FILED: June 19, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7058
(8:16-cv-03552-JMC)

TERRANCE D. JOHNSON

Petitioner - Appellant

v.

JOSEPH MCFADDEN, Warden

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Agee, Judge Wynn, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7058

TERRANCE D. JOHNSON,

Petitioner - Appellant,

v.

JOSEPH MCFADDEN, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Anderson. J. Michelle Childs, District Judge. (8:16-cv-03552-JMC)

Submitted: February 22, 2018 Decided: March 30, 2018

Before AGEE, WYNN, and DIAZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Terrance D. Johnson, Appellant Pro Se. Donald John Zelenka, Deputy Attorney General, Caroline M. Scrantom, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

PER CURIAM:

Terrance D. Johnson seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). 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) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district 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.

We have independently reviewed the record and conclude that Johnson has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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

Terrance D. Johnson, Petitioner, v. Warden Joseph McFadden, Respondent.	)	Civil Action No.: 8:16-cv-03552-JMC **ORDER AND OPINION**

Petitioner Terrance D. Johnson ("Petitioner") filed this *Pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition") on November 3, 2016. (ECF No. 1.) On February 6, 2017, Respondent filed a Motion for Summary Judgment. (ECF No. 14.) On March 13, 2017, Petitioner filed a response to Respondent's Motion for Summary Judgment (ECF No. 14), and Respondent filed a reply on March 17, 2017 (ECF No. 22).

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, the matter was referred to United States Magistrate Judge Jacquelyn D. Austin for pre-trial handling. On June 29, 2017, the Magistrate Judge issued a Report and Recommendation ("Report") recommending that the court to deny Petitioner's habeas corpus petition and grant Respondent's Motion for Summary Judgment. (ECF No. 23.) This review considers Petitioner's Objection to Report and Recommendation ("Objections"), filed on July 13, 2017. (ECF No. 14.) For the reasons set forth herein, the court **ACCEPTS** the Magistrate Judge's Report. The court thereby **DENIES** Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and **GRANTS** Respondent's Motion for Summary Judgment.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The facts viewed in the light most favorable to Petitioner are discussed in the Report. (*See*

ECF No. 23.) The court concludes, upon its own careful review of the record, that the Magistrate Judge's factual summation is accurate and incorporates it by reference. The court will only recite herein facts pertinent to the analysis of Petitioner's Objections. Petitioner is an inmate incarcerated at Lieber Correctional Institution in the South Carolina Department of Corrections. (ECF No. 1.) In June 2004, Petitioner was indicted for trafficking cocaine and possessing a weapon during the commission of a violent crime in Charleston County, South Carolina (hereafter "State"). (ECF No. 13-1.) On March 10, 2006, a jury returned a guilty verdict against Petitioner for trafficking cocaine (second offense) and possessing a weapon during the commission of a violent crime. (ECF No. 13-2 at 260.) Petitioner was subsequently sentenced to life imprisonment for these offenses. (ECF No. 13-2 at 282.)

Petitioner filed an appeal of his State sentence in the South Carolina Court of Appeals (hereafter "Court of Appeals"). (ECF No. 13-4.) Chief Appellate Defender Robert M. Dudek represented Petitioner on this direct appeal. On August 29, 2011, the Court of Appeals affirmed Petitioner's conviction and sentence. (ECF No. 13-6.) Remittitur was issued on September 14, 2011. (ECF No. 13-7.) On September 15, 2011, Petitioner, proceeding *pro se*, filed a petition for rehearing. (ECF No. 13-8.) In a letter dated September 16, 2011, the Court of Appeals returned this petition, informing Petitioner that it no longer had jurisdiction over the case because his case was remitted to the Charleston County Clerk's office prior to receiving Petitioner's petition for rehearing. (ECF No. 13-9.)

On December 13, 2011, Petitioner, proceeding *pro se*, filed an application for post-conviction relief ("PCR"). (ECF No. 13-2 at 280-90.) Petitioner alleged he was held unlawfully based on the allegations of ineffective assistance of counsel, and due process violations to include the Fourth, Fifth, Sixth, and Fourteenth Amendments. (ECF No. 13-2 at 286.) The State filed a

return, dated June 20, 2012. (ECF No. 13-2 at 291-96.)

A PCR hearing was held on November 21, 2013, and Petitioner was represented at this hearing by Attorney Christopher L. Murphy. (ECF No. 13-2 at 297-355.) On December 1, 2014, the PCR court filed an order denying and dismissing Petitioner's PCR application with prejudice. (ECF No. 13-2 at 342-55.) A notice of appeal was timely filed and served. (ECF No. 13-11.) Attorney Tiffany L. Butler ("Butler") of the South Carolina Commission on Indigent Defense filed a *Johnson* Petition for Writ of Certiorari on Petitioner's behalf in the Supreme Court of South Carolina, dated August 26, 2015. (ECF No. 13-12.) Attorney Butler also filed a petition to be relieved as counsel. (ECF No. 13-10.) On September 21, 2015, Petitioner filed a *pro se* Petition for Writ of Certiorari in the South Carolina Supreme Court. (ECF No. 13-13.) The court remitted the matter to the lower court on July 5, 2016. (ECF No. 13-15.)

