitioner is now entitled to an Austin review in this situation that constitutes a "gross miscarriage of justice." The Petitioner did not knowingly and intelligently waive the other two (2) objections that were not properly address in the Order of Dismissal.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner is entitled to a hearing on the two (2) issues that were not adressed in the Order of Dismissal.

Albert Scruggs

ALBERT SCRUGGS, #136701
BROAD RIVER C. I.
4460 BROAD RIVER RD
COLUMBIA, SC 29210

Sworn To And Subscribed Before Me

This 25 day of September 2015

Notary for the State of South Carolina Jennifer Montgomery

September 24, 2015

Columbia, South Carolina

My Commission Expires on: 6/10/2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Albert Scruggs, #136701
Applicant,

v.

STATE OF SOUTH CAROLINA
Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No. 2014-CP-40-02009

MOTION OF OPPOSITION TO THE
RESPONDENT'S UNLAWFUL ATTEMPT
TO HAVE PCR DISMISSED
pursuant to Rule 59 (e), SCRPC
and Coats v. State, 575 S.E.2d
557 (S.C. 2003) Pruitt, 423 S.E.
2d at 128; Marlar, 653 S.E.2d
267; Hall, 601 S.E.2d at 341
citing S.C. Code Ann. §17-27-
45(c) SCRPC.

This matter comes before this court by way of opposition to the Final Order of Dismissal that is before the Honorable DeAndrea G. Benjamin, Chief Judge for Administrative Purposes for the Fifth Circuit as follows.

Pursuant to the Subject Matter Jurisdiction issue that is before this Court cannot be Summarily Dismissed or Successive nor barred by the PCR Doctrine of Res-judicata, pursuant to Brown v. State, 540 S.E.2d 846 at N. [2-5] (2002) in which this court held that when a claim is that a conviction is void for lack of Jurisdiction citing Carter, 329 S.C. 355 S.E.2d 773 (1985) it would be a clear violation of Due Process of law to deny a pro-se indigent a full and fair and meaningful opportunity to bring his case before a court to be properly adjudicated.

The three issues raised in the 2014-CP-40-02009 PCR Application does have merit and are cognizable claims S.C. Code Ann. §17-27-20(a) (1-6).

Pursuant to the uniform Post-Conviction Procedure Act app. 11 (1966) Id § 1 Cmt. S.C. Code Ann. § 17-27-10 to 160 (2003) the applicant must be afforded to bring his issues before this court to establish the evidence in order to be granted a "Successive Application."

If the applicant is not afforded the same opportunity as the Respondent has, to come into a court and bring his evidence to bar, Sharper v. State, 279 S.C. 264. 305 S.E.2d 247 (1983) or for the Honorable to rule on every issue contained in this Application would violate due process of law under the Fourteenth Amendment.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Albert Scruggs # 136701
Applicant,

) C/A No. 2014-CP-40-02099

v.

) CERTIFICATE OF SERVICE/AFFIDAVIT

STATE OF SOUTH CAROLINA
Respondent.

I Albert Scruggs # 136701, do here by submit under the penalty of perjury the foregoing information contained in this, three (3) page, Objections to the Respondent's Order that Contains fraud, misapplication, of relevant "genuine" material fact to support that the Applicant is entitled to a full and fair and meaningful opportunity to raise all of his issues pursuant to Pruitt, Supra, Marla, Supra, Hall, Supra, Coats v. State Supra, S.C. Code Anne. § 17-27-45 (c) and § 17-27-80.

The original and a true copy is hereby enclosed and placed into the Broad River Correctional Institution's mail room staff's hands, to be mailed through the U.S. Postal system with pre-paid postage and addressed to: Ms. Jeanette W. McBride, Richland County Clerk of Court, P.O. Box 2766, Columbia, SC 29202-2766.

Please forward a clock-stamp copy back to Applicant.

Respectfully Submitted

SWORN TO BEFORE ME this 15 day
of September, 2016.

Albert Scruggs

Albert Scruggs #136701
BRCI Murray 138
4460 Braod River Rd.
Columbia, SC 29210-4012

Lisa Brown-Alston (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/5/2023

LISA BROWN-ALSTON
Notary Public, State of South Carolina
My Commission Expires 2/5/2023

To satisfy the exhaustion requirement, the Applicant is giving this ~~Court one full opportunity to resolve these claims, and then invoking one~~ complete round to the State Supreme Court 28 U.S.C. § 2254 (b), (1), (c) O'sullivan v. Boerckel 526 U.S. 838. 842 (1999) then these issues will be "fairly presented" this Court has had a fair opportunity to resolve the claims herein. Therefore, it was reasonable informed of the nature of the claims Anderson v. Harless, 459 U.S. 4 (1982) (percuriam) Picard v. Conner, 404 U.S. 270, 275-76 (1971) (discussing the requirements of the exhaustion doctrine). Wise v. Warden. 839 F.2d 1030, 1033 (4th. Cir. 1988) (applying the exhaustion doctrine);

Also pursuant to State v. Stucky 33 S.C. 56, 508 S.E.2d 564 (1988) once the Respondent appointed the Public Defender, PCR Counsel; writ of Certiorari Counsel, the Applicant's hands are tied due to hybrid Representation, and the Respondent is responsible to make sure those Counsels follow the Rules for Direct Appeal; PCR; and Writ of Certiorari pursuant to Rule 407 COPC. SCACR and for PCR Counsel to fail in filing a Rule 59(e) SCRCF, does not fall into the hands of the Applicant, it falls in the Respondent's hands.

Pursuant to S.C. App. Ct. Rule 243 (g) Writ of Certiorari Counsel must raise every issue raised in the PCR (2004-CP-40-4359) in order to preserve the issue for Federal Review in order to prevent Procedural Default.

Therefore, the Applicant moves this Court pursuant to Sharper v. State, Supra, to grant an Evidentiary Hearing in order to give this Court its opportunity to hear these claims on record and to give the Applicant a full and fair and meaningful opportunity to resolve these issues citing Rule 71.1 (d) & (E) SCRCF. S.C.Code Ann. § 17-27-45 (c) S.C. Const. Amed. Art. 1. § 3 and the 1st; 5th; 8th and 14th Amend(s) U.S. Const. Enclosed is material fact to support a Rule 71.1 (d) and (e) SCRCF Due Process Violation of the Applicant's initial Collateral Post Conviction attorney pursuant to the fourteenth Amendment citing Strickland v. Washington, Supra, also Rule 59 (e) SCRCF. If the issues are incorrect or the issues are not properly adjudicated or there has been an erroneous ruling that conflicts with the true merit. See exhibit dated July 16, 2009 by Ms. Tara Dawn Shurling, Esq. 04-CP-40-4395 and 05-CP-40-5306 "I carefully reviewed the Order and concluded that a Rule 59(e) Motions was not appropriate." Please do not misunderstand me, I'm not saying I agree with the rulings in the Order. I do not. But I

believe all your good issues are sufficiently addressed in the Order to preserve your right to appeal ... Not so, material fact clearly supports that the issues were not preserved. Because (1) a rule 59(e) must be filed in order to preserve the issues for Appellate review; (2) the Applicant lost his PCR and no relief was given. (3) Writ of Certiorari was lost because no Rule 59(e) was filed. (4) Federal Habeas Corpus §2254 was lost due to procedural default of claims.

