THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

COURT OF COMMON PLEAS

S. JACKSON KIMBALL, III, CIRCUIT COURT JUDGE

CASE NO. 2016-CP-46-2414

RALPH L. ERWIN, _____ APPELLANT,

V.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES
AND THE STATE OF SOUTH CAROLINA, _____ RESPONDENTS.

RECORD ON APPEAL

RALPH L. ERWIN
140 WEST CENTENNIAL STREET
APARTMENT NUMBER 38-B
SPARTANBURG, SOUTH CAROLINA 29303
(864) 494-2269
APPELLANT

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ATTORNEY FOR RESPONDENTS

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-46-2414

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2016 DEC -7 AM 8:35
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

Ralph L. ERWIN
PLAINTIFF(S)

S.C. DEPARTMENT of Probation, Parole, and Pardon Services, and
The STATE of South Carolina
DEFENDANT(S)

Submitted by: the Court	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Defendant	Plaintiff	$ N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

M M Kimball
Special Circuit Court Judge

3063
Judge Code

12/6/16
Date

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For Clerk of Court Office Use Only

This judgment was entered on the 7 day of Dec, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 7 day of Dec, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Ralph Erwin
140 W Centennial St, Apt 38B
Spartanburg, SC 29303
ATTORNEY(S) FOR THE PLAINTIFF(S)
Appearing Pro Se

Stephanie Burton
308 E St. John St
Spartanburg, SC 29302
ATTORNEY(S) FOR THE DEFENDANT(S)

David Mann
CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

Ralph L. Erwin,

Plaintiff,

v.

South Carolina Department of Probation, Parole and Pardon Services, and the State of South Carolina,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS

Case No. 2016-CP-46-2414

This matter came before the Court on November 17, 2016, upon Defendants' Motion to Dismiss and Motion for Sanctions. Plaintiff appeared *pro se*. Taylor P. Heath appeared on behalf of the Defendants. Based on the record presented and the arguments of the parties, I make the following findings and conclusions.

FACTUAL/PROCEDURAL BACKGROUOND

On March 24, 1961, Plaintiff pled guilty to a charge of murder in York County, South Carolina, and was sentenced to life imprisonment. (Compl. p. 2.)

Between 2003 and 2016, Plaintiff filed nine separate actions against the State of South Carolina, and two actions against the South Carolina Department of Probation, Parole and Pardon Services. In all of these actions, Plaintiff alleged claims related to his continued parole supervision. *See Erwin v. State*, 2003-CP-4602824 (2003) (Post-conviction relief case, dismissed by the Court); *Erwin v. State*, C.A. No.: 6:07-959-RBH (2007) (Habeus corpus petition, summary judgment granted); *Erwin v. State*, 2009-CP-4604556 (2009) (Post-conviction relief case, dismissed by the Court); *Erwin v. State*, C.A. No.: 6:11-cv-01070-RBH (2011) (Habeus corpus petition, dismissed by the Court); *Erwin v. State*, C.A. No.: 6:11-cv-02146-RBH (2011) (Habeas corpus petition, dismissed by the Court); *Erwin v. State*, C.A. No.: 6:12-cv-00437-RBH (2012) (Habeas corpus petition, dismissed as successive); *Erwin v. State*, C.A. No.: 6:12-3457-RBH-KFM (2012) (§1983 claim, dismissed on 11th amendment immunity grounds); *Erwin v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 2013-CP-42-1355 (2013) (Dismissed

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for lack of jurisdiction); *Erwin v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 2013-CP-42-4133 (2014) (Tort claim, dismissed by the Court).

On August 15, 2016, Plaintiff filed this tort claim against the South Carolina Department of Probation, Parole and Pardon Services and the State of South Carolina. (Compl. p. 1.) Plaintiff alleges in this complaint that the South Carolina Department of Probation, Parole, and Pardon Services ("Department"), and the State of South Carolina ("State") have committed tortious acts by requiring him to submit to parole supervision. (Compl. pgs. 3-5.) Plaintiff believes that his life sentence was limited to thirty years, and therefore expired in March of 1992. (Compl. pgs. 3-5.) Thus, Plaintiff asserts that he should no longer be on parole and subject to the restrictions and conditions imposed by parole status.

DISCUSSION/ANALYSIS

I. PLAINTIFF'S CLAIMS ARE BARRED BY RES JUDICATA

Plaintiff's claim against the State and the Department are barred by the doctrine of *res judicata*. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co. Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Plaintiff has raised the issue of his continued parole supervision in multiple prior actions involving the State and the Department.

On May 16, 2012, in the final order of dismissal in the post-conviction relief action against the State, Judge Lee S. Alford enumerated how Plaintiff had raised the issue regarding the length of his sentence in his 2003 PCR application. In that regard, Judge Alford's order states:

> That action was denied and dismissed as this Court found no merit to [Plaintiff's] claims. Thus, this issue is precluded from being raised in a subsequent action involving the same parties and the same claim. The public interest in the finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, the Court denies and dismisses these claims as barred by res judicata. (*See* 2009-CP-46-04556.)

On June 16, 2014, in the final order of dismissal in the 2014 tort action brought in state court against the State, Judge J. Mark Hayes found Plaintiff's claim to be barred under the doctrine of *res judicata*. He concluded that the same claim was being brought regarding the

length of Plaintiff's sentence, that the same parties were involved in the actions, and that the previous claims were adjudicated on the merits. Additionally, Judge Hayes concluded that Plaintiff's tort claim was barred for reasons in addition to *res judicata*: under the doctrine of collateral estoppel; under the applicable statute of limitations; for failing to state facts sufficient to constitute a cause of action; under the exceptions to the waiver of sovereign immunity under the South Carolina Tort Claims Act; and, the punitive damages claim being barred under the South Carolina Tort Claims Act.

Based on the foregoing discussion, I find and conclude that Plaintiff's claims have previously been adjudicated, and that he is barred from raising the same claim in this action against the State and the Department, or in any future similar action.

II. PLAINTIFF'S CLAIMS AGAINST THE STATE AND THE DEPARTMENT ARE BARRED BY COLLATERAL ESTOPPEL

Plaintiff's claim is also barred by the doctrine of non-mutual, defensive collateral estoppel. A party asserting collateral estoppel as a defense must demonstrate that ". . . the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. DOT,* 385 S.C. 550, 554, 684 S.E.2d 779 (Ct. App. 2009).

In this action, Plaintiff is barred from bringing this same claim against the State and the Department because the issue of length of sentence has been actually and necessarily litigated in a previous law suit, and therefore, is precluded in any subsequent action based on a different claim. *Richburg v. Baughman,* 290 S.C. 431, 351 S.E.2d 164 (1986).

Plaintiff has raised the same issue in numerous proceedings since 2003, and the issue has already been actually and necessarily litigated in prior actions. Therefore, Plaintiff's claim against the State and the Department is barred under the doctrine of collateral estoppel.

III. PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

South Carolina has adopted the "discovery rule." Accordingly, the statute of limitations ". . . runs from the date the injury is discoverable by the exercise of reasonable diligence." *Republic Contracting Corp. v. S.C. Dep't of Highways and Pub. Transp.*, 332 S.C. 197, 207, 503 S.E.2d 761, 766 (1998). An injured party must act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim might exist. *Id.*

Any action brought pursuant to the South Carolina Tort Claims Act is barred unless

commenced within two years after the date the loss was or should have been discovered. S.C. Code Ann. § 15-78-110 (1976, as amended). The Act provides the exclusive remedy for any tort committed by a governmental entity, its employees, or its agents. S.C. Code Ann. §15-78-20. As already noted, Plaintiff has raised the same issue in actions that date back to 2003. *See Erwin v. State*, 2003-CP-4602824 (2003).

Plaintiff claims that in 1992, he became aware through (his interpretation of) a judge's comments that his sentence carried a maximum term of thirty years. Thus, by his own admission, Plaintiff has had knowledge of any claim or "loss" for over twenty years. This far exceeds the allotted two years to bring an action. Plaintiff's claim has expired, and is barred under the statute of limitations.

IV. PLAINTIFF'S COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

I also find and conclude that Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against either the State, or the Department.

Plaintiff claims that his life sentence is actually a thirty-year term sentence.[1] However, Plaintiff admits that he pled guilty to the charge of murder in 1961, and received a life sentence. The statute in effect at the time of his guilty plea provided:

> Whoever is guilty of murder shall suffer the punishment of death; *provided, however*, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole lifetime of the prisoner. (S.C. Code § 16-52 (1952).)

Further, as to the issue of continued parole supervision, the law required:

> Any prisoner who shall have been paroled shall be subject during the remainder of his original term of imprisonment, up to the maximum, to the conditions and restrictions imposed in the order of parole or by law imposed. Every such paroled prisoner shall remain in the legal custody of the Board and may at any time on the order of the Board be imprisoned as and where therein designated. (S.C. Code § 55-614 (1952).)

After examining the complaint and the attached exhibits, I conclude that Plaintiff has

[1] Plaintiff misapplies the phrase "statute of limitation" when describing his damages. *See* Compl. p. 4 ("The Statute of Limitation on a Life Sentence was Thirty (30) years.").

failed to raise a cognizable claim.[2] Despite Plaintiff's assertions that his term of imprisonment is only thirty years, the sentence he received was a life sentence that will run until the end of his natural life.

V. EXCEPTIONS TO THE WAIVER OF SOVEREIGN IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT

The South Carolina Tort Claims Act includes a number of exceptions to the limited waiver of sovereign immunity. Under the Act, a governmental entity is not liable for losses resulting from:

> (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
> (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies; and
> (21) the decision to or implementation of release, discharge, parole, or furlough of any persons in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client or the escape of these persons.
> (S.C. Code § 15-78-60 (2), (3), (4), (21).)

These sections apply to the State and the Department in this action. It follows that Plaintiff's tort claim is barred under these exceptions to the waiver of sovereign immunity.

VI. PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IS BARRED BY SOUTH CAROLINA TORT CLAIMS ACT

S.C. Code §15-78-120 specifies that a claim for punitive damages is barred under the South Carolina Tort Claims Act. Thus, Plaintiff's request for punitive damages against Defendants is barred under the South Carolina Tort Claims Act.

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[2] Plaintiff relies upon an Annual Report of the Attorney General. Annual Report of the Attorney General for the State of South Carolina to the General Assembly, 312-13 (1942). In the annual report, the Attorney General expresses guidance to the Director of the South Carolina Probation & Parole Board as to when it "may" consider granting parole to a prisoner. The last paragraph provides that in the case of a "life termer," he is treated as if his sentence had been for thirty years, and thus cannot have his case considered until he has served at least 12 years of his sentence. This opinion does not change his original life sentence; nor does it require the Board to grant him parole. The opinion simply advises the Board of the earliest date when it "may" grant parole. The thirty year period is simply specified as the benchmark from which the earliest parole date is to be calculated. Obviously, it would not be possible to calculate a percentage of a "life" sentence to determine when parole eligibility attaches.

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VII. APPROPRIATE SANCTIONS

Defendants' request for sanctions is permitted and appropriate under the South Carolina Frivolous Civil Proceedings Sanctions Act. S.C. Code Ann. §15-36-10 (1976, as amended). Plaintiff has repeatedly filed petitions raising identical claims to those previously dismissed. I conclude that the serial filings are frivolous.

The circuit court has a wide discretion in ordering sanctions, and may impose a sanction on "a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing." *See* Rule 11, SCRCP; *Runyon v. Wright*, 322. S.C. 15, 19, 471 S.E.2d 160, 162 (1996). Forms of sanctions may include a directive of a nonmonetary nature designed to deter the party from bringing any future frivolous actions. *Id.* Under the South Carolina Frivolous Civil Proceedings Sanctions Act, injunctive relief is a proper nonmonetary sanction that can be used to deter future frivolous actions. *See* S.C. Code §15-35-10(G)(3).

The United States Supreme Court has denied litigants who have filed repetitive, frivolous petitions the right to proceed *in forma pauperis*, resulting in the litigants having to pay the required filing fee with that Court. *In re Whitaker*, 513 U.S. 1 (1994); *In re Anderson*, 511 U.S. 364 (1994); *In re Demos*, 500 U.S. 16 (1991); *In re Sindram*, 498 U.S. 177 (1991); *In re McDonald*, 489 U.S. 180 (1989). Other courts have required that the abusive litigant file an affidavit certifying that he believes the petition raises an original claim or is nonfrivolous before accepting filings from the litigant. *Abdul-Akbar v. Watson*, 901 F.2d 329 (3d Cir.1990).

In this case, I find and conclude that injunctive relief is appropriate. Thus, I conclude that Plaintiff, and anyone acting on his behalf, should be ordered not to file any action that is related, directly or indirectly, to the issue regarding the Plaintiff's continued parole supervision or status. Violation of such order will be deemed contempt of court, and subject the violator to punishment for contempt of court, including imprisonment.

Further, I find and conclude that the Clerk of Court in York County should refuse to accept further filings from petitioner related to the subject matter of this action. However, this direction shall not preclude Plaintiff from filing any appeal of this order.

ORDER

Therefore, based on the findings and conclusions herein, it is ordered as follows:

1. Defendants' Motion to Dismiss and Motion for Sanctions are granted, and this

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action is dismissed with prejudice.

2. Neither Plaintiff, nor anyone acting on his behalf, shall file any action that is related, directly or indirectly, to the issue regarding the Plaintiff's continued parole supervision or status. Violation of such order will be deemed contempt of court, and subject the violator to punishment for contempt of court, including imprisonment.

3. The Clerk of Court of York County is directed to refuse to accept further filings from petitioner related to the subject matter of this action, except for any appeal of this order.

AND IT IS SO ORDERED.

December 2, 2016

S. Jackson Kimball
Special Circuit Court Judge
York County

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS
Ralph L. Erwin, Plaintiff, vs. South Carolina Department of Probation, Parole and Pardon Services, and the State of South Carolina, Defendants.	**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** C.A. No.: 2013-CP-42-4133

This matter came before the Court on Defendants' Motion to Dismiss. A hearing was held on March 19, 2014. Mr. Erwin appeared *pro se*. Jennifer J. Howard appeared on behalf of Defendants.

FINDINGS OF FACT

1. On March 24, 1961, Plaintiff pled guilty to a charge of murder in York County, South Carolina and was sentenced to life imprisonment (Complaint, p. 1).

2. Plaintiff was paroled twice and had his parole revoked twice (Complaint, p. 1). He is currently out of prison but remains under supervision by the Department of Probation, Parole and Pardon Services.

3. Between 2003 and 2013, Plaintiff brought seven actions against the State and one action against the State and the Department of Probation, Parole and Pardon Services, all of which alleged claims related to his continued parole supervision. See Erwin v. S.C., 2003-CP-4602824 (2003) (Post-conviction relief case, dismissed by the court); Erwin v. S.C., C.A. No.: 6:07-959-RBH (2007) (Habeus corpus petition, summary judgment granted); Erwin v. S.C., et.al., 2009-CP-4604556 (2009) (Post-conviction relief case, dismissed by the court); Erwin v.

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S.C., C.A. No.: 6:11-cv-01070-RBH (2011) (Habeus corpus petition, dismissed by the court); Erwin v. S.C., C.A. No.: 6:11-cv-02146-RBH (2011) (Habeas corpus petition, dismissed by the court); Erwin v. S.C., C.A. No.: 6:12-cv-00437-RBH (2012) (Habeas corpus petition, dismissed as successive); Erwin v. S.C., C.A. No.: 6:12-3457-RBH-KFM (2012) (§1983 claim, dismissed on 11th amendment immunity grounds); Erwin v. South Carolina Department of Probation, Parole and Pardon Services and S.C., 2013-CP-42-1355 (2013) (dismissed for lack of jurisdiction).

4. Plaintiff alleges in this complaint that the South Carolina Department of Probation, Parole and Pardon Services ("Department") and the State of South Carolina are violating Plaintiff's constitutional rights and have committed tortious acts by continuing to require him to submit to parole supervision (Complaint, pgs. 2, 4). Plaintiff believes that his life sentence was limited to thirty years and therefore expired in March 1992 (Complaint, pgs. 2-3).

5. Having considered the record, the arguments of the parties, and the applicable law, the Court hereby grants the Defendants' Motion to Dismiss.

CONCLUSIONS OF LAW

I. PLAINTIFF FAILED TO PROPERLY SERVE HIS SUMMONS AND COMPLAINT

6. SCRCP 3(a) provides that a civil action is commenced when the summons and complaint are filed and served. Without filing and service of a complaint, this Court lacks jurisdiction and the case should be dismissed. Brown v. Evatt, 322 S.C. 189, 194, 470 S.E.2d 848, 850 (1996).

7. Service on the State is governed by SCRCP 4(d)(4), which requires service be made "[u]pon the State of South Carolina by delivering a copy of the summons and complaint to the Attorney General . . ." Furthermore, service on a state agency or department under SCRCP

4(d)(5) requires service "[u]pon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.". Rule 4(d)(8) allows service by registered or certified mail upon classes of defendants in subsections (1) or (3) of the rule but is not applicable to sections (4) or (5).

8. Plaintiff claims to have served his summons and complaint on the Attorney General by "registered or certified mail" (Plaintiff's Objection to Defendants' Motion to Dismiss, p. 2). Plaintiff stated at the hearing that he also served the Department by registered or certified mail. Defendants contend that the Attorney General did not receive the summons and complaint by any means and that the copy of the summons and complaint received by the Department arrived by regular mail. Furthermore, the copy of the Complaint received was not clocked and lacked a civil action number.

9. Service by registered or certified mail on either the State or the Department is improper under the rules. Rule 4 clearly requires that both entities receive actual delivery of the summons and complaint. This Court finds that Plaintiff has failed to effect proper service of process. Furthermore, the summons and complaint that was served was invalid because it was not a filed copy and lacked the civil action number.

II. PLAINTIFF'S COMPLAINT FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

10. Regardless of service, this Court finds that Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against either the State or the Department.

11. Plaintiff claims that his life sentence is actually a thirty-year term sentence.[1] However, Plaintiff admits that he pled guilty to the charge of murder in 1961 and received a life sentence. The statute in effect at the time of his guilty plea provided:

> Whoever is guilty of murder shall suffer the punishment of death; *provided, however*, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole lifetime of the prisoner.

S.C. Code § 16-52 (1952). Furthermore, as to the issue of continued parole supervision, the law required:

> Any prisoner who shall have been paroled shall be subject during the remainder of his original term of imprisonment, up to the maximum, to the conditions and restrictions imposed in the order of parole or by law imposed. Every such paroled prisoner shall remain in the legal custody of the Board and may at any time on the order of the Board be imprisoned as and where therein designated.

S.C. Code § 55-614 (1952).

12. After examining the complaint and the attached exhibits, the Court concludes that Plaintiff has failed to raise a cognizable claim.[2] Despite Plaintiff's assertions that his term of imprisonment is only thirty years, the sentence he received was a life sentence that will run until the end of his natural life.

III. THE STATUTE OF LIMITATIONS BARS THE PLAINTIFF'S CLAIMS

13. South Carolina has adopted the discovery rule. Accordingly, the statute of limitations "runs from the date the injury is discoverable by the exercise of reasonable

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[1] Plaintiff misapplies the phrase "statute of limitation" when describing his injury. *See* Complaint, p. 2 ("The Statute of Limitation on a Life Sentence was Thirty (30) years.").

