UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6420

WALLACE EUGENE EVATT, JR.,

Petitioner - Appellant,

v.

WARDEN STEPHAN,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. Terry L. Wooten, Senior District Judge. (4:18-cv-00994-TLW)

Submitted: June 20, 2019 Decided: June 25, 2019

Before NIEMEYER, AGEE, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Wallace Eugene Evatt, Jr., Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Wallace Eugene Evatt, Jr., seeks to appeal the district court's order accepting the magistrate judge's recommendation and denying relief on his 28 U.S.C. § 2254 (2012) petition. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court's order was entered on the docket on February 5, 2019. The notice of appeal was filed on March 13, 2019.* Because Evatt failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we 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

* For the purpose of this appeal, we assume that the date appearing on the notice of appeal is the earliest date that it could have been delivered to prison officials for mailing to the court. Fed. R. App. P. 4(c); *Houston v. Lack*, 487 U.S. 266 (1988).

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

WALLACE EUGENE EVATT, JR.,	)	
	)	
Petitioner,	)	
	)	C/A No.: 4:18-cv-0994-TLW
v.	)	
	)	
WARDEN STEPHAN,	)	
	)	
Respondent.	)	
	)	

Petitioner Wallace Eugene Evatt, Jr., proceeding *pro se*, filed this petition pursuant to 28 U.S.C. § 2254. ECF No. 1. Respondent Warden Stephan filed a motion for summary judgment on June 8, 2018, ECF No. 11, to which Petitioner responded, ECF No. 35. Petitioner has also filed various other motions. ECF Nos. 22, 24, 25, 29, 30, 31, 51.

This matter now comes before this Court for review of the Report and Recommendation (the Report) filed on November 1, 2018, by United States Magistrate Judge Thomas E. Rogers, III, to whom this case was previously assigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c), (D.S.C.). In the Report, the Magistrate Judge recommends granting summary judgment and dismissing the petition. ECF No. 39. Petitioner filed Objections to the Report, ECF No. 43, and Respondent filed a Reply to the Objections, ECF No. 48. This matter is now ripe for disposition.

The Court is charged with conducting a *de novo* review of any portion of the Magistrate Judge's Report and Recommendation to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636. In conducting its review, the Court applies the following standard:

> The magistrate judge makes only a recommendation to the Court, to which any party may file written objections .... The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a *de novo* determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted).

In light of the standard set forth in *Wallace*, the Court has carefully reviewed, *de novo*, the Report, the applicable law, the Objections, and all other relevant filings, including cites to the record by counsel. As noted in the Report, Petitioner has not presented cause for the procedural default of four of his habeas claims, and these claims are therefore procedurally barred for the reasons stated in the Report. ECF No. 39 at 10–20. Further, the Court accepts the Magistrate Judge's careful factual and legal analysis, which concludes that the "PCR court's rejection of the ineffective assistance of counsel ground for relief did not result in an unreasonable application of *Strickland* and was not based upon an unreasonable determination of facts in light of the state court record." *Id.* at 22. Therefore, after careful consideration, **IT IS ORDERED** that the Report, ECF No. 39, is **ACCEPTED**, and the Petitioner's Objections, ECF No. 43, are **OVERRULED**. The Respondent's motion for summary judgment, ECF No. 11, is **GRANTED**, and the Petition, ECF No. 1, is hereby **DISMISSED**. In light of the dismissal of the Petition, all other pending motions are hereby deemed **MOOT**. ECF Nos. 22, 24, 25, 29, 30, 31, 51.