Also, the Applicant sent an official Correspondence to PCR Counsel on July 4, 2009 pursuant to Rule 52(a) and Rule 59(e) SCRPC.

The Applicant did instruct the counsel to file a Rule 59(e) SCRPC But she refused, therefore, pursuant to State v. Stuckey, Supra, Counsel is responsible for any Court filings and Responsible for making sure that the rules of PCR is followed. The Applicants hands are tied due to hybrid representation and in which violated the 14th Amend. Under the U.S. Const. and Article 1 § 3 S.C. Cont. Due Process of law standards and Rule 71.1(d) and (e) SCRPC.

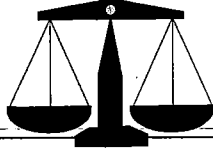
Respectfully Submitted

Albert Scruggs

DATE: 9-15-2016

Albert Scruggs #136701
BRCI Murray 138
4460 Broad River Rd.
Columbia, SC 29210-4012

LAW OFFICE OF



TARA DAWN SHURLING, PA

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Jeremy A. Thompson

Associate Attorney

July 16, 2009

Albert Scruggs, 136701
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210-0000

RE: Albert Scruggs, 136701 v. State of South Carolina; 04-CP-40-4395 & 05-CP-40-5306.

Dear Mr. Scruggs:

Enclosed you will find a copy of the Notice of Appeal I filed on your behalf with the Supreme Court of South Carolina. This Notice advises both the Attorney General's Office and the Supreme Court of your intent to appeal the Order of Dismissal issued in your case by Judge L. Casey Manning. I carefully reviewed the Order and concluded that a 59(e) Motion was not appropriate. Please do not misunderstand me. I am *not* saying I agree with the rulings in the Order. I do not. But, I believe all your good issues are sufficiently addressed in the Order to preserve your right to appeal Judge Manning's rulings on each of them.

I was court-appointed to represent you in the Circuit Court. Now that the Circuit Court has denied your Application, it will be the responsibility of the South Carolina Commission on Indigent Defense, Office of Appellate Defense to represent you on appeal to the Supreme Court of South Carolina. I am in private practice however and would be available to be hired to handle this appeal on your behalf. It is my policy to give my former court-appointed clients a reduced fee if they retain me for a subsequent appeal. In the next few days, I will be sending the Office of Appellate Defense a package concerning your case which will include all documents necessary to perfect this appeal on your behalf. Your right to appeal the decisions of Judge Manning has been preserved. Feel free to write me or call if you have any further questions concerning the status of your case. For now, I remain,

Yours sincerely,

A large, stylized handwritten signature in black ink. The signature is written in a cursive style and appears to read "Tara Dawn Shurling". The signature is positioned above the typed name and title.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: Nancy Scruggs

Mr. Albert Scruggs, #136701
BRCI, Murray 196
4460 Broad River Road
Columbia, S.C. 29210

July 4, 2009

Tara Dawn Shurling, P.A.
3614 Landmark Dr., Suite D
Columbia, S.C. 29204

Re: Rules 52(a), 59 (e), SCRPC Motions & PCR Appeal

Dear Ms. Shurling,

I really hope that this letter finds you in the best of spirits today. Ms. Shurling, do you see how the PCR judge misunderstood and misinterpreted all of our issues that we brought up in front of him, about me receiving ineffective assistance of Counsel at trial, that denied and deprived me of a fair trial and did in fact prejudiced my defense. This is what we call a miscarriage of justice, its really a mocking the sheets of pages you talked about or we filed on the law in my case. The statutes about the LWOP S.C. Code Ann. § 17-25-45; if you really read it, it says even if the solicitor put a person or his lawyer on notice, he still had to have a hearing on this matter before a judge to make a decision on it or adjudicate it by the procedures and if the solicitor does not, then the person's charge shall be reversed for the violation of this procedure...

Ms. Shurling, a judge must make this decision and/or decide, is there's enough evidence or enough charges for this statute, this is a real serious statute here... Now you see how they do people like us.

Upon review, the Judge's PCR Order did not rule on all of the issues that I raised at PCR. Therefore, I need you to file a MOTION TO ALTER OR AMEND JUDGEMENT pursuant to Code 1976, § Rules 52(a) & 59(e), SCRCP, U.S.C.A. Const. Amend. Six.

If the judge rules in the State's favor in regards to the Rule 52(a) & 59(e), SCRCP Motions; then would you please immediately file a PCR Appeal.

I thank you for your performance of your duties both in the past and in the future.

Sworn to before me
this 6th day of July, 2009.

Susan J. Johnson

Notary Public for South Carolina:

My Commission Expires: _____

Respectfully requested,

Albert Scruggs

Mr. Albert Scruggs, #136701

Pro Se

My Commission Expires
March 5, 2018

cc: S.C. Attorney General
Judge Manning
Clerk of Court, Richland County

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2005CP4005306

Albert Scruggs

Petitioner

v.

State of South Carolina

Respondent

BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY BELLITT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

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ATTORNEYS FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

WHETHER THE PCR COURT'S ORDER OF DISMISSAL WAS BASED ON
SUFFICIENT PROBATIVE EVIDENCE AND WAS NOT AN ERROR OF
LAW?

STATEMENT OF THE CASE

The Respondent agrees with Petitioner's statement of the case for purposes of this Return.

In June 2002, the Richland County Grand Jury indicted Scruggs for burglary second degree, kidnapping and assault with intent to commit criminal sexual conduct, indictments #02-GS-40-5055, 56, 57. The burglary and assault indictments were amended by the Grand Jury on November 14, 2002. On January 15, 2003, Scruggs proceeded to jury trial before the Honorable G. Thomas Cooper. The jury returned verdicts of guilty and Scruggs was sentenced to life without parole pursuant to S.C. Code §17-25-45.

A timely notice of intent to appeal was filed on Scruggs' behalf. The South Carolina Court of Appeals remanded the case for a factual determination in regard to the amendment of the indictment. On October 3, 2005, after the remand, the Court of Appeals affirmed the sentence and conviction. State v. Scruggs, Op. No. 2005 UP-537 (S.C. Ct. App. filed Oct. 3, 2005).

Petitioner filed an application for post conviction relief on September 20, 2004, before the direct appeal had been decided. That case was dismissed without prejudice. On October 14, 2005, petitioner filed a timely application for post conviction relief. On January 5, 2009, the State filed a return. An evidentiary hearing was held on February 25, 2009, before the Honorable L.