II. STANDARD OF REVIEW

The Magistrate Judge's Report is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See Matthews v. Weber*, 423 U.S. 261, 270-71 (1976). This court is charged with making a *de novo* determination of those portions of the Report to which specific objections are made, and the court may accept, reject, or modify, in whole or in part, the magistrate judge's recommendation, or recommit the matter with instructions. *See* 28 U.S.C. § 636 (b)(1).

Objections to a Report and Recommendation must specifically identify portions of the Report and the basis for those objections. Fed. R. Civ. P. 72(b). "[I]n the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must 'only satisfy itself

that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 316 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note). Failure to timely file specific written objections to a Report will result in a waiver of the right to appeal from an Order from the court based upon the Report. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). If the plaintiff fails to properly object because the objections lack the requisite specificity, then *de novo* review by the court is not required.

As Plaintiff is a *pro se* litigant, the court is required to liberally construe his arguments. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). The court addresses those arguments that, under the mandated liberal construction, it has reasonably found to state a claim. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999).

III. DISCUSSION

Petitioner's Objections to the Magistrate Judge's Report are merely a restatement of the underlying claims contained in his habeas corpus petition and are without merit. Petitioner's claims are as follows:

GROUND ONE: 4th Amendment Violation

Supporting facts: "This is a case where petitioner's 4th Amendment has been clearly violated. The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

GROUND TWO: 5th Amendment Violation - Due Process

Supporting facts: The court erred in "refusing to suppress the drug evidence since there was no legal basis of stopping appellant's vehicle and then detaining him since the evidence clearly shows officer thought appellant was a drug courier, he ask for consent to search and utilize his drug dog when the petitioner refused since suppression was mandated under these circumstances."

GROUND THREE: Ineffective Assistance - Sixth Amendment violation

Supporting facts: (A) "Counsel was ineffective for failing to challenge the traffic stop. (B) Counsel failed to call Fauntain Judon a witness at applicant's suppression hearing, that would have showed that the officer (Troy Butler) was never behind the applicant."

GROUND FOUR: Ineffective Assistance - 14th Amendment

Supporting facts: "Counsel was ineffective for failing to properly investigate whether a camera was in the police car." "Counsel was also ineffective for failing to object to the judge going into the jury room."

GROUND FIVE: "Counsel was ineffective for failing to argue the fact the Stop was pretextual, Officer (Troy Butler) had no legal basis for the stop. The stop was a unconstitutional traffic stop."

GROUND SIX: "Trial counsel was ineffective for failing to recognize that there was no plain view."

GROUND SEVEN: "Trial counsel was ineffective for not objecting to judge going into jury room prior trial. The presence of the judge in jury room did infact deny petitioner his right to a fair trial by an impartial jury."

GROUND EIGHT: "The unconstitutional stop and the detention in this case could not be separated from the viewing of the gun and the arrest."

GROUND NINE: "Allen Charge - (Allen- v. United States,)

164 U.S. 492 (1896) - defining the charge to be used to encourage a showing of deficiency and prejudice under Strickland v. Washington 466 U.S. 668 (1984) in support of his claim."

GROUND TEN: "Due Process - The start of the trial without ruling on the motion to suppress clearly is in violation of petitioner's constitutional right."

See Petition for Writ of Habeas Corpus. (ECF No. 1.)

Petitioner asserts that the Magistrate Judge incorrectly determined that his legal and factual issues (Ground One, Ground Three, Ground Five, Ground Six, and Ground Seven) are without merit. (ECF No. 25 at 3.) First, Petitioner reasserts Ground One of his habeas corpus petition that his rights against unreasonable search and seizure were violated without any supporting fact. (*Id.* at 1.) The Magistrate Judge reviewed Petitioner's assertions in his habeas corpus petition and determined that they were without any merit. The Magistrate Judge explained that Petitioner had a full and fair opportunity to litigate his Fourth Amendment claims during his suppression hearing in State court. (ECF No. 23 at 17.) Furthermore, Petitioner raised this issue on direct appeal. (*Id.*) Accordingly, Petitioner's Objections to the Report concerning Ground One is overruled.

Next, Petitioner challenges the Magistrate Judge's determination in relation to Ground Three (A) of his habeas corpus petition, reiterating that his trial counsel was ineffective for failing to challenge the stop of the vehicle. (ECF No. 1 at 8.) Petitioner further reasserts Grounds Five and Six of his habeas corpus petition that his trial counsel was ineffective for failing to argue that his traffic stop was pretextual and there was a legal basis for the stop. In addition, Petitioner states that his trial counsel was ineffective for "failing to recognize that there was no plain view." (ECF No. 25 at 6.) The Magistrate Judge determined the record supports the PCR court's decision. (ECF No. 23 at 23.) The facts supporting the PCR court's reasoning are well-founded during testimony

at trial and Petitioner's PCR hearing. (*Id.*) Specifically, Petitioner's trial counsel challenged Petitioner's traffic stop and attempted to suppress the gun and drugs evidence during the suppression hearing. (*Id.*); (ECF No. 13-2 at 8-103.) After the trial court denied the suppression motion (ECF No. 13-2 at 85–94), Petitioner's trial counsel renewed this objection (*Id.* at 194–96). The Magistrate Judge determined that the PCR court's decision was not an unreasonable determination, which is based on error evident "beyond any possibility for fairminded disagreement." (ECF No. 23 at 23.) Therefore, Petitioner's Objections to the Report concerning Grounds Three (A), Five and Six are overruled.