The Court has reviewed this Petition in accordance with Rule 11 of the Rules Governing Section 2254 Proceedings. The Court concludes that it is not appropriate to issue a certificate of appealability as to the issues raised herein. Petitioner is advised that he may seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

s/Terry L. Wooten
Chief United States District Judge

February 5, 2019
Columbia, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

WALLACE EUGENE EVATT, JR.,	)	C/A No. 4:18-994-TLW-TER
	)	
Petitioner,	)	
	)	
vs.	)	
	)	REPORT AND RECOMMENDATION
WARDEN STEPHAN,	)	
	)	
Respondent.	)	
	)	

Petitioner, appearing *pro se*, filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254[1] on April 12, 2018. Respondent filed a motion for summary judgment on June 8, 2018, along with a return and memorandum. (ECF No.11 and No.12). The undersigned issued an order filed June 11, 2018, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately. (ECF No.13). Petitioner filed a response on August 17, 2018, and Respondent filed a reply on August 23, 2018.

PROCEDURAL HISTORY

Petitioner has not disputed the procedural history set forth by Respondent in the

[1] This habeas corpus case was automatically referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c), DSC. Because this is a dispositive motion, this report and recommendation is entered for review by the district judge.

memorandum. Therefore, the procedural history as set forth in Respondent's memorandum will be repeated herein.

Petitioner is currently incarcerated in the Broad River Correctional Institution pursuant to orders of commitment from the Clerk of Court for Greenville County. Petitioner was indicted in December 2009 by the Greenville County Grand Jury for murder. Petitioner was represented by Dorothy Manigault, Esquire. Petitioner's jury trial was held on July 16, 2012, whereby Petitioner was found guilty. The Honorable Victor C. Pyle, Jr., sentenced Petitioner to life imprisonment.

Direct Appeal

A timely Notice of Appeal was served on behalf of Petitioner, and an appeal was perfected with the filing of a Final Anders Brief of Appellant. On appeal, Petitioner was represented by Susan B. Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. In his Anders Brief, Petitioner raised the following issue:

> In violation of Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, the trial judge erred in admitting statements allegedly made by Appellant to police following his arrest where Appellant was unable to make a knowing, intelligent, and voluntary waiver of his rights due to his psychological condition and impairment and his medication to treat his mental disorder.

(Attachment 2 at 3.) Appellate counsel also petitioned the court to be relieved as

counsel, having briefed an arguable legal issue that arose at trial, but opining the appeal was without merit. On March 18, 2015, after conducting an Anders v. California, 386 U.S. 738 (1967) review, the South Carolina Court of Appeals dismissed the appeal affirming Petitioner's convictions and sentences in an unpublished decision and granted counsel's motion to be relieved.

PCR

Petitioner filed his application for post-conviction relief (PCR) on January 29, 2016. In the PCR application, Petitioner argued ineffective assistance of counsel as follows:

a. No counsel, failed to represent me all together.
b. All she did was stand beside me when sentenced.
c. Attorney in her closing statement said "she had no knowledge of guns."
d. Failed to have victims (sic) gun fingerprinted, angle of gun indicated suicide.

On October 13, 2016, appointed counsel Rodney Richey, Esquire, filed an amendment to the application alleging thirty-one claims of ineffective assistance of counsel including:

1. My defense attorney failed to conscientiously discharge his professional responsibilities while he was handling my case.
2. My defense attorney failed to effectively challenge the arrest and seizure of Applicant.
3. My defense attorney failed to act as my diligent, conscientious advocate.
4. My defense attorney failed to give me his complete loyalty.

5. My defense attorney did not have my best interest in mind while he was supposed to be investigating and preparing my case.
6. My defense attorney failed to serve my cause in good faith.
7. My defense attorney neglected the necessary investigations and the preparation of my case.
8. My defense attorney did not do the necessary factual investigations on my behalf.
9. My defense attorney did not do the necessary legal research.
10. My defense attorney did not conscientiously gather any information to protect my rights.
11. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage.
12. My defense attorney did not advise me of all my rights or take any of the actions that were necessary to protect preserve them, knowing that I was not versed in the law.
13. My defense attorney, knowing I was illiterate in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case.
14. My defense attorney never properly consulted with me or kept me informed with what was going on as far as my case was concerned.
15. My defense attorney never explained to me or discussed with me any of the elements of the crime charged.
16. My defense attorney never made any attempt to ascertain whether or not I actually knew what the elements for the crime charged were or whether or not I understood exactly what the term "criminal element" actually meant.
17. My defense attorney never explained to me or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
18. My defense attorney never informed me of any of the defenses that were available to me.
19. My defense attorney never intended to offer any defense to the court on my behalf.

