FILED: March 30, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7282
(6:18-cv-00290-JMC)

ANGELO HAM, a/k/a Angelo Bernard Ham

Petitioner - Appellant

v.

WARDEN WILLIAMS

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wilkinson, Judge Keenan, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7282

ANGELO HAM, a/k/a Angelo Bernard Ham,

Petitioner - Appellant,

v.

WARDEN WILLIAMS,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. J. Michelle Childs, District Judge. (6:18-cv-00290-JMC)

Submitted: January 21, 2020 Decided: January 24, 2020

Before WILKINSON, KEENAN, and THACKER, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Angelo B. Ham, Appellant Pro Se. Melody Jane Brown, Senior Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

PER CURIAM:

Angelo B. Ham seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (2018) petition. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) (2018). The magistrate judge recommended that relief be denied and advised Ham that failure to file timely, specific objections to this recommendation could waive appellate review of a district court order based upon the recommendation.

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017); *Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985); *see also Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). Although Ham received proper notice and filed timely objections to the magistrate judge's recommendation, he has waived appellate review of the dispositive issue, because the objections were not specific to the magistrate judge's recommendation that Ham's § 2254 petition be dismissed as untimely. *See Duffy*, 858 F.3d at 245 (holding that, "to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection") (internal quotation marks omitted). 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
GREENVILLE DIVISION

Angelo Ham, Petitioner, v. Warden Williams, Respondent.	Civil Action No. 6:18-cv-00290-JMC **ORDER AND OPINION**

Petitioner Angelo Ham, proceeding *pro se* and *in forma pauperis*, filed for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Habeas Petition"). (ECF No. 1.) The matter before the court is a review of the Report and Recommendation ("Report") issued by the Magistrate Judge on July 23, 2019. (ECF No. 39.) For the following reasons, the court **ADOPTS** the Magistrate Judge's Report (ECF No. 39), **GRANTS** Respondent's Motion for Summary Judgment (ECF No. 34), and **DISMISSES** the Habeas Petition (ECF No. 1) with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is incarcerated at the McCormick Correctional Institution serving a life sentence without the possibility of parole for murder and a concurrent sentence of twenty-five years for armed robbery. (ECF No. 39 at 2.) Petitioner filed a Habeas Petition on February 1, 2018, that asserts "ineffective assistance of counsel, violations due to illegal indictments, and illegal waiver from juvenile to adult [court]." (ECF No. 1 at 3.) On December 21, 2018, Respondent filed a Motion for Summary Judgment based on the Pleadings. Fed. R. Civ. P. 56(b). Thereafter, the Magistrate Judge issued his Report recommending that the court grant Respondent's motion and dismiss Petitioner's Habeas Petition. (ECF No. 39 at 31.)

II. LEGAL STANDARD

The Magistrate Judge's Report is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge only makes a recommendation to this court, and the recommendation has no presumptive weight. *See Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The responsibility to make a final determination remains with the court. *Id.* at 271. As such, the court is charged with making *de novo* determinations of those portions of the Report to which specific objections are made. *See* 28 U.S.C. § 636(b)(1); *See also* Fed. R. Civ. P. 72(b)(3). In the absence of specific objections to the Magistrate Judge's Report, the court is not required to give any explanation for adopting the Report. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Rather, "in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note). Thus, the court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The court is required to interpret *pro se* documents liberally and will hold those documents to a less stringent standard than those drafted by attorneys. *See Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). *See also Hardin v. United States*, C/A No. 7:12–cv–0118–GRA, 2012 WL 3945314, at *1 (D.S.C. Sept. 10, 2012). Additionally, *pro se* documents must be construed in a favorable manner, "no matter how inartfully pleaded, to see whether they could provide a basis for relief." *Garrett v. Elko*, No. 95-7939, 1997 WL 457667, at *1 (4th Cir. Aug. 12, 1997). Although *pro se* documents are liberally construed by federal courts, "[t]he 'special judicial solicitude' with

which a district court should view *pro se* complaints does not transform the court into an advocate." *Weller v. Dep't of Soc. Servs. for Balt.*, 901 F.2d 387, 391 (4th Cir. 1990).

III. ANALYSIS

A. First Objection

The Report recommends granting Respondent's Motion for Summary Judgment because Petitioner has failed to meet the first and second prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court determined that, to be entitled to relief for ineffective assistance of counsel, a petitioner must show: (1) a trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but-for counsel's error, the outcome of the proceeding would have been different. *Id.* at 687-97.

Petitioner objects to "Ground 1.1.a: Ineffective Assistance of Counsel" of the Report, arguing that:

> [Petitioner] raised and argued that 'his juvenile counsel was ineffective for failing to advise him of his right to appeal or discuss . . . rights to appeal the waiver order . . . [Petitioner] also relied and quoted a state precedent where a juvenile appealed the waiver order because that juvenile was erroneously waived to the court of General Sessions for a crime that couldn't be waived to that court.

(ECF No. 41 at 2.)

While Petitioner's objection cites a specific portion of the Report, he merely rehashes his previous assertions. (Compare ECF No. 41 at 2, with ECF No. 1 at 5.) The record shows that the Post-Conviction Relief court's rejection of the ineffective assistance of claim was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . 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). As such, Petitioner's first objection is without merit.

B. Second Objection

The Report recommends granting Respondent's Motion for Summary Judgment because "the record indicates compliance with [*Kent v. United States*, 383 U.S. 541 (1966)] and the [P]etitioner has not met his burden of showing that his waiver to the Court of General Sessions was not in compliance with *Kent*." (ECF No. 39 at 28-29.)

Petitioner objects to "Ground 1.2.a: Waiver Hearing" of the Report, claiming that:

> Although the Magistrate Judge recognize [sic] that 'juvenile waiver hearings must measure up to the essentials of due process and fair treatment,' the Magistrate Judge failed to see and recognize that the [sic] Judge Henderson failed to allow [Petitioner] to speak at this hearing in violation of [Petitioner's] allocution rights; failed to allow [his] mother to speak at this hearing; allowed the State to use hearsay testimony against [Petitioner] after noticing that different versions of the case was [sic] given by [Petitioner] (and his co-defendants); and failed to force the State to present rehabilitative programs in the adult court that would benefit [Petitioner]. The Family Court also failed to honor the facts that [Petitioner] was not armed with a deadly weapon before, during, or after the crime.

(ECF No. 41 at 4.)

The court finds that Petitioner's second objection is also a restatement of the earlier claim that his hearing was defective because the State failed to present clear and convincing evidence to support a waiver from Family Court to the Court of General Sessions. (*Compare* ECF No. 41 at 4, *with* ECF No. 1 at 5.) The record shows that a full investigation into Petitioner's background was conducted and that the Family Court judge's decision was made after careful consideration of the facts and testimony related to Petitioner's criminal history. *See Kent*, 383 U.S. at 561-63. Consequently, Petitioner's second objection is without merit.