[2] Plaintiff relies heavily on an Annual Report of the Attorney General. Annual Report of the Attorney General for the State of South Carolina to the General Assembly, 312-13 (1942). In the annual report, the Attorney General expresses guidance to the Director of the South Carolina Probation & Parole Board as to when they "may" consider granting parole to a prisoner. The last paragraph provides that in the case of a "life termer," he is treated as if his sentence had been for thirty years and thus cannot have his case considered until he has served at least 12 years of his sentence. This opinion does not change his original life sentence nor does it require the Board to grant him parole. The opinion simply advises the Board when they "may" grant him parole.

diligence." Republic Contracting Corp. v. S.C. Dep't of Highways and Pub. Transp., 332 S.C. 197, 207, 503 S.E.2d 761, 766 (1998). An injured party must act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim might exist. Id.

14. The evidence in this record reveals that Plaintiff had knowledge of his potential claim in 1992 (Complaint, p. 6). Plaintiff claims that Judge William H. Ballenger raised the issue of the length of his sentence at a hearing on an unrelated matter. Id. Additionally, Plaintiff has raised the same issue in actions that date back to 2003. See Erwin v. S.C., 2003-CP-4602824 (2003). Accordingly, his claims are barred by the applicable statute of limitations.

V. PLAINTIFF'S CLAIMS AGAINST THE STATE ARE BARRED BY RES JUDICATA

15. Plaintiff's claims against the State are barred by the doctrine of res judicata. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. Inc. v. City of Conway, 334 S.C. 30, 34, 512, S.E.2d 106, 109 (1999). Plaintiff has raised the issue of the length of his sentence in eight prior actions involving the State.

16. In the final order of dismissal in the post-conviction relief action brought in state court against the State of South Carolina, Judge Lee S. Alford enumerated how Plaintiff had raised the issue regarding the length of his sentence in his 2003 PCR application. To that end, that order states:

> That action was denied and dismissed as this Court found no merit to [Plaintiff's] claims. Thus, this issue is precluded from being raised in a subsequent action involving the same parties and the same claim. The public interest in the finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, the Court denies and dismisses these claims as barred by res judicata.

See 2009-CP-46-04556.

17. This Court finds that Plaintiff's claim regarding the length of his sentence has previously been adjudicated and he is barred from raising the same claim in this action against the State.

VI. PLAINTIFF'S CLAIMS AGAINST THE STATE AND THE DEPARTMENT ARE BARRED BY COLLATERAL ESTOPPEL

18. Plaintiff's claim is barred by the doctrine of non-mutual defensive collateral estoppel.

19. A party asserting collateral estoppel must demonstrate that "the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Carolina Renewal, Inc. v. S.C. DOT, 385 S.C. 550, 554, 684 S.E.2d 779 (Ct. App. 2009). The modern trend is to disregard the privity requirement in a collateral estoppel analysis. "[I]n such cases [where privity is lacking], on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies." Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982) (quoting Jenkins v. Atl. Coast Line R.R. Co., 89 S.C. 408, 421, 71 S.E. 1010, 1012 (1911)). Courts continue to expand the use of non-mutual collateral estoppel. *See* Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984) (adopting the doctrine of non-mutual offensive collateral estoppel), Doe v. Doe, 346 S.C. 145, 551 S.E.2d 257 (2001) (finding that non-mutual collateral estoppel prevents a person criminally convicted from subsequently litigating the same facts in a civil proceeding), Irby v. Richardson, 278 S.C. 484, 298 S.E.2d 452 (1982) (holding plaintiff collaterally estopped from bringing a legal malpractice action against attorney who represented him in divorce because the same issues were previously litigated in the family court action).

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20. Here, Plaintiff previously brought numerous actions alleging that the State was acting unlawfully by not treating his sentence as limited to thirty years. He cannot reassert the same claim in this case.

VIII. EXCEPTIONS TO THE WAIVER OF SOVEREIGN IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT APPLY TO PLAINTIFF'S CLAIMS

21. The South Carolina Tort Claims Act includes a number of exceptions to the limited waiver of sovereign immunity. Under the Act, a governmental entity is not liable for losses resulting from administrative action, lawful implementation of any process, compliance with any law, or the decision to grant parole to any prisoner. S.C. Code § 15-78-60 (2-4, 21).

22. This section applies to the present case and Plaintiff's tort claims are barred.

IX. PUNITIVE DAMAGES ARE BARRED BY S.C. CODE § 15-78-120

23. Plaintiff's claim for punitive damages is barred because the South Carolina Tort Claims Act specifically excludes punitive damages. S.C. Code § 15-78-120.

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED.

AND IT IS SO ORDERED.

J. Mark Hayes, II
Court of Common Pleas

June 16th, 2014
Spartanburg, South Carolina

2014 JUN 18 AM 9:44

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Ralph Leroy Erwin, Plaintiff,

v.

South Carolina Probation, Parole and Pardon Services; and State of South Carolina, Defendants.

Civil Action No. 6:12-cv-03457-RBH

United States District Court, D. South Carolina, Greenville Division.

February 12, 2013

ORDER

R. BRYAN HARWELL, District Judge.

Plaintiff Ralph Leroy Ervin, proceeding *pro* se, filed this action against the State of South Carolina and the South Carolina Department of Probation, Parole and Pardon Services, seeking actual and punitive damages in excess of $10,000,000 for failing to terminate his parole. This matter is before the Court after the issuance of the Report and Recommendation ("R&R") of United States Magistrate Judge Kevin F. McDonald.[1] In the R&R, the Magistrate Judge recommends that the Court summarily dismiss Plaintiff's action against Defendants *without prejudice* and without service of process.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff files this action against Defendants pursuant to 42 U.S.C. § 1983, seeking $10,000,000.00 in actual damages, punitive damages, and a refund of "monies he has been paying since being on parole." The Magistrate Judge thoroughly details the facts in his R&R; however, Plaintiff complains that, considering his prison sentence and parole, he has served a longer punishment than is permitted by law. Compl., ECF No. 1. The Magistrate Judge issued his R&R on January 29, 2013, R&R, ECF No. 11, and Plaintiff filed timely objections to the R&R on February 8, 2013, Pl.'s Objs., ECF No. 13.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to the 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, 270-71 (1976). The Court is charged with making a *de novo* determination of those portions of the R&R 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 to him with instructions. 28 U.S.C. § 636(b)(1).

The right to *de novo* review may be waived by the failure to file timely objections. *Orpiano v. Johnson,* 687 F.2d 44, 47 (4th Cir. 1982). The Court need not conduct a *de novo* review when a party makes only "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate's proposed findings and recommendations." *Id.* Moreover, in the absence of objections to the R&R, the Court is not required to give any explanation for adopting the recommendation. *Camby v. Davis,* 718 F.2d 198, 199 (4th Cir. 1983). However, in the absence of objections, the Court must "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Accident Ins. Co.,* 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed.R.Civ.P. 72 advisory committee's note).

DISCUSSION

The Magistrate Judge recommends summarily dismissing Plaintiff's complaint on the basis that Defendants, a state and one of its agencies, are immune under the Eleventh Amendment in suits for damages. R&R 5-6. Plaintiff summarizes his objections to the R&R as follows:

1. The Plaintiff[s] claim[s] have merit and warrant[] a hearing.

2. The Defendants acted in bad faith, actual intent and recklessness.

3. The Plaintiff stated a cause of action under 42 U.S.C.A. [§] 1983.

Pl.'s Objs. 1.

The Court reiterates that it may only consider objections to the R&R that direct this Court to a specific error. *See* Fed.R.Civ.P. 72(b); *United States v. Schronce,* 727 F.2d 91, 94 n.4 (4th Cir. 1984); *Wright v. Collins,* 766 F.2d 841, 845-47 nn.1-3 (4th Cir. 1985). "Courts have... held *de novo* review to be unnecessary' in... situations when a party makes general and conclusory objections that do not direct the court to a specific error in the [Magistrate Judge's] proposed findings and recommendation." *Orpiano,* 687 F.2d at 47. Furthermore, in the absence of specific objections to the R&R, this Court is not required to give any explanation for adopting the recommendation. *Camby,* 718 F.2d at 199.

Here, the only argument of Plaintiff that can remotely be construed as a specific objection to the Magistrate Judge's recommendation is a statement by Plaintiff that the Eighth and Fourteenth amendments "allow the Plaintiff to sue for monetary damages" under § 1983. Memo. to Pl.'s Objs. 6, ECF No. 13-1. Plaintiff,

however, is barred from receiving damages from the State of South Carolina and its agencies due to the Eleventh Amendment, and there is no indication that South Carolina has waived its sovereign immunity. *See Alabama v. Pugh,* 438 U.S. 781, 782 (1978) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit."); *Quern v. Jordan,* 440 U.S. 332, 345 (1979) ("[Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States."). Therefore, the Court finds no error in the Magistrate Judge's recommendation, and Plaintiff's objections are overruled.

CONCLUSION

The Court has thoroughly analyzed the entire record, including the complaint, the Magistrate Judge's R&R, objections to the R&R, and the applicable law. For the reasons stated above and by the Magistrate Judge, the Court hereby overrules Plaintiff's objections and adopts the Magistrate Judge's R&R.

IT IS THEREFORE ORDERED that Plaintiff's complaint be DISMISSED *without prejudice* and without service of process.

IT IS SO ORDERED.

Notes:

[1] In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (D.S.C.), this matter was referred to the Magistrate Judge for pretrial handling. The Magistrate Judge's review of Plaintiff's complaint was conducted pursuant to the screening provisions of 28 U.S.C. § 1915(e)(2). The Court is mindful of its duty to liberally construe the pleadings of *pro se* litigants. *See Gordon v. Leeke,* 574 F.2d 1147, 1151 (4th Cir. 1978); *but see Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir. 1985).

Ralph Leroy Erwin, formerly SCDC ID # 051231, a.k.a. Ralph L. Erwin, Plaintiff,

v.

SC Probation, Parole and Pardon Services; and State of South Carolina, Defendants.

No. 6:12-3457-RBH-KFM

United States District Court, D. South Carolina.

January 29, 2013

REPORT AND RECOMMENDATION

KEVIN F. McDONALD, Magistrate Judge.

This is a civil action filed by a *pro se* litigant. Plaintiff, a state parolee, is proceeding *in forma pauperis.* The case is presently before the undersigned United States Magistrate Judge for report and recommendation following pre-service review pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(e) DSC.

PRO SE AND *IN FORMA PAUPERIS* REVIEW

Under established local procedure in this judicial district, a careful review has been made of the *pro se* complaint. The Complaint in this case has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). A finding of frivolousness can be made where the complaint "lacks an arguable basis either in law or in fact." *Denton v. Hernandez,* 504 U.S. 25, 31 (1992). Hence, under § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte. Neitzke v. Williams,* 490 U.S. 319 (1989); *Allison v. Kyle,* 66 F.3d 71 (5th Cir. 1995).

This court is required to liberally construe *pro se* complaints. *Erickson v. Pardus,* 551 U.S. 89, 94 (2007). Such *pro se* complaints are held to a less stringent standard than those drafted by attorneys, *id.; Gordon v. Leeke,* 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case. *Hughes v. Rowe,* 449 U.S. 5, 9 (1980); *Cruz v. Beto,* 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint, the plaintiff's allegations are assumed to be true. *Erickson,* 551 U.S. at 93 (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555-56 (2007)). Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.,* 901 F.2d 387 (4th Cir. 1990); *see also Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1953 (2009) (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for "all civil actions"). The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so; however, a district court may not rewrite a complaint to include claims that were never presented, *Barnett v. Hargett,* 174 F.3d 1128 (10th Cir. 1999), construct the plaintiff's legal arguments for him, *Small v. Endicott,* 998 F.2d 411 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, *Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir. 1985).

BACKGROUND

Plaintiff files this action pursuant to 42 U.S.C. § 1983,[1] seeking $10,000,000.00 in actual damages, punitive damages, and a refund of "monies he has been paying since being on parole." ECF No. 1, p. 6. Plaintiff alleges that on March 25, 1961, in York County Circuit Court, he pleaded guilty to a charge of murder and was sentenced to life imprisonment. Plaintiff alleges that, in 1961, a life sentence carried a maximum penalty of 30 years, because 30 years was "the most time that a person was considered to serve" under the laws in effect at the time. ECF No. 1, p. 3-4. Plaintiff alleges that, when he was sentenced, he became eligible for parole after serving ten years, or one third of his "original sentence." Plaintiff alleges that he was paroled twice, first in 1971 and again in 1982, and had his parole revoked each time. *Id.* [2] Plaintiff alleges that when he received his life sentence "it was not classified as a felony." ECF No. 1, p. 5. Plaintiff alleges that after each parole revocation he was returned to prison to serve this same life sentence, which "in 2012 the Plaintiff is still serving." *Id.* Plaintiff alleges that Defendants have shown "recklessness and actual intent in this case" by holding Plaintiff "in confinement for so long that he was unable to earn enough work credits to draw Social Security and is unable to work at this time." *Id.* Plaintiff alleges that Defendants have violated his Eighth and Fourteenth Amendment rights and subjected him to cruel and unusual punishment by "making his sentence greater in punishment than it was when the crime was committed." *Id.*

DISCUSSION

The State of South Carolina and its agency the South Carolina Department of Probation, Parole, and Pardon Services are immune from any suit brought in this Court by Plaintiff in which he seeks monetary damages from these Defendants. The Eleventh Amendment to the United States Constitution states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. art. XI.[3] Sovereign immunity protects both the State itself and its agencies, divisions, departments, officials, and other "arms of the State." *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 70 (1989); *see also* Regents of the Univ. of California v. Doe, 519 U.S. 425, 429 (1997) ("[I]t has long been settled that the reference [in the Eleventh Amendment] to actions against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities."); *Mt. Healthy Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances."). Moreover, the United States Supreme Court has stated that § 1983 "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Will,* 491 U.S. at 66; *see also Quern v. Jordan,* 440 U.S. 332, 343 (1979) (recognizing that Congress did not override the Eleventh Amendment when it created the remedy found in 42 U.S.C. § 1983 for civil rights violations).

Although a State may waive sovereign immunity, *Lapides v. Board of Regents,* 535 U.S. 613 (2002), the State of South Carolina has specifically denied this waiver for suit in federal district court. *See* S.C. Code Ann. § 15-78-20(e). Any claim of negligence against the State is similarly barred from adjudication in this Court. *See Id.* ("Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in Federal Court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina."). Accordingly, Plaintiff's claim for damages against the State of South Carolina and the South Carolina Department of Probation, Parole, and Pardon Services fails as a matter of law because Plaintiff is seeking monetary relief against Defendants who are immune from such relief in this Court. Thus, pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii), this Court should dismiss the instant case based on lack of subject matter jurisdiction.

RECOMMENDATION

For the foregoing reasons, it is recommended that the instant Complaint be summarily dismissed, without prejudice and without issuance and service of process. Plaintiff's attention is directed to the important notice on the next page.

Notes:

[1] Section 1983 is the procedural mechanism through which Congress provided a private civil cause of action based on allegations of federal constitutional violations by "person(s)" acting "under color of state law." *See Jennings v. Davis,* 476 F.2d 1271 (8th Cir. 1973). The purpose of § 1983 is to deter state actors from using their badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *See McKnight v. Rees,* 88 F.3d 417(6th Cir. 1996). In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that: (1) individual defendant(s) deprived him of a federal right, and (2) did so under color of state law. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980).

[2] The undersigned takes judicial notice of Plaintiff's prior unsuccessful habeas corpus proceedings in this district court, wherein it was established, in *Erwin v. State of South Carolina,* C/A No. 6:07-959-RBH-WMC (D.S.C. 2008), that, after serving approximately ten years of his sentence, Plaintiff was granted parole on June 17, 1971, but this parole was revoked on August 20, 1975. After serving an additional prison term of more than six years, Plaintiff was again granted parole on January 20, 1982, but was declared an absconder on January 12, 1983. Plaintiff's parole was again revoked on July 24, 1985 and Plaintiff served an additional 22 years in prison until he was once again paroled in March 2007. *See* C/A No. 07-959, ECF No. 21, p. 1-5. Thus, it appears that Plaintiff may have served a total of more than 38 years in prison, due to his multiple parole violations and revocations and, as he alleges, he currently remains on parole. *See Aloe Creme Laboratories, Inc. v. Francine Co.,* 425 F.2d 1295, 1296 (5th Cir. 1970) (district court clearly had the right to take notice of its own files and records).

[3] Although the language of the Eleventh Amendment does not explicitly prohibit a citizen of a state from suing his own state in federal court, the United States Supreme Court in *Hans v. Louisiana,* 134 U.S. 1 (1890), held that the purposes of the Eleventh Amendment, *i.e.* protection of a state treasury, would not be served if a state could be sued by its citizens in federal court.

(R&R at 2); *see also Erwin I,* Docket Entries 1, 21, and 23. Petitioner even appears to admit in his Objections that he "has filed numerous petitions pertaining to the same issues presented in his present... Habeas Corpus Application." (Obj. at 1.) Moreover, while a successive § 2254 petition may be filed *after* receiving the required authorization from the Fourth Circuit, nowhere has Petitioner indicated that he has even sought or received any such authorization from the Fourth Circuit. Thus, the undersigned agrees with the Magistrate Judge that Petitioner's § 2254 Petition should dismissed as successive.

In addition, the Magistrate Judge alternatively concluded that "[e]ven if the instant petition were to be liberally construed as having been filed pursuant to 28 U.S.C. § 2241, ... the Petition would still be subject to summary dismissal." (R&R at 8.) Specifically, the Magistrate Judge found that, even if construed as a § 2241 petition, "Petitioner has not yet exhausted his state remedies." (*Id.* at 9.) Again, the undersigned agrees. A state prisoner must first fully exhaust his or her state remedies before filing a federal habeas petition pursuant to § 2241. (R&R at 8) (citing 28 U.S.C. § 2254(b) and *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 490-91 (1973)); *see also Dalton v. W.Va. Parole Bd.,* No. 2:08-cv-01218, 2010 WL 395650, at *2 (S.D. W.Va. Jan. 19, 2010) (noting that "there is nothing in the AEDPA which suggests that Congress intended to eliminate the judicially created requirement that a state prisoner must exhaust his state remedies before filing a § 2241 petition"). Here, in his § 2254 Petition, Petitioner specifically alleges that he has a currently-pending state court post-conviction relief ("PCR") application, in which he is challenging his parole on the same grounds as set forth in his instant § 2254 Petition. (§ 2254 Petition at 12.) He again references "his present PCR... Application" in his Objections. (Obj. at 1.) Thus, the court agrees with the Magistrate Judge that, even if the instant Petition were liberally construed as filed under § 2241, it is still subject to dismissal as Petitioner failed to exhaust his state remedies prior to filing the Petition.

Certificate of Appelabililty

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell,* 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate *both* that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack,* 529 U.S. at 484-85. In the instant matter, the court concludes that Petitioner has failed to make the requisite showing of "the denial of a constitutional right."

Conclusion

The court has thoroughly reviewed the entire record, including the R&R and Objections, and the applicable law. For the reasons stated above and by the Magistrate Judge, the court hereby overrules all of Petitioner's Objections and adopts and incorporates by reference the Magistrate Judge's R&R. Accordingly, it is therefore ORDERED that the instant Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, is DISMISSED *without prejudice* and without issuance and service of process upon Respondent.

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

IT IS SO ORDERED.

Notes:

[1] This matter was referred to Magistrate Judge McDonald pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c), D.S.C.

[2] The court may take judicial notice of its own records in Petitioner's prior case. *Colonial Penn. Ins. Co. v. Coil,* 887 F.2d 1236, 1239 (4th Cir. 1989) (noting that "[t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records" (internal quotations and citations omitted)); *Aloe Creme Labs., Inc. v. Francine Co.,* 425 F.2d 1295, 1296 (5th Cir. 1970) (holding that "[t]he District Court clearly had the right to take notice of its own files and records").