With respect to Ground Three (B), Petitioner reasserts that his trial counsel was ineffective for failing to call Fauntain Judon ("Judon") as a witness at the suppression hearing, which would have showed that Police Officer Troy Butler "was never behind the applicant." (ECF No. 25 at 4.) Petitioner states that the testimony of this witness would have "effected the outcome of the suppression motion and petitioner's trial." (*Id.* at 5.) However, the Magistrate Judge determined that the PCR court's analysis was reasonable. Petitioner's counsel testified at the PCR hearing that she knew the Judon family and that either she or her investigator talked to Judon. (ECF No. 13-2 at 324). When questioned why she did not call Judon as a witness at the suppression hearing, counsel stated that it was "[p]robably because I wouldn't have thought it was relevant to the actual issues of the suppression hearing . . . ." (*Id.*) The Magistrate Judge adequately explained that Judon's testimony likely would not have effected the outcome of the suppression motion or Petitioner's trial. (ECF. No. 23 at 25.) Therefore, Petitioner's Objections to the Report concerning Ground Three (B) is overruled.

Finally, Petitioner contends in Ground Seven that his trial counsel was ineffective because he did not object to the "judge going into jury room." (ECF No. 25 at 2-3.) Petitioner states that

"[t]he presence of the judge in jury room without question denied Petitioner his right to a fair trial by an impartial jury." (*Id.* at 3.) Despite's Petitioner's clarification in his Objections for Ground Seven, the Magistrate Judge adequately explained that the State court's record does not reflect that the trial judge entered the jury room or improperly interacted with the jury. (ECF No. 23 at 26.) The Magistrate Judge determined that Petitioner failed to demonstrate that the judge inappropriately interacted with the jury. (*Id.*) Petitioner has not shown that the State court's application of the *Strickland* standard was unreasonable. (ECF No. 23 at 26.) Therefore, Petitioner's Objections to the Report concerning Ground Seven is overruled.

IV. CONCLUSION

Based on the aforementioned reasons and a thorough review of the Report and Recommendation of the Magistrate Judge and the record in this case, the court **ACCEPTS** the Report and Recommendation of the Magistrate Judge (ECF No. 23). It is therefore ordered that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is **DENIED** and Respondent's Motion for Summary Judgment is **GRANTED**.

Certificate of Appealability

The law governing certificates of appealability provides that:

> (c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d

676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met.

IT IS SO ORDERED.

J. Michelle Childs
United States District Judge

August 2, 2017
Columbia, South Carolina

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

Terrance D. Johnson, Petitioner, v. Warden Joseph McFadden, Respondent.	C/A No. 8:16-cv-03552-JMC-JDA **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This matter is before the Court on Respondent's motion for summary judgment. [Doc. 14.] Petitioner, proceeding pro se, is a state prisoner who seeks relief under 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

Petitioner filed this Petition for writ of habeas corpus on October 27, 2016.[1] [Doc. 1.] On February 6, 2017, Respondent filed a motion for summary judgment and a return and memorandum to the Petition. [Docs. 13, 14.] On that same day, the Court filed an Order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the summary judgment procedure and of the possible consequences if he failed to adequately respond to the motion. [Doc. 15.] On March 13, 2017, Petitioner filed a response in opposition to the motion for summary judgment. [Doc. 20.] On March 17, 2017, Respondent filed a reply. [Doc. 22.]

[1] A prisoner's pleading is considered filed at the moment it is delivered to prison authorities for forwarding to the court. *See Houston v. Lack*, 487 U.S. 266, 270 (1988). Accordingly, this action was filed on October 27, 2016. [Doc. 1-3 (envelope marked as received by prison mailroom on October 27, 2016).]

Having carefully considered the parties' submissions and the record in this case, the Court recommends Respondent's motion for summary judgment be granted.

BACKGROUND

Petitioner is presently confined in the South Carolina Department of Corrections at Lieber Correctional Institution pursuant to orders of commitment of the Charleston County Clerk of Court. [Doc. 1 at 1.] In June 2004, Petitioner was indicted for trafficking cocaine and possession of a weapon during the commission of a violent crime. [Doc. 13-1.] On March 9, 2006, represented by Melissa Gay ("Gay"), Petitioner proceeded to trial before the Honorable Deadra Jefferson. [App. 1–279.[2]] On March 10, 2006, the jury returned a verdict of guilty on both charges. [App. 256.] Petitioner was subsequently sentenced to life imprisonment. [App. 278.]