IV. CONCLUSION

After a thorough review of the Report and of the record in this case, the court **ADOPTS** the Magistrate Judge's Report (ECF No. 39), **GRANTS** Respondent's Motion for Summary Judgment (ECF No. 34), and **DISMISSES** the Habeas Petition (ECF No. 1) with prejudice.

Certificate of Appealability

The law governing certificates of appealability provides that:

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

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 536 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met.

IT IS SO ORDERED.

J. Michelle Childs
United States District Judge

August 22, 2019
Columbia, South Carolina

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

Angelo Ham, Petitioner, vs. Warden Williams, Respondent.	C/A No.: 6:18-290-JMC-KFM **REPORT OF MAGISTRATE JUDGE**

The petitioner, a state prisoner proceeding *pro se* and *in forma pauperis*, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

BACKGROUND

The petitioner is currently incarcerated at McCormick Correctional Institution in the custody of the South Carolina Department of Corrections ("SCDC") (doc. 1 at 1). The petitioner was indicted by the Darlington County Grand Jury in October 2005 for murder (2005-GS-16-01969), armed robbery (2005-GS-16-01970), and conspiracy/criminal conspiracy (2005-GS-16-01971) (app. 211-16).

Transfer to General Sessions

The petitioner's charges stem from a murder and armed robbery of a convenience store in Darlington County in 2004 (app. 211-16). At that time, the petitioner was a juvenile (app. 49). On July 18, 2005, a contested waiver hearing was held before South Carolina Family Court Judge Roger E. Henderson to determine whether the petitioner's charges should be transferred from family court to the Darlington County Court of General Sessions (app. 1-48). Henry M. Anderson, Jr., Esq. ("plea counsel") represented

the petitioner at the hearing (app. 1). At the hearing, Judge Henderson heard testimony from Dr. Heffler, a psychologist for the Department of Juvenile Justice ("DJJ") (app. 5-26). Dr. Heffler testified regarding his examination of the petitioner and recommended that the petitioner remain in the custody of the DJJ because that environment would offer the petitioner a better opportunity for rehabilitation than SCDC (*id.*). Judge Henderson also heard testimony from Investigator Jackson, an officer with the Darlington County Sheriff's Department who investigated the murder at issue (app. 27-45). Inv. Jackson testified regarding his investigation and the arrest of the petitioner and his co-defendants (*id.*). Following the testimony, Judge Henderson ruled that in light of the eight factors set forth in *Kent v. United States*, 383 U.S. 541 (1966), it was appropriate to waive the petitioner's criminal charges to the Court of General Sessions (app. 46–47). Judge Henderson's ruling was followed by a written order on August 3, 2005 (app. 49–50).

Guilty Plea

As noted, once the waiver was granted, the petitioner was indicted on charges of murder, armed robbery, and criminal conspiracy (app. 211-16). On April 17, 2006, represented by plea counsel, the petitioner pled guilty to all three charges, but was only sentenced on the criminal conspiracy charge (app. 51-81). South Carolina Circuit Court Judge John M. Milling accepted the plea and sentenced the petitioner to five years on the criminal conspiracy charge (with any sentence later-imposed for murder and armed robbery to run concurrent to the criminal conspiracy charge) (*id.*). The petitioner did not file an appeal from the criminal conspiracy guilty plea or sentence.

On September 14, 2007, the petitioner appeared before Judge Milling to be sentenced on the murder and armed robbery charges (app. 83-124). Judge Milling sentenced the petitioner to a term of life imprisonment without the possibility of parole for the murder charge and a concurrent 25-year sentence for armed robbery (app. 122). The

petitioner filed an appeal to the South Carolina Court of Appeals, but withdrew it, with the Court of Appeals dismissing his appeal by order dated June 9, 2008 (doc. 33-1).

PCR Number 1

On September 11, 2007, the petitioner filed a *pro se* application for post-conviction relief ("PCR") with respect to his criminal conspiracy charge (2007-CP-16-0811) ("PCR Number 1") (doc. 33-2). The petitioner alleged he was in custody unlawfully due to ineffective assistance of counsel (alleging that counsel failed to ask if he wanted to file an appeal), that the judge had a conflict of interest, and that the statements from co-defendants were "void" (*id.*). The petitioner was assigned counsel, attorney Charles T. Brooks, Esq. ("PCR 1 Counsel").

The Honorable Larry B. Hyman, Jr., held an evidentiary hearing in the matter on October 15, 2008 (doc. 33-3 at 1). Assistant Attorney General Karen C. Ratigan represented the State (*id.*). At the hearing, the petitioner, through PCR 1 Counsel, moved to withdraw PCR Number 1 with prejudice (*id.*). After hearing testimony from the petitioner with respect to his request to dismiss his petition, Judge Hyman granted the petitioner's request, noting that based upon the petitioner's testimony, the dismissal with prejudice was voluntary, knowing, and intelligent (*id.* at 1-2). The petitioner did not appeal PCR Number 1.

PCR Number 2

The petitioner filed a second *pro se* PCR application in the Darlington County Court of Common Pleas on November 21, 2008 (2008-CP-16-1006) ("PCR Number 2") (doc. 33-4, app. 125-29). In that application, he alleged the following grounds for relief:

1. ineffective assistance of counsel
    a. failed to investigate case with close scrutiny
    b. failed to object to videotape entered into evidence during plea hearing

2. violations due to illegal indictments

    a. plea judge did not have subject matter jurisdiction of the indictments

3. illegal waiver from juvenile to adult

    a. all 8 factors weren't considered before waiving to general sessions

(Doc. 33-4; app. 125-29). The State made its return on February 25, 2009 (app. 130-34). The petitioner was then assigned counsel, Gary I. Finklea, Esq. ("PCR 2 Counsel"). Assistant Attorney General Karen C. Ratigan again represented the State. The Honorable Thomas A. Russo held an evidentiary hearing in the matter on September 13, 2010 (app. 137-99). During the hearing, Judge Russo heard testimony from the petitioner and plea counsel (*id.*). The petitioner, during the hearing, only submitted the following allegations of ineffective assistance of counsel:

1. failure to quash allegedly defective indictments;

2. failure to argue a violation of Rule 3(c), S.C. R. Crim. P.;

3. failure to appeal family court judge's decision to transfer the case to general sessions;

4. failure to adequately investigate the petitioner's case;

5. failure to advise the petitioner of the plea judge's relationship with the victim;

6. failure to object to the viewing of the videotape (prepared by the victim's family) at the sentencing hearing;

7. failure to move for withdrawal of guilty plea; and

8. failure to submit a motion to reconsider the petitioner's sentence.

