UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6319

RISHAWN LAMAR REEDER,

Petitioner - Appellant,

v.

WARDEN REYNOLDS,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Margaret B. Seymour, Senior District Judge. (9:17-cv-00830-MBS)

Submitted: August 16, 2018 Decided: August 21, 2018

Before WYNN and DIAZ, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Rishawn Reeder, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Rishawn Reeder 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 Reeder has not made the requisite showing. Accordingly, we deny a certificate of appealability 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

Rishawn Lamar Reeder, #282918, Petitioner, vs. Warden Reynolds, Lee Correctional Institution, Respondent.	)	C/A No. 9:17-830-MBS **ORDER AND OPINION**

Petitioner Rishawn Lamar Reeder is an inmate in custody of the South Carolina Department of Corrections. He currently is housed at Lee Correctional Institution in Bishopville, South Carolina. This matter is before the court on Petitioner's petition for relief under 28 U.S.C. § 2254, which petition was filed on March 29, 2017.

FACTS AND PROCEDURAL HISTORY

On March 14, 2009, Bryant Miller ("Bryant"); Dwight Geter ("Dwight"); Marty; and D.G., Dwight's younger brother ("Decedent") were at Club Dream in Spartanburg County, South Carolina. Transcript of Record 84-85 ("Trial Transcript"), ECF No. 91-1. Dwight, Decedent, and Marty got into a fight with Darius Cathcart and some others. Id. at 86. Bryant, Dwight, Marty, and Decedent left the club and rode in Dwight's red Crown Victoria to a Waffle House where they sat in the parking lot for thirty or forty-five minutes. Id. at 88. They left to take Decedent home. Dwight was driving, Marty was in the passenger seat, Bryant was sitting behind Dwight, and Decedent was sitting behind Marty. At a four-way stop, a dark green Nissan pulled up next to the Crown Victoria on the driver's side and an occupant or occupants started shooting at the Crown Victoria. Bryant was shot in the neck. Bryant returned fire, and the Nissan drove off. Id. at 88-92.

It appears the bullet passed through Bryant's neck and fatally struck Decedent in the neck. Id. at121. The group dropped off Marty at the Geters' house, talked to Decedent's mother, and drove to Mary Black Hospital, where Decedent was pronounced dead upon arrival. Id. at 128.

Around the same time, Jack Christopher Durham of the Spartanburg County Sheriff's Office received a call that there were shooting victims at Mary Black Hospital and Spartanburg Regional Hospital. Id. at 143-45. He traveled to Spartanburg Regional Hospital and was advised Cathcart had a grazing injury to his right side, and that Petitioner had been shot in the hand or wrist. Id. at 151.

Cathcart was brought into the Sheriff's Office for questioning. Cathcart told Durham that he (Cathcart), Petitioner, and an individual named Black had been at Club Dream and that he (Cathcart) had been driving his girlfriend's grey Nissan. Cathcart stated that he was taking Black and Petitioner home when a vehicle came up beside them and the occupants started shooting. According to Cathcart, the shooting occurred while he, Petitioner, and Black were entering I-85. Black dropped them off at Spartanburg Regional Hospital and drove off. Id. at 158-59.

Robert Charles Talanges of the Spartanburg County Sheriff's Office also responded to the Spartanburg Regional Hospital, where he collected gunshot residue and buccal swabs from Cathcart, Michael Crossley, and Petitioner. Id. at 257-59.

Tim Davis, Patrick Cockrell, and Michael Shawn Nix of the Spartanburg County Sheriff's Office responded to the scene at the four-way stop and located some shell casings and an unfired bullet. Id. at 229, 234. On March 15, 2009, David Hogsed of the Spartanburg County Sheriff's Department executed a search warrant on the Crown Victoria, which had been impounded. Hogsed located ten bullet holes on driver's side of the vehicle, a lead projectile fragment from the top of the dashboard on the driver's side, a cartridge casing on the top of the dashboard on the passenger's side,

a cartridge case on the right side of the floorboard, an unfired bullet on the right side rear seat, a projectile on the left side rear seat, a cartridge case on the front center console, a cartridge case in the driver's seat, lead projectile from inside the driver's door, among other things. Id. at 239-40.

Hogsed, Davis, and Talanges searched a Nissan two days later that had been set on fire. Hogsed identified a cartridge casing inside the driver's seat. Id. at 244. Davis located a cartridge casing on the front passenger floor area. Id. at 296. Talanges located bullet holes and bullet strikes to the passenger side, as well as a cartridge case in the back floor area. Id. at 293-95. The vehicle belonged to William Dendy, Cathcart's uncle, but Cathcart made the payments and drove the car. Id. at 279-80. No crime scene was identified at the I-85 on-ramp described by Cathcart. Id. at 233.

Cathcart and Petitioner were indicted and charged with assault with intent to kill, murder, and assault and battery with intent to kill. They proceeded to trial before the Honorable Roger L. Couch and a jury on May 9 - 12, 2011. Petitioner was represented by Michael Brown, Esquire. Among other things, Ila Simmons, forensic chemist of the South Carolina Law Enforcement Division (SLED) forensic laboratory trace evidence department was qualified as an expert in the field of gun shot residue testing. Id. at 319-21. She testified that residue was found on both of Petitioner's palms as well as the back of his left hand. Residue was found on both of Cathcart's palms. No gunshot residue was detected on Michael Crossley. Id. at 325. Kenneth H. Whitler of SLED was qualified as an expert in the field of firearms identification and testing. He testified that he had tested eleven .40 caliber Smith and Wesson cartridge cases and a 9-millimeter cartridge case. Of those, five were fired by one firearm and five were fired by another firearm. The eleventh cartridge case could have been fired by one of those two firearms based on the class characteristics, or a third weapon could have been involved. Whitler further testified that a third weapon was required to shoot the 9-

millimeter cartridge, and that four weapons was the maximum number of weapons that could have been involved, based on the fragments that could not be identified as coming from a particular gun. Id. at 354-56. The jury also was shown a surveillance video from a business in the area of the four-way stop that revealed a vehicle traveling toward the four-way stop followed by another vehicle with its headlights off. When the cars reached the four-way stop, the shooting commenced. Id. at 303, 378-79.

The jury found Cathcart and Petitioner guilty on all charges. Id. at 465-66. The trial judge sentenced Cathcart to 20 years incarceration as to assault and battery with intent to kill, 10 years as to assault with intent to kill, and 45 years as to murder, to run concurrently. Id. at 482. The trial judge sentenced Petitioner to 20 years incarceration as to assault and battery with intent to kill, 10 years as to assault with intent to kill, and to life as to murder, to run concurrently. Id. at 484.

Petitioner appealed his conviction and sentence to the South Carolina Court of Appeals. Notice of Appeal, ECF No. 9-4. On August 30, 2011, the appeal was dismissed because Petitioner, through counsel, failed to timely order the transcript and/or serve and file the initial brief of appellant and designation of matter. Order of Dismissal, ECF No. 9-5. Remittitur was issued on September 14, 2011. Remittitur, ECF No. 9-6.

On January 23, 2012, Petitioner filed for post-conviction relief (PCR), as amended on May 24, 2012, April 16, 2013, April 19, 2013, January 6, 2014, April 7, 2014, May 5, 2014, and October 22, 2014. Applications for Post-Conviction Relief, ECF No. 9-1 (pp. 490-95; 498-500); ECF No. 9-2 (pp. 12-13; 22-23; 24; 25-27; 32-69. On November 3, 2014, Petitioner appeared before the Honorable R. Keith Kelly for a PCR hearing. Petitioner was represented by J. Falkner Wilkes, Esquire. According to the PCR judge, Petitioner raised the following issues:

1. Ineffective assistance of counsel in that;
   a. Counsel failed to use exculpatory evidence,
   b. Counsel failed to object to alleged non-testifying codefendant's out of court statements through investigators' testimonies,
   c. Counsel failed to confront and cross-examine Officer Heather Forrester,
   d. Counsel requested a self-defense charge,
   e. Counsel failed to conduct an independent investigation,
   f. Counsel failed to interview alibi witnesses,
   g. Counsel failed to present the Spartanburg Regional Hospital video,
   h. Counsel failed to prevent alleged codefendant with identification of shooter,
   i. Counsel failed to make a motion for severance,
   j. Counsel failed to object to jury charge instructing that malice could be inferred from the use of a deadly weapon,
   k. Counsel failed to present the gunshot residue analysis information forms for [Petitioner] and alleged codefendant,
   l. Counsel failed to call Loren Williams as a witness,
   m. Counsel failed to object to the admission of [Petitioner's] gunshot residue test,
   n. Counsel failed to move to suppress gunshot residue test pursuant to SCRE 403,
   o. Counsel failed to move to quash the indictments before the jury was sworn,
   p. Counsel failed to investigate alleged deal between State and alleged codefendant.
2. Due process violations, in that;
   a. Violation of Sixth Amendment Confrontation Clause.
3. Prosecutorial misconduct, in that;
   a. Brady violation.

Order of Dismissal 2-3, ECF No. 9-3, 46-47.

Of these grounds raised by Petitioner, Grounds 1.e, 1.g, and 1.j are pertinent to the within § 2254 petition because, as discussed below, the remaining grounds for relief have been procedurally defaulted.

As to Ground 1.e, Petitioner called Glenn William Kelly to testify on his behalf at the PCR hearing. Transcript of Record 89 ("PCR Transcript"), ECF No. 9-2, 160. Kelly testified that he had

been near the four-way stop and had seen a car pull up with the headlights on. Then he saw a green Mustang pull up behind the first car and the occupants begin shooting. Id. at 90, ECF No. 9-2, 161. Kelly called 911 and reported the information. Id. at 91, ECF No. 9-2, 162. Kelly testified that he was about fifteen feet away from the shooting and that he can recognize the make and model of a vehicle just by the headlights from thirty feet away. Id. at 92, ECF No. 9-2, 163. Kelly admitted he had been drinking alcoholic beverages the night of the shooting. Id.

