IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

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| Anthony Fields, | ) | |
| | ) | C/A No. 0:16-2463-TMC |
| Petitioner, | ) | |
| | ) | |
| v. | ) | **ORDER** |
| | ) | |
| Warden Cartledge, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

This matter is before the court on Respondent's motion for summary judgment. (ECF No.12). Petitioner Anthony Fields, a state inmate proceeding pro se, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a magistrate judge. On April 24, 2017, Magistrate Judge Paige J. Gossett filed a Report and Recommendation ("Report") recommending that Respondent's motion for summary judgment should be granted. (ECF No. 44). On May 10, 2017, Petitioner timely filed objections to the Report (ECF No. 46), and Respondent filed a response to Petitioner's objections on May 24, 2017 (ECF No. 47).

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). 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).

**I. Background/Procedural History**

Petitioner is a state inmate currently housed in the Broad River Correctional Institution. In October 1989, Petitioner was indicted for second-degree burglary and larceny. On February 27, 1990, he pled guilty to the charges and was sentenced to concurrent terms of ten years' imprisonment, provided that upon ninety days of shock probation, the balance of his sentence would be suspended and he would be placed on probation for three years with other conditions. He did not appeal his 1990 convictions and sentences.

In March 1993, Petitioner's probation was revoked when he was indicted for one count of first-degree burglary and two counts of second-degree burglary. On August 10, 1993, Petitioner pled guilty to those charges and was sentenced to an aggregate term of twenty years' imprisonment. Petitioner did not appeal his 1993 convictions and sentences.

In August 2005, Petitioner was indicted for first degree burglary and petit larceny. In 2006, after a jury trial, he was found guilty as charged and sentenced to life imprisonment without the possibility of parole for the burglary offense and thirty days imprisonment for the larceny offense. In 2007, Petitioner filed an application for post-conviction relief ("PCR") challenging his 1990 convictions and sentences. Petitioner's application was dismissed as untimely on January 23, 2017.

In 2013, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court, challenging his 1993 and 2006 convictions and sentences. See C/A No.

0:13-02679-TMC (D.S.C. Oct. 1, 2013). The petition was dismissed and respondent was granted summary judgment on July 25, 2014.

Petitioner then filed this habeas action challenging his 1990 convictions and sentences. Specifically, Petitioner raises the following grounds for relief, quoted verbatim:

> **Ground One:** 6th Amendment Violations, Denial of Counsel.
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> **Supporting Facts:** Petitioner invoked his right to counsel, but no counsel represented petitioner, at no judicial proceedings for this case. And petitioner never waived his right to counsel. State has delayed adjudicating petitioner PCR petition for more than 8 years, and is still pending.
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> **Ground Two:** Denial of Direct Appeal of Conviction.
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> **Supporting Facts:** I was not consulted by counsel on my ability to appeal or means to appeal. Never waived right to a direct appeal.
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> **Ground Three:** Newly discovered evidence
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> **Supporting Facts:** There was a conflict of interest when the investigator (Sherriff Reid) had a intimate relationship with petitioner mother during the time the petitioner was charged with this crime, and during the time petitioner was convicted for this charge.
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> **Ground Four:** Due Process violation, S.C. and U.S. Constitutional rights violated
>
> **Supporting Facts:** The State used this conviction, which was uncounseled, to enhance petitioner future convictions.

(Habeas Pet., ECF No. 1 at 5, 6-7, 8, 9-10).

## II. Applicable Law

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

underlying state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(1)(2); *see Williams v. Taylor*, 529 U.S. 362, 398 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 410. Moreover, the state court's factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

To prove such an ineffective assistance of counsel claim, a petitioner must establish both that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the outcome of the proceeding would have been different but for the deficient performance, a "reasonable probability" being one "sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). When there has been a guilty plea, the petitioner must prove that counsel's representation was below the standard of reasonableness, and that, but for counsel's unprofessional errors, there is a reasonable probability that petitioner would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

Summary judgment is appropriate if a party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir.1987) (stating that summary

judgment should be granted "only when it is clear that mere is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts"). "In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities in favor of the nonmoving party." *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1008 (4th Cir. 1996).

**III. Discussion**

In his summary judgment motion, Respondent contends that the Petitioner is barred from challenging his 1990 conviction because the statute of limitations ran on April 24, 1997. Respondent also contends that the petition is procedurally barred.

In her Report, the magistrate judge determined that the court does not have subject matter jurisdiction because Petitioner is not in custody pursuant to the 1990 convictions and sentences he now seeks to challenge. (Report at 5). The magistrate judge also noted that, to the extent Petitioner is seeking to challenge any enhancement of his 2006 life without parole sentence, such a claim was raised in Petitioner's 2013 habeas action, and cannot be raised again in a subsequent petition. (Report at 5 n.1). In his objections, citing *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001), Petitioner contends that the magistrate judge failed to recognize an exception to the "in custody" requirement where the petitioner alleges that his prior conviction was uncounseled. (Objections at 2-3, 5).