(*Id.*). Judge Russo denied PCR relief in a written order, noting that the petitioner failed to demonstrate both deficient performance of plea counsel or resulting prejudice and that he was only addressing matters raised and addressed during the evidentiary hearing (app. 200-10). The petitioner did not file a motion for reconsideration.

The petitioner filed a timely notice of appeal from the denial of his application (doc. 33-5), and Appellate Defendant Robert M. Pachak, Esq. ("PCR Number 2 Appellate Counsel") filed a *Johnson*[1] petition for writ of certiorari in the South Carolina Supreme Court in September 2011 (doc. 33-6). The petition raised a single issue for consideration and requested that PCR Number 2 Appellate Counsel be relieved:

> Whether plea counsel was ineffective because he failed to subject the State's case to a meaningful adversarial testing?

(Doc. 33-6 at 3). The matter was transferred to the South Carolina Court of Appeals for consideration, pursuant to Rule 243(l), SCACR. The Court of Appeals denied the petition on March 11, 2014, and returned the remittitur on March 27, 2014 (doc. 33-10).[2]

PCR Number 3

The petitioner, via counsel Elizabeth Franklin-Best, Esq. ("PCR Number 3 Counsel"), filed a third PCR application in the Darlington County Court of Common Pleas on March 20, 2013 (2013-CP-16-0248) ("PCR Number 3") (doc. 33-11). The PCR application alleged the following grounds for relief:

> 1. The petitioner's "sentence of life without parole, imposed for a crime he committed when he was a juvenile, violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution";
>
> 2. The petitioner's "sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution as an excessive and cruel and unusual punishment because he was both a juvenile and a person who did not kill or intend to kill the victim";
>
> 3. The petitioner's "sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution, because the proceedings which led to its imposition were both procedurally and substantively inadequate"; and

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[1] *See Johnson v. State*, 364 S.E.2d 201 (S.C. 1988) (setting forth the procedures for counsel to follow when filing meritless appeals in state PCR cases pursuant to *Anders v. California*, 386 U.S. 738 (1967)).

[2] The dismissal order notes that the petitioner filed a "pro se petition," but it is unclear whether that refers to a *pro se* brief or the petitioner's original *pro se* PCR petition (*see* doc. 33-10 at 2).

> 4. The petitioner "was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, because [the petitioner's] counsel failed to develop and present mitigating evidence which would have warranted a sentence of less than life without parole.

(*Id.*). With the PCR application, the petitioner filed a motion to stay the action pending the South Carolina Supreme Court's resolution of *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014), which involved the sentencing of juveniles to life without parole (doc. 33-12). On May 14, 2013, the respondent filed a return and a motion to dismiss, alleging that the application was successive and filed outside the statute of limitations (doc. 33-13). PCR Number 3 Counsel filed a response to the respondent's motion on May 28, 2013, arguing that the pending litigation in *Aiken* required holding PCR Number 3 in abeyance and also noting that there was statutory authority for filing PCR Number 3 under S.C. Code § 17-27-45(b) (*see* doc. 33-14 at 4–5).[3] In response, the respondent filed a reply indicating that holding the action in abeyance pending the South Carolina Supreme Court's decision in *Aiken* would be appropriate (*id.*). Judge Henderson[4], now a South Carolina Circuit Court Judge, issued an amended conditional order of dismissal on March 16, 2016, followed by a final order of dismissal on March 3, 2017, indicating that the petition was untimely and successive as well as that *Aiken* ordered that any individual seeking re-sentencing should file the appropriate motion in the Court of General Sessions where originally sentenced (docs. 33-14; 33-15). The petitioner did not appeal PCR Number 3.

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[3] The respondent indicates that this document is "Attachment 12," but that attachment is actually the amended conditional order of dismissal from the Darlington County Court of Common Pleas.

[4] The undersigned notes that Judge Henderson, who was the family court judge that presided over the petitioner's waiver hearing in the family court, also resided over PCR Number 3 and PCR Number 4 as a Circuit Court Judge. He was also vested with exclusive jurisdiction over the petitioner's re-sentencing by the South Carolina Supreme Court. *Ham v. State of S.C.*, 790 S.E.2d 191 (S.C. 2016) (*mem.*).

PCR Number 4

The petitioner filed a fourth PCR application, *pro se*, in the Darlington County Court of Common Pleas on March 18, 2014 (2014-CP-16-0202) ("PCR Number 4") (doc. 33-16). The PCR application alleged the following grounds for relief:

1. Ineffective assistance of PCR counsel
    a. failed to properly raise claim
2. Ineffective assistance of plea counsel
    a. ineffective during critical stage of adversarial process
3. denied confrontation rights
    a. denied the opportunity to cross-examine witnesses
4. guilty plea not valid
    a. all elements of the charged offenses could not be proven and the petitioner had a justified defense

(*Id.*). On March 10, 2016, the State submitted its return and motion to dismiss, arguing that the petitioner's PCR should be dismissed because it was untimely and successive (doc. 33-17). On March 16, 2016, Judge Henderson issued a conditional order of dismissal providing the plaintiff with 20 days to provide reasoning why his petition should not be dismissed (doc. 33-18). The petitioner timely responded on May 20, 2016 (doc. 33-19), and, on February 3, 2017, the PCR court issued a final order of dismissal (doc. 33-20). The final order indicated that there is no right to effective assistance of PCR counsel, that the court did properly exercise subject matter jurisdiction over his charges, and that the application was successive (*id.*).

The petitioner filed a timely motion for reconsideration under Rule 59(e), SCRCP on April 12, 2011, after seeking an extension of the original deadline (docs. 33-21, 33-22). On April 28, 2017, Judge Henderson denied the petitioner's motion (doc. 33-23). The petitioner appealed PCR Number 4 and submitted a *pro se* petition for writ of certiorari

with the South Carolina Supreme Court (docs. 33-24; 33-25). The petitioner's brief raised the following issues:

> 1. Whether PCR Counsel was ineffective for failing to properly preserve issues for review?
>
> 2. Whether defects regarding the adjournment of the court's term and/or true bill of the indictment when the court is not in session by statute or court order affects the subject matter jurisdiction of the court?

(Doc. 33-25 at 3). On January 18, 2018, the South Carolina Supreme Court dismissed the petitioner's appeal, noting that the petitioner "failed to show that there is an arguable basis for asserting that the determination by the lower court was improper" (doc. 33-27). The remittur was issued on February 7, 2018 (doc. 33-28).