Trial counsel testified that he had received information regarding Kelly during discovery and had spoken with Petitioner regarding the information early on, when Petitioner claimed to have not been at the crime scene. According to trial counsel, Petitioner initially claimed to have alibi witnesses to the fact that he was getting robbed at the time of the shooting, and that it was a coincidence that he was at the hospital at the same time as Cathcart. Id. at 32, ECF No. 92, 103. Later, Petitioner told trial counsel that he was in the car with Cathcart at the time of the shooting, but that he had nothing to do with the altercation at the club. According to trial counsel, Petitioner claimed someone pulled up to him and Cathcart and started shooting at them. Petitioner then blacked out until he arrived at the hospital. Id. Trial counsel did not follow up on Kelly's statement after Petitioner admitted to being in the car with Cathcart. See id. at 49, ECF No. 9-2, 120. Trial counsel further testified that he believed Kelly's claim that he had seen a green Mustang to not be exculpatory, given that it was Cathcart's car that was later found burning, both Cathcart and Petitioner had sustained gunshot wounds, and one of the victims of the shooting identified a Nissan, and not a Mustang. Id. at 82, ECF No. 9-2, 153.

Ground 1.g refers to videotapes taken at Spartanburg Regional Hospital that showed Cathcart and Petitioner arriving at the hospital and entering together. The hospital videotape's time stamp

showed approximately the same time as the time stamp of the videotape introduced at trial of the shooting. At the PCR hearing, trial counsel testified that he did not introduce the hospital videotape as proof Petitioner could not have been at the crime scene because (1) his experience was that it would have been easy for someone to "distinguish what was occurring with the time stamp, coupled with the medical records of actual admittance, the time the investigators came, hospital personnel, and actually when [Petitioner] . . . was seen, along with Mr. Cathcart. So I think that would be very easy to point out the differences between the camera and the actual time period in which they were seen by medical personnel." Id. at 17, ECF No. 92-2, 88. Trial counsel also testified, "But most importantly the fact that [Petitioner] could have been easily identified appearing with his co-defendant on the hospital tape." Id. at 12, ECF No. 9-2, 83.

Regarding Ground 1.j, the trial judge instructed the jury as to the "malice aforethought" element present in each offense charged in the indictment. As to malice, the trial judge stated:

> Malice is defined as hatred or ill will or hostility toward another person. It is the intentional doing of a wrongful act without just cause of [*sic*] excuse. Again, with the intent, there's that thing about intent, to inflict an injury or under circumstances that the law would infer an evil intent. . . .
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> . . . .
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> Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may arise when a deed is done by a person using a deadly weapon. A deadly weapon is any article or instruments or substance which is likely to cause death or great bodily harm. Now, whether an instrument is used as a deadly weapon is a question of fact for a jury to decide.
>
> The following are examples which, under the law, have been determined to be deadly weapons. Those include a pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a slingshot, metal knuckles, razors, gasoline, fire bombs. All of those things are, have been shown in cases to have been used as deadly weapons, but the question of whether it is a deadly weapon is a question of fact for the jury to decide.

Trial Transcript 448-49, ECF No. 9-1, 452-53.

The trial judge also charged self-defense:

> Now, the defendants have raised the defense of self-defense, and I'm going to talk to you a little bit about the defense of self-defense. Self-defense would constitute a complete defense, and if it is established, you must fine the defendants not guilty.
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> Now, the State has the burden, burden of disproving self-defense beyond a reasonable doubt. If you have a reasonable doubt of the defendant's guilt, after considering all the evidence including the evidence of self-defense, then you would find the defendant not guilty. However, on the other hand, if you have no reasonable doubt of the defendant's guilt, after considering all of the evidence and any evidence of self-defense, you must find the defendants guilty.
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> Now, there's three elements that are required in order to establish a defense of self-defense. First, the defendant must be without any fault in bringing about the difficulty which occurs between the parties involved. If the defendant's conduct was of a type which would reasonably calculate being, reasonably calculated to and did provoke a deadly assault, the defendant would not, would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.
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> . . . .
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> The second element is imminent danger. The second element of self-defense is that a defendant was actually in imminent danger of death or serious bodily injury or that the defendant actually believed that he was in imminent danger or death or serious bodily injury. If the defendant was actually in imminent danger, it must be shown that the circumstances would of warranted a person of ordinary firmness or courage to strike the fatal blow to prevent death or serious bodily injury to himself.
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> . . . .
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> The third element is that there's no other way to avoid danger. The final element of a defense of self-defense is that the defendant had no probable way to avoid danger or death of [*sic*] bodily injury other than to act as the defendant acted in this particular instance.

Id. at 452-54, ECF No. 9-1, 455-58.

Trial counsel testified that he had not objected to the malice charge because he did not find

it to be inconsistent with self defense. PCR Transcript, 19; ECF No. 9-2, 90. Trial counsel admitted that there was some basis to argue the inference of malice charge was improper under State v. Belcher, 685 S.E.2d 802 (S.C. 2009). PCR Transcript 19, ECF No. 9-2, 90. In Belcher, the South Carolina Supreme Court held that "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." Belcher, 685 S.E.2d at 810.

The PCR judge denied and dismissed Petitioner's PCR application, finding that Petitioner had failed to meet his burden of proof as to all issues. Id. 3-24, ECF No. 9-3, 47-68. Specifically as to Ground 1.e, the PCR judge found credible trial counsel's testimony and that Petitioner had failed to show how that any additional investigation of Kelly's statement would have affected the outcome of trial. As to Ground 1.g, the PCR judge found that trial counsel had articulated valid strategic reasons for not offering the videos from Spartanburg Regional Hospital as evidence. As to Ground 1.j, the PCR judge found no evidence in the record that would "reduce, mitigate, excuse, or justify the homicide." The PCR judge noted that Petitioner presented no evidence at trial that he had shot the victims in self-defense; in fact, he had denied shooting a gun at all the day of the incident. The PCR judge recounted the testimony of Byrant and Dwight, statements of Cathcart to the police and the destruction of Cathcart's vehicle, among other things, and concluded that Petitioner had shown neither deficient performance nor prejudice.

Petitioner filed a motion pursuant to S.C. R. Civ. P. 59(e), which was denied. Motion (Alter or Amend, Rule 59(e)), ECF No. 9-3, 69-77; Judgment in a Civil Case, ECF No. 9-3, 78-79. Petitioner, through counsel, filed a notice of appeal on or about December 19, 2014. Notice of

Appeal, ECF No. 9-7. On or about September 8, 2015, Petitioner, through counsel, filed a petition for writ of certiorari in the South Carolina Supreme Court, raising the following issues:

1.

> In a case where the State presented only circumstantial evidence of guilt and petitioner received a jury instruction on self-defense, whether trial counsel's failure to object to a jury charge that malice may be inferred from the use of a deadly weapon constituted ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights?

2.

> Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to introduce video from the hospital showing petitioner with a time stamp that was inconsistent with the time stamp from the video the police alleged showed the cars involved in the shooting?

3.

> Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to investigate and call as a witness Glenn Kelly, who would have testified that the vehicle involved in the shooting was a Mustang, and not the Nissan linked to petitioner's co-defendant?

Petition for Writ of Certiorari 2, ECF No. 9-8, 3.

The Supreme Court denied the petition for writ of certiorari on November 9, 2016. The case was remitted to the lower court on November 29, 2016.

Petitioner timely filed his § 2254 petition on March 29, 2017. Petitioner raises the following grounds for relief:

> Ground One: Ineffective Assistance of Counsel
> Supporting Facts: Counsel failed to present the Spartanburg Regional Hospital video
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> Ground Two: Ineffective Assistance of Counsel
> Supporting Facts: Counsel failed to investigate and call as a witness Glenn Kelly
>
> Ground Three: Ineffective Assistance of Trial Counsel

Supporting Facts: requesting self-defense

Ground Four: Ineffective Assistance of Trial Counsel
Supporting Facts: failure to impeach SLED investigator Ila Simmons' testimony on gunshot residue test results

Ground Five: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to object to alleged nontestifying codefendant's out-of-court statement through investigator's testimony

Ground Six: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to confront and cross-examine Ofc. Heather Forrester

Ground Seven: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to present alleged codefendant identification of shooter

Ground Eight: Ineffective Assistance of Counsel
Supporting Facts: Counsel objecting and redacting statements on affidavit of the photo identification by Mr. Dwight [G]eter identifying Mr. Cathcart as shooter

Ground Nine: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to present Crimestoppers lead of the shooter

Ground Ten: Ineffective Assistance of Counsel
Supporting Facts: Failing to present applicant and allege codefendant Gunshot Residue Analysis information forms

Ground Eleven: Ineffective Assistance of Counsel
Supporting Facts: Failure to conduct an independent investigation

Ground Twelve: Ineffective Assistance of Counsel
Supporting Facts: Failing to interview alibi witnesses

Ground Thirteen: Ineffective Assistance of Counsel
Supporting Facts: Failure to inform to testify

Ground Fourteen: Ineffective Assistance of Counsel
Supporting Facts: Failing to motion to suppress applicant's gunshot residue pursuant to S.C. Rules of Evidence Rule 403

Ground Fifteen: Ineffective Assistance of Counsel

Supporting Facts: Failing to motion for severance

Ground Sixteen: Ineffective Assistance of Counsel
Supporting Facts: Failing to object to jury charge instructing malice could be inferred from the use of a deadly weapon

Ground Seventeen: Ineffective Assistance of Counsel
Supporting Facts: Trial Counsel failed to present Edward Robinson's confession of the shooter

Ground Eighteen: Due Process of Law
Supporting Facts: State withheld deal between State and alleged codefendant

Ground Nineteen: Due Process of Law/Prosecutorial Misconduct
Supporting Facts: Prosecutorial misconduct involving Brady

See generally Petition 6-11, 17-33, ECF No. 1.

