18-7529

APPENDIX A

Derrick Cheeks #343108
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

FILED: September 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7529, Derrick Cheeks v. Alford Joyner
0:17-cv-02876-DCC

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourt.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: September 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7529
(0:17-cv-02876-DCC)

DERRICK LAMAR CHEEKS

Petitioner - Appellant

v.

ALFORD JOYNER

Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7529

DERRICK LAMAR CHEEKS,

Petitioner - Appellant,

v.

ALFORD JOYNER,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Donald C. Coggins, Jr., District Judge. (0:17-cv-02876-DCC)

Submitted: June 27, 2019 Decided: September 6, 2019

Before DIAZ and QUATTLEBAUM, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Eduardo K. Curry, CURRY LAW FIRM, LLC, North Charleston, South Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

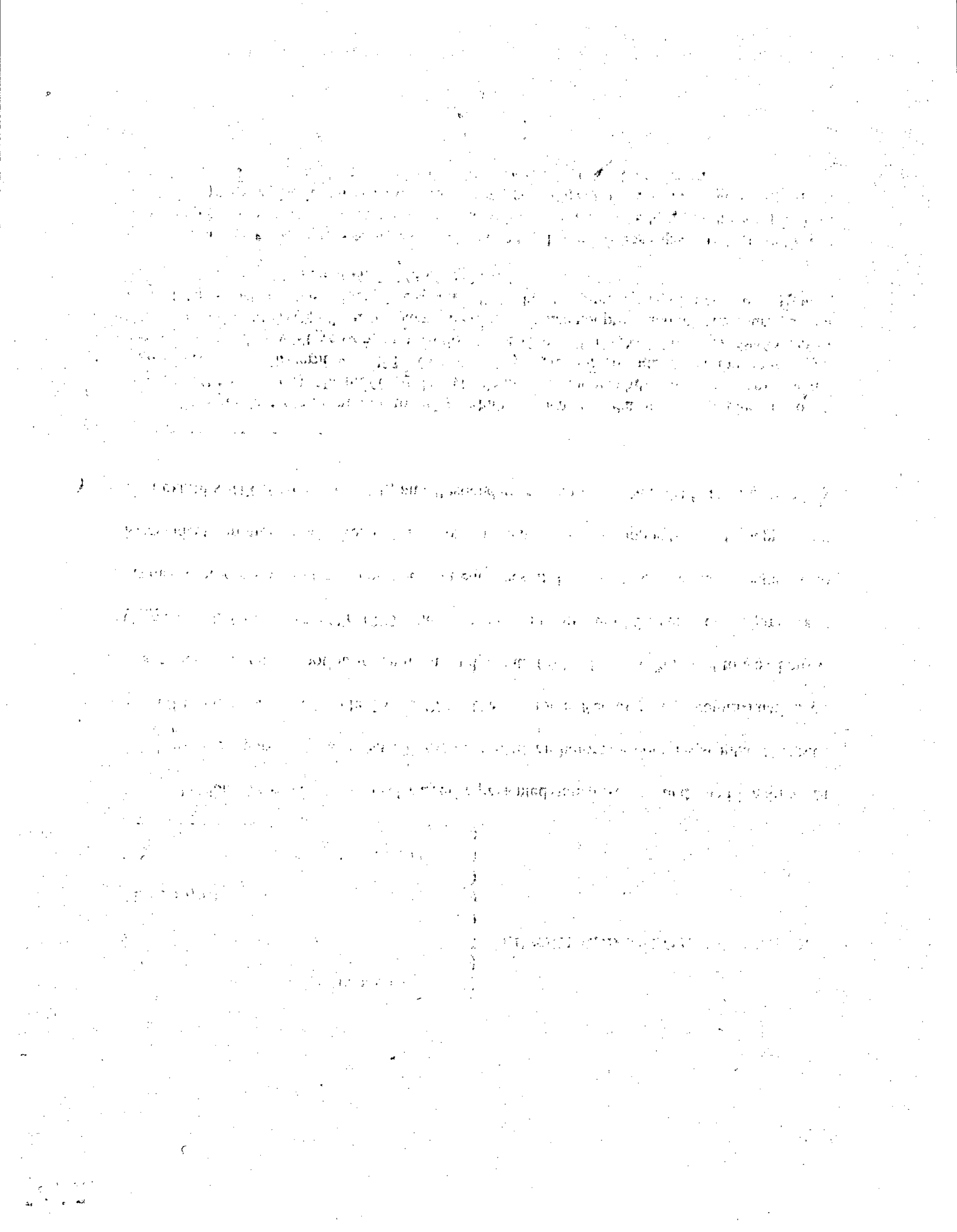
Derrick Lamar Cheeks seeks to appeal the district court's orders accepting the recommendation of the magistrate judge, denying relief on his 28 U.S.C. § 2254 (2012) petition, and denying reconsideration. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 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 Cheeks has not made the requisite showing.[1] Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are

[1] We note with disapproval that the brief filed by petitioner's attorney in this court is almost a verbatim copy of the objection to the magistrate's report that petitioner filed, pro se, in the district court. We further note that the single original argument in the brief (relating to the search warrant at issue in this case) has no basis in the record or in law.

adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED



APPENDIX B

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

Derrick Lamar Cheeks, Petitioner,	)	C/A No. 0:17-2876-DCC-PJG
vs.	)	**REPORT AND RECOMMENDATION**
Alford Joyner, Respondent.	)	

Petitioner Derrick Lamar Cheeks, a self-represented state prisoner, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on Respondent's amended motion for summary judgment. (ECF No. 33.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Respondent's motion. (ECF No. 36.) Petitioner filed a response in opposition and a supplement with exhibits[1] (ECF Nos. 46 & 49), and Respondent replied (ECF No. 47).[2] Having carefully

[1] Respondent filed a motion to strike exhibits attached to Petitioner's supplement to his response. (ECF No. 48.) The motion is denied. To the extent any exhibits improperly expand the record, see Rules Governing § 2254 Cases 7, they were not considered by the court. But see generally Fielder v. Stevenson, Civil Action No. 2:12-cv-00412-JMC, 2013 WL 593657, at *4 (D.S.C. Feb. 14, 2013) ("[T]he usual bars to hearing evidence not presented in state court may not be applicable insofar as the claims relate specifically to the PCR attorney's ineffectiveness.") (citing Cristin v. Brennan, 281 F.3d 404, 417 (3d Cir. 2002)).

[2] Petitioner also filed a sur-reply. (ECF No. 51.) The court observes that the Local Rules make no provision for sur-reply memoranda and Petitioner did not seek leave of the court to file a sur-reply. Accordingly, the sur-reply was not considered in the court's recommendation. However, consideration of the sur-reply would not have changed the court's recommendation.

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considered the parties' submissions and the record in this case, the court finds that Respondent's motion should be granted and the Petition be denied.

BACKGROUND

In November 2009, Petitioner was indicted in the Spartanburg County Court of General Sessions for trafficking in crack cocaine and possession with intent to distribute crack cocaine within one-half mile of a school. (App. at 595-98, ECF No. 32-3 at 91-100.) Petitioner was jointly tried with his uncle, Ricky Cheeks, in an October 2010 trial. (App. at 1, ECF No. 32-1 at 3.) Petitioner was represented at trial by Jeff Wilkes, Esquire. (Id.) Petitioner was found guilty as charged and sentenced to twenty-five years' imprisonment and a $200,000 fine for trafficking in crack cocaine and ten years' imprisonment and a $100,000 fine for possession within intent to distribute crack cocaine within one-half mile of a school, to run concurrently. (App. at 465, ECF No. 32-2 at 85.)