Resentencing under *Aiken v. Byars*

In accordance with the Supreme Court of South Carolina's holding in *Aiken*, the petitioner properly filed a motion for re-sentencing on June 8, 2016. The Court vested Judge Henderson with exclusive jurisdiction and appointed PCR Number 3 counsel as re-sentencing counsel for the petitioner (doc. 33-29, *see Ham v. State of S.C.*, 790 S.E.2d 191 (S.C. 2016) (*mem.*)). The Order from the South Carolina Supreme Court also instructed that a scheduling order be issued to set forth the schedule for the re-sentencing (doc. 33-29; *Ham*, 790 S.E.2d at 191). This scheduling order is not part of the record, and it appears that the re-sentencing is still pending.

Federal Petition

On February 1, 2018, the petitioner's § 2254 petition was entered on the docket, asserting the following grounds for relief:

> **Ground One:** Due process violations by family court and defense attorney in family court.
>
> **Supporting Facts:** State expert witness recommendation to remain in family court; defense attorney failure to advise me of my right to appeal transfer order or to appeal such order; defense attorney failure to object or the family court failure to

> object to the hearsay testimony of the investigator as he offered co-defendant statements.
>
> **Ground Two:** Indictment was true billed when a general sessions court was not in session by law.
>
> **Supporting Facts:** Indictments were true billed on October 20, 2005 by a Darlington County Grand Jury when no court was opened by statute or order of the court.
>
> **Ground Three:** Due Process violations by Trial Court and defense attorney in general sessions court.
>
> **Supporting Facts:** Defense attorney advised me to plea guilty to equal punishment as triggerman although I did not have intentions to harm or kill anybody; trial court used knowledge from him and the victim to enhance my punishment.

(Doc. 1 at 5-8).

On May 31, 2018, the respondent filed a return and memorandum (doc. 17), as well as a motion to dismiss the petition *without prejudice* based on the petitioner's failure to meet the exhaustion requirements of 28 U.S.C. § 2254(b)(1)(A) (doc. 20). On June 28, 2018, the undersigned issued a report and recommendation that the respondent's motion be granted and the petition be dismissed *without prejudice* based in part on the conclusion that the petitioner was awaiting re-sentencing, and as such total exhaustion of his claims in state court had not been achieved, and further that consideration of his claims would be piecemeal, and that any post re-sentencing habeas petition could be barred as successive (doc. 24). On October 18, 2018, the Honorable J. Michelle Childs, United States District Court Judge, denied the respondent's motion to dismiss, and recommitted the action to the undersigned for further proceedings (doc. 28). Specifically, the district court directed the undersigned, before addressing the merits of the petitioner's claims, to determine whether the petitioner previously presented his federal habeas claims to the Supreme Court of South Carolina in accordance with *Magwood v. Patterson*, 561 U.S. 320 (2010) (*id.* at 9–11). In *Magwood*, the United States Supreme Court recognized that an intervening re-

sentencing judgment, such as is expected here, would not disqualify a subsequent habeas petition from being "a second or successive under § 2244(b)." *Id.* at 323-24. Accordingly, the undersigned has analyzed the petitioner's existing claims, and whether he has in fact presented and exhausted those in the state courts.

On October 22, 2018, the undersigned entered an order directing the respondent to file any motion for summary judgment by December 21, 2018 (doc. 30). On December 21, 2018, the respondent filed a return and a motion for summary judgment (docs. 33, 34). On December 26, 2018, by order filed pursuant to *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975), the petitioner was advised of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion (doc. 35). The petitioner filed his response to the motion on February 1, 2019 (doc. 37). In his response, the petitioner indicates that he will "allow Ground[s] two and three to be appealed following his new sentencing hearing" (doc. 37 at 4). As such, the petitioner has not addressed grounds two and three in his response to the respondent's motion for summary judgment. The respondent has not filed a reply to the petitioner's request to withdraw grounds two and three at this time; however, the undersigned has addressed herein all three grounds for relief presented in the petition.

APPLICABLE LAW AND ANALYSIS

Summary Judgment Standard

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a

reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Section 2254 Standard

Because the petitioner filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997). Under the AEDPA, federal courts may not grant habeas corpus relief on any claim that was adjudicated on the merits in state court unless the underlying state adjudication:

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

28 U.S.C. § 2254(d). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Moreover, federal habeas review requires presuming state court factual determinations to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Timeliness

The respondent first argues that the petition is untimely under the one-year statutory deadline set forth in the AEDPA (doc. 33 at 14-17). The one-year time period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).[5] However, "[t]he time during which a *properly* filed application for State post-conviction or collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." *Id.* § 2244(d)(2) (emphasis added). State collateral review tolls the one-year statute of limitations under Section 2244(d)(1)(A) for properly filed pleadings, *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

Criminal Conspiracy Conviction

As an initial matter, the respondent argues that the petitioner is not challenging his criminal conspiracy conviction in the instant action (doc. 33 at 14). A review of the petition reveals, however, that although not specifically addressed and not mentioned in his response to the respondent's motion to dismiss (*see* doc. 21 at 2), construing the record in the petitioner's favor, the petitioner may have intended to include his criminal conspiracy conviction for review in the instant matter (doc. 1 at 1). Nevertheless, the

[5] The statute provides other possible start dates for the one-year time period that are not relevant here. *See* 28 U.S.C. § 2244(d)(1)(B)–(D).

petitioner cannot seek federal habeas review of his criminal conspiracy conviction because he is no longer in custody for that charge—and even if he was in custody, his petition with respect to that conviction is untimely. A petitioner challenging his detention through federal habeas relief must be "in custody" for the challenged charge. *See* 28 U.S.C. § 2254(a); *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989); *see also Mays v. Dinwiddie*, 580 F.3d 1136, 1140–41 (10th Cir. 2009), *cert. denied*, 558 U.S. 1095 (2009) (holding that petitioner serving two concurrent sentences was not "in custody" for purposes of challenging the constitutionality of the already completed shorter sentence).

Additionally, as noted, the petitioner's challenge to his criminal conspiracy conviction, assuming *arguendo* that he is still considered "in custody" for that charge, is untimely. The petitioner pled guilty to criminal conspiracy on April 17, 2006, and was sentenced, that same day, to five years of imprisonment (to run concurrent to his other convictions) (app. 55-56, 77-80). The petitioner did not appeal his criminal conspiracy conviction; thus, the petitioner's conviction became final ten days later on April 27, 2006. *See* Rule 203(b)(2), SCACR ("After a plea or trial resulting in conviction[,] . . . a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed"); *see also* 28 U.S.C. § 2244(d)(1)(A) (one-year runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"). As such, with respect to the petitioner's criminal conspiracy conviction, his time for filing a federal habeas petition ran from April 27, 2006, to September 11, 2007, when he filed PCR Number 1 (doc. 33-2). At that point, 502 days of untolled time had lapsed—meaning that the petitioner's federal habeas statute of limitations expired prior to filing PCR Number 1. Accordingly, even if the petitioner was considered in custody for his criminal conspiracy conviction, he is time-barred from seeking federal habeas review of that conviction.