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Bristow Marchant for a Report and Recommendation. The petition is governed by the terms of 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996.

Respondent filed a motion for summary judgment on June 6, 2017. By order filed June 12, 2017, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), Petitioner was advised of the summary judgment procedures and the possible consequences if he failed to respond adequately. Petitioner filed a response in opposition on July 24, 2017, to which Respondent filed a reply on July 31, 2017. On August 16, 2017, the Magistrate Judge issued a Report and Recommendation in which he determined that the PCR judge's findings and conclusions were supported in the record and not contrary to established law as to Grounds One, Two, and Sixteen. The Magistrate Judge further found that Grounds Three through Fifteen and Seventeen through Nineteen are procedurally barred from federal habeas review. Accordingly, the Magistrate Judge recommended that Respondent's

motion for summary judgment be granted. Petitioner filed objections to the Report and Recommendation on August 28, 2017, to which Respondent filed a reply on September 8, 2017. Petitioner filed a surreply on September 21, 2017.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility for making a final determination remains with this court. Mathews v. Weber, 423 U.S. 261, 270 (1976). This court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. § 636(b)(1). This court may also receive further evidence or recommit the matter to the Magistrate Judge with instructions. Id. This 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.

DISCUSSION

A writ of habeas corpus shall not be granted for any claim that was adjudicated on the merits in a state court proceeding unless the state court's 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).

The limited scope of federal review of a state petitioner's habeas claims is grounded in fundamental notions of state sovereignty. Richardson v. Branker, 558 F.3d 128, 138 (4th Cir. 2012) (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)). When a federal court adjudicates a habeas corpus petition brought by a state prisoner, that adjudication constitutes an intrusion on state

sovereignty. Id. (citing Harrington, 562 U.S. at 103). A federal court's power to issue a writ is limited to exceptional circumstances, thereby helping to ensure that "'state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.'" Id. (citing Harrington, 562 U.S. at 103). The restrictive standard of review "'further[s] the principles of comity, finality, and federalism.'" Id. (citing Williams v. Taylor, 529 U.S. 362, 364 (2000)). "'The pivotal question is whether the state court's application of the [applicable federal legal] standard was unreasonable.'" Id. (quoting Harrington, 562 U.S. at 103). So long as fairminded jurists could disagree on the correctness of a state court's decision, a state court's adjudication that a habeas claim fails on its merits cannot be overturned by a federal court. Id. (citing Harrington, 562 U.S. at 102).

> Further, a§ 2254 petition filed by a person in state custody
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> shall not be granted unless it appears that –
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> (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.

28 U.S.C. § 2254(b)(1).

If a § 2254 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, a federal court is barred from considering the filed claim, absent a showing of cause and actual prejudice. See Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997). A petitioner is required to squarely present all issues to the South Carolina appellate courts to avoid procedural default upon federal habeas review. See Joseph v. Angelone, 184 F.3d 320, 328 (4th Cir. 1999).

Law/Analysis

Petitioner contends that he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner ordinarily must satisfy both parts of the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner first must show that counsel's representation fell below an objective standard of reasonableness. Id. at 687–88. In making this determination, a court considering a habeas corpus petition "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. However, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Id. at 691-92 (citing United States v. Morrison, 449 U.S. 361, 364–65 (1981)). "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." Id. at 692.

A. Failure to Present Spartanburg Regional Hospital Video (Ground One)

The Magistrate Judge noted that credibility findings are entitled to great deference in a federal habeas action. See 28 U.S.C. § 2254(e)(1) ("[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."). Citing Strickland, 466 U.S. at 689, the Magistrate Judge further observed that tactical and strategic choices made by counsel after due consideration do not constitute ineffective assistance of counsel. In addition, the Magistrate Judge determined that Petitioner had failed to show prejudice in light of the facts of the case, including

Petitioner's arriving at the hospital with Cathcart, Cathcart having been shot, Petitioner having been shot, one of the victim's identifying a car matching the description of Cathcart's car, and Cathcart's car being found riddled with bullets and burned. Accordingly, the Magistrate Judge determined that the PCR Judge's finding that trial counsel articulated a reasonable trial strategy did not 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 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.

In his objections, Petitioner contends that the hospital videotape showing him entering the hospital twenty-eight seconds after the surveillance video of the scene of the crime demonstrates his lack of involvement in the shooting. Petitioner contends that the times relied on by trial counsel – medical records, times investigators were at the hospital, and hospital personnel – are insufficient to rebut the technology appertaining to the hospital videotape system. Petitioner contends that the Spartanburg Regional Hospital tapes would have exonerated him.

The court agrees with the Magistrate Judge that the PCR judge properly applied established federal law and that the PCR's decision that was based on a reasonable determination of the facts in light of the evidence presented. Petitioner's objections are without merit.

B. Failure to Investigate Glenn Kelly (Ground Two)

The Magistrate Judge recited the evidence set forth in the PCR hearing and determined that the PCR judge properly found trial counsel's performance to not be deficient under Strickland, and that Petitioner had failed to show any prejudice that may have resulted from trial counsel's allegedly ineffective performance. Giving due deference to the PCR judge's credibility determinations, the

Magistrate Judge determined that the PCR Judge's findings did not 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 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.

Petitioner contends that introduction of Kelly's testimony would have rebutted the state's theory of a gray 4-door Nissan, "as there has never been made a 4-door mustang in this world." Objections to Report and Recommendation 7, ECF No. 24. The court notes that the PCR judge did not find Kelly to be credible. Further, Kelly's testimony regarding a two-door Mustang would not have changed the outcome of trial, given the other evidence presented by Respondent. Moreover, Petitioner proceeded to trial on the theory that he was a innocent passenger in Cathcart's vehicle and that he and Cathcart had been shot at. The court agrees with the Magistrate Judge that the PCR judge properly applied established federal law and that the PCR's decision that was based on a reasonable determination of the facts in light of the evidence presented. Petitioner's objections are without merit.

C. Failure to Object to Malice Charge (Ground Sixteen)

The Magistrate Judge determined that the PCR judge correctly determined that trial counsel was not ineffective for failing to object to the malice charge. Petitioner does not object to the Magistrate Judge's decision. 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 accept the recommendation." Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005). The court has thoroughly reviewed the record and finds no clear

error.

C. Remaining Grounds for Relief (Grounds Three through Fifteen and Seventeen through Nineteen)

The Magistrate Judge found that the remaining grounds for relief are procedurally barred because they were not properly preserved for review in state court. The Magistrate Judge further found that Petitioner has not demonstrated cause and prejudice for his procedural default. Specifically, the Magistrate Judge observed that ineffective assistance of appellate PCR counsel in not raising additional issues does not constitute cause.

Petitioner contends that the court should reach the merits of his defaulted claims because he received ineffective assistance of appellate counsel on direct review, and because appellate PCR counsel did not raise the claims Petitioner requested in the petition for writ of certiorari from the PCR judge's decision. However, as the Magistrate Judge noted, Petitioner raised his direct claims before the PCR judge, who ruled on the merits of the claims. See Order of Dismissal, 20-22, ECF No. 9-3,64-66. Although the remaining grounds for relief were not raised to the Supreme Court in the petition for writ of certiorari, Petitioner is not entitled to raise ineffective assistance of PCR appellate counsel as cause for not properly raising the defaulted claims. See Johnson v. Warden, No. 12-7270, 2013 WL 856731, at *1 (4th Cir. March 8, 2013). Petitioner's objection is without merit.

CONCLUSION

For all these reasons, the court concludes that the PCR judge's rulings were not contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Respondent's motion for summary

judgment (ECF No. 10) is **granted**. Petitioner's § 2254 petition is denied and dismissed, with prejudice.

CERTIFICATE OF APPEALABILITY

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 that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that Petitioner has not made the requisite showing.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina

March 22, 2017

NOTICE OF RIGHT TO APPEAL

Petitioner is hereby notified of the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

RISHAWN LAMAR REEDER, #282918, Petitioner,	)	CIVIL ACTION NO. 9:17-830-MBS-BM
v.	)	**REPORT AND RECOMMENDATION**
WARDEN REYNOLDS, LEE CORRECTIONAL INSTITUTION, Respondent.	)	

Petitioner, an inmate with the South Carolina Department of Corrections, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The pro se petition (dated February 6, 2017) was filed on March 29, 2017.[1]

The Respondent filed a return and motion for summary judgment on June 7, 2017. As the Petitioner is proceeding pro se, a Roseboro order was entered on June 12, 2017, advising the Petitioner that he had thirty-four (34) days to file any material in opposition to the motion for summary judgment. Petitioner was specifically advised that if he failed to respond adequately, the

[1]The Respondent states that the Fourth Circuit inadvertently docketed Petitioner's application for habeas relief as a motion for authorization to file a successive application for post-conviction relief, and then transferred the § 2254 motion to the U.S. District Court of South Carolina for docketing purposes on March 29, 2017. See Respondent's Memorandum in Support of Summary Judgment, p. 1, n. 1. Respondent does not assert that there is any basis to challenge the timeliness of the Petition, however, see Respondent's Memorandum in Support of Summary Judgment, p. 12, n. 5; so it is not necessary to determine the exact filing date pursuant to Houston v. Lack, 487 U.S. 266 (1988).

motion for summary judgment may be granted, thereby ending his case. After Petitioner's motion for an evidentiary hearing was denied, Petitioner filed a memorandum in opposition to Respondent's motion on July 24, 2017. Respondent then filed a reply on July 31, 2017.