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals, wherein he was again represented by Wilkes. (ECF No. 32-5 at 1.) Petitioner raised the following issues on appeal:

> I. Should the drugs' [sic] seized in the home be suppressed because the Search Warrant, which did not give any description of the place to be searched, was facially invalid?
>
> II. Was it error for the trial court to instruct the jury that "actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use?"

(ECF No. 32-5 at 6.) The appeal was certified for review by the South Carolina Supreme Court pursuant to South Carolina Appellate Court Rule 204(b). The Supreme Court affirmed Petitioner's convictions and sentences in a published opinion.[3] (App. at 477, ECF No. 32-2 at 97.)

[3] State v. Derrick Lamar Cheeks, 737 S.E.2d 480 (S.C. 2013).

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Petitioner filed a *pro se* application for post-conviction relief ("PCR") in the Spartanburg County Court of Common Pleas on June 21, 2013. Petitioner raised the following issues:

(a) Counsel failed to argue the probable cause to issuance of warrant.

(b) Counsel failed to challenge the veracity of warrant affidavit.

(c) Counsel failed to move for a bill of particulars requesting disclosure of confidential informant.

(App. at 487, ECF No. 32-2 at 107) (errors in original). Petitioner then retained counsel, Christopher D. Brough, Esquire, and amended his application to raise the following issues (quoted verbatim), in addition to those already raised:

(a) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in consenting to allow the Applicant's case to be tried with the case of Ricky Dwight Cheeks thereby prejudicing the Applicant's defense.

(b) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in failing to move to sever his case from the case of Ricky Dwight Cheeks.

(c) Ineffective Assistance of Counsel – The Applicants trial counsel was ineffective in failing to make a motion for a pretrial Franks hearing in order to suppress evidence of drugs based on a search warrant dated June 4, 2009, that was defective.

(d) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in failing to make a motion in limine to exclude any character and prior bad act evidence before the trial, resulting in testimony being admitted of the Applicant's prior drug dealings.

(e) Ineffective Assistance of Counsel – The Applicant's trial counsel was ineffective in failing to object to testimony from Eric Elder and Tracy Markley that discussed the prior drug relationship that they had with the Applicant. The Applicant's trial was also ineffective for failing to move for a mistrial based upon prosecutorial misconduct, such misconduct being the admission of prior drug dealings by an experienced prosecutor.

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1. Defense Counsel was ineffective for failing to file necessary motions with the court and law enforcement to ensure that all physical evidence in this case was preserved and that the Applicant had an equal opportunity to access the evidence for the independent testing.

2. Defense Counsel was ineffective for failing to prepare and present a defense to Applicant's charges where the benefit of retaining the right to the last argument was significantly outweighed by the need to explain the circumstances and evidence that were readily explainable and which, left unrefuted, were highly prejudicial to the defense.

3. Defense Counsel was ineffective for failing to hire an independent search warrant expert in Applicant's case.

4. Defense Counsel was ineffective for failing to move to suppress evidence that was obtained in violation of the Fourth Amendment.

5. Defense Counsel was ineffective for failing to object and challenge the Trial Judge abusing his discretion during motion to suppress.

6. Defense Counsel was ineffective for failing to adequately cross-examine state witness Craig Hanning.

7. Defense Counsel was ineffective for failing to adequately cross-examine state witness Matt Hutchins.

8. Defense Counsel was ineffective for failing to cross-examine state witness Paul Norris.

9. Defense Counsel was ineffective for failing to cross-examine state witness Lieutenant Steve Cooper.

10. Defense Counsel was ineffective for failing to cross-examine Sgt. Pharis.

11. Defense Counsel was ineffective for neglecting to investigate and produce witnesses who would have established that Eric Elder and Tracy Markley did in fact sell drugs.

12. Defense Counsel was ineffective for failing to object to prior bad act evidence of Eric Elder where the content of testimony was more prejudicial than probative.

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13. Defense Counsel was ineffective for failing to object to prior bad act evidence of Tracy Markley where the content of testimony was more prejudicial than probative.

14. Defense Counsel was ineffective for failing to research and present an argument pertaining to a defense of third party guilt where, on the demonstrable facts of this case such a defense was a viable option.

15. Defense Counsel was ineffective for failing to object to The Hands of One Hand of All Jury Charge that violated Applicant's due process by shifting burden from State to Applicant.

16. Defense Counsel was ineffective for failing to move to quash Applicant's indictments based on Selective Prosecution.

17. Appellate Counsel was ineffective in that he advised Applicant's family at Oral Argument that if the State Supreme Court affirmed the lower court's ruling he would appeal decision to The United States Supreme Court, and subsequent to Supreme Court's ruling that was unequivocally contrary to Federal Established Law he failed to do so.

18. Defense Counsel was ineffective in that he failed to object; and renew his motions to sever and mistrial based on State's failure to notify the Applicant of all charges Applicant was held to answer for.

19. Prosecutorial Misconduct in that the prosecutor's opening and closing arguments to the jury deprived Applicant of a fair trial in violation of due process.

20. Defense Counsel's failure to object to the prosecutor's opening and closing arguments to the jury constituted deficient performance.

21. Prosecutorial Misconduct in that the prosecutor failed to disclose "material" evidence in violation of Brady, cumulative effect of all "undisclosed" evidence was "favorable" to the Applicant, and favorable evidence the prosecutor failed to disclose to Applicant would have made a different result "reasonable probable" in Trafficking Crack Cocaine prosecution, and thus, non-disclosure of evidence deprived Applicant of a fair trial in violation of due process.

22. Defense Counsel's failure to object to the prosecutor's failure to disclose favorable evidence that was material to Applicant's guilt constituted deficient performance. In addition "the Applicant contends that there is evidence of

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> material facts not previously presented and heard that requires vacation" [S.C. Code Ann. § 17-22-15(C)] of his judgment and sentences. . . .
>
> 23. Applicant seeks a new trial based upon after discovered evidence based upon where the State witness Eric Elder and Tracy Markley has subsequently been given "rewards" for "testifying" from the state, and where they have subsequently pled guilty to charges of "PWID non-violent as "lesser included offenses" of "Trafficking Crack Cocaine" "100 grams or more" and "400 grams or more."

(ECF No. 32-8 at 1-6) (errors in original). A hearing was held on the application on September 3, 2015. (App. at 496, ECF No. 32-2 at 116.). The PCR court denied Petitioner's application by order dated November 2, 2015. (App. at 583, ECF No. 32-3 at 85.)

Petitioner appealed the PCR court's order by filing a petition for a writ of certiorari to the South Carolina Supreme Court on November 10, 2015. Petitioner presented the following issue in the petition:

> Trial counsel erred in failing to object to the prejudicial prior bad acts evidence and negative character testimony from drug users and dealers who aligned themselves with petitioner because the result was the denial of petitioner's right to a fair trial in the case.

(ECF No. 32-10 at 3.) The Supreme Court denied the petition and issued the remittitur on July 28, 2017. (ECF No. 32-18.)

During the pendency of his PCR appeal, Petitioner filed a second *pro se* PCR application in the Spartanburg County Court of Common Pleas on June 20, 2016. (ECF No. 32-12 at 1.) The PCR court dismissed Petitioner's second PCR application on November 6, 2017. (ECF No. 32-17 at 1.)

Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 23, 2017. Petitioner amended his petition on November 17, 2017.

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FEDERAL HABEAS ISSUES

The Petition for a writ of habeas corpus raises the following issues, quoted verbatim:

Ground One: The trial court jury instruction that actual knowledge of the presence of crack cocaine is strong evidence of a Defendant's intent to control its disposition or use was error that had a substantial and injurious effect and influence in the jury's verdict.