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22 16 RJ

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT

FILED-RECEIVED
2012 MAY 24 AM 10:45
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Ralph Leroy Erwin, #051231, Applicant,

v.

State of South Carolina, Respondent.

2009-CP-46-4556

CONDITIONAL ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed October 19, 2009. The Respondent made its return and motion to dismiss on May 14, 2012.

Procedural History

The Applicant is presently on parole and living in Spartanburg County[1]. The Applicant was indicted at the January 1961 term of the York County Grand Jury for murder. Harley Gaston, Esquire and Robert Hayes, Esquire, represented him. On March 24, 1961, the Applicant pled guilty as indicted to murder. He was sentenced by the Honorable James M. Brailsford to confinement for life. The Applicant did not appeal his conviction or sentence.

1991 PCR Action

The Applicant subsequently filed his first PCR application on October 10, 1991. An evidentiary hearing into the matter was held on October 21, 1992 at the York County Courthouse. The Applicant raised the following issues:

1 This is based on the information provided in the PCR application.

#1

1. Ex Post Facto violation in that:
   a. The application of the 1986 S.C. Criminal Justice Improvement Act to Applicant's case results in Applicant only being eligible for parole every two years rather than every one; and
   b. The application of the 1986 Criminal Justice Improvement Act to Applicant's case results in Applicant not being eligible to participate in the SCDC work release program.

The Honorable Thomas J. Erving denied and dismissed the Applicant's first PCR application by written Order in December 1992.

The Applicant then filed a timely appeal. The South Carolina Supreme Court granted the Applicant's Petition for Writ of Certiorari and reversed the PCR court's determination that there was not an ex post facto violation in this case. Erwin v. State, Memorandum Op. No. 93-MO-286 (filed August 20, 1993). The Remittitur was issued on October 8, 1993.

2003-CP-46-2824

The Applicant then filed his second PCR application on October 22, 2003. The Applicant raised the following issues:

1. "I was convicted under a statute which is unconstitutional"; and
2. "The statute of limitations has run out on the sentence."

The Respondent made its Return and Motion to Dismiss on November 11, 2004. The Honorable Lee S. Alford denied and dismissed the second application as successive and time barred by written Order dated April 27, 2005.

A timely appeal was filed on the Applicant's behalf pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The South Carolina Supreme Court denied the Applicant's Petition for Writ of Certiorari by Order on November 29, 2006. The Remittitur was issued on January 9, 2007.

6:07-959-RBH-WMC

#2

The Applicant subsequently filed a Petition for Habeas Corpus with the United States District Court for the District of South Carolina on April 9, 2007. The Honorable William M. Catoe issued a Report and Recommendation on January 7, 2008, recommending summary judgment be granted in favor of the Respondent. On February 28, 2008, the Honorable R. Bryan Harwell granted summary judgment in favor of the Respondent by written Order, thereby denying and dismissing the Applicant's Federal Habeas Corpus action.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. "The Statute of Limitation has run out on the sentence"

Incorporated herein is the York County Clerk of Court records, the South Carolina Department of Corrections' records and the prior PCR and Federal Habeas Corpus records by reference. The Respondent reserves the right to amend this information upon receipt of any relevant materials.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

> All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

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Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. The Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court additionally finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to –160. S.C. Code Ann. §17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgement of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this application on March 24, 1961. The Applicant was therefore required to file his application by July 1, 1996. This application was filed

#4

on October 19, 2009, well over thirteen (13) years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the York County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

#5
6018

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AND IT IS SO ORDERED this 16th day of May, 2012.

LEE S. ALFORD
Chief Administrative Judge
Sixteenth Judicial Circuit

York, South Carolina

#6
2008

Ralph Leroy Erwin, formerly S.C.D.C. I.D. # 051231, Petitioner,

v.

State of South Carolina, Respondent.

Civil Action No. 6:12-cv-00437-RBH

United States District Court, D. South Carolina, Greenville Division.

April 13, 2012

ORDER

R. BRYAN HARWELL, District Judge.

Petitioner, a state parolee proceeding *pro se,* brought this action pursuant to 28 U.S.C. § 2254. Petitioner currently resides in Spartanburg, South Carolina. This matter is now before the court with the [Docket Entry 9] Report and Recommendation ("R&R") of United States Magistrate Judge Kevin F. McDonald[1] filed on March 7, 2012. In his R&R, the Magistrate Judge recommended that "the instant successive § 2254 Petition should be summarily dismissed pursuant to 28 U.S.C. § 2244[] and *In re* [] *Vial,* 115 F.3d 1192, 1194 (4th Cir. 1996)." (R&R at 2.) Petitioner timely filed his [Docket Entry 14] Objections to the R&R.

Background

Petitioner was sentenced to life imprisonment for murder after pleading guilty in York County (South Carolina) General Sessions Court on March 24, 1961. (§ 2254 Petition [Docket Entry 1] at 1.)

On April 10, 2007, Petitioner filed a § 2254 petition in this court, in *Erwin v. State of South Carolina,* Civ. No. 6:07-cv-00959-RBH (D.S.C. 2008) (hereinafter " *Erwin I* "), challenging this same state court conviction and sentence, and raising the same grounds set forth in the instant § 2254 Petition. *See Erwin I,* Docket Entries 1 and 21.[2] In that case, this court ultimately granted summary judgment in favor of the respondent, denied Petitioner's summary judgment motion, and dismissed Petitioner's § 2254 petition as time-barred. *See id.,* Docket Entry 23.

On February 17, 2012, Petitioner filed the instant § 2254 Petition. In which, Petitioner indicates that he "is not challenging the conviction but rather the exp[i]ration date of the sentence has expired, " (§ 2254 Petition at 13), and he raises the following ground for relief:

Ground One: According to the South Carolina Constitution the most time to be served on a life sentence is thirty (30) years.

Supporting Facts: The Petitioner was convicted and sentenced to life on or about March 24, 1961. During that time there was no law which stated life was the entire life of a defendant.

(*id.* at 5.) For relief, Petitioner asks "[t]hat [he] be released from the custody of the South Carolina Probation and Parole Board." (*Id.* at 14.)

Standard of Review

The Magistrate Judge makes only a recommendation to the 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, 270-71 (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 court is obligated to conduct a *de novo* review of every portion of the Magistrate Judge's report to which objections have been filed. *Id.* However, the court need not conduct a *de novo* review when a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson,* 687 F.2d 44, 47 (4th Cir. 1982). In the absence of a timely filed, specific objection, the Magistrate Judge's conclusions are reviewed only for clear error. *See Diamond v. Colonial Life & Accident Ins. Co.,* 416 F.3d 310, 315 (4th Cir. 2005).

Discussion

In his R&R, the Magistrate Judge determined that Petitioner's § 2254 Petition is "successive" and should be summarily dismissed pursuant to 28 U.S.C. § 2244. (R&R at 2.) Upon review, the undersigned agrees. "Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas corpus... without first receiving permission to do so from the appropriate court of appeals." *In re Vial,* 115 F.3d 1192, 1194 (4th Cir. 1997). Specifically, § 2244(b)(3)(A) (emphasis added) provides that " *[b]efore* a second or successive application permitted by this section is filed in the district court, the applicant *shall* move in the appropriate court of appeals for an order authorizing the district court to consider the application." Here, Petitioner's § 2254 Petition is clearly successive. As specifically noted by the Magistrate Judge, "[t]he claim presented in this [instant] Petition was presented in a prior habeas petition that was dismissed on the merits."

(R&R at 2); *see also Erwin I.* Docket Entries 1, 21, and 23. Petitioner even appears to admit in his Objections that he "has filed numerous petitions pertaining to the same issues presented in his present... Habeas Corpus Application." (Obj. at 1.) Moreover, while a successive § 2254 petition may be filed *after* receiving the required authorization from the Fourth Circuit, nowhere has Petitioner indicated that he has even sought or received any such authorization from the Fourth Circuit. Thus, the undersigned agrees with the Magistrate Judge that Petitioner's § 2254 Petition should dismissed as successive.

In addition, the Magistrate Judge alternatively concluded that "[e]ven if the instant petition were to be liberally construed as having been filed pursuant to 28 U.S.C. § 2241, ... the Petition would still be subject to summary dismissal." (R&R at 8.) Specifically, the Magistrate Judge found that, even if construed as a § 2241 petition, "Petitioner has not yet exhausted his state remedies." (*Id.* at 9.) Again, the undersigned agrees. A state prisoner must first fully exhaust his or her state remedies before filing a federal habeas petition pursuant to § 2241. (R&R at 8) (citing 28 U.S.C. § 2254(b) and *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 490-91 (1973)); *see also Dalton v. W.Va. Parole Bd.,* No. 2:08-cv-01218, 2010 WL 395650, at *2 (S.D. W.Va. Jan. 19, 2010) (noting that "there is nothing in the AEDPA which suggests that Congress intended to eliminate the judicially created requirement that a state prisoner must exhaust his state remedies before filing a § 2241 petition"). Here, in his § 2254 Petition, Petitioner specifically alleges that he has a currently-pending state court post-conviction relief ("PCR") application, in which he is challenging his parole on the same grounds as set forth in his instant § 2254 Petition. (§ 2254 Petition at 12.) He again references "his present PCR... Application" in his Objections. (Obj. at 1.) Thus, the court agrees with the Magistrate Judge that, even if the instant Petition were liberally construed as filed under § 2241, it is still subject to dismissal as Petitioner failed to exhaust his state remedies prior to filing the Petition.

Certificate of Appelabililty

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell,* 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate *both* that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack,* 529 U.S. at 484-85. In the instant matter, the court concludes that Petitioner has failed to make the requisite showing of "the denial of a constitutional right."

Conclusion

The court has thoroughly reviewed the entire record, including the R&R and Objections, and the applicable law. For the reasons stated above and by the Magistrate Judge, the court hereby overrules all of Petitioner's Objections and adopts and incorporates by reference the Magistrate Judge's R&R. Accordingly, it is therefore ORDERED that the instant Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, is DISMISSED *without prejudice* and without issuance and service of process upon Respondent.

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

IT IS SO ORDERED.

Notes:

[1] This matter was referred to Magistrate Judge McDonald pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c), D.S.C.

[2] The court may take judicial notice of its own records in Petitioner's prior case. *Colonial Penn. Ins. Co. v. Coil,* 887 F.2d 1236, 1239 (4th Cir. 1989) (noting that "[t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records" (internal quotations and citations omitted)); *Aloe Creme Labs., Inc. v. Francine Co.,* 425 F.2d 1295, 1296 (5th Cir. 1970) (holding that "[t]he District Court clearly had the right to take notice of its own files and records").

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Ralph Leroy Erwin, *formerly SCDC ID # 051231, a.k.a. Ralph L. Erwin,* Petitioner, vs. State of South Carolina, Respondent.	C/A No. 6:12-437-RBH-KFM **REPORT AND RECOMMENDATION**

Petitioner, Ralph Leroy Erwin, *formerly SCDC ID # 051231, also known as Ralph L. Erwin*, ("Petitioner"), a state parolee residing in Spartanburg, South Carolina, who is proceeding *pro se* and *in forma pauperis*, has filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. This matter is before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) DSC for initial screening. Petitioner was sentenced to life imprisonment for murder after pleading guilty in York County General Sessions Court on March 24, 1961. ECF No. 1, p. 1. Petitioner previously filed a § 2254 petition in this Court, on April 10, 2007, in *Erwin v. State of South Carolina*, C/A No. 6:07-959-RBH-WMC (D.S.C. 2008), challenging this same state court conviction and sentence and raising the same ground that Petitioner raises in the instant petition. *See* ECF No. 1, p. 5, 13; C/A No. 07-959, ECF No. 21, p. 5.[1] In that case, Respondents' motion for summary judgment was granted , Petitioner's motion

[1] *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'").

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for summary judgment was denied, and Petitioner's § 2254 petition was dismissed as time-barred by this Court.[2] *See* C/A No. 07-959, ECF No. 23. Having reviewed the instant Petition and applicable law, the undersigned finds that the instant successive § 2254 Petition should be summarily dismissed pursuant to 28 U.S.C. § 2244(3) and *In re: Vial*, 115 F.3d 1192, 1194 (4th Cir. 1996). The claim in this Petition was presented in a prior habeas petition that was dismissed on the merits, and, before filing this successive petition, Petitioner did not obtain an order from the United States Court of Appeals for the Fourth Circuit authorizing this district court to consider the instant petition.[3]

PRO SE HABEAS REVIEW

Under established local procedure in this judicial district, a careful review has been made of the *pro se* petition filed in the above-captioned case. This Court is required to construe *pro se* petitions liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976)). 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. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir.

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[2] *See Simmons v. Cummins*, No. 2:10-CV-28-ID, 2010 WL 582091 (M.D. Ala. Jan. 15, 2010) (collecting cases holding that untimeliness determination is "on the merits" and next petition is successive).

[3] Prior to C/A No. 07-959, Petitioner also filed a § 2254 petition in C/A No. 04-1561, which was not adjudicated on the merits but was summarily dismissed without prejudice because Petitioner had not yet exhausted his state court remedies. Subsequent to C/A No. 07-959, Petitioner filed petitions raising the same claim, in C/A No. 11-1070 and C/A No. 11-2146, both of which were summarily dismissed without prejudice, as successive.

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1978) (citing *Rice v. Olson*, 324 U.S. 786, 791–92 (1945); *Holiday v. Johnston*, 313 U.S. 342, 350 (1941)).

When a federal court is evaluating a *pro se* petition, the petitioner's allegations are assumed to be true. *Hughes*, 449 U.S. at 10 (citing *Cruz v. Beto*, 405 U.S. 319, 322 (1972)). However, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990). Furthermore, the court is charged with screening Petitioner's lawsuit to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts; *see also* Rule 1(b) of Rules Governing Section 2254 Cases in the United States District Courts (a district court may also apply these rules to a habeas corpus petition not filed pursuant to § 2254). The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so; however, a district court may not rewrite a petition to include claims that were never presented, *Barnett v. Hargett*, 174 F.3d 1128 (10th Cir. 1999), construct the petitioner's legal arguments for him, *Small v. Endicott*, 998 F.2d 411 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

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BACKGROUND

Petitioner alleges that he is "currently on parole under the supervision of the South Carolina Parole Board" and that he "is not challenging the conviction but rather the exp[i]ration date of the sentence has expired." ECF No. 1, p. 13. Petitioner alleges that he is challenging his sentence on the ground that "according to the South Carolina Constitution the most time to be served on a life sentence is thirty (30) years" and that, when he was convicted and sentenced in 1961, "during that time there was no law which stated life was the entire life of a defendant." ECF NO. 1, p. 5. Petitioner also alleges that "the state has unconstitutional[ly] delayed hearing the Petitioner's most recent PCR for over two (2) years." ECF No. 1-1, p. 3. Petitioner asks that he "be released from the custody of the South Carolina Probation and Parole Board." ECF No. 1, p. 14.

The instant Petition includes none of the following details; however, United States Magistrate Judge Catoe's Report and Recommendation in C/A No. 07-959 (C/A No. 07-959, ECF No. 21), which was adopted and incorporated in United States District Judge R. Bryan Harwell's Order granting summary judgement to the respondent in *Erwin v. State of South Carolina*, C/A No. 6:07-959-RBH-WMC (D.S.C. 2008), ECF No. 23, reveals that, after serving approximately ten years of his sentence, Petitioner was granted parole on June 17, 1971, but this parole was revoked on August 20, 1975.[4] After serving an additional prison term of more than six years, Petitioner was again granted parole on

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[4] As the United States Court of Appeals for the Fifth Circuit commented when faced with similar circumstances, "The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time. Once was sufficient." *Aloe Creme Laboratories, Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970).

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January 20, 1982, but was declared an absconder on January 12, 1983. Petitioner's parole was again revoked on July 24, 1985, and Petitioner served an additional 22 years in prison until he was once again paroled, sometime in 2007. *See* C/A No. 07-959, ECF No. 21, p. 1-5. Thus, it appears that Petitioner may have served a total of more than 38 years in prison, due to his multiple parole violations and revocations. As noted above, Petitioner alleges that he is still on parole, which constitutes "custody" under 28 U.S.C. § 2254.[5] Petitioner asserted in C/A No 07-959, among other grounds, that "[the] statute of limitations ha[d] run out on []his life sentence" and that "at the time petitioner received his life sentence, the amount of time to be served on a life sentence was thirty years with some or most defendants actually serving 12 years." C/A No. 07-959, ECF No. 21, p. 5.

DISCUSSION

The Petition filed in this case should be summarily dismissed because it is successive and there is no indication that Petitioner requested and received permission from the United States Fourth Circuit Court of Appeals before he submitted it to this Court. If a petition is frivolous or patently absurd on its face, entry of dismissal may be made on the court's own motion without the necessity of requiring a responsive pleading from the government. *See Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970). Under 28 U.S.C. § 2244(b)(1), "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." The issue of successiveness of a habeas petition may be raised by the court

[5] *See Jones v. Cunningham*, 371 U.S. at 243 (1963).

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sua sponte. *Rodriguez v. Johnson*, 104 F.3d 694, 697 (5th Cir. 1997); *Latimer v. Warden*, NO. 6:10-721-JFA-WMC, 2010 WL 2720912 (D.S.C. July 08, 2010).

Chapter 153 of Title 28 of the United States Code provides a statutory framework for federal post-conviction relief from judgments of conviction entered in federal and state courts. Under this framework, individuals convicted of crimes in state courts seek federal habeas corpus relief through 28 U.S.C. § 2254. *See In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997). On April 24, 1996, the President of the United States signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA") which, in part, amended Chapter 153. The AEDPA effected a number of substantial changes regarding the availability of federal post-conviction relief to individuals convicted of crimes in federal and state courts. Of particular importance here are the provisions of the AEDPA codifying and extending judicially constructed limits on the consideration of second and successive applications for collateral relief. *See Felker v. Turpin*, 518 U.S. 651, 657 (1996). Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas corpus (or the equivalent thereof) without first receiving permission to do so from the appropriate circuit court of appeals. *See In re Vial*, 115 F.3d at 1194.[6] The

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[6] A petitioner may be able to present a claim for the first time in a successive habeas petition where the claim relies on a new rule of constitutional law, *see* 28 U.S.C. § 2244(b)(2)(A), or, if the claim is based on newly discovered evidence, where the petitioner can make a *prima facie* showing of both cause and prejudice within the meaning of § 2244(b)(2)(B)(i) and § 2244(b)(2)(B)(ii). *See Evans v. Smith*, 220 F.3d 306, 323 (4th Cir. 2000). Even if a petitioner's grounds for relief satisfy these strict requirements, the Fourth Circuit is the proper tribunal to make that decision when authorization is requested, not the district court. "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

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"gatekeeping" mechanism created by the AEDPA added 28 U.S.C. § 2244(b)(3)(A) to provide that, "*[b]efore* a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. (emphasis added).[7]

Hence, the threshold issue in this case is whether Petitioner has complied with the provisions of § 28 U.S.C. § 2244(b)(3)(A)-(E) and Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts, by obtaining authorization from the Fourth Circuit to file this action. *See In re Williams*, 364 F.3d 235, 238 (4th Cir. 2004), the "initial determination of whether a claim satisfies" the requirements of § 2244(b)(2) "must be made by a court of appeals"; *In re Fowlkes*, 326 F.3d 542, 544 (4th Cir. 2003) ("Since Fowlkes has previously filed a section 2254 motion, he may only file a successive section 2254 motion if he receives authorization from this court [(the Fourth Circuit Court of Appeals)] under the standard established in section 2244(b)(3)(C)."); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003) ("In the absence of pre-filing authorization [from the court of appeals], the district court lacks jurisdiction to consider an application containing abusive or repetitive claims."). It is clear on the face of the instant Petition that such a motion has not been filed in the Fourth Circuit by Petitioner, and such an order making the required determination to authorize this Court to consider this second § 2254 petition has not been issued by the Fourth Circuit. Consequently, this District Court has no jurisdiction to

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[7] Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts reiterates this requirement, stating that "[b]efore presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals, authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4)."