Armed Robbery & Murder Convictions

As noted, on April 17, 2006, the petitioner pled guilty to armed robbery and murder (app. 51-81). The petitioner was sentenced on his murder and armed robbery charges on September 14, 2007 (app. 83-124). The petitioner filed an appeal to the South Carolina Court of Appeals, but withdrew it, with the Court of Appeals dismissing his appeal by order dated June 9, 2008 (doc. 33-1). Thus, the petitioner's conviction became final 15 days later on June 24, 2008. *See* Rule 221(a), SCACR ("Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court."); Rule 242(c), SCACR (establishing that an appellant cannot petition the South Carolina Supreme Court for review of the Court of Appeals' decision unless a petition for rehearing is filed in and acted on by the Court of Appeals); *see also* 28 U.S.C. § 2244(d)(1)(A) (one-year runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) ("We hold that, for a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires.").

The petitioner's time for filing a federal habeas petition ran from June 24, 2008, until he filed PCR Number 2 (the first PCR application challenging his armed robbery and murder convictions) on November 21, 2008 (app. 125–29; doc. 33-4). At that point, 150 days of untolled time had lapsed, leaving 215 days in the federal limitations period. The petitioner's time limit remained tolled until the PCR appeal concluded. Using the date most favorable to the petitioner, the tolled period for the PCR action concluded on March 31, 2014, when the Darlington County Clerk of Court filed the remittitur in the PCR appeal (doc. 33-10). *See Smith v. Warden of Perry Corr. Inst.*, C/A No. 8:18-2841-RMG, 2019 WL 1768322, at *2 (D.S.C. Apr. 22, 2019) ("The tolling period ends when the final state appellate decision affirming denial of the application is filed in the state circuit court.")

(citing *Beatty v. Rawski*, 97 F. Supp.3d 768, 780 (D.S.C. 2015) (finding that final disposition of a PCR appeal in South Carolina occurs when the remittitur is filed in the circuit court, and thus the statute of limitations is tolled until that time)). Accordingly, the statute of limitations expired 215 days later on October 17, 2014. As noted above, the petitioner filed PCR Number 3 on March 20, 2013; however, because the petition was dismissed as successive, it does not toll the statute of limitations for federal habeas purposes (docs. 33-11, 33-14, 33-15). *See Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (noting that "[w]hen a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)" tolling); *Randolph v. Warden, Perry Corr. Inst.*, C/A No. 2:07-cv-00245-MBS, 2008 WL 508674, at *2 (D.S.C. Feb. 21, 2008), *appeal dismissed* 274 F. App'x 278 (4th Cir. 2008) (noting that PCR action that was dismissed as untimely and successive not "properly" filed and "does not qualify for tolling pursuant to § 2244(d)(2)"). PCR Number 4, filed by petitioner on March 19, 2014, likewise did not toll the petitioner's federal habeas time, because it was dismissed as successive and barred by *res judicata* (docs. 33-16, 33-18, 33-20).

The petitioner filed his federal habeas petition on January 30, 2018, the date he delivered the petition to the prison mail room for filing with this court (doc. 1-1 at 2).[6] *See Houston v. Lack*, 487 U.S. 266 (1988) (providing a prisoner's document is deemed filed at the moment of delivery to prison authorities for forwarding to the district court). Therefore, a total of 1,201 days of untolled time lapsed between the petitioner's convictions becoming final and the filing of his Section 2254 petition. As the petitioner exceeded the statute of limitations by more than 800 days, his petition is untimely.

[6] The mailing envelope is stamped "received" January 30, 2017; however, it appears that the stamp had not been updated to the year "2018," as the petitioner dated his petition January 29, 2018, and the postmark is dated January 30, 2018 (*see* docs. 1 at 14; 1-1).

To avoid application of Section 2244(d) regarding the timeliness of the instant federal habeas petition, the petitioner must show that the one-year limitations period should be equitably tolled under applicable federal law. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (concluding that § 2244(d) is subject to the principles of equitable tolling); *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000) (same). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418 (citation omitted); *see also Holland*, 560 U.S. at 649. Equitable tolling is available only in "those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Harris*, 209 F.3d at 330; *see also United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). The Fourth Circuit is clear that equitable tolling is only appropriate where a petitioner shows: "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (*en banc*).

The petitioner does not argue he is entitled to equitable tolling; instead, he relies on the respondent's notation in his brief that the petitioner "technically meets the exhaustion requirement of 28 U.S.C. § 2254(d)(1)" (*see* doc. 37 at 3 (citing doc. 33 at 17)). The undersigned notes, however, that liberally construed, the petitioner asserts that the limitations period should have tolled during PCR Number 3 and PCR Number 4. As set out above, however, Section 2244(d)(2) states that the statute of limitations is tolled for "[t]he time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2) (emphasis added). As recognized by the Supreme Court of the United States, "an application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8 (emphasis in original).

As such, the petitioner's filing of PCR Number 3 and PCR Number 4 do not excuse the untimeliness of the instant petition. *See Pace*, 544 U.S. at 414; *Randolph*, 2008 WL 508674, at *2. Further, because the petitioner has failed to show that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented the timely filing of his federal petition, it appears that his federal habeas petition is untimely. Nevertheless, the undersigned will address whether the petitioner's claims have been procedurally defaulted and the merits of those grounds not procedurally defaulted.

Procedural Default

The respondent asserts that—in addition to being untimely—the majority of the petitioner's claims are procedurally barred (doc. 33 at 18-21). While the respondent characterizes the petitioner's first and third grounds as asserting due process violations and his second ground as a challenge to his indictments (doc. 33 at 20), the undersigned finds that the petitioner's grounds should be characterized as follows:

Ground 1: Waiver Hearing Defects

(1) Ineffective Assistance of Counsel

(a) Plea counsel failed to tell the petitioner that the wavier to general sessions court could be appealed immediately.

(b) Plea counsel failed to object to co-defendant hearsay testimony presented by the State at the waiver hearing

(2) Waiver hearing

(a) Did not comport with due process because the state did not meet its burden of clear and convincing evidence.

(b) State expert opined that the petitioner should remain in the custody of DJJ.

> **Ground 2**: Improper indictments were true billed when General Sessions Court was not in session.
>
> **Ground 3**: Ineffective Assistance of Counsel because plea counsel advised the petitioner to plead guilty.

(*See* doc. 1). As noted, the respondent asserts that all three grounds for relief have been procedurally defaulted (doc. 33 at 18–21). The petitioner asserts that he is not procedurally barred by relying on the respondent's note that the petitioner has "technically" exhausted his state court remedies (doc. 37 at 3).