Supporting Facts: The South Carolina Supreme Court ruling that the jury charge unduly emphasized the evidence and deprived the jury of its prerogative to draw inferences and weigh the evidence and petitioner could not demonstrate prejudice due to overwhelming guilt was contrary to clearly established federal law and was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding.

Ground Two: The petitioner had a legitimate expectation of privacy in the premises searched.

Supporting Facts: The state's key witnesses Eric Elder and Tracy Markley unequivocally demonstrated by their testimony that the petitioner had a legitimate expectation of privacy in the premises searched.

Ground Three: The search warrant is defective on its face for failing to state with particularity the premises to be searched.

Supporting Facts: The South Carolina Supreme Court ruling that an affidavit may incorporate by reference the description of the premises searched where the search warrant is blank following the section titled "Description of Premises (Person, Place, or Thing) to be Searched", or an accompanying affidavit for purposes of satisfying the particularity requirement was contrary to and involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.

Ground Four: Petitioner was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendment to the United States Constitution as well as Article I, Section 14 of the South Carolina Constitution when trial counsel failed to make A Motion for a Pre-Trial Frank's Hearing.

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Supporting Facts: Counsel failure to investigate and introduce the arrest warrants and police reports of Paul Norris and Craig Hanning that was in his possession; subpoena Paul Norris and Craig Hanning to the hearing; investigate and fully cross examine trial counsel in regards to the petitioner being arrested and indicted for the March 3 and 16, 2009 C.I. buys in the affidavit; and file a Rule 59(e) motion during petitioner's initial collateral proceeding impeded the petitioner from complying with the state's established procedures.

Ground Five: Petitioner was denied his right to Effective Assistance of Counsel under the Sixth and Fourteenth Amendment of the United States Constitution as well as Article I, Section 14, of the South Carolina Constitution when trial counsel failed to make a pre-trial motion for Disclosure and Identity of Confidential Informant.

Supporting Facts: The search warrant affidavit unequivocally reveals that the confidential informant was an active participant and counsel's failure to raise claim during petitioner's initial collateral proceeding impeded petitioner from complying with the state's established procedures.

Ground Six: Petitioner was denied his rights to equal protection and effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution as well as Article I, Section 14, Article I § 3, of the South Carolina Constitution when trial counsel failed to make a motion to squash petitioner's indictments based on selective prosecution.

Supporting Facts: During the PCR Hearing of the petitioner the state's PCR judge and petitioner's PCR counsel impeded petitioner from presenting his selective prosecution claim. Petitioner argued that he was similarly situated to his white codefendant's Eric Elder and Tracy Markley when it came to the 400 grams and half proximity to a school zone charges. Petitioner never had a chance to fully argue and present his claim because the PCR judge stated "he wasn't buying the issue". However, the judge asked PCR counsel did he know of any other issues? PCR counsel stated that "he presented what he deemed to be the most significant issues that he felt showed trial counsel was ineffective". In addition, PCR counsel stated that he had a discussion with petitioner in regards to other issues petitioner wanted to raise and he told petitioner that he

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thought that the issues raised were the most realistic in showing that trial counsel was ineffective. Petitioner asked about introducing his exhibits to support his claim and PCR counsel stated that petitioner's exhibits were a matter of the record and counsel's failure to file a Rule 59(e) motion impeded petitioner from complying with the state's established procedures.

Ground Seven: Petitioner was denied his right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution when the state committed a due process violation in presenting false testimony of prosecution witnesses denying that the state had agreed to dismiss felony charges against them in exchange for their testimony: Matt Hutchins testimony that petitioner was standing in proximity of the crack cocaine when the search warrant was executed: and prosecutor's opening and closing arguments that petitioner possessed toe 100 grams of crack cocaine.

Supporting Facts: During the PCR hearing of the petitioner the state PCR judge and petitioner's PCR counsel impeded petitioner from presenting his false testimony claim and introducing his exhibits in support of his claim. Petitioner asked PCR counsel at the beginning and during the hearing could he present his exhibits and PCR counsel stated that he would give petitioner the opportunity to put anything that he wanted to introduce in the record at the end of the hearing. Petitioner argued that his after discovered evidence of Eric Elder and Tracy Markley plea deals supported his claim that the prosecutor presented false testimony to the jury in opening statement and during trial. Petitioner never got the opportunity to fully argue and present his claim because the PCR judge stated "What else? What other issues?" However, the PCR judge asked PCR counsel did he know of any other issues? And PCR counsel stated that he presented what he deemed to be the most significant issues that he felt showed trial counsel was ineffective. Petitioner asked PCR counsel what about his exhibits he wanted to introduce into the record. PCR counsel stated that petitioner's exhibits were a matter of the record.

Ground Eight: Petitioner was denied his right to effective Assistance of Counsel under the Sixth and Fourteenth Amendments to the

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United States Constitution as well as Article I, Section 14, of the South Carolina Constitution when trial counsel failed to make a Motion in Limine and object to exclude any character and prior bad act evidence prior to and during trial where the content of testimony was more prejudicial than probative because the result was the denial of petitioner's right to a fair trial.

Supporting Facts: PCR court ruling trial counsel wasn't ineffective for failing to make a motion to exclude character and prior bad act evidence prior to trial and object to the testimony of Eric Elder because it was the resgestae of the case: and failing to object to Tracy Markley testimony to be objectionable because an objection would have drawn unnecessary attention to the jury was contrary to and involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States and was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding.

(Am. Pet., ECF No. 8-1) (errors in original).

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

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In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322. Further, while the federal court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson v. Pardus, 551 U.S. 89 (2007), 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 Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Habeas Corpus Standard of Review

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States," or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state

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quotation marks and citation omitted). Thus, a federal court may consider only those issues which have been properly presented to the state appellate courts with jurisdiction to decide them. Generally, a federal habeas court should not review the merits of claims that would be found to be procedurally defaulted (or barred) under independent and adequate state procedural rules. Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008); Longworth, 377 F.3d 437; see also Coleman v. Thompson, 501 U.S. 722 (1991). For a procedurally defaulted claim to be properly considered by a federal habeas court, the petitioner must "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.

D. Respondent's Motion for Summary Judgment

1. Claims Not Cognizable Under § 2254 (Ground One)

Respondent argues that Petitioner's Ground One fails to state a claim upon which federal habeas corpus relief may be granted because the claim raises only issues of state law. The court agrees.

A district court may only entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); see also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions."). In Ground One, Petitioner claims the trial court's jury instruction on actual knowledge of the presence of the drugs was erroneous because it was a comment on the facts and the weight of those facts. In Petitioner's direct appeal, the South Carolina Supreme Court agreed with this argument, finding it was error for

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the trial court to give that instruction, but also finding Petitioner was not prejudiced by that error. (App. at 482, ECF No. 32-2 at 102.) But such an error is one of state constitutional law. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); see also State v. Smith, 342 S.E.2d 600, 601 (S.C. 1986) ("The trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of the accused or as to controverted facts.") Accordingly, Petitioner's claim in Ground One is not cognizable here because it presents no federal issue. See Gilmore v. Taylor, 508 U.S. 333, 342 (1993) ("Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief.") (citing Estelle, 502 U.S. at 112); Billotti v. Legursky, 975 F.2d 113, 119 (4th Cir. 1992) (finding the habeas petitioner's allegation that the state trial court erred in its jury instructions failed to raise a claim redressable under § 2254 where the petitioner failed to explain in his brief how the alleged trial error resulted in a deprivation of a federal right) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)).