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consider the instant Petition and Petitioner is barred from attacking his state court murder conviction and sentence of life imprisonment in this Court.

Even if the instant petition were to be liberally construed as having been filed pursuant to 28 U.S.C. § 2241, in an attempt to challenge only the execution of Petitioner's sentence, not the validity of Petitioner's underlying conviction, the Petition would still be subject to summary dismissal. A state prisoner's sole federal remedies for challenging the constitutional validity of his or her custody are a writ of habeas corpus under 28 U.S.C. § 2254 and possibly, but less commonly, a writ of habeas corpus under 28 U.S.C. § 2241, either of which can be sought only after a petitioner has exhausted state court remedies with regard to the conviction and sentence. *See* 28 U.S.C. § 2254(b); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973) (exhaustion also required under 28 U.S.C. § 2241). Circuit courts are split on whether § 2254 or § 2241 is the proper statute under which a state inmate should proceed when challenging the manner of execution of a state sentence. The majority view is that § 2254 is the exclusive vehicle for habeas corpus relief by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying conviction. *See White v Lambert*, 370 F.3d 1002, 1005 (9th Cir. 2004), overruled on other grounds by *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010). *But see Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002) (approving of inmates proceeding under § 2241 to challenge execution of state court sentence). The Fourth Circuit noted the split of authority in *Gregory v. Coleman*, No. 06-6646, 2007 WL 570522 (4th Cir. Feb. 20, 2007), but does not appear to have taken a definitive stance to date. However, as noted above, under either § 2254 or § 2241, a petitioner must first fully exhaust his or her state remedies before filing a federal habeas

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petition. In this case, Petitioner alleges that he has a pending state court PCR application, C/A No. 2009-CP-46-04556, in York County Common Pleas Court, filed on October 19, 2009, in which he is challenging his parole on the same ground, *i.e.* that "the statute of limitations has run out on the sentence." ECF No. 1, p. 4, 12. The York County 16th Judicial Circuit Public Index confirms that Petitioner's § 2241-type challenge to the execution of his sentence is still pending.[8] *See* http://judicial.yorkcountygov.com/scjdpublicindex/PISearch.aspx?CourtType=G (last visited Mar. 1, 2012). Thus, it plainly appears on the face of the Petition that, if the instant claim were to be considered as a first-time assertion of a § 2241 "manner of execution" challenge to Petitioner's sentence, the Petition must still be summarily dismissed because Petitioner has not yet exhausted his state remedies.

RECOMMENDATION

Accordingly, it is recommended that the instant Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, be dismissed without prejudice and without issuance and service of process upon Respondent. *See Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 656 (4th Cir. 2006) (district courts are charged with the duty to independently screen initial filings and dismiss those actions that plainly lack merit without requesting an answer from the respondent). Petitioner's attention is directed to the important notice on the next page.

March 7, 2012
Greenville, South Carolina

s/ Kevin F. McDonald
United States Magistrate Judge

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[8] The Court may take judicial notice of factual information located in postings on government web sites. *See Williams v. Long*, 585 F.Supp.2d 679, 687-88 (D. Md. 2008) (noting that some courts have found postings on government web sites as inherently authentic or self-authenticating).

Ralph L. Erwin, Petitioner,

v.

State of South Carolina, Respondent.

C.A. No. 6:11-cv-02146-RBH

United States District Court, D. South Carolina, Greenville Division.

October 11, 2011

ORDER

R. BRYAN HARWELL, District Judge.

Petitioner, a state parolee proceeding *pro se* , brought this suit seeking relief pursuant to 28 U.S.C. § 2254. This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Kevin F. McDonald, made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local 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 this court. See *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 the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

Neither party has filed objections to the Report and Recommendation. In the absence of objections to the Report and Recommendation of the Magistrate Judge, this court is not required to give any explanation for adopting the recommendation. See *Camby v. Davis* , 718 F.2d 198, 199 (4th Cir. 1983). The Court reviews only for clear error in the absence of an objection. See *Diamond v. Colonial Life & Accident Ins. Co.* , 416 F.3d 310 (4th Cir. 2005) stating that "in the absence of a timely filed objection, a district court need not conduct *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.'" (quoting Fed.R.Civ.P. 72 advisory committee's note).

After a thorough review of the record in this case, the Court finds no clear error. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted and incorporated by reference. Therefore, it is

ORDERED that the § 2254 petition is dismissed *without prejudice* and without requiring Respondent to file an Answer or return.

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

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Ralph L. Erwin, # 051231, *aka* Ralph Leroy Erwin, Petitioner, vs. State of South Carolina, Respondent.	C/A No. 6:11-2146-RBH-KFM **REPORT AND RECOMMENDATION**

The petitioner, Ralph L. Erwin ("Petitioner"), a state parolee, files this action seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. Petitioner has filed two previous § 2254 petitions in this Court, which raise the same issues for review. Plaintiff's § 2254 petition in this case is successive.

DISCUSSION

Under established local procedure in this judicial district, a careful review has been made of the *pro se* petition pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996. Petitioner is a *pro se* litigant, and thus his pleadings are accorded liberal construction. *See Erickson v. Pardus*, 551 U.S. 89 (2007)(per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9-10 & n. 7 (1980)(per curiam); and *Cruz v. Beto*, 405 U.S. 319 (1972). Even under this less stringent standard, the petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990).

Petitioner raises two grounds in his petition, which are as follows: (1) "ex post

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facto violation - the statute of limitations has run out on sentence;" and (2) "cruel and unusual punishment - violation of 14th and 8th Amendments." ECF No. 1 at 5, 6. A prior § 2254 petition, filed by Petitioner on May 9, 2011, raises these same issues. The prior petition was dismissed because it is a successive petition. *See Erwin v. State*, C/A No. 6:11-1070-RBH (D.S.C. June 2, 2011). As discussed in this recent case, which was dismissed only two months prior to Petitioner filing the current case, Petitioner's grounds for relief have already been considered in Petitioner's § 2254 petition dismissed in 2008. *Id.*; *see also Erwin v. State*, C/A No. 6:07-959-RBH (D.S.C. February 28, 2008). Any subsequent § 2254 petition raising the grounds that have already been considered is a successive petition and must be dismissed pursuant to 28 U.S.C. § 2244(b)(1). The petition for habeas relief in this case should be dismissed because it is successive, for the same reasons as discussed in Petitioner's prior case, *Erwin v. State*, C/A No. 6:11-1070-RBH (D.S.C. June 2, 2011).

RECOMMENDATION

Accordingly, it is recommended that the § 2254 petition be dismissed *without prejudice* and without requiring Respondent to file an Answer or return. *See* Rule 4, Rules Governing Section 2254 Cases ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.").

s/ Kevin F. McDonald
United States Magistrate Judge

September 16, 2011
Greenville, South Carolina

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Ralph Leroy Erwin formerly #51231 a/k/a Ralph L. Erwin, Petitioner,

v.

State of South Carolina, Respondent.

C.A. No. 6:11-cv-01070-RBH

United States District Court, D. South Carolina, Greenville Division.

June 2, 2011

ORDER

R. BRYAN HARWELL, District Judge.

Plaintiff, a resident of Spartanburg, South Carolina, proceeding *pro se,* brought this suit pursuant to 28 U.S.C. § 2254. This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Kevin F. McDonald, made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local 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 this court. See *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 the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

Neither party has filed objections to the Report and Recommendation. In the absence of objections to the Report and Recommendation of the Magistrate Judge, this court is not required to give any explanation for adopting the recommendation. See *Camby v. Davis* , 718 F.2d 198, 199 (4th Cir. 1983). The Court reviews only for clear error in the absence of an objection. See *Diamond v. Colonial Life & Accident Ins. Co.* , 416 F.3d 310 (4th Cir. 2005) stating that "in the absence of a timely filed objection, a district court need not conduct *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.'" (quoting Fed.R.Civ.P. 72 advisory committee's note).

After a thorough review of the record in this case, the Court finds no clear error. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted and incorporated by reference. Therefore, it is

ORDERED that the Section 2254 Petition is dismissed *without prejudice* and without requiring Respondent to file an Answer or return.

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

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Ralph Leroy Erwin, *formerly* # 051231, *aka Ralph L. Erwin,*	)	**C/A No. 6:11-1070-RBH-KFM**
Petitioner,	)	**Report and Recommendation**
vs.	)	
State of South Carolina,	)	
Respondent.	)	

Background of this Case

Petitioner is a resident of Spartanburg, South Carolina. On March 24, 1961, in the Court of General Sessions for York County, Petitioner pled guilty to murder and was sentenced to life in prison. Petitioner is currently "on parole" with respect to his life sentence.

Petitioner raises two grounds in the Petition. Those grounds are: ***(I)*** statute of limitations has "run out" on sentence; and ***(II)*** cruel and unusual punishment. Petitioner discloses that he has a pending post-conviction case in the Court of Common Pleas for York County (Case No. 2009-CP-46-4556).

Discussion

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Petition and the Form AO 240 (Motion for Leave to Proceed *in forma pauperis*) pursuant to the procedural provisions of 28 U.S.C. § 1915 and the Anti-Terrorism and Effective Death Penalty Act of 1996. Petitioner is a *pro se* litigant, and thus

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his pleadings are accorded liberal construction. *See Erickson v. Pardus*, 551 U.S. 89 (2007)(*per curiam*); *Hughes v. Rowe*, 449 U.S. 5, 9-10 & n. 7 (1980)(*per curiam*); and *Cruz v. Beto*, 405 U.S. 319 (1972). Even under this less stringent standard, the Petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990).

With respect to his conviction and sentence, Petitioner's sole federal remedy is a writ of habeas corpus under 28 U.S.C. § 2241 or 28 U.S.C. § 2254, which can be sought only after he has exhausted his state court remedies. *See* 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270 (1971); and *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-491 (1973) (exhaustion required under 28 U.S.C. § 2241).

In *Ralph L. Erwin v. State of South Carolina*, Civil Action No. 6:07-0959-RBH-WMC, Petitioner on April 10, 2007, brought a habeas corpus action to challenge his conviction and sentence for murder entered in the Court of General Sessions for York County on March 24, 1961. In an order filed in Civil Action No. 6:07-0959-RBH-WMC on May 9, 2007, the Honorable William M. Catoe, United States Magistrate Judge, authorized service of process. On August 28, 2007, Petitioner filed his own motion for summary judgment.

After receiving an extension of time, the Office of the Attorney General of the State of South Carolina on August 31, 2007, filed a return, memorandum, and motion for summary judgment. Magistrate Judge Catoe on September 4, 2007, issued a *Roseboro*

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order to apprise Petitioner of dispositive motion procedure. *See Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). Petitioner's initial response to the motion for summary judgment was filed on the same day as the *Roseboro* order. Petitioner on September 20, 2007, filed his second response to the *Roseboro* order.

In a Report and Recommendation filed in Civil Action No. 6:07-0959-RBH-WMC on January 7, 2008, Magistrate Judge Catoe recommended that Respondent's motion for summary judgment be granted and that Petitioner's motion for summary judgment be denied. The parties in Civil Action No. 6:07-0959-RBH-WMC were apprised of their right to file timely written objections to the Report and Recommendation and of the serious consequences of a failure to do so. Copies of the Report and Recommendation were mailed by the Clerk's Office to Petitioner at his original address listed on the petition and later to his then-new address. No objections were filed.

In an Order filed in Civil Action No. 6:07-0959-RBH-WMC on February 28, 2008, the Honorable R. Bryan Harwell, United States District Judge, adopted the Report and Recommendation. No appeal was filed in Civil Action No. 6:07-0959-RBH-WMC.

The standard for determining whether a petition is successive appears in *Slack v. McDaniel*, 529 U.S. 473, 485-89 (2000) (to qualify as "successive" petition, prior petition must have been adjudicated on the merits). *See also Tyler v. Cain*, 533 U.S. 656 (2001) (Section 2244(b) applies when first habeas corpus petition adjudicated on the merits was filed prior to enactment of AEDPA and second petition was filed after enactment of AEDPA). Since Civil Action No. 6:07-0959-RBH-KFM was decided by summary judgment, the petition in the above-captioned case (Civil Action No. 6:11-1070-RBH-KFM) is successive.

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Ground I (statute of limitations has "run out" on life sentence) of the Petition in the above-captioned case was raised as Ground IV in the petition filed in Civil Action No. 6:07-0959-RBH-KFM. Moreover, although Ground II (cruel and unusual punishment) of the Petition in the above-captioned case was not enumerated as a separate ground in the petition filed in Civil Action No. 6:07-0959-RBH-KFM, Petitioner clearly had the opportunity to raise it in Civil Action No. 6:07-0959-RBH-KFM. *See Briley v. Booker*, 746 F.2d 225, 227 (4th Cir. 1984) (citing *Woodard v. Hutchins*, 464 U.S. 377 (1984)).

This court may take judicial notice of Civil Action No. 6:07-0959-RBH-KFM. *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'"); *Mann v. Peoples First National Bank & Trust Co.*, 209 F.2d 570, 572 (4th Cir. 1954); and *Long v. Ozmint*, 558 F. Supp. 2d 624, 629 (D.S.C. 2008).

When a petitioner has previously litigated a § 2554 petition, he or she must, "[b]efore a second or successive application permitted by this section is filed in the district court," . . . "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). *See also* Rule 9, Rules Governing Section 2254 Cases in the United States District Courts ("Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2243(b)(3) and (4).").

There is no indication in the present petition that Petitioner has sought leave from the United States Court of Appeals for the Fourth Circuit to file the Petition in the above-captioned case. Leave from the United States Court of Appeals for the Fourth Circuit

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is required under the Anti-Terrorism and Effective Death Penalty Act of 1996 for filers of successive § 2254 petitions. *In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1996) ("Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas corpus or § 2255 motion to vacate sentence without first receiving permission to do so from the appropriate circuit court of appeals.").

On December 1, 2009, the Rules governing Section 2254 and 2255 cases in the United States District Courts were amended to require that the district court issue or deny a certificate of appealability when a final ruling on a post-conviction petition is issued. *See* Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts: "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

Recommendation

Accordingly, it is recommended that the Section 2254 Petition be dismissed *without prejudice and without requiring Respondent to file an Answer or return. See* Rule 4, Rules Governing Section 2254 Cases in the United States District Courts ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."). It is also recommended that the District Court deny a Certificate of Appealability. Petitioner's attention is directed to the important notice on the next page.

May 11, 2011
Greenville, South Carolina

s/Kevin F. McDonald
United States Magistrate Judge

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

Ralph L. Erwin, #51231,	)	
	)	C.A. No.: 6:07-959-RBH
Petitioner,	)	
	)	
vs.	)	**ORDER**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge William M. Catoe, made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local 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 this court. See 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 the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

The Petitioner filed no objections to the Report and Recommendation. In the absence of objections to the Report and Recommendation of the Magistrate Judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

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After a thorough review of the Report and Recommendation and the record in this case, the court adopts Magistrate Judge Catoe's Report and Recommendation and incorporates it herein. It is therefore

ORDERED that the respondent's motion for summary judgment is hereby **GRANTED**. Further, the petitioner's motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

S/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Florence, South Carolina
February 28, 2008

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Ralph L. Erwin, #51231,

Petitioner,

vs.

State of South Carolina,

Respondent.

Civil Action No. 6:07-0959-RBH-WMC

REPORT OF MAGISTRATE JUDGE

The petitioner, a state prisoner proceeding *pro se*, seeks habeas corpus relief pursuant to Title 28, United States Code, Section 2254.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review posttrial petitions for relief and submit findings and recommendations to the District Court.

BACKGROUND OF THE CASE

The record reveals that the petitioner was confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. The petitioner is now residing in Spartanburg County, South Carolina on parole[1] for the subject charge. The petitioner was indicted for murder at the January 1961 term of General Sessions for the York County Grand Jury. He was represented by attorneys Harley Gaston, Jr. and Robert Hayes. On March 24, 1961, the petitioner pleaded guilty as indicted

[1]Parole satisfies the custody requirement of any habeas action.

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to murder. He was sentenced by the Honorable James M. Brailsford, Jr., to confinement for life. The petitioner did not appeal his guilty plea or sentence.

Subsequently, the petitioner was granted parole on June 17, 1971, and his parole was revoked on August 20, 1975. The petitioner was again granted parole on January 20, 1982, and was declared an absconder on January 12, 1983, at which time a warrant was issued for the petitioner's arrest and subsequent revocation action was taken. The petitioner was apprehended and his revocation was affirmed before the parole board on July 24, 1985.

The petitioner filed an application for post-conviction relief (PCR) on October 10, 1991. An evidentiary hearing was convened on October 21, 1992, at the York County Courthouse. The petitioner raised the following issues in his first PCR:

(1) Ex Post Facto violation in that:

a. The application of the 1986 S.C. Criminal Justice Improvement Act to Applicant's case results in Applicant only being eligible for parole every two years rather than every year; and

b. The application of the 1986 S.C. Criminal Justice Improvement Act to Applicant's case results in Applicant not being eligible to participate in the SCDC work release program.

The Honorable Thomas J. Ervin, Circuit Judge, denied and dismissed the petitioner's PCR application by written order in December 1992.

The petitioner then filed a timely appeal. The South Carolina Supreme Court granted the petitioner's petition for writ of certiorari and reversed the PCR court's determination that there was not an ex post facto violation in this case. *Erwin v. State*, Memorandum Opinion No. 93-MO-286 (filed August 20, 1993). The respondent filed a motion to stay remittitur, which was denied and the remittitur was issued October 8, 1993.

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The petitioner then filed a second PCR on October 22, 2003. The petitioner was represented by Pamela Pearson. In this second PCR application, the petitioner alleged he was being held in custody unlawfully for the following reasons (verbatim):

(1) I was convicted under a statute which is unconstitutional; and

(2) The statute of limitation has run out on the sentence.

The respondent made its return and motion to dismiss by way of motion for summary judgment on November 11, 2004. The second PCR court had before it the records of the York County Clerk of Court regarding the subject conviction; the petitioner's records from the South Carolina Department of Corrections; and the petitioner's prior PCR and PCR appeal records. The court granted a conditional order of dismissal dated December 29, 2004. The order was filed January 11, 2005.

In the order, the Honorable Lee Alford, Circuit Judge, granted the motion to dismiss and summarily dismissed the petitioner's second PCR application as successive to his prior application and found the allegations could have been raised in the petitioner's first application. Judge Alford also found the second PCR action should be summarily dismissed because it failed to comply with the one year statute of limitations for filing PCR actions in South Carolina. The petitioner had one year from the effective date of the statute of limitations, July 1, 1996, in which to file a PCR application, and the petitioner did not file the second PCR action until October 22, 2003. The petitioner was therefore time barred. The court gave the petitioner 20 days to show the court why the dismissal should not become final. Petitioner's counsel received the conditional order on January 20, 2005, and had until February 9, 2005, to submit reasons why the order should not become final.