Procedural default, sometimes referred to as procedural bar or procedural bypass, is the doctrine applied when a petitioner seeks habeas corpus relief on an issue after he has failed to raise that issue at the appropriate time in state courts and has no further means of bringing that issue before the state courts. *Coleman v. Thompson*, 501 U.S. 722, 785 n.1 (1991). In such a situation, the person has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. *Id.*; *see Smith v. Murray*, 477 U.S. 527, 533 (1986).

Default can occur at any level of the state proceedings if the state has procedural rules that bar its courts from considering claims not raised in a timely fashion. If a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. As the Supreme Court has explained:

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

Reed v. Ross, 468 U.S. 1, 10-11 (1984).

"[A] federal court ordinarily may not consider claims that a petitioner failed to raise at the time and in the manner required under state law unless 'the prisoner demonstrates cause for the default and prejudice from the asserted error.'" *Teleguz v.*

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Pearson, 689 F.3d 322, 327 (4th Cir. 2012) (quoting *House v. Bell*, 547 U.S. 518, 536 (2006)). To show cause, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," *Murray v. Carrier*, 477 U.S. 478, 488 (1986), or that "the factual or legal basis for the claim was not reasonably available to the claimant at the time of the state proceeding," *Roach v. Angelone*, 176 F.3d 210, 222 (4th Cir. 1999). Alternatively, the petitioner may "prove that failure to consider the claims will result in a fundamental miscarriage of justice." *McCarver v. Lee*, 221 F.3d 583, 588 (4th Cir. 2000) (citing *Coleman*, 501 U.S. at 750). A fundamental miscarriage of justice equates to the conviction of someone who is actually innocent. *Murray*, 477 U.S. at 496 (noting that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"). However, "actual innocence" requires "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks and citation omitted).

Procedural default is an affirmative defense that is waived if not raised by the respondent. *Gray v. Netherland*, 518 U.S. 152, 165–66 (1996). If the defense is raised, it is the petitioner's burden to show cause and prejudice or actual innocence; if not shown by the petitioner, the court need not consider the defaulted claim. *Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995). The Fourth Circuit Court of Appeals has observed that although it is always tempting to discuss the merits as an alternative reason for a conclusion, once a court finds an issue to be procedurally barred, all discussion that follows is only dicta. *Karsten v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 36 F.3d 8, 11 (4th Cir. 1993).

Here, construing the record in the light most favorable to the petitioner, the following grounds are procedurally barred as direct claims because they were not raised to the state court for review: Ground 1.1.b (ineffective assistance of counsel for failure to object to co-defendant hearsay testimony presented by the State at the waiver hearing),

Ground 1.2.b (waiver hearing defective because state expert opined that the petitioner should remain in the custody of DJJ), and Ground 3 (ineffective assistance of counsel for plea counsel advising the petitioner to plead guilty).[7]

The undersigned finds that the petitioner has not previously raised Ground 1.1.b or Ground 3 in any proceeding before the state court (including a petition, circuit court order, or appellate document). Although the petitioner mentioned Ground 1.2.b in PCR Number 1, as noted above, that application referenced only his criminal conspiracy charge and was not appealed (doc. 37-2); thus, even if its inclusion in PCR Number 1 could apply to the petitioner's other charges, he failed to present that ground to the state's highest court. As such, because the above grounds were not fully and finally presented for review in the state courts, as outlined, they are procedurally barred from federal habeas review absent a showing of cause and prejudice. *Coleman*, 501 U.S. at 749–50.

In *Martinez v. Ryan*, however, the United States Supreme Court carved out a "narrow exception" that modified the "unqualified statement in *Coleman*, [501 U.S. at 754–55,] that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." 566 U.S. 1, 9 (2012). In *Martinez*, the Court

> 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

[7] Missing from the record before the court, and not available publicly online, are some of the records from the petitioner's appeal of PCR Number 2. Although the *Johnson* petition and order are included in the record, the Supreme Court of South Carolina's order dismissing the appeal references a "pro se petition" that is not part of the record (doc. 33-10 at 2). In light of that, in construing the facts in the non-movant's (the petitioner's) favor, the undersigned construes the grounds presented in and ruled upon by the court in PCR Number 2 as included in the petitioner's appeal before the Supreme Court of South Carolina.

> "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, 569 U.S. 413, 423 (2013) (quoting *Martinez*, 566 U.S. at 14–18). The Court in *Martinez* also noted:

> When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

566 U.S. at 15-16.

Nevertheless, the petitioner has failed to establish cause for any procedural default. As noted above, Grounds 1.1.b, 1.2.b, and 3 were procedurally defaulted because (in addition to some not being raised before the PCR court) they were not raised to the Supreme Court of South Carolina in the petitioner's petition for writ of certiorari. During PCR Number 1, PCR Number 2, PCR Number 2 Appeal, and PCR Number 3, the petitioner was represented by counsel, and the *Martinez* exception does not extend to allegations of ineffective assistance of PCR appellate counsel. *See e.g.*, *Crowe v. Cartledge*, C/A No. 9:13-2391-DCN, 2014 WL 2990493, at *6 (D.S.C. July 2, 2014) ("[I]neffective assistance of PCR appellate counsel is not cause for a default."); *Cross v. Stevenson*, C/A No. 1:11-2874-RBH, 2013 WL 1207067, at *3 (D.S.C. Mar. 25, 2013) ("*Martinez*, however, does not hold that ineffective assistance of counsel in a PCR appeal establishes cause for a procedural default."). The Supreme Court expressly noted that its holding in *Martinez* "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." *Martinez*, 566 U.S. at 16. Additionally, the record is void of evidence that the petitioner's underlying ineffective assistance of counsel claims have merit. Therefore, the petitioner has not demonstrated cause for failing to raise these issues in his petition for writ of certiorari in the South

Carolina Supreme Court, and these grounds are procedurally defaulted. Thus, the undersigned recommends granting the respondent's motion for summary judgment with respect to Grounds 1.1.b, 1.2.b, and 3, because the petitioner is procedurally barred from raising those grounds here and has not shown cause and prejudice to excuse that bar.[8]

Merits Review

Ground 1.1.a: Ineffective Assistance of Counsel

In Ground 1.1.a of his petition, as noted, the petitioner asserts that his plea counsel was ineffective because he failed to tell the petitioner that the waiver to the Court of General Sessions could be appealed immediately. The petitioner has asserted this claim at the PCR and PCR appeal stages of state court litigation. This claim is therefore properly preserved, cognizable, and ripe for consideration by this court.