20. My defense attorney never explained to me or discussed with me any kind of defense strategy.
21. My defense attorney never explained to me or discussed with me any of the tactical choices that they either made or were planning to make.
22. My defense attorney dictated to me exactly how my case was going to be handled and offered no alternative options.
23. My defense attorney failed to properly acquaint themselves with the law and the facts surrounding my case and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.
24. Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings.
25. My defense attorney did not subject the prosecution's case to any adversarial testing.
26. My defense attorney failed to oppose the prosecution's case with any adversarial litigation.
27. My defense attorney failed to function as the government's adversary in any sense of the word.
28. My defense attorney failed to pursue any of the legal recourse that were available to him.
29. The attorney that represented me on this charge in Court failed to function as the counsel that the Constitution's Sixth Amendment Guarantees.
30. My defense attorney failed to call alibi witnesses on my behalf which would have proven my innocence.
31. My defense attorney failed to appeal my case after I was convicted when I wanted to appeal.

(Attachment 1 at 414 (errors in original).)

An evidentiary hearing was convened October 26, 2016, before the Honorable John C. Hayes, III. (Attachment 1 at 417.) Assistant Attorney General Patrick Schmeckpeper represented the State, and Rodney Richey represented Petitioner. By

order filed November 4, 2016, Judge Hayes denied and dismissed the PCR application with prejudice. (Attachment 1 at 446.)

PCR Appeal

Petitioner timely served and filed a notice of appeal. On appeal, Petitioner was represented by Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a petition for writ of certiorari in the Supreme Court of South Carolina on July 24, 2017. The following issue was raised:

> Whether the PCR court erred by finding trial counsel acted strategically reasonably in not calling two witnesses who confirmed to trial counsel that the decedent had made prior suicide attempts, where petitioner's defense was that the decedent committed suicide, since the failure to present available corroborating witnesses because the decedent's prior suicide attempts did not involve a gun was not objectively reasonable?

The State filed its return to the petition for writ of certiorari on January 8, 2018.

The Supreme Court of South Carolina issued an order on March 28, 2018, denying the petition for writ of certiorari. (Attachment 8.) The remittitur was issued on April 13, 2018, and the Greenville County Clerk of Court filed the remittitur on April 23, 2018.

HABEAS ALLEGATIONS

In the petition, Petitioner only set forth one Ground. However, the memorandum attached set forth additional grounds. The grounds raised are delineated as follows:

1. Ineffective assistance of trial counsel for failure to (a) call witnesses who could testify about the victim's history of suicidal behavior, (b) consult experts in DNA and firearms, (c) failure to challenge trace evidence found on the barrel of the gun.
2. Prosecutorial misconduct for failure to disclose the victim's history to the defense at trial
3. Ineffective assistance of PCR counsel for failure to ask for a continuance after learning about the existence of family witnesses.

STANDARD FOR SUMMARY JUDGMENT

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. 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, Weller v. Dep't of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists. If none can be shown, the motion should be granted. Fed. R. Civ. P. 56(c).

The moving party bears the burden of showing that summary judgment is

proper. Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. Celotex, 477 U.S. 317. Once the moving party has brought into question whether there is a genuine dispute for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine dispute for trial. Fed.R.Civ.P. 56(e); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Barber v. Hosp. Corp. of Am., 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

To show that a genuine dispute of material fact exists, a party may not rest upon the mere allegations or denials of his pleadings. See Celotex, 477 U.S. at 324 (Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves). Rather, the party must present evidence supporting his or her position through "depositions, answers to interrogatories, and admissions on file, together with . . . affidavits, if any." Id. at 322; see also Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390 (4th Cir. 1994); Orsi v. Kickwood, 999 F.2d 86 (4th Cir. 1993); Local Rules 7.04, 7.05, D.S.C.