Direct Appeal

Petitioner appealed his conviction. Chief Appellate Defender Robert M. Dudek ("Dudek") represented him on direct appeal. [Doc. 13-4.] Petitioner raised the following issue on direct appeal:

> Whether the court erred by refusing to suppress the drug evidence since there was no legal basis of stopping appellant's vehicle and then detaining him since the evidence clearly shows the officer thought appellant was a drug courier, he asked for consent to search and utilized his drug dog when appellant refused since suppression was mandated under these circumstances?

[2]The Appendix can be found at Docket Entry Number 13-2.

[*Id.* at 4.] The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence on August 29, 2011. [Doc. 13-6.] Remittitur was issued on September 14, 2011. [Doc. 13-7.]

On September 15, 2011, Petitioner, proceeding pro se, filed a petition for rehearing. [Doc. 13-8.] In a letter dated September 16, 2011, the South Carolina Court of Appeals returned the document, informing Petitioner that the Court of Appeals no longer had jurisdiction over the case because it had sent the remittitur to the Charleston County Clerk's office prior to receiving Petitioner's submission. [Docs. 13-9, 13-10.]

PCR Proceedings

Petitioner, proceeding pro se, filed an application for post-conviction relief ("PCR") on December 13, 2011. [App. 280–85.] Petitioner alleged he was being held in custody unlawfully based on the following grounds, quoted substantially verbatim:

> (a) Ineffective Assistance of Counsel -
> Counsel failed to challenge the stop, and numerous other ineffective assistance of counsel claims. Petitioner reserves the right to amend his PCR.
>
> (b) Due process violations to include Fourth, Fifth, Sixth, and Fourteenth Amendment.

[App. 282.] The State filed a return, dated June 20, 2012. [App. 287–92.]

A hearing was held on November 21, 2013, and Petitioner was represented at the hearing by Christopher L. Murphy ("Murphy"). [App. 293–336.] On December 1, 2014, the PCR court filed an order denying and dismissing the PCR application with prejudice. [App. 338–47.] A notice of appeal was timely filed and served. [Doc. 13-11.]

Tiffany L. Butler ("Butler") of the South Carolina Commission on Indigent Defense filed a *Johnson*[3] petition for writ of certiorari on Petitioner's behalf in the Supreme Court of South Carolina, dated August 26, 2015. [Doc. 13-12.] The petition asserted the following as the sole issue presented:

> Did the trial judge err by finding trial counsel provided effective representation where counsel failed to object and move for a mistrial when the trial judge improperly entered the jury room during trial to release the jury for lunch?

[*Id.* at 3.] Butler also submitted a petition to be relieved as counsel. [*Id.* at 10.]

Petitioner then filed a pro se petition for writ of certiorari in the South Carolina Supreme Court, dated October 8, 2015, alleging the following issues:

> 1) Counsel was ineffective for failing to argue that Petitioners stop violated his 4th Amendment rights thus resulting in a Denial of Equal Protection.
>
> 2) Counsel was ineffective for failing to file a motion to exclude all evidence discovered pursuant to the illegal traffic stop, thus resulting in a denial of Equal Protection.
>
> 3) Counsel was ineffective for failing to argue that the stop of Petitioners vehicle was pretex[t]ual, thus resulting in a denial of Equal Protection.
>
> 4) Counsel was ineffective for failing to call witnesses to trial who would have substantiated that the stop was pretex[t]ual thus denying Petitioners 5th and 6th Amendment rights.

[Doc. 13-13 at 3.]

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[3]A *Johnson* petition is the state PCR appeal analogue to an *Anders* brief; a brief filed pursuant to *Anders v. Cal.*, 386 U.S. 738 (1967), and effectively concedes the appeal lacks a meritorious claim. *See Johnson v. State*, 364 S.E.2d 201 (S.C. 1988).

On June 16, 2016, the court denied the petition and granted Butler's request to withdraw. [Doc. 13-14.] The court remitted the matter to the lower court on July 5, 2016. [Doc. 13-15.]

Petition for Writ of Habeas Corpus

Petitioner filed this Petition for writ of habeas corpus on October 27, 2016. [Doc. 1.] Petitioner raises the following grounds for relief, quoted substantially verbatim, in his Petition pursuant to 28 U.S.C. § 2254:

GROUND ONE: 4th Amendment Violation

Supporting facts: This is a case where petitioner's 4th Amendment has been clearly violated. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

GROUND TWO: 5th Amendment Violation - Due Process

Supporting facts: The refusal to suppress the drug evidence since there was no legal basis of stopping appellant's vehicle and then detaining him since the evidence clearly shows the officer thought appellant was a drug courier, he asked for consent to search and employed his drug dog when the petitioner refused since suppression was mandated under theses circumstances.