To be entitled to relief on an ineffective assistance of counsel claim, a petitioner must show that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of that proceeding would have been different. *Strickland v. Washington*, 466 U.S.668, 687–94 (1984). *Strickland* does not guarantee perfect representation, only a "'reasonably competent attorney.'" *Id.* at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770, 771 (1970)). There is a strong presumption, however, that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. *Id.* at 690.

The review of ineffective assistance of counsel claims in federal habeas is not simply a new review of the merits; rather, habeas review is centered upon whether the state court decision was reasonable. *See* 28 U.S.C. § 2254(d). Additionally, each step in the

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[8] As noted above, the undersigned has addressed Grounds 2 and 3 in this analysis despite the petitioner's indication that he intends to seek relief under Grounds 2 and 3 after he has been re-sentenced.

review process requires deference—deference to counsel and deference to the state court that previously reviewed counsel's actions:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, 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.

Harrington v. Richter, 562 U.S. 86, 105 (2011) (internal citations omitted). In order to satisfy the prejudice requirement of *Strickland* following a guilty plea, a petitioner who alleges ineffective assistance of counsel must show that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (footnote omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The petitioner asserts that plea counsel was ineffective because he failed to advise the petitioner that he could appeal the waiver decision immediately (docs. 1 at 5; 37 at 4-6). The respondent asserts that there remain no genuine issues of material fact that the record before the State court included substantial evidence that plea counsel was not ineffective because the waiver decision/order was not immediately appealable under South Carolina law (doc. 33 at 27-28).

At the PCR hearing, plea counsel testified that he discussed the waiver order with the petitioner but that he did not remember discussing appellate rights with the petitioner with respect to the waiver order (app. 148-49). Although the petitioner testified

before the PCR court, he did not provide testimony regarding appealing the waiver order. In light of the testimony and record before it, the PCR court found as follows:

> This Court finds the [petitioner] failed to meet his burden of proving plea counsel should have appealed the family court judge's decision to transfer the case to general sessions. Such a transfer order is interlocutory and not immediately appealable. *See [Sanders v. State*, 314 S.E.2d 319, 321 n.1 (S.C. 1984) (citing *State v. Lockhart*, 267 S.E.2d 720 (S.C. 1980)]. That decision, therefore, must be appealed at the conclusion of the resulting guilty plea or trial. Plea counsel did file a notice of appeal in this case. At that point, the [petitioner] could have pursued the transfer issue. Instead, the [petitioner] chose to voluntarily withdraw his appeal.
>
> . . . .
>
> Accordingly, this Court finds the [petitioner] has failed to prove the first prong of the *Strickland* test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The [petitioner] failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the [petitioner]. This Court also finds the [petitioner] has failed to prove the second prong of *Strickland* – that he was prejudiced by plea counsel's performance.

(app. 205-06, 208-09).

The PCR court's rejection of this ineffective assistance of counsel ground for relief was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . 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 PCR court found that the petitioner failed to meet the first and second prongs of *Strickland* and noted that the petitioner's testimony was not credible while finding plea counsel's testimony credible (app. 204). The PCR court's factual determinations regarding credibility are entitled to deference, and there is a presumption of correctness that attaches to state court factual findings. *See* 28 U.S.C. § 2244(e)(1); *Cagle v. Branker*, 520 F.3d 320, 324–25 (4th Cir. 2008) (internal citation omitted). Further, the petitioner's assertion that the waiver order was immediately appealable focuses on the underlying facts of when the waiver order could be appealed (i.e.

a merits review) – not on the reasonableness of the PCR court's finding that counsel was not deficient in not appealing (or advising the petitioner he could appeal) the waiver.[9] As such, in light of the support in the record for the PCR court's finding that the petitioner failed to meet the first and second prongs of *Strickland* with respect to his ineffective assistance of counsel claim based upon his appellate rights regarding the wavier order, the undersigned recommends granting the respondent's motion for summary judgment as to Ground 1.1.a.

Ground 1.2.a: Waiver Hearing

In Ground 1.2.a of his petition, as noted, the petitioner asserts that the waiver hearing did not comport with due process because the State did not meet its burden of clear and convincing evidence. The petitioner has asserted this claim at the PCR and PCR appeal stages of state court litigation. This claim is therefore properly preserved, cognizable, and ripe for consideration by this court.

Juvenile waiver hearings must measure up to the essentials of due process and fair treatment. *Kent*, 383 U.S. at 560–62. As recognized by the Court of Appeals, *Kent* "make[s] it unquestionably clear that Juvenile Court proceedings that affect a young person's substantial rights 'must measure up to the essentials of due process and fair treatment.'" *Kemplen v. Maryland*, 428 F.2d 169, 173 (4th Cir. 1970). The petitioner argues that the waiver hearing was defective because the State did not meet its burden of

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[9] The petitioner asserts that the waiver decision is immediately appealable, referencing case law from the Fourth Circuit (doc. 37 at 4 (citing *United States v. Smith*, 851 F.2d 706, 708 (4th Cir. 1988)). However, the petitioner's assertion relies on Court of Appeals' precedent interpreting federal criminal law, *not* state criminal law. *See United States v. Smith*, 851 F.2d 706 (4th Cir. 1988) (evaluating federal indictment of juvenile as an adult and finding the decision immediately appealable). Here, the petitioner was charged in state court—and the parameters for appeal in the state court are set by state court procedure. As such, the petitioner's assertion that "every circuit that has addressed this issue has held that an order transferring a juvenile to be tried as an adult is immediately appealable" (doc. 37 at 4) does not nullify (or appropriately challenge) the PCR court's finding that, pursuant to South Carolina law, the order was not immediately appealable—and that the petitioner did not meet his burden of showing that plea counsel was ineffective for not advising the petitioner to appeal the order.

presenting clear and convincing evidence (doc. 37 at 8-10). The respondent asserts, on the other hand, that the court's decision included detailed findings in line with the factors set forth in *Kent* (doc. 33 at 24-27). Federal habeas relief is only warranted if a petitioner can demonstrate that the adjudication of his claims by the state court "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." 28 U.S.C. § 2254(d). Additionally, factual issues determined by the State court are presumed correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. *Id.* at § 2254(e)(1).

At the waiver hearing, as noted above, the petitioner was represented by plea counsel, and Judge Henderson heard testimony from Dr. Heffler (a DJJ psychologist) and Inv. Jackson (investigating officer) (app. 1-48). Dr. Heffler's testimony included a recommendation that the petitioner stay within the DJJ system instead of being waived to the Court of General Sessions (app. 5-26). The court then heard testimony from Inv. Jackson regarding the murder in question and his investigation (app. 27-45). Inv. Jackson's testimony included detailing his investigation of the crime as well as that the petitioner (and his co-defendants) provided police with videotaped confessions to the crime (*id.*). In light of the testimony and record before him, Judge Henderson found that it was appropriate to waive the petitioner's criminal charges to the Court of General Sessions and indicated in his written order:

> 1. The [petitioner] was born November 1, 1988[,] and is sixteen (16) years old.
>
> 2. The [petitioner] has been charge[d] with Murder, Armed Robbery, and Possession of a Weapon During the Commission of a Violent Crime.
>
> 3. The alleged offenses occurred in Darlington County on or about September 9, 2004, when the [petitioner] was fifteen (15) years old.