STANDARD OF REVIEW

In addition to the standard that the court must employ in considering motions for summary judgment, the court must also consider the petition under the requirements set forth in 28 U.S.C. § 2254. Under § 2254(d),

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim-
> (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 State court proceeding.

Thus, a writ may be granted if a state court "identifies the correct principle from [the Supreme] Court's decisions but unreasonably applies that principle of law" to the facts of the case. Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir. 2005) (citing Williams v. Taylor, 529 U.S. 362, 413 (2000)). However, "an 'unreasonable application of federal law is different from an incorrect application of federal law,' because an incorrect application of federal law is not, in all instances, objectively unreasonable." *Id.* "Thus, to grant [a] habeas petition, [the court] must conclude that the state court's adjudication of his claims was not only incorrect, but that it was objectively unreasonable." McHone v. Polk, 392 F.3d 691, 719 (4th Cir. 2004). Further, factual findings "made by a State court shall be presumed to be correct," and a Petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

PROCEDURAL BAR

The United States Supreme Court has clearly stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts, Smith v. Murray, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings, if a state has procedural rules which bar its courts from considering claims not raised in a timely fashion. The two routes of appeal in South Carolina are described above, (i.e., direct appeal, appeal from PCR denial) and the

South Carolina Supreme Court will refuse to consider claims raised in a second appeal which could have been raised at an earlier time. Further, 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. 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).

Although the federal courts have the power to consider claims despite a state procedural bar,

> . . . the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice" resulting from the alleged constitutional violation.

Smith v. Murray, 477 U.S. at 533 (quoting Wainwright v. Sykes, 433 U.S. at 84 (1977)). See also Engle v. Isaac, 456 U.S. 107, 135 (1982).

Stated simply, if a federal habeas Petitioner can show (1) cause for his failure to raise the claim in the state courts, and (2) actual prejudice resulting from the failure,

a procedural bar can be ignored and the federal court may consider the claim. Where a Petitioner has failed to comply with state procedural requirements and cannot make the required showing(s) of cause and prejudice, the federal courts generally decline to hear the claim. See Murray v. Carrier, 477 U.S. 478, 496 (1986).

Even if a Petitioner cannot demonstrate cause for failure to raise a claim, he can still overcome procedural default by showing a miscarriage of justice. In order to demonstrate a miscarriage of justice, a petitioner must show he is actually innocent. See Carrier. 477 U.S. at 496 (holding a fundamental miscarriage of justice occurs only in extraordinary cases, "where a constitutional violation has probably resulted in the conviction of someone who is actually innocent"). Actual innocence is defined as factual innocence, not legal innocence. Bousley v. United States, 523 U.S. 614, 623 (1998). To meet this actual innocence standard, the petitioner's case must be truly extraordinary. Carrier, 477 U.S. at 496.

ANALYSIS

Procedurally Barred Claims

As an initial matter, Respondent contends that Petitioner's claim(s) in Ground One(b) ineffective counsel for failing to consult experts in DNA and firearms, (c) ineffective counsel for failing to challenge trace evidence found on the barrel of the gun, Ground Two alleging prosecutorial misconduct, and Ground Three alleging PCR

counsel was ineffective are procedurally defaulted in state court and barred from federal habeas review.[2]

Ground One (b)