Casey Manning. In a written order signed June 23, 2009, Judge Manning denied relief and dismissed the application. A timely notice of intent to appeal was filed on July 17, 2009.

The Petitioner filed a Petition for Writ of Certiorari on April 30, 2010. This Court granted certiorari on November 17, 2011. The Brief of Petitioner was filed on December 19, 2011.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v.

~~State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington.~~

Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

THE PCR COURT'S ORDER OF DISMISSAL WAS BASED ON SUFFICIENT PROBATIVE EVIDENCE AND WAS NOT AN ERROR OF LAW.

In his Petition, the Petitioner now argues that the PCR Court erred because trial counsel's performance was deficient and the Petitioner was prejudiced when counsel failed to move for a mistrial following the "cumulative effect" of three objections made during the State's closing argument. (Brief, p. 5 - 10). The Respondent respectfully submits that no such "cumulative effect" argument was ever made at the PCR hearing nor was it part of the PCR Court's Order of Dismissal. Specifically, the Petitioner alleges three (3) separate instances of improper closing argument by the State that were objected to by counsel:

1. Prior evidence that the Petitioner was in Five Points drinking at the time of the incident,
2. When the identification expert (Dr. Cutler) agreed to testify, and
3. Whether the officer that first encountered the Petitioner was fired for not taking him into custody following that first encounter.

(Brief, p. 8).

The Respondent respectfully submits that only one of those three (3) issues was ever pursued at PCR. Issues one (1) and two (2) were not specifically addressed at the PCR hearing nor were they specifically addressed by the PCR Court's Order of Dismissal. Accordingly, because

issues one (1) and two (2) were not addressed there was also no mention of any sort of "cumulative effect" concerning the combination(s) of issues one (1), two (2), and/or three (3). There was no Rule 59(e), SCRCF motion.

The Respondent respectfully submits that the elaborate arguments put forth in the petition for writ of certiorari were not preserved at the circuit level; and there is no basis to claim the PCR court erred regarding issues and arguments never presented. The Petitioner instead argues - for the first time - that the PCR court erred concerning an analysis it never actually addressed.

A "party must timely file a Rule 59(e), SCRCF, motion to preserve for review any issues not ruled upon by the court in its order." Al- Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (S.C.1992) [issue must be raised and ruled on by the PCR judge in order to be preserved for review]. Therefore, since the issue presented to this Court was never ruled on by the PCR court in his order, the Petitioner should be barred from further state collateral review. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (2007) ["Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review" (emphasis added)]; Humbert v. State, 345 S.C. 332, 548 S.E.2d 862, 865 (2001); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477, 478-480 (1992) [issue must be both raised to and ruled upon

by PCR judge to be preserved for appellate review]; see Rule 59(e), SCRC

[providing avenue for any party to move to alter or amend a judgment if they believe necessary matters were not addressed in original order]; Primus v. Padula, 555 F.Supp.2d 596, 611 (D.S.C.2008); Smith v. Warden of Broad River Correctional Inst., No. 07-327, 2008 WL 906697 at 1 n. 1 (D.S.C. March 31, 2008); McCullough v. Bazzle, No. 06-1299, 2007 WL 949600 at 3 (D.S.C. March 27, 2007) (citing Al-Shabazz, 577 S.E.2d at 747).

This Court should not reverse the PCR court regarding an issue never presented in the form now addressed in the petition for writ of certiorari, and never fully addressed by the PCR court's order of dismissal when, the Petitioner never filed a Rule 59(e), SCRC motion to ensure that the PCR court ruled on the issue and enable this Court to review that ruling.

On a final note, despite the "cumulative effect" issues that were not addressed by the PCR Court, the one issue [raised in the Petition] that was addressed by the PCR Court [failure to move for a mistrial regarding the State's closing argument comment about an officer being fired] was properly addressed by the PCR Court. The PCR Court found that Petitioner failed to demonstrate any prejudice in that the trial court would have granted a mistrial if one was requested following the objection to the State's closing argument comment about the fired officer. (App. p. 628 – 629). The PCR Court's Order of Dismissal states:

To receive a mistrial, a defendant must show both error and

7

resulting prejudice. The Applicant failed to demonstrate any
~~prejudice regarding the State's closing argument and comment~~
about why the Officer's supervisor may have been fired and how
that would reasonably affect the outcome of the trial.

(App. p. 629) (Citation omitted).

The Respondent submits that the PCR Court properly addressed the
only closing argument mistrial issue that was before it and the elaborate
cumulative effect argument presented in the brief was not presented to the
PCR Court.

7

CONCLUSION

For the reasons stated above, this Court should affirm the PCR
Court's Order and deny the Petitioner's request for relief.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy
Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

By: _____
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
February 1, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Case No. 2005-CP-40-5306

Albert Scruggs, 136701

Petitioner,

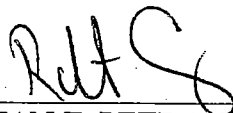
v.

STATE OF SOUTH CAROLINA,

Respondent.

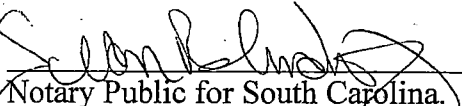
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the letter informing opposing counsel, Kathrine H. Hudgins, by mailing two (2) copies in an envelope addressed to: South Carolina Office of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29211; with postage prepaid, this 7th day of February, 2012.



BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 7th
day of February, 2012.

 (L.S.)
Notary Public for South Carolina.

My Commission Expires: ~~My Commission Expires~~
January 30, 2013

Other Orders/Judgments

5:12-cv-02940-GRA-KDW

Scruggs v. Stevenson

KDW-Inmate

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 5/23/2013 at 4:14 PM EDT and filed on 5/23/2013

Case Name: Scruggs v. Stevenson

Case Number: 5:12-cv-02940-GRA-KDW

Filer:

Document Number: 42

Docket Text:

REPORT AND RECOMMENDATION recommending Respondent's Motion for Summary Judgment, ECF No. [17], be denied without prejudice and with leave to refile as discussed herein. In the event this portion of the Report and Recommendation is adopted, Petitioner is to file a return and dispositive motion within 30 days of the entry of the order of the District Court. Further, it is recommended that Petitioner's Motion to Stay, ECF No. [39], be granted insofar as it is construed as a Motion to Amend the Petition, and denied insofar as it seeks to have this federal habeas matter stayed while Petitioner pursues further collateral relief. Objections to R&R due by 6/10/2013 Signed by Magistrate Judge Kaymani D West on 5/23/2013. (Attachments: # (1) Notice of Right to File Objections)(mcot,)

5:12-cv-02940-GRA-KDW Notice has been electronically mailed to:

Donald John Zelenka dzelenka@scag.gov, lbrawley@scag.gov

5:12-cv-02940-GRA-KDW Notice will not be electronically mailed to:

Albert Scruggs

#136701

Broad River Correctional Institution

4460 Broad River Road

Columbia, SC 29210

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1091130295 [Date=5/23/2013] [FileNumber=5584733-0
] [84469d11f3f3e1f5cb56edaa3a28f3d185d02662ce939f5e395fbc8cbe7fe1f87a1
dae90054569894fbc38506ea93ba3b3c93dfc37a93f7ddf9e9263661944da]]

Document description:Notice of Right to File Objections

Original filename:n/a

Electronic document Stamp:

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Albert Scruggs, #136701,)	
)	C/A No. 5:12-2940-GRA-KDW
Petitioner,)	
)	
vs.)	REPORT AND RECOMMENDATION
)	
Warden Stevenson,)	
)	
Respondent.)	