On January 20, 2005, the petitioner filed a document captioned "Objections to State's Intent to Summarily Dismiss PCR Application." In this document, the petitioner argued he was not informed of any appeals process by his attorneys nor did he know of any

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appeals process. The petitioner also argued that the statute of limitations on a life sentence was 30 years at the time of his conviction. The petitioner argued that regardless of parole violations, his sentence should have run out at 30 years. The petitioner was served with the conditional order of dismissal on February 11, 2005.

On February 15, 2005, the petitioner's attorney, Pamela Pearson, filed an Amendment to Petition for Post -Conviction Relief. The petitioner alleged three grounds in this filing:

> (1) Denial of effective assistance of counsel - The applicant claims he was not effectively represented at his original plea of 1961;
>
> (2) Denied due process of law - The applicant claims the state made error in his case by not holding a competency to stand trial hearing; and
>
> (3) Denied due process of law -The State convicted the applicant with an indictment that was not considered a "true bill." (and) It does not have an indictment number on it.

On April 27, 2005, Judge Alford found that the petitioner had not shown sufficient reason in the intervening 20 days why the conditional order should not become final. Therefore, Judge Alford ordered that for the reasons stated in the December 29, 2004, order, the petitioner's second PCR application was denied and dismissed with prejudice. The final order was served on the petitioner's counsel on April 13, 2005. The final order was filed on May 6, 2005. The petitioner received notice of entry of the order on May 9, 2005. The petitioner timely appealed the dismissal of his second PCR application by filing his appeal on May 26, 2005.

The petitioner filed a writ of certiorari following the denial of his second PCR application. His appellate counsel in this collateral matter asserted to the South Carolina Supreme Court that the appeal was without merit and requested permission to withdraw from further representation. The petitioner filed a *pro se* petition. The South Carolina

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Supreme Court transferred the appeal to the South Carolina Court of Appeals. After careful consideration of the entire record as required by *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), the South Carolina Court of Appeals denied the petitioner's petition for writ of certiorari on November 29, 2006, and granted appellate counsel's request to withdraw. The order was filed the same day. The remittitur was filed January 9, 2007.

The petitioner was subsequently paroled and resides in Spartanburg County. Since the petitioner was sentenced to life in prison, he is still under supervision of the South Carolina Department of Probation and Parole.

In his petition now before this court, the petitioner makes the following allegations (verbatim):

> (1) Convicted under a statute which was declared to be unconstitutional.
>
> I was convicted under a statute that was declared unconstitutional by both the United States Supreme Court and the South Carolina Supreme Court. Furthermore, the statute took affect in 1962. I was convicted of it in 1961.
>
> (2) Denied due process of law by trial counsel.
>
> My original trial counsel advised me to plead guilty to murder where the only evidence against me was a statement I made stating the shooting was an accident. This type of advice was not in the realm of competent counsel.
>
> (3) Denied Due Process of Law
>
> The State made an error in not holding a competency to stand trial hearing, after evaluation was ordered by Judge James E. Brailsford, Jr. It is my belief that the Petitioner was not competent at the time of the hearing in 1961. See Attached Order
>
> (4) Statute of limitations has run out on this life sentence.
>
> At the time petitioner received his life sentence, the amount of time to be served on a life sentence was thirty years with some or most defendants actually serving 12 years.

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On August 28, 2007, the petitioner filed a motion for summary judgment. The respondent filed its opposition to the motion on September 4, 2007. On August 31, 2007, the respondent filed a motion for summary judgment. By order filed September 4, 2007, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the petitioner was advised of the summary judgment dismissal procedure and the possible consequences if he failed to adequately respond to the motion. The petitioner filed his opposition to the motion for summary judgment on September 20, 2007.

APPLICABLE LAW

Title 28, United States Code, Section 2254(d) and (e) provides in pertinent part as follows:

> (d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (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.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> Title 28, United States Code, Section 2244(d), provides:
>
> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The 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 shall not be counted toward any period of limitation under this subsection.

ANALYSIS

The respondent first argues that the petition is untimely under the one-year statutory deadline set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The one-year time period runs from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The petitioner's convictions became final before the enactment of the AEDPA; accordingly, the limitations period began to run with the AEDPA's effective date, April 24, 1996. *See Hernandez v. Caldwell*, 225 F.3d 435, 439 (4th Cir. 2000). The limitations period expired on April 24, 1997, unless the period was at any time tolled for any properly filed state PCR application. 28 U.S.C. § 2244(d)(2).

The petitioner filed his first and only post-AEDPA PCR action on October 22, 2003, over six years and five months after the statute of limitations expired. Assuming that

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this PCR petition tolled the period of limitations, the statute would have been tolled from October 22, 2003, until January 9, 2007, the date of the filing of the remittitur by the South Carolina Court of Appeals. Another three months passed between this date and the filing of the federal petition in this court on April 10, 2007.[2] Accordingly, even assuming that the petitioner's successive and time-barred post-AEDPA PCR action could toll the statute of limitations, which it could not, some six years and eight months of non-tolled time lapsed before the federal habeas petition was filed. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (Time-barred applications for state collateral review are not "properly filed" applications that trigger statutory tolling.).

Furthermore, the petitioner has offered no valid explanation as to why the statute of limitations should be equitably tolled. In *Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2000), the Fourth Circuit Court of Appeals described the analysis of a claim of equitable tolling as follows:

> "As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line-rules." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir.1999). The doctrine has been applied in "two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time." *Alvarez-Machain v. United States*, 107 F.3d 696, 700 (9th Cir.1996) (citation omitted). But any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where--due to circumstances external to the party's own conduct--it would be unconscionable to enforce

[2]It does not appear that the petitioner was incarcerated at the time of the filing of the petition. Accordingly, he would not be entitled to a *Houston v. Lack*, 487 U.S. 266, 275-76 (1988), delivery date.

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> the limitation period against the party and gross injustice would result.

Id. at 330. The petitioner has failed to put forth any facts supportive of equitable tolling.

Based upon the foregoing, the petition was not timely filed, and it is barred by Section 2244(d)(1).

CONCLUSION AND RECOMMENDATION

Being "mindful that Congress enacted §2244(d) 'with the ... purpose of curbing the abuse of the statutory writ of habeas corpus,'" *Allen v. Mitchell*, 276 F.3d 183, 186 (4th Cir. 2001) (quoting *Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001)), this court concludes that the petition in this case was untimely filed, even when properly tolled.[3]

Wherefore, based upon the foregoing, it is recommended that the respondent's motion for summary judgment be granted.[4] *See Rouse v. Lee*, 339 F.3d 238, 257 (4th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004) (affirming dismissal of petition filed one day late). Further, it is recommended that the petitioner's motion for summary judgment be denied.

s/William M. Catoe
United States Magistrate Judge

January 7, 2008

Greenville, South Carolina

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[3]The decision of the Fourth Circuit Court of Appeals in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), is inapposite on the facts.

[4]As this court has recommended dismissal based on statute of limitations grounds, the respondent's other grounds for dismissal will not be addressed.

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STATE of South CAROLINA
County of York

Ralph L. Erwin #051231
Applicant,

V.

S.C. Dept. of Probation, Parole & Pardon Board & STATE of South CAROLINA
Respondents.

South CAROLINA TORT CLAIMS ACT

CASE No: 2016CP46-2414

COMPLAINT
False Imprisonment

STATEMENT of the CASE

The TORT of False Imprisonment is ANOTHER LINEAL descendent of the ACTION of TRESPASS. (Prosser Section 11). The South CAROLINA Supreme COURT HAS STATED THAT TO ESTABLISH A CAUSE of ACTION FOR False Imprisonment Applicant MUST PROVE THAT: (1) defendant restrainded Applicant; (2) The restraint WAS intentional; and (3) The restraint WAS un LAWful. (32 AM. Jur. 2D False Imprisonment Section 12) 2007).

The Applicant in this Particular Matter is going to Attempt To do Just That As Follows:

FACTS #1

Hopefully For Sake of Time The Applicant has Forwarded A Copy of his Chronology From Another Case And has enJoined it Alone with his Complaint. Applicant Ralph L. Erwin, In 1961 Plead guilty To Murder With the Recomendation of Mercy of the Court. Applicant WAS Sentenced To Life Imprisonment With Parole being A Constitutional Part of the Applicants Sentence. Applicant Now resides AT 140 W. Centennial St, Apt. #38-B, Spartanburg S.C. 29303 where he has been under the Jurisdiction of the S.C. Dept of Parole, Probation + Pardon Services Since 2007 Till Present. When Applicant WAS Sentenced he WAS NOT Sentenced To Life Without Parole. (See Exhibit #1)
In FACT when Applicant WAS sentenced he WAS Sentenced As A Non-Violant

offender. (See Also Exhibit #2 Institutional Record). Since The S.C. Dept. of Probation, Parole, & Pardon Services have Applicant on Parole it is obvious he is being Restrained. The Attorney General Alone with the S.C. Dept. of Probation, Parole & Pardon Service Are Saying The Applicant is on Parole for the Balance of his entire Life which is incorect According To Statute. This ACT establishes their ACTIONS Are intentional.

FACTS #2

When Applicant Received his Life Sentence In 1961 A Life Sentence WAS basically An Indeterminate Sentence. The South Carolina General Assembly Created the Parole Board In 1942. (See Exhibit #3-A) Act No. 562. During this Same year the General Assembly Needed To determine The Amount of years A Life Term would be For Parole Purposes since A Person had To do A Certain Amount of years

To be Considered For Parole. IT WAS determined AT That time That A Life Sentence WAS Considered The Same As A thirty (30) year Sentence. (See Exhibit #3-B Attorney General Annual Report To The General Assembly Addressing This Same issue, not only To The Parole Board but, Also To The General Assembly).

No where in This Act is it saying That Life means Till the death of the defendant. No other Authority have Jurisdiction To Suspend That Law besides The Legislative Committee.

As of The Present date no other Statute became effective To change Section 11 of the Act Creating the Parole Board besides Section 16-3-20 which does state That Life means Till death. However, the Applicant in This Case had Already served thirty years before This Act became effective.

Moreover, See What Our Very own South Carolina Supreme Court has Compared A Thirty Year Sentence To. (See Exhibits

4-A and 4-B) Page 41-42).

Conclusion

The essence of A Claim of False Imprisonment is The unLawful interference with The Plaintiffs Personal Liberty, The Foundation of The Cause of Action is The Right which even A guilty man has To be Protected Against Any unLawful restraint of his Personal Liberty. Plaintiff in This Action States That he has been unlawfully Restrained of his Liberty For The Past Twenty (24) years by The S.C. Dept. of Probation, Parole and Pardon Services And the State of South Carolina. For All The Reasons Stated Aboue The Applicant In this Case would Ask this Court To Award him A Total of $3,000.000.00 in Total For Pain and Suffering, emotional distress, Loss of Life, And $3,000.000.00 For Punitive DAMAges. The Applicant would Also Ask this Court To Award him $400.00 he had To Pay For A Psychological examination by The S.C. Parole Board.

And Also monies he has Paid To the Parole Board For Supervision Fees Since he WAS LAST Paroled in 2007. Finally As this Court Can Witness From the Financial Summons From the defendants ATTACHED To this Complaint, there is no doubt in the Plaintiffs mind that this is the Purpose of these Unconstitutional Acts That they Should pay For because they Are definately intentional. For All the Reasons STATED Above the Applicant Pray that he will be And should be AWARDED his Request in this MATTER.

Ralph L. Erwin

Ralph L. Erwin #051231
140 W. Centennial St.
Apt. #38-B
Spartanburg, S.C.
29303
Ph. # 864-504-4704

August 12 2016

Sworn to And Subscribed before me this 12 day of August, 2016.

Cynthia E Sapp
Notary Public

My Commission Expires April 27, 2025

CYNTHIA E. SAPP NOTARY PUBLIC EXPIRES APRIL 27, 2025 MY COMMISSION SOUTH CAROLINA

WITNESSES

Clifton Fields

Elizabeth Hicks

Ed Groves

Grover Noe S

Ebert Allison S

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VERDICT

Guilty with recommendation to the mercy of the court.

Charlie W. Preslar
Foreman

The State of South Carolina,

County of YORK

COURT OF GENERAL SESSIONS

JANUARY Term, 19 61

THE STATE

vs.

RALPH LEROY ERWIN

INDICTMENT FOR MURDER

GEORGE F. COLEMAN
Solicitor

True Bill

Tom Harvey

Foreman of Grand Jury

I (We) Ralph Leroy Erwin hereby appear in my (our) own proper person(s) and plead guilty to the within indictment or to

Witness:

Tom P. Williams
C. C. G. PS. and G. S.

Ralph Leroy Erwin

Bin Arthur

The Sentence of the Court is that the Defendant(s) Ralph Leroy Erwin be confined at hard labor ~~upon the Public Works of York County for a period of~~ in the State penitentiary for the term of his natural life ~~or for a like period in the State Penitentiary, or pay a fine in the amount of~~

___ day of ___ 19___

Presiding Judge

EXHIBIT #65

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The State of South Carolina,

County of YORK

S. 56—INDICTMENT FOR MURDER

At a Court of General Sessions, begun and holden in and for the County of YORK in the State of South Carolina, YORK COUNTY Court House, in the County and State aforesaid, on the FIRST Monday of JANUARY in the year of our Lord one thousand nine hundred and SIXTY-ONE.

The Jurors of and for the County aforesaid, in the State aforesaid, upon their oath, Present: That RALPH LEROY ERWIN, late of the County and State aforesaid,

on the 24th day of December in the year of our Lord one thousand nine hundred and sixty with f and arms, at York County Courthouse in the County York and State of South Carol in and upon one Mrs. Eula Fields, late of the County and State aforesaid,

feloniously, wilfully and of his malice aforethought, did make an assault, and that the said Ralph Leroy Erwin

her the said Mrs. Eula Fields then and there felonio wilfully and of his malice aforethought with a loaded shotgun shoot, hit, penetrate and wound; giving to the Mrs. Eula Fields thereby in and upon the body, head and limbs of her the said Mrs. Eula Fields

CERTIFIED
CLERK

030 67

one mortal wound; of which said mortal wound the said Mrs. Eula Fields did then and there die on the 24th day of December, 1960 in the County of York, State of South Carolina,

CERTIFIED TRUE COPY
2003 OCT 23 AM 11:18
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

And so the Jurors aforesaid, upon their oath aforesaid, do say that the said Ralph Leroy Erwin

~~him~~ her the said Mrs. Eula Fields then and there in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the form of the Statute in such case made and provided, and against the peace and dignity of the State.

Geo F Coleman
Solicitor.
GEORGE F. COLEMAN

029 68

STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS

COUNTY OF YORK

The sentence of the court is that you, Ralph Leroy Erwin, be confined at hard labor in the State Penitentiary during your whole life time.

JAMES M. BRAILSFORD, JR.
Presiding Judge
6th Judicial Circuit

March 24, 1961
York, S. C.

Exhibit #2

69

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 02/15/12
OMCOMITA RELEASE DATE SCREEN C023981
SCDC# > 51231 LOC: SPARTANBURG
ERWIN, RALPH LEROY SCDC CLASSIFICATION..: NON-VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY..: N
SEXUAL PREDATOR..:
DNA STATUS.....: COMPLETED
GPS REQUIREMENT..: N
PREA DECISION....:

CURRENT SENTENCE: CONSECUTIVE SENTENCE ..:
LIFE CURRENT SENT START DATE: 03/24/1961
PROJECTED COMPLETION DATES
MAXOUT DATE .....: 99/99/9999 CURRENT EWC .:
YOA SIX YEAR DATE: CURRENT EEC .:
INITIAL PAROLE DATE: 01/16/1979 NEXT PAROLE HEARING DATE: 02/07/2008

TOTAL GT DAYS EARNED .....: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ..: 000000 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS ....: 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS .: 000
TOTAL SERVICE TIME EARNED ..: 000000

PFKEYS: 5:HISTORY OF DATE CHANGES

4-© 1 Sess-1 167.7.50.33 SCDC1424 3/1

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SPARTANBURG COUNTY
2014 AUG 27 AM 9:24
M. HUREL BLACKLEY

70

RUTN, RALPH LEROY   FBI # 787693D   SID# SC00076575   SCDC # 51231 (CONTINUED)

6/22/78	CENTRAL	INCARCERATED	RETURN FROM ESCAPE
4/ 7/77	ESCAPES	ESCAPED-AWOL	AWOL-ESCAPE
1/28/76	SCCJA	INCARCERATED	ADMINISTRATIVE
9/ 4/75	KIRKLAND	INCARCERATED	ADMINISTRATIVE
8/22/75	MIDLANDS R&E	INCARCERATED	PAROLE VIOLATOR
6/16/71	UNK	PAROLE	PAROLE BOARD ACTION
1/ 4/71	STEVENSON	INCARCERATED	ADMINISTRATIVE
4/ 9/70	MANNING	INCARCERATED	ADMINISTRATIVE
2/21/70	CENTRAL	INCARCERATED	ADMINISTRATIVE
10/ 2/69	STEVENSON	INCARCERATED	ADMINISTRATIVE
7/20/67	MANNING	INCARCERATED	ADMINISTRATIVE
6/27/67	CENTRAL	INCARCERATED	ADMINISTRATIVE
5/30/67	MACDOUGALL CORR	INCARCERATED	ADMINISTRATIVE
5/18/67	CENTRAL	INCARCERATED	ADMINISTRATIVE
3/10/66	MANNING	INCARCERATED	ADMINISTRATIVE
12/20/65	CENTRAL	INCARCERATED	ADMINISTRATIVE
8/19/63	MANNING	INCARCERATED	ADMINISTRATIVE
3/25/61	CENTRAL	INCARCERATED	ADMINISTRATIVE

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
CUSTODIAL WORKER	08/24/06	3/15/ 7	RELEASED/PAROLED	YES
CUSTODIAL WORKER	10/11/05	8/23/ 6	INMATE REQUEST	YES
FURNITURE ASSEMBLER	05/28/04	10/ 6/ 5	INSTIT TRANSFER	YES
FURNITURE ASSEMBLER	06/14/03	4/ 7/ 4	INSTIT TRANSFER	YES
CHIEF CLERK	06/24/98	6/12/ 2	INSTIT TRANSFER	YES
CUSTODIAL WORKER	07/10/97	6/23/98	INMATE REQUEST	YES
CUSTODIAL WORKER	09/19/96	7/ 9/97	REMOVAL FROM 7 DAY CREDIT	YE7
SENIOR CUSTODIAN	09/07/95	8/14/96	INSTIT TRANSFER	YE7
SENIOR CUSTODIAN	06/16/94	8/31/95	INSTIT TRANSFER	YES
SANDBLASTER	10/22/92	6/15/94	LATERAL TRANSFER	YES
SANDBLASTER	06/26/92	10/19/92	COURT	YES
FOOD SERVICE AIDE	09/16/89	3/ 7/90	INSTIT TRANSFER	YE7
SENIOR COOK	05/18/89	9/15/89	DEMOTION	YE7
BAKER	04/05/89	5/17/89	PROMOTION	YE7
FOOD SERVICE AIDE	03/08/89	4/ 4/89	PROMOTION	YE7
SENIOR BAKER	06/17/88	3/ 3/89	INSTIT TRANSFER	YE7
BAKER	05/25/88	6/16/88	PROMOTION	YE7
FOOD SERVICE AIDE	02/03/88	5/24/88	INSTIT TRANSFER	
GENERAL WORKER	08/12/87	2/ 2/88	INMATE REQUEST	
SENIOR COOK	06/18/86	8/11/87	INMATE REQUEST	
FOOD SERVICE AIDE	09/13/85	6/17/86	PROMOTION	
CUSTODIAL WORKER	01/16/81	1/20/82	RELEASED/PAROLED	
SENIOR COOK	03/19/80	12/ 3/80	INSTIT TRANSFER	
CUSTODIAL WORKER	05/11/79	3/18/80	INSTIT TRANSFER	
TITLE CHANGED TO 053	10/05/78	5/10/79	TERM CODE CHG TO 13	