In Ground One(b), Petitioner alleges ineffective assistance of counsel for failing to consult experts in DNA and firearms. This issue was not raised or addressed in the PCR appeal. Therefore, this issue was procedurally defaulted in state court. Thus, it is procedurally barred from federal habeas review absent a showing of cause and actual prejudice, or by showing actual innocense. Wainwright v. Sykes, 433 U.S. 72, 87, 90-91 (1977). Because Petitioner has failed to show cause for his procedural default on this issue, his claim is procedurally barred. Rodriguez v. Young, 906 F.2d 1153, 1159 (7th Cir. 1990), cert. denied, 498 U.S. 1035 (1991) ("Neither cause without prejudice nor prejudice without cause gets a defaulted claim into Federal Court."); Turner v. Jabe, 58 F.3d 924 (4th Cir.1995) (Absent a showing of "cause", the court is not required to consider "actual prejudice.").

Under circumstances not present here, procedural default can be excused pursuant to Martinez v. Ryan, 132 S. Ct. 1309 (2012). However, the Martinez exception does not extend to PCR appellate counsel which is the basis of Petitioner's

[2] Respondent submits that Petitioner is not in violation of the AEDPA one-year of statute of limitations. (ECF No. 12 at 10, fn. 3).

argument here. See e.g., Crowe v. Cartledge, No. 9:13–CV–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, No. 1:11–CV–02874–RBH, 2013 WL 1207067 at *3 (D.S.C. Mar.25, 2013) ("Martinez, however, does not hold that the ineffective assistance of counsel in a PCR appeal establishes cause for a procedural default.").[3] Therefore, it is recommended that Respondent's motion for summary judgment be granted with respect to this issue.

Ground One(c)

In Ground One (c), Petitioner argues ineffective assistance of counsel alleging there was gun shot residue and blood on the barrel of the gun that counsel never told the jury about and did not challenge the prosecution's argument that the gun was wiped off.

The record reflects that Ground One(c) was procedurally defaulted in state court and is barred from federal habeas review. Petitioner did not raise Ground One in his Application for Post-Conviction Relief, and it was not ruled upon by the PCR Court and was not preserved for review by the South Carolina Supreme Court. Plyler v.

[3] It is noted from the PCR Order of Dismissal that the PCR court concluded that trial counsel did retain and consult with experts who could potentially help the defense but determined the expert's opinions could be more harmful than helpful in presenting them at trial. Further, counsel decided to pursue the benefit of last closing argument since the expert testimony would not be beneficial. Additionally, Petitioner did not present any expert testimony at the PCR hearing to show what the experts would have testified to had they been called at trial.

State, 424 S.E.2d (1992) (issue must be both raised and ruled upon by the PCR court to be preserved for appellate review); Rule 59(e). Thus, this claim could not have been properly presented to the South Carolina Supreme Court by way of an appeal of the PCR Court's Order of Dismissal. South Carolina state courts would find this type claim procedurally defaulted if Petitioner attempted raise it now because Petitioner did not present this claim to the South Carolina Supreme Court for review. Petitioner's claim(s) presented in Ground One(c) is procedurally barred from federal habeas review absent a showing of cause and actual prejudice, or by showing actual innocense. Wainwright v. Sykes, 433 U.S. 72, 87, 90-91 (1977).

Here, Petitioner has not presented cause to excuse the default of his claim(s) in Ground One (c). Rodriguez v. Young, 906 F.2d at 1159; Turner v. Jabe, 58 F.3d 924

To the extent Petitioner argues the procedural bar should be excused pursuant to Martinez, the argument fails. In Martinez, the Supreme Court established a "limited qualification" to the rule in Coleman v. Thompson, 501 U.S. 722, that any errors of PCR counsel cannot serve as a basis for cause to excuse a petitioner's procedural default of a claim of ineffectiveness of trial counsel. Martinez, 132 S. Ct. at 1319.To establish cause under Martinez, Petitioner must demonstrate (1) that his PCR counsel was ineffective under Strickland and (2) that "the underlying ineffective-assistance-of-

counsel claim is a substantial one." Martinez, 132 S. Ct. at 1318. Petitioner has not shown that his PCR counsel was ineffective under Strickland or that the underlying ineffective assistance of trial counsel claim is substantially meritorious to overcome the default.