This matter is now before the Court for disposition.[2]

Procedural History

The record reflects that Petitioner was indicted in Spartanburg County in May 2010 for murder [Indictment No. 10-GS-42-2927], assault and battery with intent to kill [Indictment No. 10-42-2928], and assault with intent to kill [Indictment No. 10-GS-42-2926]. (R.pp. 864-869). Petitioner was represented by Michael Brown, Esquire, and following a jury trial on May 9-12, 2011, was found guilty as charged. (R.p. 467). Petitioner was then sentenced to life for murder, and concurrent terms of twenty (20) years imprisonment for assault and battery with intent to kill, and ten (10) years imprisonment for assault with intent to kill. (R.p. 485).

Petitioner's trial counsel filed a notice of appeal. See Court Docket No. 9-4. However, on August 30, 2011, the South Carolina Court of Appeals filed an Order dismissing the appeal for failure to timely order the transcript and for failure to serve and file the initial brief of the Appellant. See Court Docket No. 9-5. The Court of Appeals thereafter issued the Remittitur to the Spartanburg County Clerk of Court on September 14, 2011. See Court Docket No. 9-6.

On January 31, 2012, Petitioner filed an application for post-conviction relief ("APCR") in state circuit court. See Reeder v. State of South Carolina, No. 2012-CP- 42-509. (R.pp.

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[2]This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(c)and (e), D.S.C. The Respondent has filed a motion for summary judgment. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.

487-496). Petitioner raised the following issues in this APCR:

> **Ground One:** Ineffective assistance of counsel (failure to use exculpatory evidence).
>
> **Ground Two:** Denial of due process of law (violation of Sixth Amendment Confrontation Clause); and
>
> **Ground Three:** Prosecutor misconduct (violation of Brady).[3]

(R.pp. 489).

Charles J. Hodge, Esquire, was initially appointed to represent the Petitioner in his PCR, but he was relieved on April 29, 2013.[4] (R.pp. 497-499, 516-517). John (Brandt) Rucker, Esquire, was then appointed to represent the Petitioner. (R.p. 518). On January 6, 2014 and April 7, 2014, respectively, Petitioner's new counsel filed amended Applications for PCR alleging the following grounds:

> Ineffective Assistance of Counsel.
>
> (1) Failing to object to alleged non-testifying codefendant's out-of-court statements through investigators' testimonies;
>
> (2) Failing to confront and cross-examine Officer Heather Forrester;
>
> (3) Requesting self-defense charge;
>
> (4) Failing to conduct an independent investigation;
>
> (5) Failing to interview alibi witnesses;
>
> (6) Failing to present Spartanburg Regional Hospital film;

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[3]Brady v. Maryland, 373 U.S. 83 (1963).

[4]Respondent represents that after Petitioner was appointed counsel, Petitioner made numerous substantive pro se filings, even while represented by counsel. However, the Respondent did not include those filings in its history of the case, stating that he did not consider those pro se filings to be part of the procedural history. The undersigned agrees that Petitioner could not assert additional issues by means of a *pro se* filing with respect to his APCR. Cf. Miller v. State, 697 S.E.2d 527 (S.C.2010) [Since there is no right to "hybrid representation", a pro se motion is "essentially a nullity."].

(7) Failing to prevent alleged codefendant with identification of shooter;

(8) Failing to motion for severance;

(9) Failing to object to the jury charge instructing that malice could be inferred from the use of a deadly weapon;

(10) Failing to present applicant and alleged codefendant Gunshot Residue Analysis Information Forms;

(11) Failing to call Lorin Williams as a witness;

(12) Failing to object to admission of applicant's gunshot residue test;

(13) Failing to make a motion to suppress applicant's gunshot residue test pursuant to S.C. Rules of Evidence 403;

(14) Failing to make a motion to quash the indictments before the jury was sworn;

(15) Failing to investigate alleged deal between the State and alleged codefendant.

(R.pp. 519-520).

(1) Trial Counsel was ineffective for objecting and redacting statement on affidavit of the photo identification by Dwight Jeter identifying Darius Cathcart as the shooter;

(2) Trial counsel was ineffective for failing to present Crimestoppers lead of the shooter;

(3) Trial counsel ineffective for failing to object to Gunshot Residue kit levels.

(R.p. 521).

Rucker was then relieved as Petitioner's PCR counsel and Leah B. Moody, Esquire, was appointed to represent Petitioner in his APCR. (R.pp. 525-527). However, by order filed October 27, 2014, Leah Moody was relieved as counsel, and J. Faulkner Wilkes, Esquire, was

substituted as (retained) counsel of record. (R.pp. 567-568).[5] An evidentiary hearing was then held on Petitioner's application on November 3, 2014. (R.pp. 569-696). In an Order dated December 5, 2014 (filed December 9, 2014), the PCR judge denied relief on the APCR in its entirety. (R.pp. 826-849).

Petitioner filed a timely appeal of the PCR court's order.[6] See Court Docket No. 9-7. Petitioner was represented on appeal by Appellate Defender David Alexander of the South Carolina Office of Indigent Defense, who raised the following issues:

> **Ground One:** In a case where the State presented only circumstantial evidence of guilt and petitioner received a jury instruction on self-defense, whether trial counsel's failure to object to a jury charge that malice may be inferred from the use of a deadly weapon constituted ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights?
>
> **Ground Two:** Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to introduce video from the hospital showing petitioner with a time stamp that was inconsistent with the time stamp from the video the police alleged showed the cars involved in the shooting?
>
> **Ground Three:** Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment rights by failing to investigate and call as a witness Glenn Kelly, who would have testified that the vehicle involved in the shooting was a Mustang, and not the Nissan linked to Petitioner's co-defendant?

See Petition, p. 2 (Court Docket No. 9-8, p. 3).

On November 9, 2016, the Supreme Court of South Carolina denied the petition for writ of certiorari. See Court Docket No. 9-11. See Reeder, Petitioner, v. State of South Carolina, Appellate Case No.

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[5]Wilkes apparently also filed some "amendments" to Petitioner's APCR after he was retained, although it is not clear what those amendments were. See (R.p. 529).

[6]Petitioner had also filed a pro se Motion to Alter or Amend Judgment (R.pp. 850-858) while still represented by counsel, who had previously filed a Notice of Appeal on Petitioner's behalf. The South Carolina Supreme Court dismissed the motion as untimely and improper. (R.pp. 861-863).

2014-002708 Order (S.C. Nov. 9, 2016) (Court Docket No. 9-11). The Remittitur was sent down on December 2, 2016. See Court Docket No. 9-12.

In his Petition for writ of habeas corpus filed in this United States District Court, Petitioner raises the following issues:

Ground One: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to present the Spartanburg Regional Hospital video

Ground Two: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to investigate and call as a witness Glenn Kelly

Ground Three: Ineffective Assistance of Trial Counsel
Supporting Facts: requesting self-defense

Ground Four: Ineffective Assistance of Trial Counsel
Supporting Facts: failure to impeach SLED investigator Ila Simmons testimony on gunshot residue test results

Ground Five: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to object to alleged nontestifying codefendant's out-of-court statement through investigator's testimony

Ground Six: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to confront and cross-examine Ofc. Heather Forrester

Ground Seven: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to present alleged codefendant identification of shooter

Ground Eight: Ineffective Assistance of Counsel
Supporting Facts: Counsel objecting and redacting statements on affidavit of the photo identification by Mr. Dwight [G]eter identifying Mr. Cathcart as shooter.

Ground Nine: Ineffective Assistance of Counsel
Supporting Facts: Counsel failed to present Crimestoppers lead of the shooter

Ground Ten: Ineffective Assistance of Counsel
Supporting Facts: Failing to present applicant and allege codefendant Gunshot Residue Analysis information forms

Ground Eleven: Ineffective Assistance of Counsel
Supporting Facts: Failure to conduct an independent investigation

Ground Twelve: Ineffective Assistance of Counsel
Supporting Facts: Failing to interview alibi witnesses

Ground Thirteen: Ineffective Assistance of Counsel
Supporting Facts: Failure to inform to testify

Ground Fourteen: Ineffective Assistance of Counsel
Supporting Facts: Failing to motion to suppress applicant's gunshot residue pursuant to S.C. Rules of Evidence Rule 403

Ground Fifteen: Ineffective Assistance of Counsel
Supporting Facts: Failing to motion for severance

Ground Sixteen: Ineffective Assistance of Counsel
Supporting Facts: Failing to object to jury charge instructing malice could be inferred from the use of a deadly weapon

Ground Seventeen: Ineffective Assistance of Counsel
Supporting Facts: Trial Counsel failed to present Edward Robinson confession of the shooter

Ground Eighteen: Due Process of Law
Supporting Facts: State withheld deal between State and allege codefendant

Ground Nineteen: Due Process of Law/Prosecutorial misconduct
Supporting Facts: Prosecutorial misconduct involving Brady

See Petition, pp. 6, 8-9, 11 & Attachment. (errors in original).

Discussion

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56, Fed.R.Civ.P; see Habeas Corpus Rules 5-7, 11. Further, while the federal court is charged with liberally construing pleadings filed by a pro se litigant to allow the development of a

potentially meritorious case; See Cruz v. Beto, 405 U.S. 319 (1972), and Haines v. Kerner, 404 U.S. 519 (1972); the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Social Services, 901 F.2d 387 (4th Cir. 1990).

Here, after careful review of the record and the arguments of the parties, the undersigned finds for the reasons set forth hereinbelow that the Respondent is entitled to summary judgment in this case.

I.