GROUND THREE: Ineffective Assistance - Sixth Amendment violation

Supporting facts: Counsel was ineffective for failing to challenge the traffic stop. Counsel failed to call Fauntain Judon as a witness at applicant's suppression hearing, that would have showed that the officer (Troy Butler) was never behind the applicant.[4]

GROUND FOUR: Ineffective Assistance - 14th Amendment

Supporting facts: Counsel was ineffective for failing to properly investigate whether a camera was in the police car. Counsel was also ineffective for failing to object to the judge going into the jury room.[5]

GROUND FIVE: Counsel was ineffective for failing to argue the fact the stop was pretextual, Officer (Troy Butler) had no legal basis for the stop. The stop was a unconstitutional traffic stop.

GROUND SIX: Trial counsel was ineffective for failing to recognize that there was no plain view.

GROUND SEVEN: Trial counsel was ineffective for not objecting to the judge going into jury room prior to trial. The presence of the judge in jury room did in fact deny petitioner his right to a fair trial by an impartial jury.

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[4]Petitioner's Ground Three contains two separate claims: (A) counsel was ineffective for failing to challenge the traffic stop; and (B) counsel failed to call Fauntain Judon as a witness at applicant's suppression hearing. [Doc. 1 at 8.] The Court will address each claim separately as Grounds Three (A) and Three (B).

[5]Similarly, Petitioner's Ground Four asserts two separate claims: (A) counsel was ineffective for failing to properly investigate whether a camera was in the police car; and (B) counsel was also ineffective for failing to object to the judge going into the jury room. [Doc. 1 at 10.] The Court will address each claim separately as Grounds Four (A) and Four (B).

GROUND EIGHT: The unconstitutional stop and the detention in this case could not be separated from the viewing of the gun and the arrest.

GROUND NINE: Allen Charge - (Allen - v. United States,) 164 U.S. 492 (1896) - defining the charge to be used to encourage a showing of deficiency and prejudice under *Strickland v. Washington* 466 U.S. 668 (1984) in support of his claim.

GROUND TEN: Due Process - The start of the trial without ruling on the motion to suppress cleary is in violation of petitioner's constitutional right.

[Docs. 1 at 5–10; 1-1 (errors in original) (footnotes added).] As stated, Respondent filed a motion for summary judgment on February 6, 2017. [Doc. 14]. Petitioner filed a response in opposition on March 13, 2017 [Doc. 20], to which Respondent filed a reply on March 17, 2017 [Doc. 22]. Accordingly, the motion is ripe for review.

APPLICABLE LAW

Liberal Construction of Pro Se Petition

Petitioner brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. Even under this less stringent standard, however, the pro se petition is still subject to summary dismissal. *Id.* at 520–21. The mandated liberal construction means only that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could

prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the petitioner's legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Summary Judgment Standard

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

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

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

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this

standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Further, Rule 56 provides in pertinent part:

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

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

Habeas Corpus

Generally

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

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

28 U.S.C. § 2254(d). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision," and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Moreover, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Procedural Bar

Federal law establishes this Court's jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person "is in custody in violation of the Constitution or laws or treaties of the United States" and requires that a petitioner present his claim to the state's highest court with authority to decide the issue before the federal court will consider the claim. *Id.* The separate but related theories of exhaustion and procedural bypass operate to require a habeas petitioner to first submit his claims for relief to the state courts. A habeas corpus petition filed in this Court before the petitioner has appropriately exhausted available state-court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

Exhaustion

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

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (I) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254. The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. *Id.* § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). Thus, a federal court may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds for relief be stated in the direct appeal or PCR application. S.C. App. Ct. R. 203; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C. 1976). If the PCR court fails to address a claim as required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the judgment. S.C. R. Civ. P. 59(e). Failure to do so will result in the application of a procedural bar to that claim by the South Carolina Supreme Court. *Marlar v. State*, 653 S.E.2d 266 (S.C. 2007).[6] Further, strict time deadlines govern direct appeal and the filing

[6]In *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009), the Fourth Circuit found that, prior to the Supreme Court of South Carolina's November 5, 2007 decision in *Marlar*, South Carolina courts had not uniformly and strictly enforced the failure to file a motion pursuant

of a PCR application in the South Carolina courts. For direct appeal, a notice of appeal must be filed and served on all respondents within ten days after the sentence is imposed or after receiving written notice of entry of the order or judgment. S.C. App. Ct. R. 203(b)(2), (d)(1)(B). A PCR application must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

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

Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner seeks habeas corpus relief based on an issue he failed to raise at the appropriate time in state court, removing any further means of bringing that issue before the state courts. In such a situation, the petitioner has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). The United States Supreme

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to Rule 59(e) as a procedural bar. 589 F.3d at 162–65. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the Court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

Court has stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See id.* Bypass can occur at any level of the state proceedings if a state has procedural rules that bar its courts from considering claims not raised in a timely fashion. *Id.*

The Supreme Court of South Carolina will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. *See* S.C. Code Ann. § 17-27-90; *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Further, if a prisoner has failed to file a direct appeal or a PCR application and the deadlines for filing have passed, he is barred from proceeding in state court. S.C. App. Ct. R. 203(d)(3), 243. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. *See Reed v. Ross*, 468 U.S. 1, 11 (1984); *see also Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995). As the United States Supreme Court explained:

> . . . [State procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Reed, 468 U.S. at 10–11.