> (The following Findings are based on the criteria listed by the United States Supreme Court in [*Kent*].)
>
> 4. There is probable cause to believe the [petitioner] committed the crimes for which he/she is charged.
>
> 5. The seriousness of the offenses is against persons and is of such gravity as to require waiver for the protection of the community.
>
> 6. The alleged offenses are of a premeditated nature.
>
> 7. There is sufficient merit to warrant the grand jury returning a true bill on the charges.
>
> 8. despite the pre-waiver evaluation report, the testimony of Dr. Heffler and Investigator Jackson indicated that the [petitioner] has been engaging in pseudo-adult activities and therefore has an enhanced level of sophistication and maturity.
>
> 9. The crimes for which the [petitioner] is charged are of a serious nature and if found guilty, would suggest he/she is capable of acting without regard for others.
>
> 10. It is the opinion of the Court that it is not likely the [petitioner] could be rehabilitated, in part due to prior attempts at rehabilitation by [DJJ].
>
> CONCLUSIONS OF LAW
>
> . . . .
>
> 2. Based upon the factors outlined above, the Court concludes that there is little likelihood that [the petitioner] can be rehabilitated in the Juvenile Justice System.
>
> 3. It is in the best interest of [the petitioner] that he be waived to the Court of General Sessions . . . .

(app. 49–50).

As noted above, to be appropriate in light of *Kent*, a reviewing court should have before it a statement of the reasons motivating the waiver and a statement of the relevant facts. *Kent*, 383 U.S. at 561. The record must demonstrate that a "full investigation" into the matter occurred and must reflect careful consideration of the waiver by the Family Court. *Id.* at 561-63. The petitioner argues that the order lacks "specificity" because it only indicates that the petitioner lived in a "less than stable" family and that neither he nor his family were permitted to testify at the hearing (doc. 37 at 9-10). The

petitioner further argues that the record did not include enough information about his prior DJJ commitments in ruling that further time in the Juvenile Justice System would not have a rehabilitative effect on the petitioner (*id.*).[10] The undersigned finds, however, that there are no remaining questions of material fact, that Judge Henderson's waiver hearing and resultant order provide the appropriate record for review, and that Judge Henderson's waiver of the petitioner's charges to General Sessions Court comported with *Kent*.

As noted by the respondent, the order indicates that Judge Henderson's decision was based upon the testimony received from Dr. Heffler and Investigator Jackson, the pre-waiver evaluation, and other evidence of record before him (app. 49). The record includes testimony by Dr. Heffler recommending that the petitioner remain in DJJ custody, but recognizing that the petitioner had a "long history" with DJJ (app. 7-8, 14-15, 18). The record also includes hearing testimony from Inv. Jackson about the murder investigation and the confession given by the petitioner (app. 34-37). In light of this testimony, as noted above, Judge Henderson found that the petitioner was engaging in pseudo-adult activities and had an enhanced level of sophistication and maturity (app. 50). The order further noted that the serious nature of the crimes for which the petitioner was charged required waiver for protection of the community and that there was probable cause to believe the petitioner committed the crimes for which he was charged (*id.*). As noted, the undersigned finds that the waiver order contains the requisite reasoning for Judge Henderson's ruling that the petitioner could not be rehabilitated in the DJJ system. Moreover, the waiver hearing conducted was extensive; during the hearing the petitioner was represented by counsel who had access to his juvenile records. As such, the record evidence indicates

[10] The petitioner, in his response in opposition to the respondent's motion, indicates for the first time, that counsel was defective in that his closing argument consisted of only "7-line[s]" and detailed nothing about the petitioner (doc. 37 at 10). To the extent the petitioner attempts a broad ineffective assistance of counsel claim with respect to his waiver hearing, not only is he barred from raising new claims/grounds for relief in responding to a motion for summary judgment, he has also not raised this claim before the state court.

compliance with *Kent*, and the petitioner has not met his burden of showing that his waiver to the Court of General Sessions was not in compliance with *Kent*. As such, in light of the support in the record for Judge Henderson's finding, the undersigned recommends granting the respondent's motion for summary judgment as to Ground 1.2.a.

Ground 2: Improper Indictments

In Ground 2 of his petition, as noted, the petitioner asserts that the Court of General Sessions did not have subject matter jurisdiction over his indictments because they were true billed when the Court of General Sessions was not in session (doc. 1 at 6). The petitioner has asserted this claim at the PCR and PCR appeal stages of state court litigation. As noted in the PCR court's written decision:

> Plea counsel testified he had not noticed the indictments stated the Grand Jury convened on October 24 but that the true bill was signed on October 20. Plea counsel testified, however, that this did not affect the case in any way.
>
> . . . .
>
> Initially, this Court notes the [petitioner] and plea counsel were on notice of the charges the [petitioner] was facing. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the [petitioner] of what he must be prepared to meet. [*State v. Gentry*, 610 S.E.2d 494, 500 (S.C. 2005)]. Indictments are not evidentiary or jurisdictional documents – they are merely notice documents. [*Id.*]. Regardless, the [petitioner's] argument that plea counsel should have objected because the Grand Jury was not scheduled to convene when his indictments were signed is without merit. While terms of court are technically prescribed by statute, this Court notes general sessions matters may be transacted during common pleas terms of court and vice versa. *See* S.C. Code Ann. §§ 14-5-410, -420 (Supp. 2003). Therefore, even if the Grand Jury were convened during a term of common pleas, it would not have rendered the indictments defective.

(app. 203, 204-05). This claim is therefore properly preserved, cognizable, and ripe for consideration by this court. Nevertheless, this ground for relief lies in state law and procedure and, as such, is not cognizable under Section 2254. "[I]t is only noncompliance

with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." *Wilson v. Cocoran,* 562 U.S. 1, 5 (2010) (emphasis in original). "The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* (quoting 28 U.S.C. § 2254(a)). "'[F]ederal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire,* 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers,* 497 U.S. 764, 780 (1990)). As such, the undersigned recommends granting the respondent's motion for summary judgment as to Ground 2.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, IT IS RECOMMENDED that the respondent's motion for summary judgment (doc. 34) be **granted** and the petitioner's habeas petition be dismissed.

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

July 23, 2019
Greenville, South Carolina