Petitioner, Albert Scruggs (“Petitioner” or “Scruggs”), a state prisoner, filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) DSC for a Report and Recommendation on Respondent’s Return and Motion for Summary Judgment, ECF Nos. 17, 18, and Petitioner’s Motion to Hold Habeas Petition; Respondent’s Pending Motion; and Petitioner’s Opposition in Abeyance (“Motion to Stay”), ECF No. 39. Respondent opposes the Motion, ECF No. 40.

Petitioner brought this habeas action on October 8, 2012.¹ On January 17, 2013, Respondent filed a Return and a Motion for Summary Judgment. ECF Nos. 17, 18. Pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Respondent’s motion. ECF No. 19. After requesting and receiving several extensions of time within which to respond to the Return and Motion for Summary Judgment,

¹ This filing date reflects that the envelope containing the Petition was stamped as having been received on October 8, 2012, at the Broad River Correctional Institution mailroom. Pet. Attach. 2, ECF No. 1-2. *Houston v. Lack*, 487 U.S. 266 (1988) (holding prisoner’s pleading is considered filed when filed with prison authorities for forwarding to the district court). The Petition was received by the court and docketed October 11, 2012. Pet., ECF No. 1.

Petitioner filed the Motion to Stay on April 8, 2013. In his Motion, Petitioner seeks to hold the deadline for his responding to the Petition and Motion for Summary Judgment in abeyance, ECF No. 39. He has not filed a substantive response to the Motion for Summary Judgment. Having reviewed the parties' filings, the undersigned recommends the following: Petitioner's Motion to Stay, ECF No. 39, be construed in part as a Motion to Amend the Petition, and such portion of the Motion be *granted* as further set forth herein; the remainder of Plaintiff's Motion to Stay be *denied*; and Respondent's Motion for Summary Judgment, ECF No. 18, be *denied with leave to refile* as further set forth herein.

I. Procedural History

Petitioner, confined at the Broad River Correctional Institution pursuant to orders of commitment from the Clerk of Court for Richland County, South Carolina, was indicted at the June 2002 term of the Court of General Sessions for Richland County for Burglary, second degree (02-GS-40-5055); Kidnapping (02-GS-40-5056); and Assault with Intent to Commit Criminal Sexual Conduct (02-GS-40-5057). Prior to trial the Petitioner was served with notice of intent to seek life without parole ("LWOP") on October 18, 2002. App. 608.² On November 14, 2002 Indictments 02-GS-40-5055 and 02-GS-40-5057 were re-presented to the grand jury as amended prior to the commencement of the trial and true-billed in their amended form. *See State v. Scruggs*, Factual Determination Order, filed April 9, 2004, ECF No. 17-4. On January 15, 2003, Petitioner proceeded to trial before the Hon. G. Thomas Cooper. He was represented by James P. Rogers, Esquire. Petitioner was found guilty on all charges. He was sentenced by Judge

² Citations to "App." refer to the Appendix and Supplemental Appendix for Writ of Certiorari as to Petitioner's claim for collateral relief in the state courts of South Carolina, which is available at ECF Nos. 17-16 through 17-20 in this habeas matter. Page number references are to the pages as numbered in the Appendix.

Cooper to confinement for LWOP for both the Kidnapping and the Assault with intent to commit Criminal Sexual Conduct, and to a period of 15 years for the second-degree burglary offense. App. 514.

A. The Direct Appeal

Petitioner filed a timely Notice of Intent to Appeal with the South Carolina Court of Appeals on January 16, 2003. On appeal, Petitioner was represented by Robert M. Pachak of the South Carolina Office of Appellate Defense. On November 19, 2003, counsel made a Final Brief of Appellant asserting as the ground for relief: "Whether the trial court had subject matter jurisdiction to try appellant for assault with intent to commit criminal sexual conduct where the indictment was amended after it was true-billed by the grand jury?" Final Br. of Appellant 3, ECF No. 17-1. The South Carolina Court of Appeals remanded the case to the circuit court for a factual determination regarding whether the indictment had been re-presented in its amended form to the grand jury prior to the Petitioner's trial. *State v. Scruggs*, Op. No. 2004-UP-226 (S.C. Ct. App., March 30, 2004), ECF No. 17-3. On remand, Judge Cooper issued his order that the indictment had been re-presented to the grand jury in November 2002. *See State v. Scruggs*, Factual Determination Order, filed April 9, 2004, ECF No. 17-4. Through counsel Pachak, Petitioner filed a Supplemental Brief of Appellant on April 20, 2004. In the brief, counsel Pachak acknowledged Judge Cooper's order and supporting documentation and noted that "[t]here no longer exists an issue to the indictment." Suppl. Br. of Appellant 4-5, ECF No. 17-5. The Court of Appeals affirmed Petitioner's convictions, noting: "Appellant concedes in his supplemental final brief that there is no longer an issue regarding the indictment." *State v. Scruggs*, Op. No. 2005-UP-537, 2 n.1 (S.C. Ct. App. Oct. 3, 2005), ECF No. 17-6. Petitioner sought neither

rehearing in the South Carolina Court of Appeals nor certiorari to the South Carolina Supreme Court. The remittitur was issued by the Court of Appeals on October 19, 2005. ECF No. 17-7.

B. State PCR Proceedings

Petitioner first made an Application for Post-Conviction Relief ("PCR") on September 20, 2004, 2004-CP-40-4395, amended March 4, 2005, while his direct appeal was still pending. App. 525-37. That Application was dismissed without prejudice on September 21, 2005. App. 541-42. On October 14, 2005, subsequent to the Court of Appeals' decision affirming his conviction, Petitioner filed another PCR Application, 2005-CP-40-5306. App. 543-55. That Application was merged with the original application by the Administrative Judge on November 23, 2005. Because the dismissal was without prejudice of the 2004 action, the Respondent, upon notice, sought to reset the 2004 Application, 2004-CP-40-4395, to the active roster on or about February 2008. *See* App. 556 n.1. The PCR court concurred. App. 579. Respondent made its Return on January 5, 2009. App. 556-61. An evidentiary hearing into the matter was convened on February 25, 2009 at the Richland County Courthouse before the Honorable L. Casey Manning, Circuit Court Judge. Petitioner was present at the hearing and was represented by appointed counsel Tara Dawn Shurling, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented Respondent. App. 572-621 (Hr'g Tr.).