However, if a federal habeas petitioner can show both (1) "'cause' for noncompliance with the state rule" and (2) "'actual prejudice resulting from the alleged constitutional violation[,]'" the federal court may consider the claim. *Smith*, 477 U.S. at 533 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause

and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Further, if the petitioner does not raise cause and prejudice, the court need not consider the defaulted claim. *See Kornahrens*, 66 F.3d at 1363.

If a federal habeas petitioner has failed to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state courts and in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). Absent a showing of cause and actual prejudice, a federal court is barred from considering the claim. *Wainwright*, 433 U.S. at 87. In such an instance, the exhaustion requirement is technically met, and the rules of procedural bar apply. *Teague v. Lane*, 489 U.S. 288, 297–98 (1989); *Matthews*, 105 F.3d at 915 (citing *Coleman*, 501 U.S. at 735 n.1; *Teague*, 489 U.S. at 297–98; *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990)).

Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this Court may consider claims that have not been presented to the South Carolina Supreme Court in limited circumstances—where a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or where a "fundamental miscarriage of justice" has occurred, *Carrier*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim, where the novelty of the constitutional

claim is such that its legal basis is not reasonably available to the petitioner's counsel. *Id.* at 487–89; *Reed*, 468 U.S. at 16. Absent a showing of "cause," the court is not required to consider "actual prejudice." *Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice to excuse a default. *Carrier*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error. *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982).

DISCUSSION

Non-Cognizable Claims

As an initial matter, to the extent Petitioner asserts in Grounds One, Two, and Eight[7] that his rights against unreasonable search and seizure were violated and that the trial court erred in failing to grant his motion to suppress, any freestanding Fourth Amendment allegation is not cognizable. *Stone v. Powell*, 428 U.S. 465, 482 (1976); *Todd v. Warden, Livesay Corr. Inst.*, No. 1:14-cv-00221-TLW, 2015 WL 424573, at *6 (D.S.C. Feb. 2, 2015). Where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Stone*, 428 U.S. at 494. In further defining this rule, the Fourth Circuit Court of Appeals held in *Doleman v. Muncy*, 579 F.2d 1258 (4th Cir. 1978), that the *Stone* requirement of an opportunity for full and fair litigation of a Fourth Amendment claim is met when state procedures provide a meaningful vehicle for a prisoner to raise a Fourth Amendment claim.

[7]Although Petitioner does not cite to the Fourth Amendment in Grounds Two and Eight, because he is challenging the suppression motion and the stop, the Court construes Grounds Two and Eight as raising Fourth Amendment violations.

In *Doleman*, the requirement was met because the prisoner had an opportunity to present his Fourth Amendment claim through a motion to suppress at his state criminal trial, and through an assignment of error on appeal once the motion was denied. *Id.* at 1265.

Here, Petitioner had a full and fair opportunity to litigate this Fourth Amendment issue during his suppression hearing in state court and did so. (App. 2–97, 180–90.) Further, as stated, Petitioner raised this issue on direct appeal. [Docs. 13-4; 13-6.] Because Petitioner was afforded a full and fair opportunity to pursue his Fourth Amendment claim in state court in accordance with *Stone*, the Court need not inquire further into the merits. Accordingly, the undersigned recommends granting summary judgment on Grounds One, Two, and Eight.

Procedurally Barred Claims

Procedural default is an affirmative defense that is waived if not raised by respondents. *Gray v. Netherland*, 518 U.S. 152,165–66 (1996). If the defense is raised, it is the petitioner's burden to raise cause and prejudice or actual innocence; if not raised by the petitioner, the court need not consider the defaulted claim. *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995). Here, Respondent contends Grounds Four(A), Nine, and Ten are procedurally barred. [Doc. 13 at 16–19.] Respondent also argues Petitioner cannot overcome the default of these grounds because he cannot establish cause and prejudice or a miscarriage of justice. [*Id.* at 19.]

Ground Four (A)

In Ground Four (A), Petitioner argues that counsel was ineffective for failing to properly investigate whether a camera was in the police car during the stop. [Doc. 1 at 10.]

As stated, "[t]o satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state's highest court." *Matthews*, 105 F.3d at 911. A federal court may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them. Ground Four (A) is procedurally defaulted because Petitioner failed to raise this claim on appeal of his PCR application.

Ground Nine

In Ground Nine, Petitioner asserts, "Allen Charge – (Allen v. United States,) 164 U.S. 492 (1896) – defining the charge to be used to encourage a showing of deficiency and prejudice under Strickland v. Washington 466 U.S. 668 (1984) in support of his claim." [Doc. 1-1 at 2.] While it is not entirely clear what Petitioner is arguing, liberally construing the Petition, it appears Petitioner may be reasserting a claim raised in his *Johnson* petition. [*See* Doc 13-12 at 3.] In the pro se *Johnson* petition, Petitioner argued that when the jury foreman announced that the jury had reached a verdict, and the trial court's poll revealed that one or two jurors did not agree with that verdict, that the trial court should have granted counsel's motion for mistrial. [*See* Doc. 13-13 at 29–31.] To the extent Petitioner's Ground Nine can be liberally construed as asserting counsel was ineffective in handling the mistrial motion, this claim was not raised to or ruled on by the PCR court. Because this ground was not fairly presented to the Supreme Court of South Carolina, it is procedurally barred from federal habeas review absent a showing of cause and actual prejudice. *See Coleman*, 501 U.S. 722 (stating that if an issue is not properly raised to the state's highest court and would be procedurally impossible to raise now, then it is procedurally barred from federal habeas review); *Wainwright*, 433 U.S. at 87; *Matthews*, 105 F.3d at 915.