HISTORY OF EARNED EDUCATION CREDITS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON

NO SCHOOL ASSIGNMENTS*

********* END OF REPORT *********

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SPARTANBURG COUNTY
FL. HOPE BLACKLEY

71

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 02/15/12

C0239

TRUTH,RALPH LEROY FRI # 7R7A920 STD# SC00074575 SCDC # 51231
OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE
INSTITUTION ..: SPARTANBURG CO
SR RITY/CUST.: 2 MINIMUM IN
CURR INCARC SENT...:999 YRS 0 MOS 0 DYS
CENTRAL MONITORING.: NO
SOCIAL SECURITY #...[redacted]4099

DORM.....: 0000
RACE....:B SEX...:M
PROJ MAXOUT DATE: 99/99/9999
PROJ PAROLE DATE: 02/07/2008
EDUC JOB..: NO CURRENT JOB
EDUC PGM.: NO CURR EDUC PROGRAM
EDUC LEVEL: 0 EEC LEVEL:
ASSIGNMENT..: BUILDING #1

PREVIOUS NUMBERS:
** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE YRS	MOS	DYS	COUNTY	SENTENCE START	V/NV	CATEGORY
ESCAPE	1	0	0	RICHLAND	11/ 1/1978	V	4
MURDER BEFORE 1977, JUNE	999	99	999	YORK	3/24/1941	V	5

PRIOR COMMITMENTS OVER 90 DAYS:
11/13/77 *POSSESS STOLEN PROPERTY 0 YRS 6 MOS 0 DYS
4/ 3/73 *BREAK-ENT W/INTENT-STEAL 7 YRS 0 MOS 0 DYS
DETAINERS (HOLD,WANTED,NOTIFY):
NO DETAINERS
NO DETAINERS
ESCAPES:
1/13/83 OTHER ESCAPE RELATED CODE NOT IN TABLE
4/ 7/77 ESCAPE CLASS II
CRIMINAL CHARGES:
NO CRIMINAL CHARGES WHILE IN CUSTODY
NO CRIMINAL CHARGES HISTORY
ASSAULTIVE DISCIPLINARIES:
NO ASSAULTIVE DISCIPLINARY HISTORY
NON-ASSAULTIVE DISCIPLINARIES:
NO NON-ASSAULTIVE DISCIPLINARY HISTORY
HISTORY OF MOVEMENTS:

3/15/ 7	SPARTANBURG CO	PAROLE	PAROLE BOARD ACTION
3/ 7/ 7	ALLENDALE	INCARCERATED	ADMINISTRATIVE
2/ 7/ 7	RIDGELAND	INCARCERATED	COURT/PAROLE HEARING VTA
3/15/ 6	ALLENDALE	INCARCERATED	ADMINISTRATIVE
2/15/ 6	RIDGELAND	INCARCERATED	COURT/PAROLE HEARING VTA
10/ 6/ 5	ALLENDALE	INCARCERATED	ADMINISTRATIVE
6/12/ 2	PERRY	INCARCERATED	ADMINISTRATIVE
8/14/96	ALLENDALE	INCARCERATED	ADMINISTRATIVE
8/31/95	TRENTON	INCARCERATED	ADMINISTRATIVE
10/23/92	TYGER RIVER LOW	INCARCERATED	RETURN FROM COURT
10/19/92	YORK CO	AUTH ABSENCE (AWL)	TO COURT
6/19/92	TYGER RIVER LOW	INCARCERATED	ADMINISTRATIVE
6/12/92	YORK CO	AUTH ABSENCE (AWL)	TO COURT
3/ 7/90	TYGER RIVER LOW	INCARCERATED	ADMINISTRATIVE
3/ 3/89	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
5/24/88	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
8/30/85	CENTRAL	INCARCERATED	ADMINISTRATIVE
7/24/85	MIDLANDS RAP	INCARCERATED	PAROLE VIOLATOR
7/24/85	RICHLAND CO	PAROLE	RETURN FROM ABSCONTION
1/13/83	UNK	DEAD TIME	WARRANT ISSUED
1 0/82	NORTH CAROLINA	PAROLE	PAROLE BOARD ACTION
12/ 6/81	CENTRAL	INCARCERATED	ADMINISTRATIVE
12/ 3/80	MIDLANDS RAP	INCARCERATED	DISCIPLINARY
3/19/80	FAIRFIELD CO DF	INCARCERATED	ADMINISTRATIVE

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CLERK OF COURT
SPARTANBURG COUNTY
2014 AUG 27 AM 9:24
M. NIKKI BLACKLEY

Exhibit #3-A

until the sum of Seven Thousand,Five Hundred ($7,500.00) Dollars, or a sum similar to the one to be borrowed, is available as a donation from the P.W.A. or some other Governmental Agency. The note so executed is hereby secured by one half (½) of one (1) mill of the millage fixed in Section 6 of Section 1 of the Act herein amended. This one half (½) mill when collected by the Treasurer of Sumter County shall be applied by him as collected at the end of each month upon the payment of the said note, or notes."

SECTION 2: Repeal.—All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 3: Time effective.—This Act shall take effect upon its approval by the Governor.

Approved the 6 day of Oct 1941

(R547, S141, H444, of 1941) **No. 562**

AN ACT to Provide for the Suspension of Sentences and Use of Probation in Criminal Cases; to Provide for the Creation of the South Carolina Probation and Parole Board and to Prescribe Its Duties and Powers and the Terms of Office and Compensation of the Members; to Provide for the Appointment of a Supervisor of Probation and Parole and Probation Officers and to Prescribe Their Powers, Duties, Terms of Office and Compensation, and to Devolve the Powers, Duties and Authorities of the Pardoning Board of This State Upon the South Carolina Probation and Parole Board.

BE IT ENACTED by the General Assembly of the State of South Carolina:

SECTION 1: After conviction or plea except where punishment is death or life imprisonment judges of courts of record with criminal jurisdiction may suspend sentence and place defendant on probation or may impose fine and place defendant on probation.—That after conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of any Court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant in probation.

SECTION 2: Probation officer report on offenses and defendants.—That, when directed by the Court, the probation officer shall fully investigate and report to the Court in writing the circumstances of the offense and the criminal record, social history, and present condition of the defendant, including, whenever practicable ,the findings of a physical and mental examination of the defendant. When the services of a probation officer are available to the Court, no defendant charged with a felony, and, unless the Court shall direct otherwise in individual cases, no other defendant shall be placed on probation or released under suspension of sentence until the report of such investigation shall have been presented to and considered by the Court.

SECTION 3: Conditions of probation.—That the Court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following or any other: That the probationer shall:

(a) Refrain from the violation of any State or Federal penal laws;

(b) Avoid injurious or vicious habits;

(c) Avoid persons or places of disreputable or harmful character;

(d) Permit the probation officer to visit at his home or elsewhere;

(f) Work faithfully at suitable employment as far as possible;

(h) Pay a fine in one or several sums as directed by the Court;

(j) Support his dependents;

(k) Follow the probation officer's instructions and advise regarding recreational and social activities.

SECTION 4: Period of probation or suspension of sentence—discharge—arrest probationers—revoke dispose of case.—That the period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the Judge of the Court and may be continued or extended within the above limit. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the Court shall by order duly entered discharge the defendant. At any time during the period of probation or suspension of sentence, the Court may issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer. In case of an arrest the arresting

officer shall have a written warrant by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation and said statement shall be warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until said probationer can be brought before the Judge of the Court. Such probation officer shall forthwith report such arrest and detention to the Judge of the Court and submit in writing a report showing in what manner the probationer has violated his probation. Upon such arrest, the Court shall cause the defendant to be brought before it and may revoke the probation or suspension of sentence and shall proceed to deal with the case as if there had been no probation or suspension of sentence.

SECTION 5: The South Carolina probation and parole board—pay—term—appointment—vacancy—duties and powers of pardoning board devolved on.—The South Carolina Probation and Parole Board shall consist of one member from each Congressional District of the State, and they shall serve without salary but shall receive actual traveling expenses and Ten ($10.00) Dollars per day while in the performance of their official duties. The terms of office of the members of said Board shall be for a period of four (4) years and until their respective successors are appointed and qualified. The members of said Board shall be appointed by the Governor with the advice and consent of the Senate. All vacancies occurring among the members of said Board shall be filled as soon as practicable by the Governor by appointment with the advice and consent of the Senate for the unexpired term. The said Board shall elect annually between January 15th and January 30th, a Chairman from its members. All powers, duties and authorities of the Pardoning Board of this State are hereby devolved upon the said The South Carolina Probation and Parole Board.

SECTION 7: Supervisor of probation and parole—assistants.—That the said South Carolina Probation and Parole Board is authorized and empowered to appoint a Supervisor of Probation and Parole, who shall serve as its executive secretary, and shall receive a salary of not less than Three Thousand Six Hundred ($3,600.00) Dollars nor more than Four Thousand ($4,000.00) Dollars per annum, payable semi-annually, and shall also be paid traveling and other necessary expenses in the performance of his official duties, and who shall give his entire time to the work. When the necessity of the service requires, it shall appoint one or more assistants and fix their salaries.

The person appointed as Supervisor of Probation and Parole shall be qualified by academic preparation equivalent to that represented by graduation from an institution of recognized standing, or (2) by skill and any equivalent combination of training and experience.

SECTION 8. Supervisor—appoint probation officers and clerical help—duties and powers.—That the Supervisor of Probation and Parole shall appoint, subject to the approval of the South Carolina Board of Probation and Parole, such probation officers as are required for service in the State, and such clerical assistance as may be necessary.

The Supervisor of Probation and Parole shall direct the work of the probation officers appointed under this Act. He shall consult and co-operate with the Courts and institutions in the development of methods and procedure in the administration of probation and parole; and shall arrange conference of probation officers and judges. He shall make an annual written report with statistical and other information to the South Carolina Probation and Parole Board and the Governor.

SECTION 9: Probation officers — work under supervisor — salaries—expenses—oath.—That probation officers appointed under this Act shall be assigned to serve in such Courts or districts or otherwise as the Supervisor of Probation and Parole may determine. They shall be paid salaries, to be fixed by the South Carolina Board of Probation and Parole not to exceed Two Thousand One Hundred ($2,100.00) Dollars per annum, payable semi-monthly, and shall also be paid traveling and other necessary expenses incurred in the performance of their official duties as probation officers when such expense accounts have been authorized and approved by the Supervisor of Probation and Parole. Each person appointed as a probation officer shall take an oath of office as required by State officers, and shall be noted of record by the Clerk of Court.

SECTION 10: Probation officers—duties and powers.—That a probation officer shall investigate all cases referred to him for investigation by the Judges of the Courts or by the Supervisor of Probation and Parole, and shall report in writing thereon. He shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation or parole under

his supervision byvisiting, requiring reports, and in other ways, and shall report thereon in writing as often as the Court or Supervisor of Probation and Parole may require. Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the Court or the Supervisor of Probation and Parole, to aid and encourage persons on probation or parole to bring about improvement in their conduct and condition. Such officer shall keep detailed records of his work; shall make such reports in writing to the Supervisor of Probation and Parole as he may require; and shall perform such other duties as the Supervisor of Probation and Parole may require. A probation officer shall have, in the execution of his duties, the powers of arrest and to the extent necessary for the performance of his duties the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State. In the performance of his duties of probation and parole investigation and supervision he shall be regarded as the official representative of the Court and the South Carolina Board of Probation and Parole.

SECTION 11: Cases board act on.—That in all cases cognizable of this Act, the South Carolina Probation and Parole Board, with the approval of the Governor, may upon ten days' written notice to the Solicitor and Judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the State Penitentiary, in any jail or upon the public works of any County, who if sentenced for less than life, shall have served at least one-third of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if sentenced for life, shall have served five years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who, if he is a first offender and is sentenced for an indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good behavior or who, if sentenced for more than one year, shall have served one-third of the term for which he was sentenced, not deducting any allowance of time for good behavior. That, after a prisoner has served one-third of his sentence, if such sentence exceed one year, it is made mandatory that the Board review his case, irrespective of whether or not any applicaation has been made therefor, for the purpose of determining whether or not any such prisoner is entitled to any of the [illegible] provided for in this Act.

SECTION 12: Prisoners parole—conditions—board determine violations—no arguments or appearances—effect of cancelling parole.—That the South Carolina Probation and Parole Board is required to carefully consider the record of the prisoner, before and after imprisonment, and, no such prisoner shall be paroled until it shall appear, to the satisfaction of said Board, that the prisoner has shown a disposition to reform; that, in the future, he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interests of society will not be impaired thereby; and that suitable employment has been secured for him; and the paroled prisoner, shall as often as may be required, render a written report to said Board giving such information as may be required by the Board which shall be approved by the person in whose employment the prisoner may be at the time.

That the South Carolina Probation and Parole Board shall issue an order in quadruplicate signed by each member of the Board which, if countersigned by the Governor (and the acceptance of the prisoner noted thereon by his signature) directing the officer, officers or Board having the supervision and control of the prisoner to forthwith release the prisoner on parole, and the prisoner shall serve the remainder of his term of imprisonment up to the maximum, subject to the conditions and restrictions hereinafter imposed. Every such paroled prisoner shall remain in the legal custody of the Board and may at any time, on the order of the Board, be reimprisoned in said prison or such other jail or camp as may be designated by the said Board.

That the South Carolina Probation and Parole Board shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed.

That the said Board shall not permit arguments or appearances, nor shall it have any other hearing than upon the records prescribed by this Act.

That, upon failure of any prisoner released on parole under the provisions of this Act, to do, or refrain from doing, any of the things set forth and required to be done by and under the terms of said parole, the said order of parole shall be cancelled, and the prisoner shall thereupon and thereafter have the status of an escaped convict; be arrested without a warrant, and be required to serve the part of the sentence that shall remain unserved, and be ineligible to parole thereafter under this Act.

SECTION 13: Term of parole—prisoners released on good behavior.—That any prisoner hereafter sentenced, who may be paroled under authority of this Act, shall continue on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is or may hereafter be provided for by law.

Any prisoner who shall have served the term or terms for which he shall hereafter be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole and shall be subject to all provisions of law relating to the parole of prisoners under this Act until the expiration of the maximum term or terms specified in his sentence; *Provided,* That this Section shall not operate to prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

SECTION 14: Public agencies and officials cooperate—supervisor make surveys—records of prisoners.—That it is hereby made the duty of every city, county or State official or department to render all assistance and cooperation within his or its fundamental power which may further the objects of this Act. The South Carolina Probation and Parole Board, the Supervisor of Probation and Parole, and the probation officers are authorized to seek the cooperation of such officials and departments, and especially of the sheriffs, jailers, magistrates, police officials and institutional officers. The Supervisor of Probation and Parole is authorized to conduct surveys of the State Penitentiary, county jails and camps and shall obtain such information as will enable the Board to intelligently pass upon all applications for parole. It shall be the duty of the Superintendent of the State Penitentiary, wardens, jailers, sheriffs, supervisors or such officer in whose control a prisoner may be committed, to aid and assist the Supervisor of Probation and Parole and the probation officers in such surveys.

That it shall be the duty of the Superintendent of the State Penitentiary, where the prisoner is confined in the State Penitentiary; or to the sheriff of the county, where the person is confined in county jail; of the county Supervisor, or the chairman of the Governing Board of the county; if there be no County Supervisor, where the prisoner is confined upon the chaingang of any county, to keep a record of the industry, habits and deportment of any such prisoner, as well as any other information which may have theretofore been requested of such officer by the South Carolina Probation and Parole Board or the Supervisor of Probation and Parole, and to furnish the same upon request of the Board or of the Supervisor.

SECTION 15: Information received by probation officers.—That all information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to anyone other than the judge or to others entitled under this Act to receive reports, unless and until otherwise ordered by a judge of the Court or the Supervisor of Probation and Parole.

SECTION 16: Appropriation.—For the purpose of paying salaries and expenses necessary for carrying out the provisions of this Act, the sum of Twenty-seven Thousand ($27,000.00) Dollars, if so much be necessary, is hereby appropriated.

SECTION 17: Offices for probation officers.—That the Governing body of each county in which a probation officer serves, shall provide in or near the court house, suitable office space for such officer.

SECTION 18: Persons not admit to parole.—That no person shall be admitted to parole under the terms of this Act whose sentence expires prior to January 1, 1941.

SECTION 19: Effect on powers of pardoning board.—That nothing in this Act shall be construed as changing or altering any of the present powers of the Pardoning Board of this State.

SECTION 20: Repeal.—That all other laws or parts of laws inconsistent with this Act are hereby repealed.

SECTION 21: Time effective.—That this Act shall take full force and effect from and after the date of its approval by the Governor.

Approved the 18 day of October, 1941

(R571, H141, S174, of 1941) No. 563

AN ACT to Amend an Act Entitled "An Act to Provide for the Suspension of Sentences and Use of Probation in Criminal Cases; to Provide for the Creation of the South Carolina Probation and Parole Board and to Prescribe Its Duties and Powers and the Terms of Office and Compensation of the

[redacted]

SPECIAL RECEIPT
UNIVERSITY OF SOUTH CAROLINA
STUDENT'S COPY

Exhibit #3B

Social Security No.	Date	76 Receipt 407379
	11 2 7 12	

Received From: Ralph Erwin

	Code	Dept.	Fund	Class	Amount
		32000	E400	48450	6 50
				Total	6 50

By: Megan Brown

Description: photocopies X 3 + S/H
#048819

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

STATE OF SOUTH CAROLINA

TO THE

GENERAL ASSEMBLY

FOR THE

PERIOD BEGINNING JULY 1, 1941 AND ENDING JUNE 30, 1942

JOHN M. DANIEL
ATTORNEY GENERAL

M. J. HOUGH
ASSISTANT ATTORNEY GENERAL

T. C. CALLISON
ASSISTANT ATTORNEY GENERAL

Exhibit #B-B

MRS. IDESSA H. NEWMAN
SECRETARY AND LAW CLERK

MRS. SADYE B. DAVIS
STENOGRAPHER

SOLICITORS

Julian S. Wolfe, First Circuit	Hugh Beasley, Eighth Circuit
B. D. Carter, Second Circuit	Robt. McC. Figg, Jr., Ninth Circuit
Frank A. McLeod, Third Circuit	Rufus W. Fant, Tenth Circuit
S. S. Tison, Fourth Circuit	Jeff D. Griffith, Eleventh Circuit
A. F. Spigner, Fifth Circuit	J. Reuben Long, Twelfth Circuit
W. G. Finley, Sixth Circuit	Robt. T. Ashmore, Thirteenth Circuit
Samuel R. Watt, Seventh Circuit	Randolph Murdaugh, Jr., Fourteenth Circuit

[redacted]

the jury must be unanimous in its verdict. It was not the intention of the General Assembly to make it easy for a person to be released. Such doubt as will cause a member of the Board to be unwilling to *recommend parole* will be sufficient to prevent such parole—until such time as the Board can act unanimously.

77

Yours very truly,
JOHN M. DANIEL,
Attorney General.

Release Of Persons—Life Termers And Those Sentenced For One Year Or Less

March 16, 1942.