At the trial, Darwin Shaw of the Greenville County Forensics Division testified that he collected swabs from the barrel of the gun, trigger, and the grip. Another investigator testified that the DNA swabs were not tested because they knew the gun belonged to the victim so that her DNA would have been on the gun, and Evatt admitted that he had touched the gun so that his DNA would also be on the gun. The investigator testified that there is a limitation on how much can be sent for testing, and they did not send the swab samples because they did not think it was relevant since they knew both the victim's and Evatt's DNA would be found. (Tr. 326-327).

Trial counsel cross-examined the investigator and questioned the decision not to submit certain swabs for testing. Further, during closing argument, trial counsel pointed out that the medical examiner drew conclusions about the death without any forensics reports informing his decision (Tr. 378) and again referred to the fact that the grip and the trigger were swabbed for DNA and labeled but never tested. (Tr. 381). Therefore, trial counsel did challenge the State's presentation of the evidence found on the gun and tried to discredit the investigation by pointing out all the tests that were

not performed. Thus, Petitioner has not shown that the underlying ineffective assistance of trial counsel claim is substantially meritorious to overcome the default. Thus, it is recommended that Respondent's motion for summary judgment with regard to Ground One(c) be granted and this issue dismissed.

Ground Two

In Ground Two, Petitioner argues prosecutorial misconduct alleging the solicitor refused to turn over evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, Petitioner alleges the solicitor failed to turn over the name of family members who could testify about the victim's previous suicide attempts and intentionally left that information out of the discovery. This issue was not raised to the state's highest court. Therefore, this issue is procedurally defaulted.

Petitioner's claim of prosecutorial misconduct presented in Ground Two is procedurally barred from federal habeas review absent a showing of cause and actual prejudice, or by showing actual innocense. Wainwright, supra.

Here, Petitioner has not presented cause to excuse the default of his claim in Ground Two. Petitioner produced no witnesses or evidence in his PCR proceedings to support his assertions that there were family members of the victim that would have testified to the victim's history of suicidal attempts that would have been beneficial. Bassette v. Thompson, 915 F.2d 932, 939, 941 (4th Cir.1990), cert. denied, 499 U.S.

982, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991); cf. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807, 809 (S.C.1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."); Clark v. State, 315 S.C. 385, 434 S.E.2d 266, 267–268 (S.C.1993) (pure conjecture as to what a witness' testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20, 22 (S.C.1992) (prejudice from trial counsel's failure to interview or call witnesses could not be shown where witnesses did not testify at PCR hearing). Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the PCR hearing. Glover v. State, 458 S.E.2d 538, 540 (S.C. 1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Thus, this issue is barred from habeas review.

Therefore, it is recommended that Respondent's motion for summary judgment be granted with respect to this issue.

Ground Three

Petitioner argues in Ground Three that PCR counsel was ineffective by failing to request a continuance from the PCR court upon learning of potential witnesses that could be called about the victim's previous history of suicide attempts. This issue is barred from review.

To the extent that Petitioner alleges, as a freestanding claim in Ground Three, that his PCR counsel was ineffective, such a claim is not cognizable in a federal habeas action. See, e.g., Phillips v. Cartledge, C.A. No. 0:16-cv-375-PMD-PJG, 2017 WL 4160969, at *3 (D.S.C. Sept. 20, 2017). Section 2254(i) explicitly states that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." As Martinez holds, "while § 2254(i) precludes [a petitioner] from relying on the ineffectiveness of his postconviction attorney as a 'ground for relief,' it does not stop [him] from using it to establish 'cause'" for an otherwise procedurally defaulted ineffective assistance of trial counsel claim. 566 U.S. at 17 (citation omitted). "In other words, a habeas petitioner can only assert PCR counsel was ineffective to the extent that PCR counsel failed to raise a claim of ineffective assistance of trial counsel." Elders v. Stevenson, No. 8:14-04916-RBH, 2016 WL 1182615, at *11 (D.S.C. Mar. 28, 2016). Accordingly, it is recommended that

Respondent's motion be granted as to Ground Three and this claim be dismissed.