In his amended Application, Petitioner alleged that he is being held in custody unlawfully for the following reasons:

1. Subject Matter Jurisdiction
 - a. The service of the LWOP notice was faulty and therefore conviction and sentencing is invalid.
2. Ineffective Assistance of Counsel.
 - a. Counsel failed to object to the sentence of life without parole under Section 17-25-45.

- b. Counsel Failed to investigate, including the interviewing of defense witnesses and advice about the use of his prior record to impeach.
- c. Counsel failed to request mental evaluation prior to trial concerning his competency to stand trial.
- 3. Improper jury instructions.
 - a. Instructions shifted the burden of proof when instructions referred to “absolute certainty.”
 - b. Counsel was ineffective in failing to object to the instruction.

App. 549-55. Petitioner testified on his own behalf at the PCR hearing. App. 580-607. His trial counsel, James Rogers, Esquire, also testified at the hearing. App. 607-18. The PCR court entered its Order of Dismissal of Petitioner’s Application on June 23, 2009. App. 622-31.

C. PCR Appeal

Petitioner filed a timely notice of appeal. In the appeal, he was represented by Appellate Defender Katherine H. Hudgins. On April 30, 2010, counsel made a petition for writ of certiorari raising the following issue: “Did the PCR judge err in refusing to find counsel ineffective for failing to move for a mistrial based on three separate improper comments made by the State in closing argument?” Pet. for Writ of Cert. 2, ECF No. 17-9. Respondent, through Assistant Attorney General Petrano, made a Return to the petition and asserted as a counter-issue “whether the issue(s) now argued was not similarly addressed by the PCR court and is not properly before this court.” Resp’t’s Return to Pet. for Writ of Cert. 1, ECF No. 17-10.

On August 18, 2011, the Supreme Court of South Carolina issued its order granting the petition for writ of certiorari and directed briefing. ECF No. 17-11. The Brief of Petitioner was filed on December 19, 2011, ECF No. 17-12, and the Brief of Respondent was filed on February 7, 2012, ECF No. 12-13. On June 13, 2012, the South Carolina Supreme Court entered its order dismissing the certiorari proceedings as improvidently granted. *Scruggs v. State*, Op. No. 2012-

MO-022 (S.C. June 13, 2012), ECF No. 17-14. Petitioner did not seek further review. The Supreme Court of South Carolina issued its remittitur on June 29, 2012. ECF No. 17-15.

II. Discussion

A. Federal Court Filings

1. Petitioner's Federal Habeas Petition

Petitioner raises the following grounds in his federal petition for a writ of habeas corpus, quoted verbatim:

Ground One: Subject Matter Jurisdiction

Supporting Facts: There was no evidence that indictment was taken back to the grand jury. See paperwork[.] No proof of letter from Ms. Scott or affidavit from Mr. Pascoe my appeal lawyer dropped my appeal without proof that indictment went back before grand jury.

Ground Two: Ineffective trial counsel

Supporting Facts: Failure to move for a mistrial based on state's closing argument.

Pet. 6-9, ECF No. 1.

2. Respondent's Return and Motion for Summary Judgment

In Respondent's Return and Motion for Summary Judgment, Respondent argues it is entitled to judgment as a matter of law. *See* ECF No. 17. However, Respondent characterizes Petitioner's Petition as including only *one* ground—Ground One: Subject Matter Jurisdiction. *Id.* at 7-8 (indicating Petitioner's only ground concerns subject matter jurisdiction).

Accordingly, it is recommended that Respondent's Motion for Summary Judgment be *denied without prejudice* and that Respondent be permitted to file a Motion for Summary Judgment that addresses all grounds raised in Petitioner's Petition, as amended. *See infra.*

3. Petitioner's Motion to Stay

In Petitioner's Motion to Stay, he seeks to stay this federal habeas action so that he may fully exhaust his state-court remedies. Pet.'s Mot. Stay, ECF No. 39. In this Motion, Petitioner erroneously indicates his Petition includes only one ground for relief. *Id.* at 3.³ Petitioner notes he is "unskilled in the law," and had to rely on assistance from the "prison law library clerk ('PLC')" in drafting his Petition. *Id.* at 4. Petitioner indicates the PLC erroneously "abandoned the issues that were ruled on by the PCR Court, to which the PCR Court was the Court Petitioner was required to present all his ineffective assistance of counsel claims for the first time, which will be the subject of the instant motion." *Id.*

a. Motion to Stay Construed as Including a Motion to Amend Petition

Petitioner submits that, if he had included his "substantial" claims of ineffective assistance of counsel that were before the PCR court, his Petition would be a "mixed" petition that contained both exhausted and unexhausted claims. Pet.'s Mot. Stay 4, ECF No. 39. The court is required to construe pro se petitions liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (noting document filed by a pro se litigant is to be liberally construed). Such pro se petitions are held to a less stringent standard than those drafted by attorneys, and a federal district court is charged with liberally construing a petition filed by a pro se litigant to allow the development of a potentially meritorious case. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Construing this pro se Petitioner's Motion liberally,

³ This misstatement is likely based on Respondent's representation in its Return and Motion for Summary Judgment that Petitioner raised only the subject-matter-jurisdiction ground in his habeas Petition.

as it must, the court construes Petitioner's Motion to Stay as seeking to amend his Petition to include the ineffective assistance of counsel claims raised before the state PCR court.⁴

Leave to amend is to be freely given. *See* Fed. R. Civ. P. 15(a); *Forman v. Davis*, 371 U.S. 178, 182 (1962). Petitioner has one year from the conclusion of his direct appeal to file a federal habeas petition. 28 U.S.C. § 2244(d)(1)(A). The undersigned notes that Petitioner's one-year statute of limitations to file a habeas petition has not yet run. The statute of limitations begins to run at the "conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Because Petitioner did not seek review by the United States Supreme Court, the AEDPA's one-year statute of limitations began running "at the expiration of the time" for seeking direct review in state court. 28 U.S.C. § 2244(d)(1)(A). Petitioner's judgment of conviction therefore became final "when his time for seeking review with the State's highest court expired." *Gonzalez v. Thaler*, 132 S. Ct. 641, 653-54 (2012) (clarifying the Court's prior cases concerning 28 U.S.C. § 2244(d)(1)(A)).