Petitioner raises three ineffective assistance of counsel grounds (Grounds One, Two, and Sixteen) that Respondent does not challenge as being procedurally barred.[7] These grounds allege that trial counsel provided ineffective assistance of counsel by failing to present exculpatory evidence in the form of a hospital surveillance video (Ground One), by failing to investigate and call as a witness Glenn Kelly (Ground Two), and by failing to object to the jury charge instructing that malice could be inferred from the use of a deadly weapon (Ground Sixteen).

Petitioner raised these claims in his PCR proceedings, where he had the burden of proving the allegations in his petition. See Reeder v. State of South Carolina, No. 2012-CP-42-0509. See also Butler v. State, 334 S.E.2d 813, 814 (S.C. 1985), cert. denied, 474 U.S. 1094 (1986). The PCR Court denied these claims, as did the South Carolina Supreme Court when it denied Petitioner's appeal of his APCR. See Court Docket No. 9-11. Therefore, Grounds One, Two, and Sixteen are

[7]With regard to the remaining grounds, all of which Respondent challenges as being procedurally barred, the undersigned has discussed those issues separately. See discussion, infra.

properly exhausted for purposes of federal habeas review.

In his order, the PCR judge found that: 1) Petitioner's trial counsel testified he was retained by Petitioner's family; 2) trial counsel testified that Petitioner provided him with two conflicting theories of his defense: first theory - Petitioner was at a different location selling drugs and was robbed and shot and just coincidentally bumped into Cathcart, his co-defendant, at Spartanburg Regional, and second theory - Petitioner acknowledged being in the car with Cathcart, but stated he had not been involved in the earlier fight and was just riding with him; 3) counsel testified that the second theory was the more recent theory and what counsel based the defense strategy on at trial; 4) counsel testified that he requested a self-defense jury charge based upon the fact that the jury might believe Petitioner had gotten into the car with Cathcart after the fight and shot back at the victim in self-defense;

5) Petitioner testified at the PCR hearing that he was in a different location on the night of the shooting and was never at a club, gas station, or in a car with Cathcart; 6) Petitioner testified that counsel lied because Petitioner never told counsel that he was in the car with Cathcart on the night of the shooting; 7) Petitioner testified that he met with counsel approximately three or four times prior to trial; 8) Petitioner testified that counsel should have used the video from Spartanburg Regional to support a defense of alibi; 9) Petitioner testified that the timestamp on the video places Petitioner in the hospital at or near the time the victim was shot, as reflected on the video from Southeastern Converters; 10) further, Petitioner testified that although he appears to be in the hospital with Cathcart, there is no video that shows Petitioner getting out of the same car with Cathcart; 11) instead, Petitioner testified that he drove himself to the hospital in a "little white Buick";

12) counsel testified that he was aware of the videos from Spartanburg Regional Hospital and the video from Southeastern Converters; 13) Petitioner introduced a DVD containing two videos inside Spartanburg Regional and the Southeastern Converter video as Exhibit #1; 14) counsel testified that Petitioner never raised the possibility that the Spartanburg Regional videos could or should be used in support of an alibi defense; 15) counsel did not believe that the Spartanburg Regional video would support an alibi defense; 16) although the time stamp appears to show Petitioner and Cathcart in the hospital around the same time of the shooting shown on the Southeastern video, counsel believed that the times could easily be explained away if the State had brought in anyone to discuss the videos; 17) counsel also testified that he wanted to stay away from having the jury see the Spartanburg Regional videos because they show the Petitioner walking into and around the hospital with Cathcart;

18) the video places the Petitioner with Cathcart after both had been shot; 19) additionally, there was another video from Spartanburg Regional which purported to show Cathcart's car that was later found burned, driving in front of the hospital; 20) Petitioner also testified that counsel should have introduced the Coroner's report, which recorded the victim's time of death as 4:00 a.m.; 21) testimony was presented to indicate that there were at least three guns shot that night, which could mean that there were two shooters in the car with Cathcart and Petitioner, leading to the conclusion that there were three people in the car; 22) additionally, Cathcart gave a statement to police that once he and Petitioner were dropped off at Spartanburg Regional, "Black" took the car; 23) the gunshot residue tests support the theory that the Petitioner was the shooter; 24) counsel was not ineffective for failing to investigate and introduce other alleged exculpatory evidence; 25) courts are wary of second-guessing defense counsel's trial tactics; 26) where counsel articulates valid

reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance; 27) counsel articulated valid strategic reasons for not offering the videos from Spartanburg Regional as evidence; 28) because of the difficulties inherent in making the evaluation in hindsight, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance; 29) Petitioner failed to meet his burden on this claim;

30) Petitioner also argued that his counsel was ineffective for failing to object to the jury charge regarding inference of malice and for requesting a self-defense jury charge; 31) counsel testified that he did not believe the jury charge regarding inference of malice was improper and he did not believe the inferred malice charge was inconsistent with his request for a self-defense charge; 32) counsel for Cathcart requested a charge for mutual combat and self-defense, but chose mutual combat when informed by the trial judge that he would not charge both; 33) Petitioner's counsel requested a self-defense jury charge, arguing that because Petitioner had not been identified as participating in the fight at the club that Petitioner had no control over the vehicle and was not engaged in any prior difficulties; 34) the trial judge ruled that because there was no evidence Petitioner was involved in the initial altercation, he would have no duty to retreat and might not have brought on any difficulties; 35) "[a] jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide"; 36) in regards to the inference of malice with a deadly weapon, the trial court charged the jury with the following:

> Inferred malice may arise when a deed is done by a person using a deadly weapon. A deadly weapon is any article or instruments or substance which is likely to cause death or great bodily harm. Now, whether an instrument is used as a deadly weapon is a question of fact for a jury to decide.

37) had there been evidence presented to "reduce, mitigate, excuse, or justify the

homicide," the jury charges regarding an inference of malice would have been incorrect; 38) however, there was no evidence in the record which would fall in any of those four categories; 39) neither defendant presented testimony to indicate that they shot the victims in self-defense and, as was clear in the Petitioner's testimony, he denied shooting a gun at all that day; 40) at trial, the State presented testimony from victim Bryant Miller that he first saw a car beside him when the car began shooting at Miller and his friends; 41) Miller testified that once he heard the gunshots, he shot back at the dark green Nissan using a .40 caliber pistol; 42) Miller testified that all of the windows in the car he rode in were up and after they shattered from the initial gunshots, he knocked out the remainder of the window to shoot back; 43) Miller testified that he was shot on the left side of his neck and the bullet exited the right side of his neck; 44) Miller also testified that he was sitting in the backseat on the driver's side of the vehicle; 45) Dwight Geter testified that a car "just pulled up beside us and started shooting"; 46) Geter testified that the car had its headlights off, pulled up on the left side of his car, and started shooting; 47) Geter testified that Miller did start shooting back, but only after the other car shot first;

48) Geter identified Cathcart as involved in the altercation at the club; 49) testimony was also presented that Cathcart had a grazing injury to his right side; 50) Cathcart's statements to police were introduced, which placed him driving a gray Nissan with Petitioner and a guy named "Black", when a car drove up beside them near I-85 Business and shot at them; 51) later, testimony was presented that Cathcart's car was found in flames, but with no apparent damage from gunshots; 52) testimony presented showed that the victim's car had ten impact marks from bullets, all on the driver's side of the car, including marks to the driver's side of the windshield, driver's door, and back door on the driver's side; 53) the only evidence presented by the Petitioner at trial was testimony from

Officer Talanges, specifically regarding a crime scene sketch of the location of the shooting and initial interaction at the hospital with the Petitioner and Cathcart; 54) counsel questioned Talanges as to the location of shell casings, blood, and other unknown biological manner, and questioned as to whether those items were all tested; 55) counsel also questioned Talanges about locating the Petitioner and Cathcart at Spartanburg Regional and noting that Petitioner had a gunshot wound to his left wrist area; 56) counsel was not deficient for failing to object to the charge regarding the inference of malice by use of a deadly weapon or for requesting a self-defense charge; 57) erroneous jury charges are subject to harmless error analysis; 58) Petitioner failed to demonstrate that counsel was deficient or that if counsel was deficient, that Petitioner suffered any prejudice as a result;

59) Petitioner introduced a copy of a field investigation card as Exhibit #6; 60) the card referenced an interview with witness Glenn Kelly, who indicated he saw a Ford Crown Victoria and a Ford Mustang that evening at the time of the shooting; 61) Petitioner testified that he was unaware of Kelly as a potential witness, but had received a copy of the investigation card while he was located in the county detention center; 62) Petitioner testified that counsel should have called Kelly as a witness because it would have caused doubt as to which car was involved in the shooting; 63) Kelly testified at the PCR hearing that he had just returned from a club around 4:30 a.m.; 64) Kelly testified that he heard shots and saw an older green Mustang or older green car; 65) Kelly testified that he called 911, but never spoke with an officer; 66) Kelly testified that he was about fifteen feet away from the intersection and can identify cars by their headlights; 67) Kelly acknowledged that he had been drinking that night at the club; 68) counsel testified that he recalled having a discussion with the Petitioner about a report of someone seeing a Mustang; 69) however, counsel testified that he never spoke with Kelly; 70) counsel testified that the discussion with

Petitioner about someone identifying a Mustang was at the same time that Petitioner was presenting his first theory involving his being at a different location and not in the car;

