UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6090

LOUIS SANDERS,

Petitioner - Appellant,

v.

WARDEN, PERRY CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Mary G. Lewis, District Judge. (9:18-cv-02783-MGL)

Submitted: May 21, 2020 Decided: May 27, 2020

Before AGEE and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Louis Sanders, Appellant Pro Se.

PER CURIAM:

Louis Sanders seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Sanders' 28 U.S.C. § 2254 (2018) petition. The district court's order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Limiting our review of the record to the issues raised in Sanders' informal brief, we conclude that Sanders has not made the requisite showing. *See* 4th Cir. R. 34(b); *see also Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). 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
BEAUFORT DIVISION

LOUIS SANDERS, Petitioner,	§	
vs.	§	CIVIL ACTION NO. 9:18-2783-MGL-BM
WARDEN, Perry Correctional Institution, Respondent.	§	

ORDER ADOPTING THE REPORT AND RECOMMENDATION, GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING THE PETITION WITH PREJUDICE

Petitioner Louis Sanders (Sanders), a self-represented state prisoner, filed this case as a 28 U.S.C. § 2254 action. The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting Respondent Warden's (the Warden) motion for summary judgment be granted and that the Petition be dismissed with prejudice. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on July 23, 2019, the Clerk of Court entered Sanders's objections on August 27, 2019, and the Warden filed his reply on September 10, 2019. The Court has carefully reviewed the objections, but holds them to be without merit. It will therefore enter judgment accordingly.

A grand jury indicted Sanders in August 2007 for murder. After a trial, a jury found him guilty as charged. The trial judge then sentenced him to life imprisonment, without parole

Sanders filed a timely direct appeal. The South Carolina Court of Appeals dismissed the appeal. Thereafter, Sanders filed an application for post-conviction relief (PCR) in state circuit court. After conducting an evidentiary hearing, the PCR judge denied Sanders's PCR. The South Carolina Court of Appeals denied Sanders petition for a writ of certiorari to review the PCR court's denial.

Sanders then filed his Section 2254 petition in this Court, which he later amended. His amended petition raises the following grounds of relief:

> **Ground One**: Ineffective Assistance of Counsel
> Counsel failed to object to trial court's impermissible comment on the facts while instructing the jury on express malice.
>
> **Ground Two**: Ineffective Assistance of Counsel
> Trial counsel failed to object to the court's "seek the truth" charge that shifted the burden of proof.
>
> **Ground Three**: Ineffective Assist
> ance of Counsel
> Did the State PCR Court err in failing to find trial counsel rendered ineffective assistance in failing to object to the prejudicial comment made by the Solicitor during closing arguments that the lawyer for the State's witness feared that his client would be hurt as a result of testifying against [Sanders] at trial, thus implying that [Sanders] had threatened the State's witness?
>
> **Ground Four**: Ineffective Assistance of Counsel

> Was trial counsel constitutionally ineffective for failing to object to the Solicitor deliberately eliciting prejudicial hearsay testimony from Lashonda Downing and Maria Jackson about what the non-testifying children were allegedly to have seen and said about [Sanders] allegedly having a gun since [Sanders] could not challenge the hearsay and the import allowed the Solicitor capitalize on the hearsay and improperly"bolster" the State's case during closing summation?
>
> **Ground Five**: Ineffective Assistance of Counsel
> Was counsel constitutionally ineffective for failing to object when the Solicitor intentionally elicited prejudicial prior bad act testimony about [Sanders] allegedly having pointed a gun at someone not involved in the crime for which [Sanders] was being tried?
>
> **Ground Six**: Ineffective Assistance of Counsel
> Was counsel constitutionally ineffective for failing to [object] to the Solicitor's improper closing argument that improperly"bolstered" the State's case against [Sanders] and in effect gave the State the benefit of a third witness, since none of the testimony elicited and placed before the jury proved any element or fact as to whetheror not [Sanders] was guilty of the murder he was on trial for?
>
> **Ground Seven**: Ineffective Assistance of Counsel
> Was counsel constitutionally ineffective for failing to object to state witness Kim Bower's identification testimony during trial on the grounds of unduly suggestive out-of-court identification procedures used by police and the fact that Bowers on multiple previous occasions could not ID [Sanders] as the perpetrator and on other occasions ID'D another individual?

Petition at 6 and 8; Amended Petition at 1, 3, and 5.

The Magistrate Judge suggests all of Sanders's grounds for relief were procedurally defaulted at the state court level in his PCR. According to the Magistrate Judge, "because these issues were not properly pursued and exhausted by [Sanders] in the state court, federal habeas review of these claims is now precluded absent a showing of cause and prejudice, or actual innocence." Report at 8.

The Magistrate Judge notes that, "[i]n an attempt to establish 'cause' for why he did not raise these claims in state court, [Sanders] argues that his PCR counsel failed to properly raise these claims." *Id* at 9. "However, . . ." the Magistrate Judge concluded, "this argument fails to establish the necessary 'cause' to overcome the procedural bar." *Id.* "Furthermore," according to the Magistrate Judge, Sanders's "claim of actual innocence lacks merit." Report at 33.