Petitioner's direct appeal concluded when the South Carolina Court of Appeals issued its opinion affirming his conviction and sentence on October 3, 2005. *State v. Scruggs*, Op. No. 2005-UP-537 (S.C. Ct. App. Oct. 3, 2005). Because Petitioner did not file a Petition for Rehearing, his time for seeking further direct review expired on October 18, 2005, 15 days after the Court of Appeals issued its opinion. *See* Rule 221(a), SCACR (stating petitions for rehearing must be actually received by the appellate court within fifteen (15) days after the filing of the order of dismissal). Petitioner filed his PCR application on October 14, 2005, tolling the one-

⁴ In making this recommendation, the court offers no opinion on the merits of Petitioner's claims.

year limitations period, *see* 28 U.S.C. § 2244(d)(2).⁵ Because no days had elapsed when Petitioner filed his PCR application, he then had 365 days within which to timely file a federal habeas petition. Petitioner timely appealed the denial of his PCR Application, and his PCR appellate counsel made a petition for certiorari, which was granted. On June 13, 2012, the South Carolina Supreme Court dismissed the grant of certiorari as improvidently granted. Petitioner did not petition the United States Supreme Court for certiorari within the 90-day timeframe allowed. *See* Sup. Ct. R. 13.1. Because he had sought review with the state's highest court, the statute of limitations remained tolled until the 90-day time for petitioning for review before the United States Supreme Court had expired. *Gonzalez*, 132 S. Ct. at 653-54.

Accordingly, the statute of limitations began running on September 11, 2012, giving Petitioner until September 11, 2013 to timely seek federal habeas relief. Petitioner filed his original Petition in this court on October 8, 2012, well within the limitations period of 28 U.S.C. § 2244. Similarly, Petitioner's April 8, 2013 Motion to Stay (construed as Motion to Amend), ECF No. 39, was filed within the one-year limitations period. Because Petitioner's request to amend was filed within his one-year limitations window, the undersigned finds the request to amend should be granted. *See* Fed. R. Civ. P. 15(a); *Forman*, 371 U.S. at 182. *Cf. Lowery v. Stevenson*, C/A No. 8:08-2526-GRA, 2009 WL 2048928 (D.S.C. July 10, 2009) (declining to apply liberal construction and construe petitioner's motion as motion to amend when motion was not filed within the one-year limitations window). Further, because Respondent has not yet

⁵ Although it appears Petitioner filed his PCR Application prior to the Court of Appeals' issuing its remittitur, Respondent acknowledges October 14, 2005 as the date of Petitioner's PCR filing subsequent to the Court of Appeals' affirmance. *See* Resp.'s Mot. Summ. J. 4, n.1, ECF No. 17.

considered and briefed the ineffective-assistance-of-counsel claim in Petitioner's original Petition, Respondent will not be prejudiced by this amendment of Petitioner's Petition.

Accordingly, the undersigned recommends the United States District Judge construe Petitioner's Motion to Stay in part as a Motion to Amend his Petition to include, in addition to the ineffective-assistance-of-counsel claim regarding the State's closing argument, the following ineffective-assistance-of-counsel⁶ grounds:

2. Ineffective Assistance of Counsel.

- a. Counsel failed to object to the sentence of life without parole under Section 17-25-45.
- b. Counsel Failed to investigate, including the interviewing of defense witnesses and advice about the use of his prior record to impeach.
- c. Counsel failed to request mental evaluation prior to trial concerning his competency to stand trial.

[3. *Improper jury instructions.*

- a. *Instructions shifted the burden of proof when instructions referred to "absolute certainty."*
- b. Counsel was ineffective in failing to object to the instruction.

See App. 549-55 (italics added; italicized section not part of amendment).

The undersigned recommends the portion of Petitioner's Motion seeking to amend his Petition be *granted*.⁷ This amendment will work no prejudice on Respondent and will foster judicial economy.

The analysis of Petitioner's Motion does not end here, however.

⁶ Because Petitioner's PCR Application included an ineffective-assistance-of-counsel ground related to counsel's failure to object to a portion of the jury instruction, *see* ground 3(b), the court includes Grounds 3 and 3(a) for context.

⁷ In the event the United States District Court adopts this portion of this Report and Recommendation, the Clerk should be instructed to attach the portion of the Order granting amendment to Petitioner's Petition, ECF No. 1.

b. Motion to Stay and Hold Petition in Abeyance

Citing *Rhines v. Weber*, 544 U.S. 269 (2005), Petitioner asks that the court stay his pending habeas Petition so that he may return to South Carolina's state courts to exhaust his ineffective-assistance-of-counsel claims that were asserted before the PCR court but were not presented on appeal of the PCR ruling. Pet.'s Mot. 4, ECF No. 39. Petitioner argues that his is a "mixed" Petition because it includes claims that have been exhausted below and some that have not. Petitioner apparently refers to the ineffective assistance claim that was appealed to the Supreme Court of South Carolina as exhausted and the other ineffective assistance of counsel claims as being "unexhausted" because they "have not been presented to the State's highest court, but have been presented to the Court which had authority over the claims for the first initial proceeding where the issues had to be raised." *Id.* Petitioner argues these claims have not been exhausted "because of the inadequate corrective process of the State statutory appointed counsel, Rule 71.1(d) and State statutory appoint[ed] PCR appellate counsel, Rule 71.1(e), SCRCPC." *Id.* at 4-5.

In *Rhines v. Weber*, 544 U.S. 269, the Supreme Court addressed how "mixed" petitions containing both exhausted and unexhausted claims should be handled by district courts. The Court in *Rhines* noted the interplay between the one-year statute of limitations in the AEDPA, 28 U.S.C. § 2244(d) (1), and the requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), that courts are to dismiss the entire mixed habeas petition without prejudice in order to effectuate the requirement of "total exhaustion." *Rhines*, 544 U.S. at 274-75. In such cases, petitioners who come to federal court with a mixed petition "run the risk of forever losing their opportunity for any federal review [of their claims]" if the district court dismisses the case without prejudice

close to or after the limitations period has expired.” *Id.* In *Rhines*, the Court noted that some district courts have adopted a stay and abeyance procedure to deal with this problem: the court stays the petition and holds it in abeyance while the petitioner returns to state court with his unexhausted claims. *Id.* at 275-76. The Court cautioned, however, that the practice of staying a federal habeas case while a petitioner returns to state court to exhaust his claims should be used sparingly.

Stay and abeyance, if employed too frequently, has the potential to undermine these twin purposes. Staying a federal habeas petition frustrates AEDPA’s objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines 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.

For these reasons, stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner’s failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. *Id.* at 277.

In opposing Petitioner’s Motion to Stay, Respondent submits Petitioner’s Petition is not “mixed,” making *Rhines* inapplicable. Resp’t’s Mem. 5-6. Discussing only the subject-matter jurisdiction ground, Respondent submits that such ground has been fully exhausted because it was the subject of a direct appeal of Petitioner’s conviction. *Id.* The undersigned agrees.

Respondent did not address the ineffective assistance of counsel claim in Petitioner’s Petition. Having considered all grounds in Petitioner’s Petition, as amended with the additional

ineffective-assistance-of-counsel grounds, the undersigned finds that the Petition is not “mixed,” making *Rhines* inapplicable. Petitioner’s claims of ineffective assistance of counsel that were presented at the PCR hearing level but were not appealed in the South Carolina court system are considered “technically exhausted” for habeas purposes. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997) (overruled on other grounds by *United States v. Barnette*, 644 F.3d 192, 205 (4th Cir. 2011)). As the Court explained in *Woodford v. Ngo*, 548 U.S. 81 (2006):

[I]f state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or taking an appeal, those remedies are technically exhausted, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding.