71) counsel's testimony was credible that he recalled discussing the fact that one of the cars had been identified as a Mustang with the Petitioner; 72) the Petitioner failed to meet his burden of proof of establishing that counsel was deficient for failing to interview or call Kelly as a witness; 73) Petitioner's allegations that counsel did not conduct an adequate pretrial investigation were without merit; 74) following testimony and review of the transcript, it was clear that counsel had prepared extensively for Petitioner's trial; 75) the brevity of time spent in consultation, without more, does not establish that counsel was ineffective; 76) to establish counsel was inadequately prepared, a Petitioner must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared; 77) Petitioner failed to show how that any additional investigation into this witness would have affected the outcome of the trial; 78) furthermore, the Petitioner failed to show any prejudice that may have resulted from counsel's alleged inadequate investigation;

79) with regards to the allegations of ineffective assistance of counsel, counsel's testimony was credible; 80) counsel adequately conferred with the Petitioner, conducted a proper investigation, was thoroughly competent in his representation, and counsel's conduct did not fall below the objective standard of reasonableness; 81) Petitioner failed to prove that counsel failed to render reasonably effective assistance under prevailing professional norms; 82) Petitioner failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of Petitioner; 83) Petitioner failed to prove that he was prejudiced by counsel's performance; 84) Petitioner did not meet his burden of proving counsel failed to render reasonably

effective assistance; and 85) therefore, this allegation was denied. (R.pp. 830-836, 840-841, 847-848).[8]

The state court findings as to historical facts are presumed correct under 28 U.S.C. § 2254(e)(1). However, where the ultimate issue is a mixed question of law and fact, as is the issue of ineffective assistance of counsel, a federal court must reach an independent conclusion. Strickland v. Washington, 466 U.S. 668, 698 (1984); Pruett v. Thompson, 996 F.2d. 1560, 1568 (4th Cir. 1993), cert. denied, 114 S.Ct. 487 (1993) (citing Clozza v. Murray, 913 F.2d. 1092, 1100 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991)). Even so, since Petitioner's ineffective assistance of counsel claims in Grounds One, Two and Sixteen were adjudicated on the merits by the South Carolina state court, this Court's review is limited by the deferential standard of review set forth in 28 U.S.C. §2254(d), as interpreted by the Supreme Court in Williams v. Taylor, 529 U.S. 362. See Bell v. Jarvis, supra; see also Evans, 220 F.3d at 312 [Under § 2254(d)(1) and (2), federal habeas relief will be granted with respect to a claim adjudicated on the merits in state court proceedings only where such adjudication "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 "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"]. As noted by the Supreme Court, the

> AEDPA's standard is intentionally " ' "difficult to meet." ' " White v. Woodall, 572 U.S. ___, 134 S.Ct. 1697, 1702 (2014) (quoting Metrish v. Lancaster, 569 U.S. ___, 133 S.Ct. 1781, 1786 (2013)). We have explained that " 'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." White, 572 U.S., at ___, 134 S.Ct., at 1702 (some internal quotation marks omitted). "And an 'unreasonable application of' those holdings must

[8]The PCR court made additional findings on other issues. However, those other findings do not pertain to the issues discussed herein.

> be objectively unreasonable, not merely wrong; even clear error will not suffice." Id., at ___, 134 S.Ct., at 1702 (same). To satisfy this high bar, a habeas petitioner is required to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86 (2011).
>
> Adherence to these principles serves important interests of federalism and comity. AEDPA's requirements reflect a "presumption that state courts know and follow the law." Woodford v. Visciotti, 537 U.S. 19, 24(2002) (*per curiam*). When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong. Federal habeas review thus exists as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Harrington, supra, at 102–103, 131 S.Ct. 770 (internal quotation marks omitted). This is especially true for claims of ineffective assistance of counsel, where AEDPA review must be " ' "doubly deferential" ' " in order to afford "both the state court and the defense attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. ___, 134 S.Ct. 10, 13 (2013) (quoting Cullen v. Pinholster, 563 U.S. 170, ___, 131 S.Ct. 1388, 1403 (2011)).

Woods v. Donald, 135 S.Ct. 1372, 1376 (2015).

Therefore, this Court must be mindful of this deferential standard of review in considering Petitioner's ineffective assistance of counsel claims.

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 694. In Strickland, the Supreme Court articulated a two prong test to use in determining whether counsel was constitutionally ineffective. First, the Petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel's performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment. Second, the Petitioner must show that counsel's deficient performance prejudiced the defense such that the Petitioner was deprived of a fair trial. In order to show prejudice a Defendant must show that there is a reasonable

probability that, but for counsel's errors, the result of the proceeding would have been different. Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). As discussed hereinbelow, infra, Petitioner has failed to meet his burden of showing that his counsel was ineffective under this standard. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975) [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus].

Ground One

In Ground One, Petitioner contends that his counsel was ineffective for failing to present exculpatory evidence in the form of a hospital surveillance video. Petitioner testified at his PCR hearing that the video showed him to have been at the hospital at a time which was approximately the same time that the crime occurred. Therefore, Petitioner contends that the hospital videos were exculpatory evidence which his counsel should have submitted at trial. (R.pp. 663-665).

At the PCR hearing, trial counsel testified that he was aware of two videos showing Petitioner at the hospital. (R.pp. 577-578). However, counsel testified that he had discussed the video as something they wanted to stay away from, because Petitioner "could have been easily [been] identified appearing with his co-defendant on the hospital tape", and because the video showed that the alleged vehicle involved in the shoot-out was at the front of the hospital as well. (R.pp. 579-581, 584). Counsel also testified that the video, which showed Plaintiff with Cathcart simultaneously going into the hospital and both saying that they had been shot, would have helped the State. (R.p. 642). As for the time stamp on the video showing a time close to the time of the alleged shooting, counsel testified that, based on his prior experience, it would have been very easy for someone to come in and explain the nature of the time stamp for one or the other of the videos being off by a few minutes, and that he did not consider the videos as presenting any kind of valid argument for any type

of alibi defense. (R.pp. 580, 642). Moreover, in addition to counsel believing it would have been easy for someone to come in and distinguish what was occurring with the time stamps on the videos, counsel testified that the hsopital video would then have been coupled together with the medical records of Petitioner's actual admittance, the time the investigators came in, hospital personnels' testimony, and of when the Petitioner, along with Cathcart, were actually seen. (R.p. 585).

After hearing the testimony and reviewing the evidence, the PCR court found that the video placed the Petitioner with Cathcart after both had been shot; that there was another video from Spartanburg Regional which purported to show Cathcart's car (a green Nissan) driving in front of the hospital; that Cathcart gave a statement to police that once he and Petitioner were dropped off at Spartanburg Regional, "Black" took the car; that counsel's testimony with respect to his actions and what he did was credible; that counsel articulated valid strategic reasons for not offering the videos from Spartanburg Regional as evidence; and that counsel was not ineffective for failing to investigate and introduce other alleged exculpatory evidence. (R.pp. 830-831, 833). Credibility findings are entitled to great deference by this court in a habeas action. Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008)(citing 28 U.S.C. § 2254(e)(1))["[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear."]; Wilson v. Ozmint, 352 F.3d 847, 858-859 (4th Cir. 2003); see also Marshall v. Lonberger, 459 U.S. 422, 434 (1983)["28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."]. Moreover, the PCR Court noted counsel's testimony that the likely inaccuracy of the time stamp appearing on the video could be easily explained, while admitting the videos into evidence would have further linked Petitioner to Cathcart and to the car which was later found riddled with bullets and burned. (R.pp. 579-581,

584, 831).

Although Petitioner speculates that if his counsel had moved to admit these videos, that would have positively affected the outcome of his case, Petitioner's own conclusory opinion is insufficient to show that his counsel was ineffective. While the decisions of trial counsel are always subject to being second guessed with the benefit of hindsight, tactical and strategic choices made by counsel after due consideration do not constitute ineffective assistance of counsel. Strickland, 466 U.S. at 689. There is a strong presumption that counsel's conduct during trial was within the wide range of reasonable professional assistance, and this Court should not scrutinize counsel's performance by looking at the decisions made in an after the fact manner. Id. at 688-689; Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991), cert. denied, 505 U.S. 1230 (1992); Horne v. Peyton, 356 F.2d 631, 633 (4th Cir. 1966), cert. denied, 385 U.S. 863 (1966); Burger v. Kemp, 483 U.S. 776 (1987); see also Harris v. Dugger, 874 F.2d 756, 762 (11th Cir. 1989), cert. denied, 493 U.S. 1011 (1989) [An informed decision by trial counsel should not be second guessed by a reviewing court.]. Furthermore, Petitioner's counsel testified that he and Petitioner discussed the potential damaging evidence on the videos as something they wanted to stay away from. (R.pp. 579-580). Cf. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995)[While "[a] defendant's consent to trial strategy in itself, [does not vitiate] all claims of ineffective assistance of counsel ... [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance."]; see also Strickland, 466 U.S. at 689.

The PCR judge found counsel had a reasonable trial strategy based on the facts and the evidence in this case, and the undersigned can find no reversible error in this record. Nor has Petitioner shown the necessary prejudice with regard to this claim. Evans, 220 F.3d at 312; Williams

v. Taylor, supra; Strickland v. Washington, supra. Based upon the facts of the case including, but not limited to, Petitioner arriving at the hospital with Cathcart, Cathcart having been shot, Petitioner having been shot, one of the victim's identifying a car matching the description of Cathcart's car, and Cathcart's car being found riddled with bullets and burned, the PCR court found that Petitioner failed to show that he suffered the necessary prejudice to establish the second prong of the Strickland test. (R.p. 848). The undersigned agrees. When balancing the reason for not wanting the hospital videos to come into evidence, the defense's strategic reasons, along with the lack of shown prejudice, Petitioner has not shown prejudice based on the facts in this case.

Accordingly, Petitioner has failed to present evidence sufficient to show that the state court's rejection of this claim was unreasonable. Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or 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]; Bell, 236 F.3d at 157-158; 28 U.S.C. § 2254(e)(1) [determination of a factual issue by the state court shall be presumed correct unless rebutted by clear and convincing evidence]. This claim is without merit and should be dismissed.