2. Claims Barred by Stone (Grounds Two & Three)

Respondent argues Petitioner's Grounds Two and Three are barred pursuant to Stone v. Powell, 428 U.S. 465 (1976). The court agrees. In Stone, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 494; see also Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir. 1978) (applying Stone and holding that where a state court

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provides a mechanism under state practice to litigate Fourth Amendment claims, the court "need not inquire further into the merits of the petitioner's case . . . unless the prisoner alleges something to indicate his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired").

Here, Petitioner challenges the search of the home where he was arrested pursuant to the Fourth Amendment, arguing he had a reasonable expectation of privacy in the home, and also arguing that the search warrant was defective. However, the record unequivocally shows that Petitioner made these arguments at trial when trial counsel moved to suppress the search warrant. (App. at 41-50, ECF No. 32-1 at 43-52.) Petitioner also raised these arguments in his direct appeal, and the South Carolina Supreme Court ruled on these issues. (App. at 479, ECF No. 32-2 at 99; ECF No. 32-5 at 3.) Thus, Petitioner had a "full and fair" opportunity to litigate these Fourth Amendment claims in state court, and he fails to show that his opportunity to raise these issues in state court was impaired. See Doleman, 579 F.2d at 1265. Accordingly, Petitioner's claims in Grounds Two and Three are barred by Stone.

3. Procedurally Barred Claims

Respondent argues Grounds Four through Seven are procedurally barred. As will be discussed in more detail below, the court agrees that all of these claims are procedurally barred. However, Petitioner argues he can show cause to excuse the procedural bar of these claims pursuant to Martinez v. Ryan, 566 U.S. 1 (2012).

Generally, any errors of PCR counsel cannot serve as a basis for cause to excuse a petitioner's procedural bar of his claims. See Coleman, 501 U.S. at 752. However, in Martinez v. Ryan, the United States Supreme Court established a "limited qualification" to the rule in Coleman.

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Martinez, 566 U.S. at 15. The Martinez Court held that inadequate assistance of counsel "at initial-review collateral review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 9. In describing its holding in Martinez, the Supreme Court has stated:

> We . . . 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."

Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013) (citing Martinez, 132 S. Ct. at 1318-19, 1320-21); see also Sexton v. Cozner, 679 F.3d 1150, 1159 (9th Cir. 2012) (summarizing the Martinez test to require the following: "a reviewing court must determine whether the petitioner's attorney in the first collateral proceeding was ineffective . . . , whether the petitioner's claim of ineffective assistance of trial counsel is substantial, and whether there is prejudice").

Further, to excuse the procedural bar of Petitioner's claims, he must "show that [PCR] counsel's representation during the post-conviction proceeding was objectively unreasonable, and that, but for his errors, there is a reasonable probability that Petitioner would have received relief on a claim of ineffective assistance of trial counsel in the state post-conviction matter." Sexton, 679 F.3d at 1157; see also Williams v. Taylor, 529 U.S. at 391 (stating that "the Strickland test provides sufficient guidance for resolving virtually all ineffective assistance-of-counsel claims"); Strickland v. Washington, 466 U.S. 668, 687 (1984) (stating that to demonstrate ineffective assistance of counsel, a petitioner must show that (1) his counsel was deficient in his representation, *i.e.*, that

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counsel's errors were so serious that his performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment to the United States Constitution and (2) he was prejudiced as a result).

a. Ground Four

In Ground Four, Petitioner claims trial counsel was ineffective for failing to make a motion for a Franks[4] hearing. This issue was raised to and ruled upon by the PCR court. (App. at 591-92, ECF No. 32-3 at 93-94.) However, Petitioner did not raise the issue in his PCR appeal. Thus, the claim is procedurally barred from federal habeas review because it was not presented to the state appellate court in Petitioner's PCR appeal. See Lawrence, 517 F.3d at 714; see also McCray v. State, 455 S.E.2d 686, n.1 (S.C. 1995) (stating that issues not raised in a petition for a writ of certiorari from the denial of a petitioner's PCR application are not preserved for appellate review).

Petitioner argues he can show cause to excuse the procedural bar because PCR counsel failed to introduce evidence to support this claim at the PCR hearing. Specifically, he argues PCR counsel should have presented evidence that statements in the search warrant affidavit are false. But Petitioner fails to identify which statements in the affidavit are false or forecast evidence that would prove that any of the statements are false. Rather, he points out that certain information is not included in the affidavit, such as the identities of the vehicles' drivers or the fact that Petitioner did not live at the residence to be searched. And Petitioner asserts, without any supporting facts, that the confidential informant was not reliable.

[4] Franks v. Delaware, 438 U.S. 154 (1978) (providing that a defendant may attack the presumed validity of a facially valid warrant affidavit by showing the warrant relies on a false statement made either knowingly and intentionally, or with reckless disregard for the truth).

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Consequently, Petitioner fails to provide any substantiated allegations to support his claim that trial counsel had grounds to request a Franks hearing, which would require a plausible assertion that facts sworn to in the warrant affidavit were false or made with reckless disregard for the truth. See United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990) ("In order even to obtain an evidentiary hearing on the affidavit's integrity, a defendant must first make 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.' This showing 'must be more than conclusory' and must be accompanied by a detailed offer of proof.") (quoting Franks, 438 U.S. at 155-56, 171) (internal citations omitted). Because Petitioner fails to forecast any evidence that would demonstrate that trial counsel had a basis upon which he could request Franks hearing, Petitioner fails to show trial counsel was ineffective, or that the underlying claim was "substantial." See Martinez, 566 U.S. at 14 ("To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."). Thus, Petitioner fails to show cause to excuse the procedural bar in Ground Four.

b. Ground Five

In Ground Five, Petitioner argues trial counsel was ineffective for failing to move to disclose the identity of the confidential informant. While Petitioner raised this issue in his PCR application, (App. at 487, ECF No. 32-2 at 107), no evidence was submitted in support of this issue at the PCR hearing, and the PCR court did not rule on this issue. Therefore, this issue is procedurally barred from federal habeas review. See Lawrence, 517 F.3d at 714; see also Plyler v. State, 424 S.E.2d 477, 478 (S.C. 1992) (stating that issues not raised to and ruled on by the PCR court are not preserved for

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review on appeal); Marlar v. State, 653 S.E.2d 266, 267 (S.C. 2007) (stating that issues are not preserved for review where the PCR applicant fails to make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations).

Petitioner argues he can show cause to excuse the procedural bar because this claim has merit and PCR counsel failed pursue this issue at the PCR hearing. Petitioner's claim is based on the premise that the confidential informant should have been disclosed before trial because the confidential informant was the only witness who could have testified about the evidence used against him in the search warrant.

Addressing when the State is required to disclose the identity of a confidential informant, the South Carolina Supreme Court has stated,

> Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere "tipster" who supplies a lead to law enforcement. The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure.

State v. Humphries, 579 S.E.2d 613, 614-15 (S.C. 2003) (internal citations omitted).