Petitioner is no longer serving a sentence for the 1990 offense. Because the petitioner's sentence has expired on this conviction, he is no longer in custody on this conviction, and, therefore, this court lacks subject matter jurisdiction over his habeas petition with respect to this conviction. *See Steverson v. Summers*, 258 F.3d 520, 523 (6th Cir. 2001).

Petitioner, however, argues that the holding on *Lackawanna* mandates a different result. In *Lackawanna*, the United States Supreme Court held that a petitioner satisfies the habeas "in custody" requirement when he is challenging the sentence he is currently serving as having been enhanced by an allegedly unconstitutional prior conviction based on a failure to appoint counsel in regard to the prior conviction. *Lackawanna*, 532 U.S. at 394. The Court noted that the failure to appoint counsel is generally apparent from the judgment itself or a minute order. Despite Petitioner's current contentions, the record establishes that Petitioner was appointed counsel. (ECF No. 11-2). And, in fact, Petitioner has acknowledged that he was appointed counsel in his prior habeas action, but he contends that counsel was not present during his guilty plea and otherwise did not provide adequate representation. *Fields v. Stevens*, C/A No. 0:13-cv-02679 (D.S.C. filed Oct. 1, 2013) (ECF No. 15). Petitioner's arguments that appointed counsel did not adequately represent him are not the same as the failure to appoint counsel exception espoused by the Court in *Lackawanna*. *See Ocasio v. Smith*, C/A No. 07-CV-2754 (BSJ), 2008 WL 110938, at *17 & n. 35 (S.D.N.Y. Jan. 8, 2008) (noting the *Lackawanna* "exception for a *Gideon*-like challenge for failure to appoint counsel does not extend to a claim of ineffective assistance of counsel"); *see also Davis v. Roberts*. 425 F.3d 830, 835 (10th Cir. 2005) (holding petitioner is not entitled to a *Lackawanna* exception "on the ground that their counsel provided inadequate representation").

The plurality in *Lackawanna* recognized there might be other exceptions to this rule, in situations where the subsequent federal habeas petition is "the first and only forum available for review of the prior conviction." *Lackawanna*, 532 U.S. at 405-06. Specifically, two exceptions were acknowedged: (1) where a state court, without justification, refuses to rule on a

constitutional claim that has been properly presented; and (2) where a defendant subsequently obtains "compelling evidence that he is actually innocent." *Id.* In the present case, Petitioner has failed to show that the state courts refused to rule on constitutional claims that he had properly presented to them for review nor has petitioner presented this court with compelling evidence that he is actually innocent of the 1990 conviction.

Moreover, Petitioner's petition also should be dismissed as untimely because it is barred by the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitation. Section 2244 provides, in relevant part, that:

> (d)(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;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or the laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right 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
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
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> (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.

28 U.S.C. § 2244. Because Petitioner's sentence and conviction became final prior to the enactment of the AEDPA (April 24, 1996), Petitioner was entitled to a one-year grace period; therefore, he had until April 24, 1997, to file a timely § 2254 petition. *See Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir.1998). Petitioner did not file the instant petition until July 6, 2016. Thus, his petition is long overdue. Nor is Petitioner entitled to any statutory tolling because he did not file any post-conviction relief ("PCR") motions in state court in regard to his 1990 convictions before April 24, 1997. *See Grillette v. Warden, Winn Correctional Center*, 372 F.3d 765, 769 (5th Cir. 2004); *Fields v. Johnson*, 159 F.3d 914, 916 (5th Cir.1998).[1] In his response to the motion to dismiss, Petitioner does not dispute Respondent's characterization of the time line.

The undersigned also finds that Petitioner is not entitled to equitable tolling. The Supreme Court has recognized that, in appropriate cases, the limitations period may be equitably tolled. *Holland v. Florida*, 560 U.S. 631, 645-49 (2010). A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Id.* at 649. Petitioner waited until 2007 to file a PCR application regarding his 1990 conviction. Petitioner fails to demonstrate that he pursued his rights diligently and fails to identify any extraordinary circumstance that would justify equitable tolling. *See Melancon v. Kaylo*, 259 F.3d 401, 408 (5th Cir. 2001).

## IV. Conclusion

The court has thoroughly reviewed the Report and Petitioner's objections and finds no reason to deviate from the Report's recommended disposition. Accordingly, the court adopts the

[1]Petitioner filed a PCR application regarding his 1990 conviction on August 7, 2007. *Fields v. State*, 2007-CP-35-81.

Report (ECF No. 44), and Respondent's Summary Judgment Motion (ECF No. 12) is **GRANTED**.

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). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the instant matter, the court finds that Petitioner has failed to make "a substantial showing of the denial of a constitutional right." Accordingly, the court declines to issue a certificate of appealability.

**IT IS SO ORDERED.**

s/Timothy M. Cain
United States District Judge

Anderson, South Carolina
July 25, 2017