Ground Two

In Ground Two, Petitioner contends his counsel was ineffective for failing to investigate and call as a witness Glenn Kelly. Kelly testified at the PCR hearing that he saw the shooting, and that he believed one of the cars involved in the altercation was either a green Mustang

or a green older car,[9] although he also acknowledged that it was 4:30 a.m. and he had been drinking. (R.pp. 659-660). Counsel testified at the PCR hearing that he did not specifically recall seeing the field interview card identifying Glenn Kelly as a potential witness, but did recall having a discussion about a Mustang and a Crown Victoria with the Petitioner. (R.pp. 614-615, 617). However, with respect to whether this testimony was important or should have been further investigated, counsel testified that this discussion occurred when Petitioner was alleging his first theory, that he was not even present in the car involved in the shooting, and claimed that he had alibi witnesses who would state that he was at a drug buy at a different location. (R.p. 617). However, counsel was never able to find any witnesses to confirm this purported alibi. (R.p. 650). Counsel further testified that he did not believe that a witness testifying that he believed he saw a green Mustang and a Crown Victoria to be exculpatory in this situation, since it was Cathcart's car that was later found to be burned up, there was evidence of the gunshot wound Cathcart sustained along with the gunshot wound Petitioner sustained, and because Petitioner's second (and last) theory was that he *was* in the car with Cathcart. (R.p. 650). Furthermore, one of the victims of the actual shooting identified the other car as being a dark green Nissan, not a Mustang. (R.pp. 650-651). Accordingly, counsel testified that Kelly's statement was not a consideration in light of this other information. (R.p. 650).

The PCR court again found that counsel's testimony was credible, and that Petitioner had failed to meet his burden of proof of establishing that counsel was deficient for failing to interview or call Kelly as a witness. The PCR Court further found that Petitioner's allegations that counsel did not conduct an adequate pretrial investigation were without merit; that following the

[9]The other car, other than the Crown Victoria, determined to have been involved in the shooting was a green Nissan. (R.pp. 616, 651).

testimony and review of the transcript it was clear that counsel had prepared extensively for Petitioner's trial; that to establish counsel was inadequately prepared Petitioner had to present evidence of what counsel could have discovered or what other defenses could have ben pursued had counsel been more fully prepared; that Petitioner failed to show how any additional investigation into this witness would have affected the outcome of the trial; and that Petitioner had failed to show any prejudice that may have resulted from counsel's alleged inadequate investigation. (R.pp. 840-841).

The PCR judge found counsel was not ineffective on this claim based on the facts and the evidence in this case, and the undersigned can find no reversible error in this record. Nor has Petitioner shown the necessary prejudice with regard to this claim. Evans, 220 F.3d at 312; Williams v. Taylor, supra; Strickland v. Washington, supra. Accordingly, Petitioner has failed to present evidence sufficient to show that the state court's rejection of this claim was unreasonable. Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or 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]; Bell, 236 F.3d at 157-158; 28 U.S.C. § 2254(e)(1) [determination of a factual issue by the state court shall be presumed correct unless rebutted by clear and convincing evidence]. This claim is without merit and should be dismissed.

Ground Sixteen[10]

In Ground Sixteen, Petitioner alleges his counsel was ineffective for failing to object to a jury charge instructing that malice could be inferred from the use of a deadly weapon, citing to State v. Belcher, 685 S.E.2d 802 (S.C. 2009). As part of the malice charge in this case, the trial Court charged the jury as follows:

> Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may arise when a deed is done by a person using a deadly weapon. A deadly weapon is any article or instruments or substance which is likely to cause death or great bodily harm. Now, whether an instrument is used as a deadly weapon is a question of fact for a jury to decide.

(R.p. 450).

Petitioner is correct that the South Carolina Supreme Court has held that "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." State v. Belcher, 685 S.E.2d at 803-804; see also State v. Stanko, 741 S.E.2d 708, 712 (S.C. 2013). However,

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[10]The undersigned notes that Petitioner did not address Ground Sixteen in his memorandum in opposition to summary judgment, indicating this ground has been abandoned. See Jones v. Danek Medical, Inc., No. 96-3323, 1999 WL 1133272 at * 3 (D.S.C. Oct. 12, 1999)["The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action."]; Baber v. Hospital Corp. of America, 977 F.2d 872, 874–875 (4th Cir. 2991)[Once moving party establishes basis for summary judgment, to survive summary judgment the opposing party must respond with evidence showing a genuine issue for trial]; see also Coker v. International Paper Co., No. 08-1865, 2010 WL 1072643, at * 2["[A] plaintiff can abandon claims by failing to address them in response to a summary judgment motion."]. In this case, it is very likely that Petitioner did not address Ground Sixteen and intended to abandon it due to the conflicting position that he took at the PCR hearing [see discussion, infra] and the fact that it conflicts with his arguments in Ground Three. Moreover, while Respondent initially noted that Ground Sixteen appears to be the same as Ground Three [see Respondent's Memorandum, p. 27, n. 6], Petitioner's response clearly sets Ground Three out as a separate issue. See Memorandum in Opposition to Summary Judgment, pp. 9-11. Even so, out of an abundance of caution, the undersigned has proceeded hereinabove to discuss this ground on the merits.

the PCR judge found no evidence in the record that would fall into any of these four categories - i.e., to reduce, mitigate, excuse or justify the homicide in this case. The PCR Court noted that neither defendant had presented testimony to indicate that they shot the victims in self-defense. (R.pp. 833-834). Indeed, both Petitioner and counsel testified at the PCR hearing that Petitioner denied shooting a gun that day at all. (R.pp. 600-605, 668, 834). Furthermore, Petitioner testified at the PCR hearing that he never told his counsel that he had been in the car with Cathcart, that there was no proof that he was in the car with Cathcart, and that he had always maintained that he was at another location. (R.p. 680).

The evidence at trial was that the automobile in which Petitioner and his co-defendant were in pulled up to the victims' car and started shooting. (R.pp. 834-835). Petitioner's counsel testified that the theory he proceeded on at trial was that Petitioner was an innocent rider in the vehicle that evening, and that he never fired a gun. (R.p. 606). Additionally, counsel requested, and the trial court charged, the jury on the law of mere presence in addition to the self-defense charge. (R.p. 400). Therefore, the record contains ample evidence supporting the PCR court's finding that counsel was not deficient for failing to object to the charge regarding the inference of malice by use of a deadly weapon, where counsel's strategy was to show that Petitioner was an innocent rider and that his mere presence in the car was not indicative of guilt. Moreover, since Petitioner denied at the PCR hearing that he was even in the car, he has not carried his burden of showing that his counsel was ineffective for failing to object to the jury instruction. Smith, 528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus]; Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established federal law or 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]; Bell, 236 F.3d at 157-158; 28 U.S.C. § 2254(e)(1) [determination of a factual issue by the state court shall be presumed correct unless rebutted by clear and convincing evidence]. This claim should be dismissed.

II.

With regard to Petitioner's remaining Grounds for relief: Three through Fifteen and Seventeen through Nineteen; Respondent argues that these grounds are barred from consideration by this federal court because they were not properly preserved for review in state court. Petitioner does not contest that he did not properly present these claims in state court,[11] and the undersigned agrees with Respondent that they are procedurally barred from consideration by this Court.

Even if Grounds Three through Fifteen and Seventeen through Nineteen were raised in Petitioner's PCR proceeding, Petitioner does not contest that they were not pursued in his PCR appeal, and since Petitioner did not raise these issues in his PCR appeal, and/or in a direct appeal, they were not reviewed by the state Appellate Court. See Court Docket Nos. See Court Docket Nos. 9-5 and 9-8, p. 3. Hence, because Petitioner did not properly raise and preserve Grounds Three through Fifteen and Seventeen through Nineteen in his APCR appeal and state court proceedings, they are barred from further state collateral review; Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 562 n. 3 (1971); Wicker v. State, 425 S.E.2d 25 (S.C. 1992); Ingram v. State of S.C., No. 97-7557, 1998 WL 726757 at **1 (4th Cir. Oct. 16, 1998); Josey v. Rushton, No. 00-547, 2001 WL

[11] Although Respondent initially questioned whether Petitioner's Ground Three may have been essentially the same issue as Petitioner's Ground Sixteen, Petitioner clarified in his memorandum in opposition that Ground Three is a separate issue. Therefore, although Petitioner raised Ground Three in his PCR, since he did not raise it in his PCR appeal, it is in the same posture as his other procedurally barred claims.

34085199 at * 2 (D.S.C. March 15, 2001); Aice v. State, 409 S.E.2d 392, 393 (S.C. 1991)[post-conviction relief]; and as there are no current state remedies for Petitioner to pursue these issues, they are fully exhausted. Coleman v. Thompson, 501 U.S. 722, 735, n.1 (1991); Teague v. Lane, 489 U.S. 288, 297-298 (1989); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) ["A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."], cert. denied, 117 S.Ct. 854 (1997); Aice, 409 S.E.2d at 393; Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) ["To satisfy the exhaustion requirement, a habeas Petitioner must fairly present his claim[s] to the state's highest court . . . the exhaustion requirement for claims not fairly presented to the state's highest court is technically met when exhaustion is unconditionally waived by the state...or when a state procedural rule would bar consideration if the claim[s] [were] later presented to the state court."], cert. denied, 522 U.S. 833 (1997); Ingram, 1998 WL 726757 at **1.