Here, Petitioner was not tried for any of the drug activity purportedly witnessed by the confidential informant. Rather, to prove its case against Petitioner, the State only used evidence from witnesses who testified at trial and the physical evidence recovered from the residence where law enforcement observed Petitioner manufacturing narcotics. (See generally Hanning Testimony, App. at 75-81, ECF No. 32-1 at 77-83; Hutchins Testimony, App. at 112, 121-130, ECF No. 32-1

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at 114, 123-132.) The information provided by the confidential informant only helped supply the officers with cause to establish surveillance and later obtain a search warrant, thus making the confidential informant more like a "mere tipster" as described in Humphries. Thus, Petitioner fails to provide any plausible allegation that trial counsel had a basis upon which to seek disclosure of the confidential informant, and accordingly, Petitioner fails to show that the underlying ineffective assistance claim was substantial such that he could show cause to excuse the procedural bar of Ground Five based on PCR counsel's failure to raise it.

c. Ground Six

In Ground Six, Petitioner argues trial counsel was ineffective for failing to quash Petitioner's indictments based on selective prosecution. Initially, while Respondent correctly argues this claim is procedurally barred, Respondent incorrectly argues it is barred because it was not raised to and ruled upon by the PCR court. In fact, the PCR court heard and denied this claim from the bench during Petitioner's testimony at the PCR hearing. (App. at 547-48, ECF No. 32-3 at 49-50.) However, the claim is procedurally barred because it was not raised in Petitioner's PCR appeal. See Lawrence, 517 F.3d at 714; see also McCray, 455 S.E.2d at n.1.

Petitioner argues he can demonstrate cause to excuse the procedural bar for this claim because PCR counsel failed to raise this issue in a Rule 59 motion to alter or amend the judgment to preserve the issue for appellate review. However, this claim was preserved for appellate review under South Carolina law because Petitioner obtained a ruling by the PCR court, and consequently, no Rule 59 motion was necessary to preserve the issue for review. See Wilder Corp. v. Wilke, 497 S.E.2d 731, 734 (S.C. 1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet

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ruled upon by it."). Thus, Petitioner fails to provide any plausible assertion that PCR counsel's ineffectiveness caused the procedural bar. See Martinez, 566 U.S. at 14, 16.

d. Ground Seven

In Ground Seven, Petitioner argues the State violated his right to due process at trial by presenting false testimony from witnesses who denied that the State had agreed to dismiss felony charges against them in exchange for their testimony. This claim is procedurally barred because it was not presented to the trial court or PCR court. See Lawrence, 517 F.3d at 714.

However, Petitioner argues he can show cause to excuse the procedural bar because PCR counsel impeded Petitioner from presenting this issue to the court. In response, Respondent correctly argues that the Martinez exception does not apply here because the underlying claim is not one for ineffective assistance of trial counsel. See Davila v. Davis, 137 S. Ct. 2058, 2065-66 (2017) (stating Martinez is a narrow exception to Coleman "that applies only to claims of ineffective assistance of counsel at trial") (internal citations and quotation marks omitted). Therefore, Petitioner's Ground Seven is procedurally barred from federal habeas review.

4. Claims Addressed on the Merits (Ground Eight)

In Ground Eight, Petitioner argues trial counsel was ineffective for failing to object to testimony from Eric Elder and Tracy Markley that constituted impermissible prior bad act evidence.

A defendant has a constitutional right to the effective assistance of counsel. To demonstrate ineffective assistance of counsel, a petitioner must show, pursuant to the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668 (1984), that (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. Id. at 687; see also Williams v. Taylor, 529 U.S. 362, 391 (2000) (stating that "the Strickland test provides sufficient guidance for resolving virtually

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all ineffective-assistance-of-counsel claims"). To satisfy the first prong of Strickland, a petitioner must show that trial counsel's errors were so serious that his performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment to the United States Constitution. With regard to the second prong of Strickland, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

The United States Supreme Court has cautioned federal habeas courts to "guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." Harrington, 562 U.S. at 105. The Court observed that while " '[s]urmounting Strickland's high bar is never an easy task[,]' . . . [e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." Id. (quoting Padilla v. Kentucky, 559 U.S. 356, 371 (2010)). The Court instructed that the standards created under Strickland and § 2254(d) are both " 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." Id. (citations omitted). Thus, when a federal habeas court reviews a state court's determination regarding an ineffective assistance of counsel claim, "[t]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

The Supreme Court has held that a decision containing a reasoned explanation is not required from the state court. As stated above, if no explanation accompanies the state court's decision, a federal habeas petitioner must show that there was no reasonable basis for the state court to deny relief. In the case at bar, this court has the benefit of the PCR court's written opinion, certiorari review of which was denied by the South Carolina Supreme Court, which may provide reasons or

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theories that the appellate court could have relied upon in summarily denying Petitioner's petition. See Wilson v. Sellers, 138 S. Ct. 1188, 1194-97 (2018) (holding that a federal habeas court should "look through" the unexplained decision to the last related state court decision that does provide a relevant rationale, and presume that the unexplained decision adopted the same reasoning, unless the State can rebut the presumption). Therefore, the court turns to the question whether the PCR court's order unreasonably misapplied federal law or was based on an unreasonable determination of the facts. Having reviewed the PCR court's order pursuant to the § 2254 standard, the court finds for the reasons that follow that the state court did not unreasonably misapply the Strickland test in determining that no Sixth Amendment violation occurred.

At trial, Eric Elder, a witness for the State, testified about his personal knowledge of the defendants' manufacturing of crack on the day the defendants were arrested for cooking crack at Tracy Markley's house. Before Elder testified as to the specifics of the events of that day, he was asked on direct examination "Have you ever been present during the manufacturing or cooking of crack cocaine?" (App. at 256, ECF No. 32-1 at 258.) Elder responded "Yes, sir." (Id.) Elder later testified that on the day Petitioner was arrested, he was at Markley's house and he observed Petitioner cooking crack. (App. at 257, ECF No. 32-1 at 259.) Elder, who also had previously testified that he often drove the defendants in their cars, testified that he did so "[because] a lot of time I'd get free dope, free crack." (Id.) The solicitor asked Elder if that was his understanding on the day the defendants were arrested, and Elder responded that was his understanding "mostly everyday." (Id.)

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Another witness for the State, Tracy Markley, testified that he met Petitioner through a friend who bought crack from Petitioner. (App. at 300-01, ECF No. 32-1 at 302-03.) Markley testified that he and the friend would go to Markley's house to buy the crack. (App. at 301, ECF No. 32-1 at 303.)

At the PCR hearing, Petitioner testified that the State introduced evidence at trial about his history of dealing drugs that was not related to the events described in the indictment. (App. at 509, ECF No. 32-3 at 11.) Specifically, Petitioner testified that Elder and Markley testified at trial about how Elder had been present during the manufacturing of crack cocaine, how Elder got free crack from Petitioner and his co-defendant "mostly every day," and how Markley met Petitioner when Petitioner sold Markley crack. (App. at 511-12, 517, ECF No. 32-3 at 13-14, 19.)

Trial counsel testified that Elder and Markley's testimony were explanations as to what their contact with the defendants was, how they knew something, or why they were doing something. (App. at 557, ECF No. 32-3 at 59.) Trial counsel testified that "there could be some prejudice in it" but that "it was not huge," and the testimony did not seem important enough to "make an objection and draw more attention to it." Trial counsel was asked if the outcome of trial would have been different had he objected to the Elder and Markley statements, and trial counsel responded "no." (App. at 558, ECF No. 32-3 at 60.)

The PCR court found Petitioner failed to meet his burden of proving that trial counsel was ineffective for failing to object to the testimony of Elder and Markley. (App. at 592-93, ECF No. 32-3 at 94-95.) First, as to Elder's testimony that he had previously been present during the manufacturing or cooking of crack, the PCR court found trial counsel was not deficient because the testimony was not in reference to Petitioner, and thus, it did not constitute prior bad act evidence. (App. at 592, ECF No. 32-3 at 94.) Second, as to Elder's testimony that he drove Petitioner in

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exchange for free crack "everyday," the PCR court found trial counsel was not deficient because that testimony was part of the *res gestae* of the case and not a prior bad act; thus, trial counsel had no basis to object to the testimony. (Id.) Third, as to Markley's testimony that he met Petitioner through a friend who bought crack from Petitioner, the PCR court found trial counsel was not deficient because trial counsel articulated a valid strategic reason for not objecting—not emphasizing a bad fact to the jury. (App. at 593; ECF No. 32-3 at 95.)