Ground Ten

In Ground Ten, Petitioner alleges that his due process rights were violated by the timing of the ruling on the motion to suppress. [Doc. 1-1 at 2.] Ground Ten is raised for the first time in the instant Petition. Because this ground was not fairly presented to the state courts, it is procedurally barred from federal habeas review absent a showing of cause and actual prejudice. *See Coleman*, 501 U.S. at 722; *Wainwright*, 433 U.S. at 87; *Matthews*, 105 F.3d at 915.

Cause and Prejudice

The existence of cause must ordinarily turn on whether the petitioner can show some objective factor external to the defense impeded counsel's or the petitioner's efforts to comply with the state's procedural rule. *Carrier*, 477 U.S. at 488. *But see Martinez v. Ryan*, 566 U.S. 1 (2012) (holding that, in certain circumstances, ineffective assistance of counsel in an initial PCR proceeding can provide "cause" for not complying with state procedural rules regarding a claim of ineffective assistance at trial).

Here, Petitioner has failed to provide any argument to establish cause and prejudice. [*See* Doc. 20.] Because Petitioner has not shown sufficient cause and prejudice, or a fundamental miscarriage of justice, to overcome his default in state court, the undersigned recommends that summary judgment be granted on Grounds Four(A), Nine, and Ten.

Merits of Remaining Claims

Under the AEDPA, a federal court may not grant habeas relief unless the underlying state court decision was contrary to or an unreasonable application of federal law, as

determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1), or based on an unreasonable determination of the facts before the court, *id.* § 2254(d)(2). The Supreme Court has held the "contrary to" and "unreasonable application of" clauses present two different avenues for relief. *Williams*, 529 U.S. at 405 ("The Court of Appeals for the Fourth Circuit properly accorded both the 'contrary to' and 'unreasonable application' clauses independent meaning."). The Court stated there are two instances when a state court decision will be contrary to Supreme Court precedent:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405–06. On the other hand, a state court decision is an unreasonable application of Supreme Court precedent when the decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08; *see also Richter*, 562 U.S. at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable."). Finally, a decision cannot be contrary to or an unreasonable application of Supreme Court precedent unless applicable Supreme Court precedent exists; without applicable Supreme Court precedent, there is no habeas

relief for petitioners. *Virsnieks v. Smith*, 521 F.3d 707, 716 (7th Cir. 2008) (citing *Lockhart v. Chandler*, 446 F.3d 721, 724 (7th Cir. 2006); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006)); *see Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008).

When evaluating a habeas petition based on a claim of ineffective assistance of counsel, assuming the state court applied the correct legal standard—the Supreme Court's holdings in *Strickland v. Washington*, 466 U.S. 668 (1984)—"[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard."[8] *Richter*, 562 U.S. at 101. "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.*; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (stating judicial review of counsel's performance is "doubly deferential when it is conducted through the lens of federal habeas"). Even if a state court decision questionably constitutes an unreasonable application of federal law, the "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough*

[8]In *Strickland v. Washington*, the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. 466 U.S. at 687. To satisfy the first prong, a prisoner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To satisfy the second prong, a prisoner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 692. The Court cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential," and "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

v. Alvarado, 541 U.S. 652, 664 (2004)). Thus, in such situations, the habeas court must determine whether it is possible for fairminded jurists to disagree that the arguments or theories supporting the state court's decision are inconsistent with Supreme Court precedent. *Id.*

Grounds Three (A), Five, and Six

In Ground Three (A), Petitioner alleges that counsel was ineffective for failing to challenge the stop of the vehicle. [Doc. 1 at 8.] Further, in Grounds Five and Six, Petitioner argues that counsel was ineffective for failing to argue the stop was pretextual and for failing to recognize there was no plain view. [Doc. 1-1 at 1.] The PCR court held an evidentiary hearing and made the following findings with respect to these claims:

> The Applicant alleges that counsel was ineffective for failing to challenge the traffic stop which resulted in his arrest. The Court finds this allegation to be without merit. The Court finds that counsel provided credible testimony that she discussed challenging the traffic stop with the Applicant prior to trial. The Court finds and the record reflects that counsel vigorously challenged the traffic stop which resulted in Applicant's arrest during a suppression hearing held at the start of trial. (T. 3:13-95:22). After extensive cross-examination of the State's witnesses, counsel argued to the court during the suppression hearing that the traffic stop was pretextual based on the fact that the Applicant was a black man driving a nice car and that he had not committed any moving violation warranting the stop. Counsel argued further that the finding of the gun in the Applicant's car was not a separate event from the stop and both the gun and drugs found after the traffic stop should be suppressed as "fruit of the poisonous tree". (T. 75:25-92:13, 94:6-95:22). After the Court denied Applicant's motion to suppress (T. 181:17- 190:14), counsel renewed her motion to further insure that the issue was properly preserved for appellate review (T. 190:20-25). This Court finds that Applicant has failed to carry his burden of proving counsel was deficient in failing to challenge the traffic stop. As there was no deficient performance, the Court need not consider any resulting prejudice on this particular issue.