Sanders's objections are generally repackaged arguments already made to and rejected by the Magistrate Judge. Inasmuch as they are fully and correctly discussed in the Report, the Court need not repeat the discussion here. His remaining objections are either non-specific or so lacking in merit as to require no analysis. Therefore, Sanders's objections will be overruled.

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court overrules Sanders's objections, adopts the Report to the extent it does not contradict this Order, and incorporates it herein. Therefore, it is the judgment of the Court the Warden's motion for summary judgment is **GRANTED** and Sanders's petition is **DISMISSED WITH PREJUDICE**; Sanders's motion for an extension of time to file his objections is **RENDERED AS MOOT**; and, to the extent Sanders requests a certificate of appealability from this Court, that certificate is **DENIED**.

IT IS SO ORDERED.

Signed this 16th day of December, 2019, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

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NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this Order within 30 days from the date hereof, pursuant to the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

LOUIS SANDERS, #182302, Petitioner, v. WARDEN, PERRY CORRECTIONAL INSTITUTION, Respondent.	CIVIL ACTION NO. 9:18-2783-MGL-BM **REPORT AND RECOMMENDATION**

Petitioner, an inmate with the South Carolina Department of Corrections, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was filed pro se on October 4, 2018.[1]

The Respondent filed an amended return and motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on April 5, 2019.[2] As the Petitioner is proceeding pro se, a Roseboro order was entered by the Court on April 8, 2019, advising Petitioner of the importance of a motion for summary judgment and of the necessity for him to file an adequate response. Petitioner was specifically advised that if he failed to respond adequately, the Respondent's motion may be granted, thereby ending his case.

[1]Filing date pursuant to Houston v. Lack, 487 U.S. 266, 270-276 (1988).

[2]After the Respondent filed an initial return and motion for summary judgment, the Petitioner filed a motion to amend his petition, which the Court granted.

Petitioner filed a memorandum in opposition on May 13, 2019, and Respondent filed a Reply on May 20, 2019. This matter is now before the Court for disposition.[3]

Procedural History

Petitioner was indicted in Richland County in August 2007 for murder [Indictment No. 2007-GS-40-6002]. (R.pp. 1103-1105)[4]. Petitioner was represented by Camille Everhart, Esquire, Deon O'Neil, Esquire, and Casey Secor, Esquire, and after a jury trial on July 28 - August 1, 2008, was found guilty as charged. (R.pp. 1088-1091). Petitioner was then sentenced to life imprisonment without parole.[5] (R.p. 1101).

Petitioner filed a timely direct appeal. He was represented on appeal by Tricia A Blanchette, Esquire, who filed an Anders[6] brief raising the following issue:

Whether the Lower Court Erred in Denying [Petitioner's] Motion for a Continuance.

See Court Docket No. 15-5, p. 4.

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

[4]The record was filed with the Respondent's initial motion and memorandum in support of summary judgment on December 21, 2018.

[5]The State had previously served Petitioner with notice of intent to seek a life sentence pursuant to S.C. Code Ann. § 17-25-45 based on Petitioner's previous conviction for assault and battery with intent to kill. (R.p. 1097).

[6]Anders v. California, 386 U.S. 738 (1967). Anders requires that appointed counsel who seeks to withdraw because no nonfrivolous issues exist for review must submit a brief referencing anything in the record that arguably could support an appeal; a copy of that brief must be furnished to the defendant; and after providing the defendant with an opportunity to respond, the reviewing court must conduct an independent and complete examination of the proceedings to determine if further review is merited. See Anders, 386 U.S. at 744.

Petitioner also filed a *pro se* brief, raising the following additional issues:

> **Ground One**: Whether the lower Court erred in denying the [Petitioner's] motion to suppress gun case and gun cleaning kit into evidence.
>
> **Ground Two**: Whether the Lower Court erred by denying the [Petitioner's] motion to exclude certain graffic [sic] photograph[s] State's Exhibit Number[s] 14, 15, 13, and 9;
>
> **Ground Three**: Whether the Lower Court erred by overruling on [Petitioner's] objection to allowing State Witness Kimberly Bowers to do an In-Court Identification; and
>
> **Ground Four:** Whether the Lower Court erred by overruling on [Petitioner's] objection to allowing State Witness Justin Green to do a [sic] In-Court and Out-of-Court Identification.

See Court Docket No. 15-6, p. 2.

On January 27, 2010, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence, and granted counsel's petition to be relieved. See Court Docket No. 15-7; see also State v. Sanders, Op. No. 2010-UP-047 (S.C.Ct.App. filed Jan. 27, 2010). The Remittitur was issued on February 12, 2010. See Court Docket No. 15-8.