Id. at 92 (internal citations omitted).

Here, it is true that Petitioner did not include all of his ineffective assistance of counsel grounds raised to the PCR court at the state appellate court level. However, he has technically exhausted that remedy. Thus, this petition is not a mixed petition like those discussed in *Rhines*. Here, the rules of procedural bar apply to prohibit further review by the state courts. *Matthews v. Evatt*, 105 F.3d at 911. Therefore, allowing Petitioner to attempt to raise any unexhausted claims now in state court would be futile. Petitioner’s Motion to Stay should be denied.

Because Petitioner’s Petition, even amended as recommended herein, is not a “mixed” Petition, the court need not further consider the merits of Petitioner’s argument based on *Rhines*. In any event, even applying *Rhines* to the facts of this case, the undersigned is of the opinion that a stay is not warranted. Although, *arguendo*, there could be a remote possibility that the state

PCR court would review the merits of any successive PCR application filed by Petitioner,⁸ any ruling of the United States District Court that the claims are without merit would not preclude the state PCR court from reaching a contrary conclusion and granting relief. *See Ivey v. Catoe*, 36 F. App'x 718, 734 (4th Cir. 2002) (holding denial of motion to stay federal habeas petition while collateral petition was pending in state court was not abuse of discretion, particularly noting district court's ruling that claims were without merit "in no way precludes the state court from reaching a contrary conclusion and granting relief").

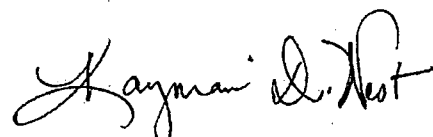
Accordingly, the undersigned recommends that this portion of Petitioner's Motion to Stay, ECF No. 39, be *denied*.

III. Conclusion

For the foregoing reasons, the undersigned recommends Respondent's Motion for Summary Judgment, ECF No. 17, be *denied without prejudice and with leave to refile as discussed herein*. In the event this portion of the Report and Recommendation is adopted, Petitioner is to file a return and dispositive motion *within 30 days of the entry of the order of the District Court*. Further, it is recommended that Petitioner's Motion to Stay, ECF No. 39, be *granted* insofar as it is construed as a Motion to Amend the Petition, and *denied* insofar as it seeks to have this federal habeas matter stayed while Petitioner pursues further collateral relief.

IT IS SO RECOMMENDED.

May 23, 2013
Florence, South Carolina


Kaymani D. West
United States Magistrate Judge

**The parties are directed to note the important information in the attached
"Notice of Right to File Objections to Report and Recommendation."**

⁸ It does not appear that Petitioner has filed another collateral action in state court.

Notice of Right to File Objections to Report and Recommendation

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

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

Larry W. Propes, Clerk
United States District Court
Post Office Box 2317
Florence, South Carolina 29503

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

Other Orders/Judgments5:12-cv-02940-GRA-KDWScruggs v. Stevenson

KDW-Inmate,LC 2

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 6/13/2013 at 1:27 PM EDT and filed on 6/13/2013

Case Name: Scruggs v. Stevenson

Case Number: 5:12-cv-02940-GRA-KDW

Filer:

Document Number: 48**Docket Text:**

ORDER RULING ON REPORT AND RECOMMENDATION: This Court adopts the Magistrate Judge's Report and Recommendation [42] in all respects except for the portion that incorrectly calculates the date that the statute of limitations for filing a habeas petition began running in this case. IT IS THEREFORE ORDERED that Petitioner's Motion to Stay (ECF No. [39]) is GRANTED insofar as the Court has construed it as a Motion to Amend the Petition as set forth in the Report and Recommendation. IT IS FURTHER ORDERED that Petitioner's Motion to Stay (ECF No. [39]) is DENIED insofar as it seeks to have this federal habeas matter stayed while Petitioner pursues further collateral relief. IT IS FURTHER ORDERED that Respondent's Motion for Summary Judgment (ECF No. [17]) is DENIED without prejudice with leave to refile a Motion for Summary Judgment that addresses all grounds raised in Petitioner's Petition, as amended. Respondent is to file a return and dispositive motion within thirty (30) days of the date of entry of this order. IT IS SO ORDERED. Signed by Honorable G Ross Anderson, Jr on 6/13/2013. (mcot,)

5:12-cv-02940-GRA-KDW Notice has been electronically mailed to:

Donald John Zelenka dzelenka@scag.gov, lbrawley@scag.gov

5:12-cv-02940-GRA-KDW Notice will not be electronically mailed to:

Albert Scruggs

#136701

Broad River Correctional Institution

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Albert Scruggs, #136701,)
)
 Petitioner,)
)
 v.)
)
 Warden Stevenson,)
)
 Respondent.)

C/A No.: 5:12-cv-02940-GRA

ORDER
(Written Opinion)

This matter comes before the Court for a review of United States Magistrate Judge Kaymani D. West's Report and Recommendation made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) DSC, and filed on May 23, 2013. Petitioner Albert Scruggs ("Petitioner"), an inmate at the Broad River Correctional Institution and proceeding *pro se* in this matter, brought this habeas action pursuant to 28 U.S.C. § 2254 on October 8, 2012.¹ ECF No. 1. Presently before the Court for a ruling are Respondent's Return and Motion for Summary Judgment (ECF Nos. 17 & 18), and Petitioner's Motion to Hold Habeas Petition; Respondent's Pending Motion; and Petitioner's Opposition in Abeyance ("Motion to Stay") (ECF No. 39). Magistrate Judge West recommends that Respondent's Motion for Summary Judgment (ECF No. 17) be denied without prejudice with leave to refile a Motion for Summary Judgment that addresses all grounds raised in Petitioner's Petition, as amended. The Magistrate Judge further recommends that Petitioner's Motion to Stay (ECF No. 39) be granted insofar as it is construed as a Motion to

¹ Prisoner petitions are deemed filed at the time that they are delivered to prison authorities for mailing to the court clerk. *Houston v. Lack*, 487 U.S. 266, 276 (1988). The envelope Petitioner used to file the § 2254 Petition is stamped "received" by Broad River Correctional Institution Mail Room on October 8, 2012 and the postmark reveals that the petition was mailed that same day. ECF No. 1-2.

~~Amend the Petition and denied insofar as it seeks to have this federal habeas matter~~

stayed while Petitioner pursues further collateral relief. In light of Respondent's objections to the Report and Recommendation, the Court adopts the Magistrate Judge's Report and Recommendation in all respects except for the portion that incorrectly calculates the date that the statute of limitations for filing a habeas petition began running in this case. The Court shall provide its own discussion of this matter herein. Ultimately, however, this error does not change the timeliness of Petitioner's Petition or motion, and the Court agrees with the Magistrate Judge's recommendation.