Hon. J. C. Todd, Director, South Carolina Probation & Parole Board, Columbia, S. C.

My dear Mr. Todd: This will acknowledge receipt of your letter of March 9, reading as follows:

"Two questions of importance have arisen in the operating of our department on which we trust you will give us your written opinion.

Namely, whether a life term prisoner can be released by our Board before the service of at least five years of his sentence, and whether or not our Board has under the creating Act any authority to take official action on a case where the sentence was for one year or less.

Please review this Act and give us at your earliest possible convenience your official interpretation on these two matters."

In reply, I advise that Section 11, of the Act creating your Board, reads, in part:

"That in all cases cognizable of this Act, the South Carolina Probation and Parole Board——may——parole any prisoner convicted of a *felony* and imprisoned in the State Penitentiary, in any jail or upon the public works of any county, who if sentenced for *less than life*, shall have served at least *one-third* of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if *sentenced for life*, shall have served five years less the diminution which would have been *allowed for good con-*

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duct, pursuant to law, *had his sentence been for thirty years*", etc.

From the above it is my opinion that where a sentence for felony is for less than life—

(1) The prisoner must serve at least one-third of the term for which he was sentenced, not deducting any allowance of time for good behavior.

If the prisoner is a life termer: he is treated as if his sentence had been for thirty years. If the life termer's sentence had been for thirty years then when he shall have served one-third of a thirty year sentence plus five years, minus three years allowed for good time, the life termer would be entitled to have his case considered. That is the life-termer will have to serve at least twelve years of his life term sentence.

Yours very truly,

JOHN M. DANIEL,
Attorney General.

REGISTRATION OF BIRTHS—(New Law)

Act Provides For Registration With Clerk Of Court Of Births

April 22, 1942.

Mrs. Lena M. Clyburn, Deputy Clerk of Court, Camden, S. C.

My dear Mrs. Clyburn: This will acknowledge receipt of your letter of April 10, reading as follows:

"Act 107 of the Acts of 1939 and amendment passed at 1941 (1942) Sessions of General Assembly designated as House Bill No. 1073, provides for registration with the Clerks of Court data regarding the date of birth, etc.

Can I register this data contained in a family Bible showing that a person was born in another State, said person offering such proof of birth being a citizen and qualified elector of South Carolina and residing in Kershaw County?

Section three of the original Act above referred to uses the words 'any citizen of this State' in its opening sentence."

In reply I advise that Act No. 107 of the Acts of 1939, is an Act entitled:

stituted grand jury would be entitled to a wri
s. The court denied relief finding a sufficien
een timely objection and no objection until afte
Code provides that no irregularity in the selec
s sufficient to set aside a conviction unless th
njured by the irregularity or unless objection
dict.[30] The defendants were obviously not preju
ect; thus if the illegality was a mere irregularity
timely object amounted to a waiver under th
ıdants contended that the illegal grand jury wa
defect, thus voiding the proceedings. In rejectin
court noted that a defect "which does not preve
f twelve competent jurors, by whose votes th
ound, and which could have been cured if th
court had been called to it at the time, or promp
the empaneling of a competent grand jury"
arity.[31]

Instructions

White[32] the defendant did not testify in his o
trial judge upon request refused to charge t
failure of an accused to testify could not be co
him. The judge reasoned that to call attention
s failure to testify may be more prejudicial tha
an issue of first impression, although dictum in
suggested that the instruction should be given

ıe instruction need not be given unless requested
al judge's belief that the instruction could be pre
ct. However, the court correctly held that the
r under the circumstances of a particular situa
ı is helpful to the defendant, is best left to
el.

Habeas Corpus

. *State*[35] the defendant appealed the denial o
s corpus sought on the grounds that the solic

ANN. § 38-214 (1962).
lanning, 242 S.C. 316, 320, 130 S.E.2d 847, 849 (1963).
38, 133 S.E.2d 320 (1963).
ing, 158 S.C. 251, 155 S.E. 409 (1930).

28, 130 S.E.2d 906 (1963).

knowingly used and encouraged false testimony. It was claimed that the testimony of three eye witnesses was so clearly "untrue and obviously prejudicially influenced" that the solicitor must have known of its falsity. The court correctly affirmed the denial pointing out that the allegations were conclusional and amounted to no more than an attack on the credibility of the witnesses.[36] Although the use of knowingly perjured testimony by the prosecuting authorities is a denial of due process,[37] the petition must allege sufficient facts to establish a prima facie case.

A petition for writ of habeas corpus was filed in *Wyatt v. State*[38] alleging a number of conclusions with little factual support. The major contention was that the defendant did not consent to a guilty plea with a recommendation of mercy for the murder of his wife. The court affirmed the lower court's denial, primarily because the trial court closely questioned the defendant about his understanding of the guilty plea. The court also strengthened *Crosby v. State*[39] by implying lack of effective assistance of counsel is a denial of due process, but the defendant must show "counsel's purported representation was such as to make the trial a farce and a mocking of justice."[40]

In *Hayes* and *Wyatt* the court reaffirmed the principle that the sufficiency or insufficiency of the evidence supporting guilt cannot be raised in a habeas corpus proceeding. The sole issue is whether the judgment, under which the petitioner is confined, is void.

Miscellaneous

In several cases[41] the court refused to review allegedly excessive sentences. This view can be justified where pre-sentence investigation places the trial judge in a superior position for evaluation.

The South Carolina Supreme Court held in a prior case that excessive sentences could violate the constitutional provision against cruel and unusual punishment.[42] It ruled unconstitutional a thirty-year sentence for burglary where the jury recommended

36. *Id.* at 330, 130 S.E.2d at 907.
37. Mooney v. Holohan, 294 U.S. 103 (1935).
38. 243 S.C. 197, 133 S.E.2d 120 (1963).
39. 241 S.C. 40, 126 S.E.2d 843 (1963).
40. 243 S.C. 197, 200, 133 S.E.2d 120, 121 (1963).
41. State v. Kirby, 244 S.C. 67, 135 S.E.2d 361 (1964). State v. Bass, 242 S.C. 193, 130 S.E.2d 481 (1963).
42. State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).

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Exhibit #44

mercy, the defendant had no prior record, and the thirty-year sentence amounted to a life term to the defendant in question.[43] While following a justified limitation on sentencing, the court consistently refuses to substitute appellate for trial court judgment on the issue of punishment.

In *State v. Hyde*[44] the court correctly reaffirmed the view that a person need not own the premises to be guilty of storing whiskey thereon. The court also noted in *Hyde* that the failure of the defense counsel to object to the instructions waived any defects.

The waiver of objections due to actions of the defense counsel was an issue in several other cases. In *State v. McCravy*[45] the court held that where the defendant agreed to be tried upon two separate indictments at the same time he cannot complain of any prejudice resulting to him. In *State v. Chasteen*[46] the court rejected the defendant's claim of prejudicial testimony because the testimony was brought out by his defense counsel. Similarly in *State v. Young*[47] the failure to object to testimony waived any error in its admission. Also in *Young* the court noted that failure to object to the indictment waived any nonjurisdictional defects.

43. *Ibid.*
44. 242 S.C. 372, 131 S.E.2d 96 (1963).
45. 242 S.C. 506, 131 S.E.2d 687 (1963).
46. 242 S.C. 198, 130 S.E.2d 473 (1963).
47. 243 S.C. 187, 133 S.E.2d 210 (1963).

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DOMESTIC RELATIONS

JAMES F. DREHER*

Ever since the passage of the South Carolina Div 1949 there has been curbstone debate among lawyers the legislature had the power, in view of the m constitutional amendment[2] of that year that divo allowed" on the ground of "desertion," to limit th divorces for desertion to cases where the desertion for a period of one year." The point was raised appeal in the famous case of *Simonds v. Simonds*,[3] did not feel it necessary to decide it and the feeling question would remain one of academic interest fore in *Nolletti v. Nolletti*[4] the point was finally decid that most practitioners had predicted. Mrs. Nollet band had left her only one month before she brou admitted that she was not entitled to a divorce u gunge of the statute but maintained that its one-ye was unconstitutional. The South Carolina Supreme monsly rejected the argument. It pointed out tha tion is basically a limitation upon legislative pow a grant of such power, so that the effect of the 19 was to prohibit the legislature from authorizing d ground other than those enumerated, rather than in prescribing conditions for the granting of div grounds. The requirement that a desertion must least one year before it matures into a cause of act is in keeping with our public policy of refusing t nages on trivial grounds and is analogous, accord ice Lewis, who wrote the opinion, to the rule w has established in applying the statute, that a d ordinarily be granted on the uncorroborated t party. The date of the opinion was July 11, 1963, e from the day that Mr. Nolletti left home, wh allowed Mrs. Nolletti to obtain her divorce shortly date was handed down. The delay may not have to her but it permitted the solution of a long-star

* Lecturer in Law, University of South Carolina.

1. S.C. CODE ANN. §§ 20-101 to -148 (1962).
2. S.C. CONST., art. 17, § 3.
3. 229 S.C. 376, 93 S.E.2d 107 (1956).
4. 243 S.C. 20, 132 S.E.2d 11 (1963).

Exhibit # 4-B

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Westlaw

AMJUR PARDON § 94
59 Am. Jur. 2d Pardon and Parole § 94

American Jurisprudence, Second Edition
Database updated November 2011

Pardon and Parole
Anne M. Payne, J.D.

III. Parole
A. In General
3. Scope of Parole Power
c. Determining Eligibility

Topic Summary Correlation Table References

§ 94. Time for granting

West's Key Number Digest

West's Key Number Digest, Pardon and Parole ⚿50

A.L.R. Library

United States Parole Commission Guidelines for federal prisoners, 61 A.L.R. Fed. 135.

In the absence of any constitutional or statutory provision to the contrary, the power of parole may be exercised at any time that the person or board in whom it is vested may see fit. In some jurisdictions, the statutory grant of power implies this by vesting the power in one department of government at the time of conviction, and in another department at all other times.[1]

In some jurisdictions, the time for granting parole is limited by a statutory provision requiring a convict to serve the minimum term of **sentence** before application may be made to the parole board for a parole, and under such a provision a prisoner cannot be paroled before serving the minimum **sentence**.[2] In still other jurisdictions, the statute makes the maximum term for the offense in question the test in determining the time when a convict shall become eligible for parole, and under such a provision, a definite time fixed by the jury for punishment in a criminal case becomes the maximum time for the purpose of determining the right of parole.[3]

When a statute requires that a presumptive parole release "date" be established, the parole authority may not set a release date at "life."[4] Moreover, where the statute requires that such a presumptive parole release date be established for every inmate eligible for parole consideration, within a specified period of time after the date of initial confinement, regardless of when a prisoner may actually be released on parole, a rule of the parole authority that it will not assign presumptive parole release dates to persons serving mandatory minimum **sentences** until they have served the mandatory minimum **sentence** is invalid.[5]

In calculating a prisoner's parole eligibility date under an **indeterminate sentence**, the period may be tolled until the completion of a definite **sentence** of actual incarceration for a different, although related, crime.[6] A

Stephanie H. Burton
sburton@gibbesburton.com

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October 17, 2016

The Honorable David Hamilton
York County Clerk of Court
P.O. Box 649
York, SC 29745

Re: Ralph L. Erwin v. South Carolina Department of Probation, Parole, and Pardon Services and State of South Carolina
C. A. No.: 2016-CP-46-2414

Dear Mr. Hamilton:

We are enclosing for filing the original and one copy of the following:

1. Motion Information Form and Coversheet;

2. Defendants' Motion to Dismiss and Motion for Sanctions; and

3. Our Certificate of Service.

We are also enclosing our firm's check in the amount of $25.00 for the required motion filing fee. We would appreciate you filing these papers and returning the clocked copies to us in the enclosed envelope. By copy of this letter, we are serving a copy of these documents on Mr. Erwin.

With kind regards,

Yours very truly,

GIBBES BURTON, LLC

Stephanie H. Burton

SHB/bre
Enclosures
cc: Mr. Ralph L. Erwin (w/enclosures)(by US Mail)

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

Ralph L. Erwin,) CASE NO. 2016-CP-46-2414

( ) Plaintiff)

v.) **MOTION INFORMATION FORM AND COVER SHEET**

South Carolina Department of Probation, Parole and Pardon Services, and State of South Carolina)

(x) Defendants)

check box above indicating submitting party

name, SC Bar no. and address of plaintiff's attorney	name, SC Bar no. and address of defendant's attorney
Ralph L. Erwin, Pro Se 140 W. Centennial St. Apt. 38-B Spartanburg, SC 29303	Stephanie H. Burton (#13089) Gibbes Burton, LLC 308 East Saint John Street Spartanburg, SC 29302 telephone: 864-327-5000 fax: 864-342-6884 e-mail: sburton@gibbesburton.com

(x) **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III)**

ق **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendants' Motion to Dismiss and Motion for Sanctions

Estimated Time Needed: 30 minutes Court Reporter Needed: YES

SECTION II: Motion Type

(x) Written motion attached

ق Form Motion --

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

Signature of Attorney for Defendant Date submitted 10.17.16

SECTION III: Motion Fee

(X) PAID - AMOUNT: $25.00

ق EXEMPT: ق Rule to Show Cause in Child or Spousal Support

(check reason) ق Domestic Abuse or Abuse and Neglect

ق Indigent Status ق State Agency v. Indigent Party

ق Sexually Violent Predator Act ق Post-Conviction Relief

ق Motion for Stay in Bankruptcy

ق Motion for Publication ق Motion for Execution (Rule 69, SCRCP)

ق 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:_____

ق Other:

JUDGE'S SECTION

ق Motion Fee to be paid upon filing of the attached order.

ق Other:

_____
JUDGE
CODE:_____ Date:_____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

ق MOTION FEE COLLECTED:_____

ق CONTESTED - AMOUNT DUE:_____

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STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
RALPH L. ERWIN, Plaintiff, v. SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, and STATE OF SOUTH CAROLINA, Defendants.	)	**DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS** C.A. No. 2016-CP-46-2414

#1

TO: PLAINTIFF RALPH L. ERWIN, PRO SE:

Defendants South Carolina Department of Probation, Parole, and Pardon Services and the State of South Carolina will move the Court, at such date and time as the Court shall direct, pursuant to Rules 12(b)(2), 12(b)(3), 12(b)(4), and 12(b)(6) of the South Carolina Rules of Civil Procedure, for an order dismissing Plaintiff's claims against Defendants as a matter of law. Defendants will also move the Court, at such date and time as the Court shall direct, pursuant to Rules 11 and 12 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Civil Proceedings and Sanctions Act, S.C. Code Ann. §15-36-10 *et seq*, for an order imposing sanctions upon Plaintiff, and pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, for an order enjoining Plaintiff from filing further actions against Defendants without first posting bond. These motions will be made upon the following grounds:

1. Plaintiff's claims against the State of South Carolina are barred by collateral estoppel and res judicata.

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2. Plaintiff's claims against Defendant Probation, Parole, and Pardon Services are barred by collateral estoppel and res judicata.

3. Plaintiff's claims against Defendants are barred by the applicable statute of limitations.

4. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against Defendants.

SHB #2

5. Plaintiff's claims against Defendants are barred by the applicable exceptions to the waiver of sovereign immunity under the South Carolina Tort Claims Act §§ 15-78-60(1), (2), (3), (4), and (21).

6. Plaintiff's claim for punitive damages is barred by S.C. Code § 15-78-120.

7. Defendants are entitled to an order dismissing Plaintiff's claims against Defendants as a matter of law.

8. Plaintiff has initiated at least nine prior actions alleging the same claims. Plaintiff made substantially the same allegations in a PCR action filed on October 22, 2003, a habeas corpus petition filed on April 10, 2007, a PCR action filed on October 19, 2009, two habeas corpus petitions filed in June 2011, a habeas corpus petition filed on February 17, 2012, a §1983 action filed in June 2012, a state tort action filed on March 18, 2013, a state tort claim filed on October 8, 2013, and a state tort claim filed on August 27, 2014.

9. The courts have repeatedly dismissed Plaintiff's claims and, most recently, found that such claims are barred by the statute of limitations. Despite this, Plaintiff continues to file meritless repetitive claims.

10. The State of South Carolina and the South Carolina Department of Probation, Parole, and Pardon Services were defendants in most of the prior actions.

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11. Plaintiff does not have a good faith basis to file this action. He fails to state any proper legal claim and asks for relief that the Court cannot grant. Additionally, his claims are barred by the statute of limitations, res judicata, and collateral estoppel.

12. Defendants will suffer irreparable injury because they have been forced to repeatedly incur expenses defending against Plaintiff's duplicative actions.

SJB #3

13. Remedies at law are not adequate.

14. Considering the balance of hardships between the parties, injunctive relief is warranted. Defendants suffer hardship in being required to repeatedly defend actions by Plaintiff.

15. The public interest would be served by granting a permanent injunction enjoining Plaintiff from filing future actions without first posting bond.

These motions are based upon the pleadings filed in this action and upon applicable common and statutory law.

Stephanie H. Burton (#13089)
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, SC 29302
sburton@gibbesburton.com
Telephone: (864) 327-5000
Facsimile: (864) 342-6884
Attorneys for Defendants South Carolina Department of Probation, Parole and Pardon Services and State of South Carolina

October 17, 2016
Spartanburg, South Carolina

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INVOICE

To: Mr. Ralph L. Erwin
140 W. Centennial Street, Apt. #38-B
Spartanburg, South Carolina 29303

From: Shannon E. McGilberry
16th Circuit Court Reporter
P.O. Box 522
Clover, S.C. 29710

Date: 1/06/17

ITEM	DESCRIPTION	AMOUNT
Orig. Transcript	Ralph L. Erwin v. State of S.C., et al 2016- CP-46-2414 (22 pp. @ 3.25 per page)	$71.50
Postage (USPS Priority Mail)		6.45
Total		$77.95
Amount Received		$136.45
Amount Refunded		$58.50

Thank you.

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STATE OF SOUTH CAROLINA IN THE FAMILY COURT

COUNTY OF YORK CASE NO. 2016-CP-46-2414

RALPH L. ERWIN,

Plaintiff,

-vs-

SOUTH CAROLINA DEPARTMENT OF PROBATION, PARDON AND PAROLE SERVICES and the STATE OF SOUTH CAROLINA,

Defendants.

TRANSCRIPT OF RECORD

November 17, 2016
York, South Carolina

B E F O R E:

Honorable S. Jackson Kimball, III, Judge.

A P P E A R A N C E S:

Mr. Ralph Erwin
Pro Se Plaintiff
Spartanburg, South Carolina

Mr. Taylor Heath
Attorney at Law
Attorney for the Defendants
Spartanburg, South Carolina

Shannon E. McGilberry, CVR-M
Court Reporter

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THE COURT: All right. This is case number 2016-CP-46-2414, Ralph L. Erwin against the South Carolina Department of Probation, Parole, and so forth. This is the defendants' motion, all the defendants, motion to dismiss. So, Mr. Heath, you go first.

MR. HEATH: Yes, sir. We also have a motion for sanctions, too, but regarding the motion to dismiss first, --

THE COURT: I don't remember that. Is it separate or is it in the --

MR. HEATH: I think it was included with the motion to dismiss. I have a copy if you need it.

THE COURT: That wouldn't surprise me. Oh. Are you talking about the injunctive relief?

MR. HEATH: Yes, sir.

THE COURT: Yes. Okay. Okay.

MR. HEATH: My apologies. Yes, sir.

THE COURT: Yes. Okay. Go ahead.

MR. HEATH: Your Honor, I also have materials as well that might be helpful for this, if I may.

