

RECEIVED

JUN 06 2017

S.C. SUPREME COURT

INRE) EVELYN BUCKLE 309884 MOTION TO APPEAL AND A  
 -VS- MOTION TO STAY  
 THE STATE OF SOUTH CAROLINA PRIOR ORDER OF DISMISSIAL  
 OF P.C.R.  
 CASE#2008-CP-40-8502

-----  
 IN ADDITION WITH A MOTION FOR A WRIT OF MANDANUS, TO ORDER THE CHIEF  
 ATTY, GENERAL ALLEN WILSON, TO SHOW CAUSE AS TO WHY THE RESPONDENT  
 HAS FAILED TO RESPOND TO THE ORDER OF THE UNITED STATES DISTRICT COURT  
 JUDGE. THE HONORABLE JUDGE TIMOTHY M. CAIN, WHO IN HIS ORDER, STATES  
 THAT MY STATE COURT RIGHTS HAVE NOT BEEN EXHAUSTED AND THE FEDERAL  
 HABEAS CORPUS WAS DISMISSED WITH <sup>out</sup>PREJUDICE. I WAS GRANTED THE RIGHT  
 TO RE-ENTER THE STATE COURT.

IT HAS BEEN A PERIOD OF (9) MONTHS SINCE I HAVE FILED A NEW P.C.R.  
 AND A MOTION TO RE-INSTATE THE 1ST AND THE RESPONDENT HAS YET TO  
 RESPOND TO MY P.C.R. CLAIM. PLEASE ORDER THE LOWER COURT TO SET THE  
 CASE FOR A HEARING AND TO RE-INSTATE P.C.R. TRICIA A. BLANCETTE ATTY.  
 I ALSO SENT JEANETTE MCBRIDE CLERK OF COURT RICHLAND COUNTY CLERK  
 IN AUG 2016 A LETTER REQUESTING TO KNOW THE STATUS OF MY P.C.R.  
 2nd P.C.R. APPLICATION AND TO HAVE A SUMMARY DOCUMENT FOR THE  
 PURPOSE OF FILING AN AMENDED ACTION TO MY CLAIM WHICH I HAD ALSO  
 SENT MY PACKAGE TO THE COURTS BEFORE AND I HAVEN'T RECEIVED A  
 RESPONSE EITHER I ALSO SENT THE SAME DOCUMENTS TO CLERK OF COURT JOHNNY

L.NORRIS OF RICHLAND COUNTY BY ALSO CERTIFIED MAIL RECEIPTS  
WERE RECEIVED BACK THESE DOCUMENTS WERE TO THE HONORABLE  
JUDGE L. MANNING ON APRIL 17,2017 AGAIN I HAVEN'T RECEIVED A  
RESPONSE ENCLOSED IS A COPY OF THE ORDER AND OPINION OF  
THE UNITED STATES DISTRICT COURT.

RESPECTFULLY

SUBMITTED

EVELYN BUCKLE 309884

*Evelyn Buckle 309884*  
JUNE 2, 2017

SWORN TO AND SUBSCRIBE BEFORE ME

ON THIS 2nd DAY OF JUNE 2017

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES July 2nd, 2016



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

Evelyn Buckle, #309884,	)	
	)	Civil Action No. 5:15-2088-TMC
Petitioner,	)	
	)	
v.	)	<b>ORDER</b>
	)	
M.C. Boulware, Warden,	)	
	)	
Respondent.	)	
_____	)	

Petitioner Evelyn Buckle, a state prisoner proceeding *pro se*, is seeking habeas corpus relief pursuant to 28 U.S.C. § 2254.<sup>1</sup> Before the court is the magistrate judge’s Report and Recommendation (“Report”), recommending that the court grant Respondent’s motion for summary judgment (ECF No. 18) and that Petitioner’s petition be denied. (ECF No. 28.) Petitioner was advised of her right to file objections to the Report. (ECF No. 28-1). Rather than filing objections, however, Petitioner has filed a response in essence agreeing with the Report and requesting a voluntary dismissal of the petition so that she might exhaust her state remedies. (ECF No. 30). Petitioner also filed a motion to alter or amend the Report. (ECF No. 31).