The court finds that Petitioner fails to meet his burden of showing that the PCR court's findings are contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts. First, the PCR court's finding here—that Elder's testimony that he had previously been present during the manufacturing or cooking of crack was not in reference to Petitioner—is supported by the record. The State's question to Elder that prompted this testimony made no reference to Petitioner's cooking of crack, but rather, was part of a sequence of questions establishing Elder's familiarity with crack and its production. (App. at 255-57, ECF No. 32-1 at 257-59.) Petitioner presents no contrary evidence, and thus, Petitioner fails to meet his burden of showing by clear and convincing evidence that this factual finding is not correct. See 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). Thus, Petitioner incorrectly argues that Elder's testimony was impermissible prior bad act evidence, and accordingly, the PCR court's conclusion that trial counsel was not deficient for failing to object to this statement because he had no basis to object is not unreasonable.

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Second, as to the PCR court's finding that Elder's testimony that he drove Petitioner in exchange for free crack "everyday" was part of the *res gestae* of the case and not a prior bad act, Petitioner fails to show any error in the PCR court's decision. Elder's testimony implied that Petitioner produced and possessed crack, which is the very offense for which Petitioner was tried. See State v. Williams, 469 S.E.2d 49, 53 (S.C. 1996) ("The rationale underlying the res gestae theory is that evidence of other criminal conduct that occurs contemporaneously with or is part and parcel of the crime charged is considered part of the res gestae of that offense. Under res gestae, evidence of other crimes is admissible where it is intimately connected with the pending offense, or is necessary to provide a complete story or explanation of the pending offense."). Also, the State's question that prompted this testimony concerned why Elder was driving the defendants on the day they were arrested. (App. at 257, ECF No. 32-1 at 259.) Therefore, Elder's testimony was necessary to explain how he had personal knowledge of the defendant's actions on the day of the arrest—specifically, why he regularly labored as a driver for the defendants. See State v. King, 514 S.E.2d 578, 582 (S.C. 1999) ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred."). Thus, Petitioner incorrectly argues that Elder's testimony here is impermissible prior bad act evidence, and accordingly, the PCR court's finding that trial counsel was not deficient because he had no basis to object to the testimony as prior bad act evidence is not unreasonable.

Third, as to the PCR court's finding that trial counsel articulated a valid strategic reason for not objecting to Markley's testimony that he met Petitioner through a friend who bought crack from Petitioner, Petitioner fails to show the PCR court's decision is contrary to, or an unreasonable

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application of, clearly established federal law. The PCR court's decision is supported by trial counsel's testimony that he did not object to Markley's testimony because it was not important and he did not want to draw attention to it. See McCarver v. Lee, 221 F.3d 583, 594 (4th Cir. 2000) ("In evaluating trial counsel's performance, we must be highly deferential to counsel's strategic decisions and not allow hindsight to influence our assessment of counsel's performance.") (citing Strickland, 466 U.S. at 689). And Petitioner fails to point to any evidence in the record that would undermine the PCR court's finding. Thus, the PCR court's finding that trial counsel was not deficient because he articulated a valid strategic reason for not objecting to Markley's testimony is not unreasonable.

RECOMMENDATION

For the foregoing reasons, the court recommends Respondent's motion for summary judgment (ECF No. 33) be granted and the Petition be denied.

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

June 28, 2018
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

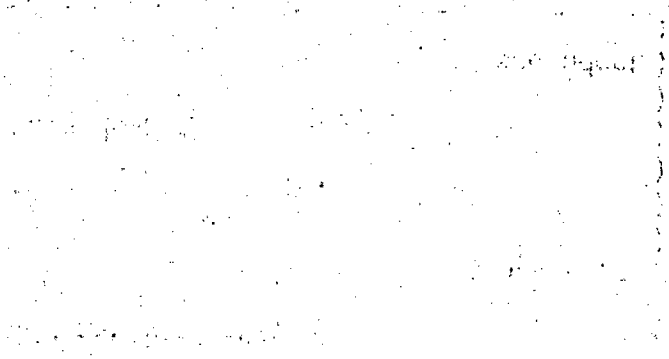
Notice of Right to File Objections to Report and Recommendation

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, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

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).



APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Derrick Lamar Cheeks, Petitioner, vs. Alford Joyner, Respondent.	)	C/A No. 0:17-cv-02876-DCC
	)	ORDER

Petitioner, proceeding pro se, is seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. ECF No. 1, 8. Respondent filed an Amended Motion for Summary Judgment and Return and Memorandum on February 26, 2018. ECF Nos. 32, 33. A *Roseboro* Order was entered by the Court and mailed to Petitioner, advising him of the importance of a dispositive motion and the need for Petitioner to file an adequate response. ECF No. 36. Petitioner filed a Response in Opposition to the Motion for Summary Judgment and a Supplement, Respondent filed a Reply, and Petitioner filed an Amended Response in Opposition and a Sur-Reply.[1] ECF Nos. 45, 46, 47, 49, 51.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2), (D.S.C.), this matter was referred to United States Magistrate Judge Paige J. Gossett for pre-trial proceedings and a Report and Recommendation ("Report"). On June 28, 2018, the Magistrate Judge issued a Report recommending that the Motion for Summary Judgment

[1] Respondent also filed a Motion to Strike Petitioner's Supplement, which the Magistrate Judge denied in the Report and Recommendation. ECF Nos. 48, 54.

be granted and the Petition be dismissed. ECF No. 54. Petitioner filed objections to the Report. ECF No. 56.

APPLICABLE LAW

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a de novo determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* U.S.C. § 636(b). The Court will review the Report only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that "in the absence of 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." (citation omitted)).

Petitioner's claims are governed by 28 U.S.C. § 2254(d), which provides that his petition cannot be granted unless the claims "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "[A] federal habeas court may not

issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Importantly, "a determination of a factual issue made by a State court shall be presumed to be correct," and Petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

DISCUSSION

Petitioner raised eight grounds in his Petition, and the Magistrate Judge recommended granting summary judgment. Petitioner does not object to the Magistrate Judge's recommendation that summary judgement should be granted with respect to Ground Seven. The Court has reviewed the record in this case, the applicable law, and the Report of the Magistrate Judge and finds no clear error and agrees with the Report's recommendation regarding this claim. Petitioner objects to the Magistrate Judge's recommendation with respect to the other grounds. The Magistrate Judge provided a thorough recitation of the procedural history and the relevant law, including the summary judgment standard and the habeas corpus standard of review, which the Court incorporates into this Order by reference.

Non-Cognizable Claim

In Ground One, Petitioner asserted that the trial court erred by instructing the jury that actual knowledge of the presence of crack cocaine is strong evidence of a defendant's intent to control its disposition or use. ECF No. 8-4 at 1. The Magistrate Judge determined

that it was not cognizable on federal habeas review because this claim raised only issues of state law. ECF No. 54 at 14–15. Petitioner objects to the Magistrate Judge addressing claims not raised in his Petition, reiterates his assertion that the trial court's instruction was an impermissible comment on the facts, and states that the Magistrate Judge did not address his claim. ECF No. 56 at 1–2. The Court disagrees.