(WHEREUPON, Mr. Heath passed documents to the Court for review.)

MR. HEATH: Tabs 1 through 11 is the chronology for helping the procedural history of this case.

THE COURT: Well, there was a procedural history

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THE COURT: Well, there was a procedural history attached to Mr. Erwin's --

MR. HEATH: Yes, sir. It's the same thing, but with the orders.

THE COURT: All right.

MR. HEATH: But, Your Honor, to sum this up, this is the plaintiff's, total now, tenth attempt to bring this action against the defendants, eight actions against the State. This will be the second one against the Department of Parole, Probation and Pardon Services.

He brings a tort claim here today, but all of his prior actions have actually been related to the same cause of action, which is his continued parole supervision. He believes that the defendants have violated his constitutional rights and have committed tortuous acts against him over the years. He believes that the statute of limitations has run out on his sentence when he was -- he pled guilty in 1961 and received a life sentence then and he believes now that the statute of limitations has run out and it should have only been a thirty-year sentence and that in 1992 it actually expired.

The defendants here are moving to dismiss on the grounds of *res judicata* first. This involves the same parties over the years. It involves the same claim brought in different forms and it all comes from the same

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transaction or occurrence that have been brought up in all these prior actions, which is, again, regarding the statute of limitations running out on his sentence.

THE COURT: As I read the record, the -- while this is the tenth time or one or more of them have been PCR petitions and then one was a 1983 case in federal court; right?

MR. HEATH: Yes, sir. Three PCR actions, four *habeas corpus* actions and one Section 1983 action and then two tort actions involved today.

THE COURT: All right.

MR. HEATH: So regarding *res judicata* in particular, though, the plaintiff believes that the merits of his claim haven't been heard, but regarding a third PCR action in 2009, Judge Alford specifically talked about his discussing that discussion point of the statute of limitations running out and that case was dismissed with prejudice as being barred by *res judicata*. Obviously, when it's dismissed with prejudice, it obviously means that it's been indicated or it indicates that it's been adjudicated on its merits.

Further, after that, in 2014, Judge Mark Hayes also barred it for being *res judicata*, 'cause, again, it's the same claim, just happening again in a different form at a later date and so the defendants think that *res judicata* alone should bar it, but if not that, we also have

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collateral estoppel. Again, it's the same claim for the same issues in every single case. No matter which way he tweaks it, in what form he puts it in, everything is the same. The issues have already been brought up, they've already been talked about and discussed and they've already been ruled on in these prior actions. So between *res judicata*, collateral estoppel, those should bar it.

In addition, the statute of limitations does bar it. Even the evidence has shown that the plaintiff alleges he found out in 1992 that a potential claim could have occurred then and now, I mean, it's been time barred many times.

THE COURT: Meaning the law changed?

MR. HEATH: Yes, sir, but he claims that the judge made a comment to him--that the statute of limitations had ran out at that time, again, what he perceives was his thirty-year limit and so then, in 1992, he should have been on alert, but now we're at 2016, so it's still very much time barred under either the personal injury statute of limitations or, like, the federal one, which we have a case in there, Wilson v. Garcia, if we had to compare.

So it's been time barred, in addition to *res judicata* and collateral estoppel. It should be barred for not having a cause of action from his Complaint because of the facts.

It's this -- he's incorrect in his interpretation of what a statute of limitations is and then, in addition to

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all those, we think that the defendants fall under the exceptions to the waiver of immunity, since it's a tort claim, under the South Carolina Tort Claims Act. In 15-78-60 it provides the exceptions, one specifically, number 4, that a government entity is not liable when they are either acting or enacting in compliance with any law.

Well, here the plaintiff alleges that the defendants were acting in compliance with a statute that was deemed unconstitutional regarding his sentence, which is -- and this is exactly the type of action that falls under that exception, because the parole board is trying to do their best to comply with that law, same with the sentencing group, complying with the law, and therefore, the exception should be liberally construed in favor of immunity, as the case law suggests, and so the plaintiff's claim should be barred for that. And then --

THE COURT: Under the statute, the statute that deals with the fact that parole -- I'll state it -- hopefully state it simply, that parole lasts 'til your sentence is completed is still good?

MR. HEATH: Yes, sir. And that the statute, I think, he cites to as well simply talks about when you have someone who has a life sentence, for purposes of determining parole, they deem it a thirty-year mark and I think that's where the confusion is there for him, but that doesn't mean that his

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life sentence is obviously a thirty-year mark, just doing that for purposes of categorizing a life sentence person. So that's where --

THE COURT: Well, and it doesn't deal with -- it doesn't transfer that, what, that sort of a revamping of that statute to the parole -- to the pardon and parole people. In other words, does the thirty-year -- would a person who's sentenced now to life -- a person who's sentenced now to life get out in thirty years as long as it's not life without parole. Right?

MR. HEATH: Yes, sir. I'm guessing so, Sir.

THE COURT: You're guessing so?

MR. HEATH: Well, I haven't read the statute.

THE COURT: But there's no statute saying that the parole -- determination of the length of parole is reduced to thirty years?

MR. HEATH: No, sir. In fact, it, again, just categorizes it so that parole, and I emphasize the word "may" be considered. I mean, it is an option by the parole board, according to the statute. They don't even have to.

THE COURT: Parole somebody?

MR. HEATH: Yes, sir. That is --

THE COURT: Of course not.

MR. HEATH: Right. So that was what I was going to emphasize as well.

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THE COURT: Okay. All right. Let me hear from Mr. Erwin.

MR. HEATH: Yes, sir.

THE COURT: Mr. Erwin?

MR. ERWIN: Yes, sir. Your Honor, this is something completely new to me, but --

THE COURT: What's new to you?

MR. ERWIN: Representing myself in court right now.

THE COURT: I thought you represented yourself in all these other times, too, did you not?

MR. ERWIN: Actually, I never had a -- I've never had a hearing. I don't know --

THE COURT: Well, this is -- you've had hearings like this, have you not?

MR. ERWIN: No, sir, not on -- not on the merits of the case.

THE COURT: No. I know there hadn't been a hearing on the merits of the case, but you've had hearings like this one, where a judge was asked to decide, as a matter of law, to throw the -- to dismiss the case; right?

MR. ERWIN: Yes, sir. I had one of those, I think it was in two thousand -- 2014 in Spartanburg. I think that's when it was.

THE COURT: All right.

MR. ERWIN: But the reason I mentioned the merits of

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the case, I got here some stuff that I had wrote down, the constitutional law. I think it's the United States Constitution. It's under the -- under Procedural Due Process concept, a hearing must be appropriate to the nature of the case and from this flows the principle that the State cannot refuse the right to litigate an issue central to a statutory violation or deprivation of a property interest and this is coming from USCA Constitution Amend 14, section 11, Constitution Article 3, section 10. And I also -- also mention that in the -- in my objections to their motion to dismiss. I've sent some stuff in concerning that on that same issue, because, I mean, like I said, I've never had a hearing on the issue for this case.

THE COURT: You've never had a trial?

MR. ERWIN: No, sir.

THE COURT: Right.

MR. ERWIN: And according to my understanding is that what the -- it's what the -- what the United States Supreme Court is saying that that's one of the main issues, is that you have to have -- they supposed to give you a hearing on the merits of the case and so from that flows everything else. Everything else falls from the merits of the case.

THE COURT: Well, everything you read me just a minute ago is absolutely correct, but it does not mean that you're entitled to a trial every time. If somebody -- if somebody

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presents a case that doesn't -- that the law doesn't recognize, the other side can ask that the case be dismissed, because the law doesn't give that kind of relief and that's essentially -- well, that's what has happened ten times before.

MR. ERWIN: I understand -- I think I understand what you're saying, Your Honor, but what they're saying is, according to what I'm reading here, if I've -- if I've never had a hearing on the merits of the case, then I've been denied due process through the whole court.

THE COURT: Well, that's what I'm trying to tell you. What you read me is absolutely correct, but that does not mean that there's a constitutional right to have a trial of a case that doesn't have any legal basis for it---

MR. ERWIN: Uh-huh.

THE COURT: ---and that's what, essentially, what the defendants are saying in this case, you're not -- that a trial is not necessary, because the law doesn't recognize the kind of case you want to bring.

MR. ERWIN: You said I'm not -- I don't know if I understand what you're saying. You say the law don't --

THE COURT: They're saying that there's no necessity that there be a trial, because at this point the law does not recognize -- will not recognize the case that you want to bring. That's what they're saying. Is that fair?

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MR. HEATH: Yes, Your Honor.

THE COURT: All right.

MR. ERWIN: But that's why -- that's why I brought it, Your Honor, under the Torts Claim Act.

THE COURT: I understand that.

MR. ERWIN: I learned -- I learned back in 1992, like you said while ago, it's on record where I filed the 1983 against them concerning the same issue and --

THE COURT: But see, Mr. Erwin, the tort claims act, among other things, has a two-year statute of limitations.

MR. ERWIN: But I've got evidence in the case as well stating that the statute of limitations don't begin to run until you have to -- until you've been released from prison, but see, as long as -- life with --

THE COURT: You were released in 2007, weren't you?

MR. ERWIN: I'm still on parole right now.

THE COURT: Well, I know that. Weren't you released from prison in 2007?

MR. ERWIN: Yes, sir, on parole.

THE COURT: Yes, sir. Okay.

MR. ERWIN: And so what -- actually, my parole -- I should have -- the sentence should have been completed in 1992, as he read while ago, but I've got in -- I got in the Complaint where the Attorney General of the State of South Carolina, he informed -- he sent a letter. If you look at

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it, you'll see where he sent this. It's a 1942 -- it's where he's talking about the life sentence is the same as a thirty-year sentence. He -- and he said that -- let me see if I can find this in here.

THE COURT: Well, you don't need to. I've read everything that you've given me. You gave me a big old stack of things and I read every word of it and it's all in there.

MR. ERWIN: But what --

THE COURT: Mr. Erwin, as far as I know, and I know, because as a young lawyer, I had a case that involved this, the only relief for a person that has a life sentence in terms of being outside, being released from the supervision of the State, is a pardon and I represented a gentleman many, many years ago who didn't know he had a pardon. He thought he was -- he thought he was going back to jail for a parole violation of a life sentence and, unbeknownst to him, he had gotten a pardon from the governor. I guess they used to routinely issue those. I don't -- after a period of time. I don't know. But I've reviewed everything you said and you -- first of all, you've had a number of judges, different judges, consider the same facts. What you're telling me today, you've presented a number of times already to other judges and they have ruled on that, not in your favor. And I -- as far as I know, there's never been an

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appeal of those rulings, so they are what we call a final ruling or a final order in the case. Because that's so, you are no longer entitled to the relief you seek, because other judges have ruled on it, on the same facts and the same people, you and the State, you on one hand, the State on the other side, because other judges have ruled on that, you no longer have the right to bring this claim.

MR. ERWIN: I would like to say this, Your Honor. That was my emphis (sic) on -- for stating this here on the merits, because they have never -- no court that I've been before so far have ruled on the merits of the case.

THE COURT: Well, they have. It just hasn't required a trial. They've ruled on the merits. They've ruled that the merits of the case are that, as a matter of law, you are not entitled to be released from parole, because your sentence has not been completed and, of course, your sentence won't be completed until your death.

MR. ERWIN: Your Honor, that's the -- that's the statute that's in effect right now, section --

THE COURT: It was in -- it's been effect since I was a young lawyer and that's a long, long time.

MR. ERWIN: The one that -- the only statute that I remember and recall being in effect where it said that 'til your death and that's section 16-3-20. That came into effect in 1994 -- '93 or'94.

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THE COURT: I can tell you that from about 1972 to this day, parole of a life sentence is not completed until the -- 'til the individual passes away.

MR. ERWIN: But that's totally opposite, Your Honor, of what the South Carolina Legislative Committee addressed in 1942 when they first created the parole board and it's the same thing that the Attorney General of the State of South Carolina addressed during that same year when they first created the parole board. The, you know, Attorney General states that -- well, I'm going to say it this way: a life sentence, during the time that I caught my life sentence, was, basically, a indeterminate sentence, didn't have no certain amount of years. So when they came up with the parole board, they had to put a life -- they had to decide how many years a person with a life sentence was going to have to do before he came up for parole, so that -- and during that time they said that a person with a life sentence was considered the same as a person with a thirty-year sentence. So, I mean, I can't -- I can't get it no clearer than that.

THE COURT: But that doesn't mean that you get -- that you get released from parole after thirty years.

MR. ERWIN: Well, from what that's saying, --

THE COURT: In fact, you served longer than thirty years.

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MR. ERWIN: From what that's saying, Your Honor, I'm getting that they saying that a life sentence, again, is the same as a thirty-year sentence and that being the case, you can't do no more than thirty years.

THE COURT: Well, you did.

MR. ERWIN: And that's why I'm here now, because I feel like it's illegal, according to what --

THE COURT: Well, that's -- Mr. Erwin, a number of judges have heard this argument, because I've reviewed the material and in no -- and they ruled against you. Those -- the orders of those judges is final, just like a jury verdict's final, and I am not entitled to change that. The law does not permit me to go back and, essentially, hear those cases again. So I'm granting the defendant's motion to dismiss the case.

You've had a full hearing on your argument somewhere from eight to ten times.

MR. ERWIN: I would like -- I would like -- I would ask that if that's so, I would like -- I would ask that the defendant show where I have been -- had given a hearing on those items.

THE COURT: He's handed me up a handful of orders that resulted from hearings.

MR. ERWIN: I remember -- I remember him saying --

THE COURT: All right. I'm going to stop you.

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MR. ERWIN: Sir?

THE COURT: You told me just a minute ago that you had a hearing in 2014 in front of Judge Mark Hayes in Spartanburg.

MR. ERWIN: And he dismissed that, not -- not --

THE COURT: That's correct.

MR. ERWIN: -- not on the issues, but he dismissed -- actually, what he said was that I wasn't allowed to -- the reason he dismissed that then was because I wasn't allowed to file for free.

THE COURT: Well, you see, he was the ninth judge to hear this case, I'm the tenth one, and my view of where you stand is the same as his and I'm going to grant the defendant's motion to dismiss.

Now, Mr. Heath, you pointed out the fact that in your motion to dismiss you've asked for injunctive relief.

MR. HEATH: Yes, Your Honor.

THE COURT: What do you want to do?

MR. HEATH: Your Honor, under tab 6 I have Rule 11 and the South Carolina Protections Against Frivolous Acts and I, on behalf of the defendants, request that we put a permanent injunction in place from this, essentially, from ever happening again. These orders need to be final in their clearest form. This just needs to be done. We don't seek any form of attorney's fees or costs, anything like that.

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We just want, under your discretion, just some injunctive relief from this happening anymore. It's been years. The defendants are having to pay more money, putting more time into this and it's been clear and stated as best that it can be.

THE COURT: Well, there's another statute, and I didn't pull it, that also -- well, you've given me a case. I'm looking for a statute.

MR. HEATH: Under tab 6, not of the chronology -- I'm sorry -- of the case law packet, there should be.

THE COURT: Oh, I'm sorry. The case law?

MR. HEATH: Yes, sir. There's two separate. I should have put a label on it.

THE COURT: Well, let me see.

MR. HEATH: Number 6 should be only --

THE COURT: You can have a seat, Mr. Erwin.

MR. HEATH: Number 6 is only for sanctions and the first one is Rule 11, which -- I'm sorry -- I'll put a thing on it next time, but should be a separate tab.

THE COURT: All right. Hang on. I'm sorry. Here we go. Here we go.

MR. HEATH: Rule 11 talks, under the South Carolina Rules of Civil Procedure, --

THE COURT: Well, there's a statute that sort of corresponds with the rule.

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MR. HEATH: That's behind Rule 11; yes, sir. That will be 15-36-10.

THE COURT: Ten.

MR. HEATH: Yes, sir. And under G(4), in particular, it talks about what a trial court can and can't do in terms of -- when it comes to sanctions and the last one talks about non-monetary relief and it says may include injunctive relief and that's what we seek here.

THE COURT: Okay. All right. All right. Mr. Erwin,---

MR. ERWIN: Yes, sir.

THE COURT: ---I'm also going to have Mr. Heath provide me with a proposed order that says that you are instructed not to file this claim again. If you file the claim again, you will be in contempt of court. If you're in contempt of court, you can wind up going back to jail. We need to put a stop to this. You're not entitled to the relief you are now seeking and you've been told that by a number of judges a number of times before. Do you have any question about that?

MR. ERWIN: Not about that. I would like to ask you one question concerning the issue and that is if I were able to appeal this decision here to South Carolina Supreme Court?

THE COURT: Yes, sir. You certainly are.

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MR. ERWIN: One other question, Your Honor, that just come to me. The South Carolina Supreme Court has stated that, and maybe I heard you mention this earlier, that the -- that parole has to be based on the entire sentence. That's what the South Carolina Supreme Court states. Now, I wonder if --

THE COURT: That's right.

MR. ERWIN: -- I wonder if parole in ten years, the first time, so ten years is one-third of thirty.

THE COURT: Right.

MR. ERWIN: So everything that I'm saying is pointing exactly to what this Attorney General stated to the Legislative Committee.

THE COURT: All right. We're not going to go there now.

MR. ERWIN: Sir?

THE COURT: I want to be sure you understand me. I'm dismissing your case. I'm also ordering you not to file it again in any court in this state. If you do, the judge that hears that can find you in contempt of court and you could be incarcerated. I'm also -- also put in the order that the Clerk of Court is instructed not to accept any such filing. That's -- there's another statute that provides that. I can't remember the number. The Clerk of Court's authorized and directed to reject any attempted filing of another

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action by Mr. Erwin. Now, my jurisdiction for that purpose is only in York County. Do you have any question you want to ask me about what I've ruled?

MR. ERWIN: No, sir.

THE COURT: What are age you, Mr. Erwin?

MR. ERWIN: Seventy-three.

THE COURT: All right. If there's no questions, -- do you have any question about an order?

MR. HEATH: No, Your Honor.

THE COURT: All right. Make the appropriate findings and, you know, be consistent with your brief. All right. That's all.

MR. HEATH: Thank you, Your Honor.

THE COURT: The hearing's concluded.

MR. ERWIN: Could I ask one more question, Your Honor?

THE COURT: Yes, sir.

MR. ERWIN: Concerning the transcript, would I be able to get a copy of that?

THE COURT: The answer to that is yes, but you have to request it. This is the court reporter. You have to request it and there's a charge for that. I don't know how they charge for it. I don't have anything to do with it. Yes, sir, you are entitled to a transcript.

MR. ERWIN: When could I do that?

THE COURT: Well, you just have to -- you have to

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contact Ms. McGilberry, not now, because we've got other hearings to hear.

MR. ERWIN: But that's who I --

THE COURT: You can get her contact information from the lady up front there.

MR. ERWIN: Okay.

THE COURT: Okay?

MR. ERWIN: Yes, sir.

THE COURT: Thank you.

MR. ERWIN: Thank you, Sir.

MR. HEATH: Thank you, Your Honor.

(END OF REQUESTED TRANSCRIPT)

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STATE OF SOUTH CAROLINA)

) C E R T I F I C A T E

COUNTY OF YORK)

I, the undersigned Shannon E. McGilberry, official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 17th day of November, 2016.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

In witness whereof, I have hereunto subscribed my name, this 6th day of January, 2017.

Shannon E. McGilberry, CVR-M

My Commission Expires:

April 16, 2017

Certificate of Appellant

The undersigned hereby certifies that the record on appeal contains all material proposed to be included by any of the parties and not any other material.

April 6, 2017

/s/Ralph L. Erwin
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