GROUND ONE(a)

In Ground One(a), Petitioner argues trial counsel was ineffective for failing to call witnesses to testify about the victim's history of suicide attempts where Petitioner's defense was that the victim committed suicide. This issue was raised at PCR and in the PCR appeal.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel in a criminal prosecution. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). In the case of Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth two factors that must be considered in evaluating claims for ineffective assistance of counsel. A petitioner must first show that his counsel committed error. If an error can be shown, the court must consider whether the commission of an error resulted in prejudice to the defendant.

To meet the first requirement, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." Strickland, at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985)

(quoting Strickland, reversed on other grounds, 476 U.S. 28 (1986)). The Court further held at page 695 that:

> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. (Emphasis added.)

Id.; Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000)(confirming the Strickland analysis). In meeting the second prong of the inquiry, a complaining defendant must show that he was prejudiced before being entitled to reversal. Strickland requires that:

> [T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, at 694.

This issue was raised and ruled upon by the PCR court and raised in the PCR appeal. In the order of dismissal, the PCR court concluded as follows:

> Applicant raised at this hearing an issue which would fall under the umbrella of "failure to investigate." T his had to do with his claim that trial counsel had not talked with witnesses who could testify as to victim's prior suicide attempts. Trial counsel did, in fact, investigate the suicide attempts and talked to two witnesses to whom Applicant had directed her. Trial counsel testified that the witnesses confirmed the

> victim had made prior suicide attempts, but not by self-inflicted gunshots. Therefore, trial counsel, after proper investigation, determined the witnesses would not be of any benefit to Applicant and decided not to call them. This is again, is proper trial strategy under the rubric of Stokes, 308 S.C. 546, 419 S.E.2d 778.

(Tr. 449).

The PCR court found that Petitioner failed to meet the first and second prongs of Strickland. A presumption of correctness attaches to state court factual findings. 28 U.S.C. §2244(e)(1). Evans v. Smith, 220 F.3d 306 (4th Cir. 2000). The state PCR court's findings of fact are not only entitled to the presumption of correctness, 28 U.S.C. § 2254(e)(1), but also are supported by the record. The PCR court found no error on the part of trial counsel. It found trial counsel investigated the prior suicide attempts and talked to two witnesses who she decided would not be of benefit to Petitioner since none of the prior suicide attempts involved self-inflicted gunshots so she did not call them to testify. The PCR court found this to be proper trial strategy. Courts are instructed not to second guess an attorney's trial strategy and tactics. Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir.1977); Stamper v. Muncie, 944 F.2d 170 (4th Cir.1991).

The PCR court's rejection of the ineffective assistance of counsel ground for relief did not result in an unreasonable application of Strickland and was not based upon an unreasonable determination of facts in light of the state court record.

Moreover, Petitioner produced no witnesses or evidence in his PCR proceedings to support his assertions. Bassette v. Thompson, 915 F.2d at 939, 941; cf. Bannister v. State, 509 S.E.2d at 809; Clark v. State, 434 S.E.2d at 267–268.

Accordingly, Petitioner fails to show the PCR court's findings of no error and no prejudice involve an unreasonable application of Supreme Court precedent.

CONCLUSION

Based on the foregoing, it is RECOMMENDED that Respondent's motion for summary judgment (ECF No. 11) be GRANTED in its ENTIRETY, and the petition be dismissed without an evidentiary hearing and any outstanding motions be deemed moot.

Respectfully submitted,

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

November 1, 2018
Florence, 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
Post Office Box 2317
Florence, South Carolina 29503

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).