"[Q]uestions of jury instructions are matters of state law, not cognizable on federal review, unless a specific constitutional issue is implicated that calls into question the Due Process Clause." *Alexander v. Cartledge*, No. 6:16-cv-0600-HMH-KFM, 2017 WL 770570, at *5 (D.S.C. Feb. 28, 2017) (citing *Grandison v. Corcoran*, 78 F. Supp. 2d 499, 507 (D. Md. 2000)). Here, in his direct appeal, the Supreme Court of South Carolina agreed with Petitioner that it was error for the trial court to give the challenged instruction; however, it also found that Petitioner was not prejudiced by the error. App. 482. As explained by the Magistrate Judge, this is a question of state constitutional law which does not give rise to federal constitutional error. Accordingly, the Court will not interfere with the Supreme Court of South Carolina's determination of state law, and this objection is overruled.

***Barred by* Stone**

In Grounds Two and Three, Petitioner raised issues under the Fourth Amendment. ECF No. 8-4 at 2–3. He stated that he had a legitimate expectation of privacy in the premises searched and that the search warrant used was defective on its face because it failed to state with particularity the premises to be searched. The Magistrate Judge found that these claims were barred by the Supreme Court's ruling in *Stone v. Powell*, 428 U.S.

465 (1976).[2] ECF No. 54 at 15–16. Petitioner objects to the Magistrate Judge's finding that he had a "full and fair" opportunity to litigate his Fourth Amendment claims in the state court and seems to object to that Magistrate Judge's decision to group these Grounds. ECF No. 56 at 2–6.

Petitioner raised these arguments at trial and on direct appeal. App. 41–50, 479. Upon review of the record, the Court disagrees with Petitioner's argument that the state courts failed to fully consider his Fourth Amendment arguments or that they "wilfully refuse[d] to apply the correct and controlling constitutional standards," as suggested by Petitioner. *See Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989) (holding that conclusory allegations, without more, are insufficient to preclude granting the summary judgment motion). Accordingly, Grounds Two and Three are barred from federal habeas review by the ruling in *Stone*, and Petitioner's objections are overruled.

Procedurally Defaulted Claims

Procedural Bar

A habeas petitioner must exhaust the remedies available to him in state court. 28 U.S.C. § 2254(b) (1). This requires a habeas petitioner to "fairly present his claims to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *overruled on*

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[2] In *Stone*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at this trial." 428 U.S. at 494.

other grounds by United States v. Barnette, 644 F.3d 192 (4th Cir.2011). Procedural bypass, sometimes referred to as procedural bar or procedural default, occurs when a petitioner seeking habeas corpus relief failed to the raise the issue asserted in his habeas petition at the appropriate time in state court. Because the petitioner has no further means of raising the issue before the state courts, he is considered to have bypassed his state court remedies and is, thus, procedurally barred from raising the issue in a federal habeas proceeding. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Weeks v. Angelone*, 176 F.3d 249, 272 n. 15 (4th Cir.1999) ("A claim is procedurally defaulted when it is rejected by a state court on an adequate and independent state procedural ground.").

Cause and Prejudice

Under *Martinez v. Ryan*, 566 U.S. 1 (2012), a federal habeas court can find cause, thus excusing procedural default of an ineffective trial counsel claim, 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." *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (quoting *Martinez*, 566 U.S. at 14, 17). A "substantial" ineffective trial counsel claim is one that "has some merit." *Martinez*, 566 U.S. at 14.

Analysis

The Magistrate Judge found that Grounds Four through Seven were procedurally barred. Thus, Petitioner has failed to "fairly present his claims to the state's highest court" and bypassed his state court remedies. *Matthews*, 105 F.3d at 911. Therefore, he is barred from raising them here unless he can show (1) cause for not complying with the state court's procedural rule and actual prejudice resulting from the alleged constitutional violation or (2) a miscarriage of justice. *Yeatts v. Angelone*, 166 F.3d 255, 260 (4th Cir. 1999).

Ground Four

In Ground Four, Petitioner alleges that trial counsel was ineffective for failing to move for a pre-trial hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). ECF No. 8-4 at 4. The Magistrate Judge found this claim was not raised on appeal from the denial of post-conviction relief ("PCR") and was procedurally defaulted; Petitioner argued, under *Martinez*, that he could show cause to excuse the procedural bar because PCR counsel was ineffective for failing to introduce evidence to support his claim. ECF No. 54 at 18. The Magistrate determined that Petitioner could not establish the requisite cause to overcome the procedural bar. The Court agrees.

The Court need not decide whether PCR counsel's performance was deficient under *Strickland* because Petitioner cannot show a reasonable probability that, but for PCR counsel's omission, the PCR court would have granted him relief. Pursuant to *Franks* and its progeny, the Fourth Amendment requires that a hearing be held at defendant's request

In *State v. Humphries*, the Supreme Court of South Carolina held that,

> Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere "tipster" who supplies a lead to law enforcement. The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure.

579 S.E.2d 613, 614–15 (S.C. 2003) (internal citations omitted).

Petitioner fails to assert any allegations that call into question the reasonableness of the conclusion that the confidential informant was a "mere tipster" in his criminal case. His conclusory assertion that the confidential informant's identity should have been disclosed is insufficient to rise to the level of a plausible allegation that trial counsel had a basis upon which to seek disclosure of the confidential informant. Thus, Petitioner fails to demonstrate that the underlying ineffective assistance of counsel claim was substantial such that he can show cause to excuse the procedural bar based on PCR counsel's failure to raise this claim. This objection is overruled.

"Ground Six

In Ground Six, Petitioner asserts that trial counsel was ineffective for failing to move to quash petitioner's indictment based on selective prosecution. ECF No. 8-4 at 6. The

Magistrate Judge found that this claim was not raised in Petitioner's PCR appeal and was procedurally barred; however, Petitioner argued that he could demonstrate cause to overcome the procedural bar because PCR counsel failed to raise this issue in a Rule 59(e) motion to alter or amend the judgment. The Magistrate Judge concluded that Petitioner failed to overcome the procedural bar because PCR counsel could not have been deficient as this claim was preserved for appellate review. ECF No. 54 at 21–22. In his objections, Petitioner attempts to relitigate this issue, but does not address the merits of the Magistrate Judge's finding. The Court has reviewed this issue de novo and overrules Petitioner's objection.

Merits

In Ground Eight, Petitioner argues that trial counsel was ineffective in failing to object to testimony from Eric Elder and Tracy Markley that constituted impermissible prior bad act evidence. ECF No. 8-4 at 8. The Magistrate Judge addressed this claim on the merits, and she found that Petitioner was not entitled to federal habeas relief on this ground. In his objections, Petitioner argues Elder's and Markley's testimony at his trial amounted to impermissible evidence of prior bad acts.[3] ECF No. 12–23.

Where allegations of ineffective assistance of counsel are made, the question is "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 v.*

[3] Plaintiff makes various claims related to the facts of the case that have no bearing on the issue at hand.