[App. 343–44.]

Upon review, the Court determines the PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court concludes the PCR court's decision was not contrary to applicable Supreme Court precedent.

Further, the record supports the PCR court's decision. The facts supporting the PCR court's reasoning are well-founded in the testimony at trial and at the PCR hearing. As is evident by the record, trial counsel sought rigorously to challenge the stop. Counsel fought to suppress the gun and drugs during the suppression hearing at the start of trial. [App. 3–99.] After the trial court denied the suppression motion [App. 181–90], counsel renewed the objection [App. 190–92]. This Court cannot find the PCR court's decision to be an unreasonable determination—i.e., a determination based on error evident "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Because Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, the undersigned recommends that summary judgment be granted on Grounds Three (A), Five, and Six.

Ground Three (B)

In Ground Three (B), Petitioner asserts that counsel was ineffective for failing to call Fauntain Judon ("Judon") as a witness at the suppression hearing. [Doc. 1 at 8.] On this issue, the PCR court found,

> Applicant further alleges that counsel was ineffective in failing to call Fauntain Judon as a witness during his suppression hearing. This Court finds this allegation to be without merit. Counsel provided a strategic basis for her decision not to call Judon as a witness during the Applicant's suppression hearing. Where counsel articulates a valid strategic reason for her action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel stated at the evidentiary hearing that Judon's testimony would not have been relevant to the suppression issue. This Court finds counsel's reasoning for failing to call Judon as a witness during the suppression hearing was valid and that no prejudice resulted from this decision.
>
> This Court also finds and the record reflects that counsel was able to vigorously argue the motion to suppress without calling any additional witnesses. This Court finds it unlikely that the testimony of Judon (as reflected in the affidavit presented by Applicant) would have assisted the court in ruing on Applicant's motion to suppress. Applicant has failed to carry his burden of proving that counsel was deficient in failing to call Judon as a witness during the Applicant's suppression hearing. This Court also finds that Applicant has failed to show that but for counsel's failure to call Judon as a witness, his motion to suppress would have been granted.

[App. 344–45.]

Upon review, the court finds the PCR court's analysis to be reasonable. Counsel testified at the PCR hearing that she knew the Judon family and that either she or her

investigator talked to Judon. [App. 320.] When questioned why she did not call Judon as a witness at the suppression hearing, counsel stated that it was "[p]robably because I wouldn't have thought it was relevant to the actual issues of the suppression hearing. . ." [App. 320.] The affidavit of Judon, in its entirety, stated,

> As I was looking for my children outside of our family business, Judon's Sewing & Alterations, I observed on Rivers Ave, a grey Jaguar in the near lane and a North Charleston police office[r] in the far lane coming towards me. As I turned to walk back in the business I saw the Jaguar pull into the florist next door and the police car make an illegal turn to the side of the Jaguar.

[App. 337.] The undersigned cannot find that Judon's testimony likely would have effected on the outcome of the suppression motion or Petitioner's trial. Thus, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of *Strickland*. Accordingly, Respondent's motion for summary judgment should be granted with respect to this ground.

Grounds Four (B) and Seven

In Grounds Four (B) and Seven, Petitioner alleges that counsel was ineffective for not objecting to the judge going into the jury room prior to trial. [Docs. 1 at 10; 1-1 at 1.] When questioned during the PCR hearing whether trial counsel committed any additional errors, Petitioner asserted that counsel was ineffective for failing to object when, prior to trial starting, the judge went into the jury room. [App. 312.] When asked why this was an error, Petitioner stated that "[he] didn't feel that the judge should have went back there by himself and dealt with the jury at all." [App. 312.] In addressing this issue, the PCR court determined that,

> The Applicant alleges that counsel failed to object to the judge going into the jury room. This Court finds this allegation to be

> without merit. This Court finds that the record is devoid of any instance reflecting that the trial judge entered the jury room or in any way inappropriately interacted with the jury. Thus, Applicant has failed to carry his burden of proving counsel ineffective in this regard.

[App. 346.]

Upon review of the record, the undersigned cannot find that the PCR court's decision was unreasonable. As stated, where allegations of ineffective assistance of counsel are made, the question becomes "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Here, Petitioner has failed to point to anything in the record to demonstrate that the judge inappropriately interacted with the jury. Petitioner cannot show that the state court's findings are unreasonable and Respondent's motion for summary judgment should be granted on these grounds.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that Respondent's motion for summary judgment be GRANTED and the Petition be DENIED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

June 29, 2017
Greenville, South Carolina