The Report has no presumptive weight and the responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). In the absence of objections to the Report, this court is not required to provide an explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Rather, “in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to

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<sup>1</sup> In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02, DSC, this matter was initially referred to a magistrate judge.

accept the recommendation.” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

In lieu of filing objections, Petitioner filed a “motion to withdraw habeas corpus application to proceed back to state court.” (ECF No. 30). In that motion, Petitioner asks this court to allow her to withdraw her habeas claims so that she may exhaust her state remedies. (ECF No. 30). She claims that she seeks this relief because of “after-discovered evidence.” (ECF No. 30 at 1). Petitioner seeks the same relief in her motion to alter or amend the Report. (ECF No. 31).

Respondent has filed a reply to Petitioner’s objections and a response to her motion. (ECF Nos. 33, 34). In those filings, Respondent asks this court to deny the request to dismiss the claims because she has not indicated any “after-discovered evidence” that would permit her to present the unexhausted claims in state court. (ECF Nos. 33 at 2; 34 at 2). Thus, Respondent claims that any future PCR applications would be barred, and accordingly, the dismissal would be futile. (ECF Nos. 33 at 2; 34 at 2).

Fed. R. Civ. P. 41(a)(2) provides district courts with authority to dismiss an action at Petitioner’s request even after Respondent has filed a motion for summary judgment. As a general rule, “[a] plaintiff’s motion under Rule 41(a)(2) for dismissal without prejudice should not be denied absent substantial prejudice to the defendant.” *S.A. Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986) (citation omitted). In determining whether a Petitioner’s request for voluntary dismissal will cause “substantial prejudice to the defendant,” district courts should consider all relevant factors under the circumstances, including: “(1) the opposing party’s effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the

litigation, *i.e.*, whether a motion for summary judgment is pending.” *Gross v. Spies*, No. 96-2146, 1998 WL 8006, at \*5 (4th Cir. Jan. 13, 1998) (citations omitted). “[P]rejudice to the defendant does not result from the prospect of a second lawsuit” or “the possibility that the plaintiff will gain a tactical advantage over the defendant in future litigation.” *Davis v. USX Corp.*, 819 F.2d 1270, 1274–75 (4th Cir. 1987) (citations omitted).

After a consideration of the briefing and relevant factors, the court finds that the motion for voluntary withdrawal should be granted. Respondent has not argued that it will suffer substantial prejudice from granting the dismissal. Respondent instead focuses his arguments on whether the claims would be barred as futile. Under South Carolina law,

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the 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.

S.C. Code Ann. § 17-27-90. Thus, “[a]ny issue which could have been raised in the initial state PCR action cannot be raised in a second PCR action.” *Primus v. Padula*, 555 F. Supp. 2d 596, 612 (D.S.C. 2008) (quoting *Wilson v. Moore*, 999 F. Supp. 783, 789 (D.S.C. 1998)). In this case, Petitioner claims she has after-discovered evidence, which may be sufficient reason why the evidence was not raised in the original application. In such an event, the claims may not be barred.

The court finds that Petitioner’s motion for voluntary dismissal (ECF No. 30) should be GRANTED. The motion to alter or amend the Report (ECF No. 31), as well as Respondent’s motion for summary judgment (ECF No. 18), are **DENIED as MOOT**. The court **MOOTS** the Report.

**IT IS SO ORDERED.**

s/Timothy M. Cain  
United States District Judge

July 26, 2016  
Anderson, South Carolina

FD2190 240700 0018842109  
C.G.G.C.I.  
4450 Broad River Rd  
Columbia, S.C. 29210



7007 0710 0003 0060 6966



MAIL ROOM  
JUN 2 2017  
5008

RETURN RECEIPT  
REQUESTED

The Supreme Court of South Carolina  
Daniel E. Shearouse, Clerk of Court  
P.O. Box 11330  
Columbia, S.C. 29211