Standard of Review

Petitioner brings this claim *pro se*. This Court is required to construe *pro se* pleadings liberally. Such pleadings are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). This Court is charged with liberally construing a pleading filed by a *pro se* litigant to allow for the development of a potentially meritorious claim. *Boag v. MacDougall*, 454 U.S. 364, 365 (1982). A court may not construct the petitioner's legal arguments for him, *Small v. Endicott*, 998 F.2d 411 (7th Cir. 1993), nor is a district court required to recognize "obscure or extravagant claims defying the most concerted efforts to unravel them," *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277 (4th Cir. 1985).

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court is charged with making a *de novo* determination of those portions

~~of the Report and Recommendation to which specific objection is made, and this~~
Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). This Court may also "receive further evidence or recommit the matter to the magistrate with instructions." *Id.* In the absence of specific objections to the Report and Recommendation, this Court is not required to give any explanation for adopting the recommendation. *Camby v. Davis*, 718 F.2d 198 (4th Cir. 1983).

Discussion

In this case, Petitioner has not filed any objections to the Report and Recommendation. However, Respondent timely filed objections on June 10, 2013. ECF No. 45. Specifically, Respondent objects to Magistrate Judge West's calculation of the date that the one-year statute of limitations period under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) began to run. The Court agrees that the date is incorrectly calculated in the Report and Recommendation. Nevertheless, this error does not change the timeliness of Petitioner's Petition or Motion to Stay.

Because Petitioner filed his § 2254 Petition after the effective date of the AEDPA, review of his claim is governed by 28 U.S.C. § 2244(d). Under the AEDPA, habeas corpus petitions filed by persons in state custody are subject to a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). This one-year period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). Here, because Petitioner did not seek review by the United States Supreme Court, Petitioner's conviction became final, and the AEDPA's one-year statute of limitations

~~began running “when [Petitioner’s] time for seeking [direct] review with the State’s~~
highest court expired.” *Gonzalez v. Thaler*, 565 U.S. ___, 132 S. Ct. 641, 654 (2012).
The South Carolina Court of Appeals issued its opinion affirming Petitioner’s
conviction and sentence on October 3, 2005. See *State v. Scruggs*, Op. No. 2005-
UP-537 (S.C. Ct. App. Oct. 3, 2005). To pursue review with the South Carolina
Supreme Court by petitioning for a writ of certiorari, Petitioner was required to first
petition the Court of Appeals for rehearing. See Rule 242(c), SCACR (stating “[a]
decision of the Court of Appeals is not final for the purpose of review by the Supreme
Court until the petition for rehearing or reinstatement has been acted on by the Court
of Appeals.”). However, because Petitioner did not file a Petition for Rehearing, his
convictions became final on October 18, 2005—fifteen (15) days after the Court of
Appeals filed its opinion. See Rule 221(a), SCACR (stating “[p]etitions for rehearing
must be actually received by the appellate court no later than fifteen (15) days after
the filing of the opinion, order, judgment, or decree of the court.”).

However, under the AEDPA, the one-year limitations period is tolled for “[t]he
time during which a properly filed application for State post-conviction or other
collateral review with respect to the pertinent judgment or claim is pending” *Id.* §
2244(d)(2). Petitioner’s filing of his post-conviction relief (“PCR”) application on
October 14, 2005 tolled the one-year limitations period. *Id.* Because no days had
elapsed since the date of final judgment, Petitioner still had 365 days in which he could
timely file a federal habeas petition. The statute of limitations remained tolled through
June 13, 2012—the date the South Carolina Supreme Court dismissed the grant of
certiorari to Petitioner on his PCR Application as improvidently granted. The

~~Magistrate Judge states in the Report and Recommendation that the statute of~~

limitations remained tolled an additional ninety (90) days—the time during which Petitioner could have filed a petition for certiorari in the United States Supreme Court. See Report and Recommendation 9, ECF No. 42 (citing Sup. Ct. R. 13.1). Yet, as correctly pointed out by Respondent in his objections, the Fourth Circuit has held that “[f]ollowing the denial of relief in the state courts in state habeas proceedings, neither the time for filing a petition for certiorari in the United States Supreme Court, nor the time a petition for certiorari is considered by the United States Supreme Court, is tolled under 28 U.S.C. § 2244(d)(2) from the one-year statute of limitations under § 2244(d)(2).” *Crawley v. Catoe*, 257 F.3d 395, 399 (4th Cir. 2001). Thus, the Court finds that the statute of limitations began to run on June 13, 2012 when the South Carolina Supreme Court dismissed the PCR appeal, rather than September 11, 2012 as found by the Magistrate Judge. Accordingly, Petitioner has until June 13, 2013 to timely seek federal habeas relief.

Nevertheless, this miscalculation did not affect the timeliness of Petitioner’s § 2254 Petition. As stated by the Magistrate Judge, Petitioner timely filed his § 2254 Petition on October 8, 2012, and the Court finds that the Petition remains timely filed even under the new properly-calculated deadlines. Moreover, Petitioner’s April 8, 2013 Motion to Stay (construed as a Motion to Amend) still falls within the one-year limitations period. Accordingly, based upon the reasoning of the Magistrate Judge, the Court concludes that Petitioner’s request to amend should be granted. //

After a thorough review of the record, the Report and Recommendation, and the relevant case law, this Court finds that the Magistrate Judge applied sound

~~principles to the facts of this case. Therefore, this Court adopts the Magistrate~~

Judge's Report and Recommendation in all respects except for the portion that incorrectly calculates the date that the statute of limitations for filing a habeas petition began running in this case.

IT IS THEREFORE ORDERED that Petitioner's Motion to Stay (ECF No. 39) is GRANTED insofar as the Court has construed it as a Motion to Amend the Petition as set forth in the Report and Recommendation.

IT IS FURTHER ORDERED that Petitioner's Motion to Stay (ECF No. 39) is DENIED insofar as it seeks to have this federal habeas matter stayed while Petitioner pursues further collateral relief.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Judgment (ECF No. 17) is DENIED without prejudice with leave to refile a Motion for Summary Judgment that addresses all grounds raised in Petitioner's Petition, as amended. Respondent is to file a return and dispositive motion within thirty (30) days of the date of entry of this order.

IT IS SO ORDERED.



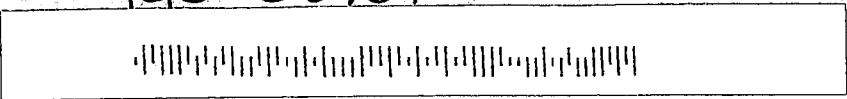
G. Ross Anderson, Jr.
Senior United States District Judge

June 13, 2013
Anderson, South Carolina

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Columbia SC 29210



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