Washington, 466 U.S. 668, 686 (1984). First, a petitioner must show that counsel made errors so serious that counsel's performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment. *Id.* at 687–88. Second, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "The standards created by *Strickland* and § 2254(d) are both highly deferential . . . and when the two apply in tandem, review is doubly so." *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011). In applying § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." *Id.*

Here, the PCR court addressed trial counsel's performance under the standard set forth in *Strickland*. App. 588–89. The PCR court found that,

> Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to make a motion to exclude character and prior bad act evidence before the trial. Applicant's first complaint regarded statements elicited from Elder. When asked if he had ever been present during the manufacturing or cooking of crack cocaine, Elder answered that he had. This Court finds that Counsel was not ineffective for failing to object to this statement because it is not an example of a prior bad act by Applicant because it does not refer to Applicant. Next, when asked why he drove Cheeks' car, Elder answered that he had hoped to get free crack. This Court finds that Counsel was not ineffective for failing to object to this statement because it is part of the res gestae of the case and not a prior bad act. When the statement is read in context, the solicitor was asking Elder about what was occurring during the day in question and why he was driving the car that was later pulled over by police. Later in the trial,

> Elder was asked why he left the residence with Ricky Cheeks and he responded that it was because Applicant told him to go somewhere to get rid of something. This Court finds that Counsel was not ineffective for failing to object to this statement because it describes the res gestae of the case and explains why Elder left the house before he was pulled over by police. Lastly, Applicant took issue with Markley's statement that he met Applicant through a friend who was buying crack from Applicant.
>
> Counsel testified at the hearing that he did not object to these because he did not believe them to be objectionable and an objection would have unnecessarily drawn the jury's attention to the statements. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Here, Counsel articulated a valid strategy in that he did not want to draw even more attention to the subject statements. Accordingly, this Court finds that Applicant has not demonstrated that Counsel's performance in this respect was unreasonable or that such performance prejudiced him.

App. 592–93. The PCR court's denial of the Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent.

Moreover, the record supports the PCR court's determination. At the PCR hearing, trial counsel testified that the witnesses' statements "in the grand scheme of things at the time, it would [have] been something that, that did not strike me as being extensive enough or large enough to jump and make an objections and draw more attention to it."[4] App. 557. Thus, trial counsel provided a valid strategic reason for his decision to decline to object to the witnesses' statements. *See Strickland*, 466 U.S. at 689 ("[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (internal citation and quotation marks omitted)). 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. *Id.* Decisions about what types of evidence to introduce "are ones of trial strategy, and attorneys have great latitude on where

[4] Trial counsel's testimony at the PCR hearing that in reviewing the witnesses' statements after Petitioner's conviction, he possibly should have objected does not alter trial counsel's valid strategic reason for declining to object to them at trial.

they can focus the jury's attention and what sort of mitigating evidence they can choose not to introduce." *Pruett v. Thompson*, 996 F.2d 1560, 1571 n. 9 (4th Cir. 1993) (citation omitted); *see also Bunch v. Thompson*, 949 F.2d 1354, 1364 (4th Cir. 1991). Thus, the petitioner has failed to establish that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and, accordingly, summary judgment is appropriate with respect to this ground.

CONCLUSION

The Court ADOPTS the Magistrate Judge's Report and Recommendation [54], as the order of this Court. Accordingly, Respondent's Amended Motion for Summary Judgment [33] is **GRANTED**.

Certificate of Appealability

The governing law provides that:

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

28 U.S.C. § 2253(c). A prisoner satisfies the standard by demonstrating that reasonable jurists would find this Court's assessment of his constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the

legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is **DENIED**.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

August 8, 2018
Spartanburg, South Carolina

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Derrick Lamar Cheeks, Petitioner, vs. Alford Joyner, Respondent.	C/A No. 0:17-cv-02876-DCC ORDER

This is a habeas corpus action brought under 28 U.S.C. § 2254. Pending before the Court are Petitioner's motion to alter or amend the Court's Order, ECF No. 62, adopting the Report and Recommendation of the United States Magistrate Judge, ECF No. 59, and Petitioner's motions to compel, ECF Nos. 64, 65, 66. Also included in Petitioner's motion is a request for a certificate of appealability. *Id.* Respondent filed a response in opposition to the motions to compel. ECF No. 67. Having carefully considered the motions, the response, the record, and the applicable law, it is the judgment of the Court that Petitioner's motion and his request for a certificate of appealability are denied and the motions to compel are moot.

BACKGROUND

United States Magistrate Judge Paige J. Gossett issued a Report recommending Respondents' amended motion for summary judgment be granted and the petition be denied. ECF No. 54. Petitioner filed objections, ECF No. 56. On August 8, 2018, this Court entered an Order overruling Petitioner's objections, adopting the Report, granting Respondent's motion for summary judgment, and denying the petition. ECF No. 59.

not have an opportunity to fully consider his claims. Accordingly, Petitioner's Motion is denied with respect to Ground Two and Three.

Ground Four

In Ground Four, Petitioner alleges that trial counsel was ineffective for failing to move for a pre-trial hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The Court found that Ground Four was procedurally barred from habeas review and that Petitioner failed to establish cause to excuse the procedural bar because he could not show a reasonable probability that, but for post-conviction relief ("PCR") counsel's omission, the PCR court would have granted him relief. ECF No. 59 at 7–9. Petitioner argues that he has established cause sufficient to excuse the procedural default. ECF No. 62 at 7–9. He reiterates that same argument that the warrant affidavit contained additional information that was not included in the police report; however, Petitioner fails to explain how the inclusion of thisinformation not contained in the police report makes it false in the warrant affidavit. The Motion is denied as to Ground Four.

Ground Five

In Ground Five, Petitioner asserts that trial counsel was ineffective in failing to make a pre-trial motion that the confidential informant's identity be disclosed. The Court found that Ground Five was procedurally defaulted and that Petitioner failed to establish cause to excuse the default because his contention that the confidential informant should have been disclosed was insufficient to rise to the level of a plausible allegation that trial counsel had a basis upon which to seek disclosure of the confidential informant. ECF No. 59 at

9–10. Petitioner disagrees with the Courts analysis but fails to provide any additional information in support of his argument. Accordingly, the Motion is denied with respect to Ground Five.

Ground Six

In Ground Six, Petitioner asserts that trial counsel was ineffective for failing to move to quash petitioner's indictment based on selective prosecution. The Court found that Ground Six was procedurally defaulted because it was not raised in Petitioner's PCR appeal. ECF No. 59 at 10–11. Petitioner reasserts his argument that PCR counsel erred in failing to file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. ECF No. 62 at 10–11. However, as explained in the Court's Order ruling on the motion for summary judgment, PCR counsel was not required to file a Rule 59(e) motion when the argument had been raised to and ruled upon by the PCR court; accordingly, the Motion is denied with respect to this argument.

Ground Eight

In Ground Eight, Petitioner argues that trial counsel was ineffective in failing to object to testimony from Eric Elder and Tracy Markley that constituted impermissible prior bad act evidence. The Court addressed the merits of Ground Eight and found that Petitioner failed to establish that trial counsel was ineffective for failing to object to certain testimony from Elder and Markley. ECF No. 59 at 11–15. Petitioner argues that trial counsel had a basis for moving to exclude the evidence, that the PCR court's order was clearly erroneous, and that there was a reasonable probability of a different outcome had the evidence been

excluded. Petitioner fails to assert any facts not previously before the Court; however, the Court has conducted a de novo review of this Ground and denies the Motion with respect to Ground Eight for the same reasons explained at length in its prior Order.

Certificate of Appealability

Finally, Petitioner objects to the Court's ruling that he is not entitled to a certificate of appealability. ECF No. 62 at 14. Petitioner fails to make a substantial showing that his constitutional right have been denied and fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Thus, the Court denies Petitioner a certificate of appealability as to his petition.

CONCLUSION

Wherefore, based on the foregoing discussion and analysis, Plaintiff's Rule 59(e) motion to alter or amend the Court's Order adopting the Report [62] is **DENIED**, Petitioner's request for a certificate of appealability is **DENIED**, and Petitioner's motions to compel [64, 65, 66] are **MOOT**.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

November 16, 2018
Spartanburg, South Carolina

Additional material from this filing is available in the Clerk's Office.