However, even though otherwise exhausted, because these issues were not *properly* pursued and exhausted by the Petitioner in the state courts through the final level of state court review, federal habeas review of these claims is now precluded absent a showing of cause and prejudice, or actual innocence. Martinez v. Ryan, 565 U.S. 1, 9-10, 132 S.Ct. 1309, 1316 (2012); Wainwright v. Sykes, 433 U.S. 72 (1977); Waye v. Murray, 884 F.2d 765, 766 (4th Cir. 1989), cert. denied, 492 U.S. 936 (1989).

> In all cases in which a State prisoner has defaulted his Federal claims in State court pursuant to an independent and adequate State procedural rule, Federal Habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of Federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750.

In this case, Petitioner argues as "cause" for failing to raise these claims, that his PCR appellate counsel was ineffective for failing to raise these Grounds in his PCR appeal.[12] See Memorandum in Opposition, pp. 1-2. The United States Supreme Court has held that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . Ineffective assistance of counsel, then, is cause for procedural default." Murray, 477 U.S. at 488; see also Coleman v. Thompson, supra; McCleskey v. Zant, 499 U.S. 467, 494 (1991); Noble v. Barnett, 24 F.3d 582, 586, n.4 (4th Cir. 1994)["[C]onstitutionally ineffective assistance of counsel is cause per se in the procedural default context"]; Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994)(en banc). However, as noted hereinbelow, Petitioner's Sixth Amendment right to counsel does not afford him relief on these claims because, while ineffective assistance of counsel can constitute "cause" for a procedural default, it will only constitute "cause" if it amounts to an independent violation. Ortiz v. Stewart, 149 F.3d 923, 932 (9th Cir. 1998); Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir. 1996). Ineffective assistance of *PCR counsel* (as opposed to trial or direct appeal counsel) does not amount to an independent constitutional violation, and therefore would not ordinarily constitute "cause" for a procedural default. Murray v. Giarratano, 492 U.S. 1-7, 13 (1989) [O'Connor, J., concurring] ["[T]here is nothing in the Constitution or the precedents of [the Supreme] Court that requires a State

[12]Grounds Eighteen and Nineteen actually appear to be direct appeal issues. However, Petitioner makes no attempt to show any sufficient cause to overcome the procedural bar for his failure to raise these issues in a direct appeal. Rather, Petitioner raised both of these issues in his APCR (noting that he did not even discover Ground Nineteen until it was uncovered by his PCR counsel - see Court Docket 1, p. 31), and both of these issues were addressed by the PCR court in its order. (R.pp. 845-846).

provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the State to provide such proceedings,...nor does...the Constitution require [ ] the States to follow any particular federal model in those proceedings."]; Mackall v. Angelone, 131 F.3d 442, 447-449 (4th Cir. 1997); Ortiz, 149 F.3d at 932; Pollard v. Delo, 28 F.3d 887, 888 (8th Cir. 1994); Lamp v. State of Iowa, 122 F.3d 1100, 1104-1105 (8th Cir. 1997); Parkhurst v. Shillinger, 128 F.3d 1366, 1371 (10th Cir. 1997); Williams v. Chrans, 945 F.2d 926, 932 (7th Cir. 1992); Gilliam v. Simms, No. 97-14, 1998 WL 17041 at *6 (4th Cir. Jan. 13, 1998).

However, in Martinez the Supreme Court did carve out a "narrow exception" that modified

> "the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." Martinez, 566 U.S. at __, 132 S.Ct. at 1315. [F]or three reasons. First, the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . . Indeed, the right to counsel is the foundation for our adversary system." Id. at ___, 132 S.Ct. at 1317.
>
> Second, ineffective assistance of counsel on *direct appellate review* could amount to "cause", excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. Id. at ___, 132 S.Ct. at 1316, 1317. But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. Id. at ___, 132 S.Ct. at 1317-1318. That is because review of such a claim normally requires a different attorney, because it often "depend[s] on evidence outside the trial record," and because efforts to expand the record on direct appeal may run afoul of "[a]bbreviated deadlines," depriving the new attorney of "adequate time . . . to investigate the ineffective-assistance claim." Id. at ___, 132 S.Ct. at 1318.
>
> Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective assistance of counsel claim during initial-review collateral proceedings, could (were Coleman read

> broadly) deprive a defendant of any review of that claim at all. Martinez, supr a at ___, 132 S.Ct. at 1316.
>
> We consequently read Coleman as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding." Martinez, supra at ___, 132 S.Ct. at 1318-1319, 1320-1321.

Trevino v. Thaler, 133 S.Ct. 1911, 1917-1918 (2013); see also Gray v. Pearson, 526 Fed. Appx. 331, 333 (4th Cir. June 7, 2013)["The Supreme Court had previously held in Coleman that because a habeas petitioner has no constitutional right to counsel in state post-conviction proceedings, the ineffectiveness of post-conviction counsel *cannot* establish 'cause' to excuse a procedural default. Coleman, 501 U.S. at 757. The Court established an exception to that rule in Martinez."]

Therefore, because, under South Carolina law, a claim of ineffective assistance of trial or appellate counsel is raised in an APCR; cf. State v. Felder, 351 S.E.2d 852 (S.C. 1986); Bryant v. Reynolds, No. 12-1731, 2013 WL 4511242, at * 19 (D.S.C. Aug. 23, 2013); Gray, 526 Fed. Appx. 333; a claim of ineffective assistance of PCR counsel as "cause" for a default may be considered under the revised standard of Martinez and Trevino. Even so, it is also clear in the caselaw that the Martinez exception only applies to initial PCR counsel. As such, ineffective assistance of PCR *appellate* counsel (which is what Petitioner argues here), as opposed to initial PCR counsel, is *not* cause for a default. Martinez, 132 S.Ct. at 1316; see Johnson v. Warden of Broad River Corr., No. 12-7270, 2013 WL 856731 at * 1 (4th Cir. Mar. 8, 2013)[PCR appellate counsel error cannot constitute cause under Martinez exception]; Cross v. Stevenson, No. 11-2874, 2013 WL 1207067 at

* 3 (D.S.C. Mar. 25, 2013)["*Martinez* . . . does not hold that the ineffective assistance of counsel in a PCR appeal establishes cause for a procedural default. In fact, the Supreme Court expressly noted that its holding 'does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts."](quoting Martinez, 132 S.Ct. at 1320); Rodriguez v. Padula, No. 11-1297, 2014 WL 1912345 at * 7 (D.S.C. May 12, 2014); Johnson v. Cartledge, No. 12-1536, 2014WL 1159591 at *10 (D.S.C. Mar. 21, 2014](same); Abney v. Warden, Perry Corr. Inst., No. 14-4084, 2015WL 5783295 at * 23 (D.S.C. Sept. 29, 2015)["Under *Martinez*, ineffective assistance of initial PCR counsel, not appellate PCR counsel, may constitute cause for a procedural default."]; Lewis v. Williams, No. 12-3214, 2013 WL 3929993 at *4 (C.D.Ill. July 29, 2013)[Ineffective assistance of PCR appellate counsel is not a ground for relief under § 2254]; Flowers v. Norris, No. 07-197, 2008 WL 5401675 at * 11 (E.D.Ark. Dec. 23, 2008)[same].

Therefore, since Petitioner's alleged "cause" for not properly raising Grounds Three through Fifteen and Seventeen through Nineteen in his PCR appeal is based on alleged ineffective assistance of PCR appellate counsel, Petitioner has not shown the necessary cause to proceed on those Grounds of this Petition. Rodriguez v. Young, 906 F.2d 1153, 1159 (7th Cir. 1990), cert. denied, 498 U.S. 1035 (1991) ["Neither cause without prejudice nor prejudice without cause gets a defaulted claim into Federal Court."]. Further, since these claims are procedurally barred from consideration by this Court, they must be dismissed. Id.; see 28 U.S.C. § 2254; see also discussion, supra.

Finally, to the extent Petitioner's claim is that he is entitled to relief because he is actually innocent of these crimes, cognizable claims of "actual innocence" are extremely rare and must be based on "factual innocence not mere legal insufficiency." Bousley v. United States, 523

U.S. 614, 623 (1998); see also Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004). In this case, Petitioner has not presented any evidence that he is factually innocent. Accordingly, Petitioner has failed to present any new, reliable evidence of any type that was not presented in any of his prior court proceedings which supports his innocence on the criminal charges on which he was found guilty. See Schlup v. Delo, 513 U.S. 298, 324 (1995)[to present a credible claim of actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial."]; Doe, 391 F.3d at 161 (quoting Schlup for the evidentiary standard required for a court to consider an actual innocence claim). Further, Petitioner has also failed to make any showing that a fundamental miscarriage of justice will occur if these claims are not considered. Wainwright v. Sykes, supra; Murray v. Carrier, 477 U.S. 478 (1986); Rodriguez, 906 F.2d at 1159 [a fundamental miscarriage of justice occurs only in extraordinary cases, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"](citing Murray v. Carrier, 477 U.S. at 496); Sawyer v. Whitley, 505 U.S. 333, 348 (1992); Bolender v. Singletary, 898 F.Supp. 876, 881 (S.D.Fla. 1995).

Therefore, Grounds Three through Fifteen and Seventeen through Nineteen asserted by Petitioner in this habeas petition are procedurally barred from consideration by this Court, and should be dismissed.

Conclusion

Based on the foregoing, it is recommended that the Respondent's motion for summary judgment be **granted**, and that the Petition be **dismissed**, with prejudice.

The parties are referred to the Notice Page attached hereto.

Bristow Marchant
United States Magistrate Judge

August 16, 2017
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

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

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

Robin L. Blume
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

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

FILED: October 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6319
(9:17-cv-00830-MBS)

RISHAWN LAMAR REEDER

Petitioner - Appellant

v.

WARDEN REYNOLDS

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

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

For the Court

/s/ Patricia S. Connor, Clerk