On May 4, 2010 (dated April 30, 2010), Petitioner filed an application for post-conviction relief ("APCR") in state circuit court. Sanders v. State of South Carolina, No. 2010-CP-40-2933. (R.pp. 1106-1112). Petitioner raised the following issues in his APCR:

> **Ground One:** Ineffective Assistance of Trial Counsel;
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> **Ground Two:** Ineffective Assistance of Appellate Counsel;
>
> **Ground Three:** Brady[7] Violation; and
>
> **Ground Four:** Prosecutorial Misconduct.

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

(R.p. 1107).

Petitioner was represented in his APCR by Nicole Simpson, Esquire, and an evidentiary hearing was held on Petitioner's application on April 21, 2012. (R.pp. 1119-1214). At the hearing, Petitioner proceeded on his claims that trial counsel was ineffective for failing to: (1) investigate and prepare for trial; (2) advise Petitioner of the ability to impeach witnesses at trial; and (3) advise Petitioner of his right to testify at trial. (R.p. 1216). In an order filed March 16, 2016 (dated March 7, 2016), the PCR judge denied Petitioner relief on his APCR. (R.pp. 1215-1223).

Petitioner filed a timely appeal of the PCR court's order, in which he was represented by Kathrine Hudgins of the South Carolina Commission on Indigent Defense. Petitioner's counsel filed a Johnson[8] petition seeking to be relieved as counsel and raising the following issue:

> Did the PCR judge err in failing to find trial counsel ineffective for not objecting to a prejudicial comment made by the State in its closing argument that the lawyer for a State's witness feared that his client would be hurt as a result of testifying against Petitioner at trial, implying that Petitioner had threatened the witness?

See Petition for Writ of Certiorari, p. 2 (See Court Docket No. 15-10, p. 3).

The Petitioner also filed his own pro se response on May 23, 2017, raising the following issues:

> **Ground One**: Counsel was ineffective for failing to object to testimony which included prior bad acts or wrong doing given by Lashonda Downing and Maria Jackson.
>
> **Ground Two:** Counsel was ineffective for failing to object to Neil v. Biggers [9].[hearing].

See Court Docket No. 15-11.

After considering the record as required by Johnson and Petitioner's pro se response,

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[8]Johnson v. State, 364 S.E.2d 201 (S.C. 1998).

[9]409 U.S. 108 (1972).

the South Carolina Court of Appeals denied the petition and granted counsel's request to be relieved on August 9, 2018. See Court Docket No. 15-13. The Remittitur was sent down on August 27, 2018, and filed with the Clerk of Court for Richland County on August 29, 2018. See Court Docket No. 15-14.

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

Ground One: Ineffective Assistance of Counsel

Counsel failed to object to trial court's impermissible comment on the facts while instructing the jury on express malice.

Ground Two: Ineffective Assistance of Counsel

Trial counsel failed to object to the court's "seek the truth" charge that shifted the burden of proof.

Ground Three: Ineffective Assistance of Counsel

Did the State PCR Court err in failing to find trial counsel rendered ineffective assistance in failing to object to the prejudicial comment made by the Solicitor during closing arguments that the lawyer for the State's witness feared that his client would be hurt as a result of testifying against Petitioner at trial, thus implying that Petitioner had threatened the State's witness?

Ground Four: Ineffective Assistance of Counsel

Was trial counsel constitutionally ineffective for failing to object to the Solicitor deliberately eliciting prejudicial hearsay testimony from Lashonda Downing and Maria Jackson about what the non-testifying children were allegedly to have seen and said about Petitioner allegedly having a gun since Petitioner could not challenge the hearsay and the import allowed the Solicitor capitalize on the hearsay and improperly "bolster" the State's case during closing summation?

Ground Five: Ineffective Assistance of Counsel

Was counsel constitutionally ineffective for failing to object when the Solicitor intentionally elicited prejudicial prior bad act testimony about Petitioner allegedly

having pointed a gun at someone not involved in the crime for which Petitioner was being tried?

Ground Six: Ineffective Assistance of Counsel

Was counsel constitutionally ineffective for failing to [object] to the Solicitor's improper closing argument that improperly "bolstered" the State's case against the Petitioner and in effect gave the State the benefit of a third witness, since none of the testimony elicited and placed before the jury proved any element or fact as to whether or not Petitioner was guilty of the murder he was on trial for?

Ground Seven: Ineffective Assistance of Counsel

Was counsel constitutionally ineffective for failing to object to state witness Kim Bower's identification testimony during trial on the grounds of unduly suggestive out-of-court identification procedures used by police and the fact that Bowers on multiple previous occasions could not ID Petitioner as the perpetrator and on other occasions ID'D another individual?

See Petition, p. 6; Amended Petition [Court Docket No. 27].

Discussion

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56, Fed.R.Civ.P; see Habeas Corpus Rules 5-7, 11. The federal court is also charged with liberally construing pleadings filed by a pro se litigant to allow for the development of a potentially meritorious case. See Cruz v. Beto, 405 U.S. 319 (1972), and Haines v. Kerner, 404 U.S. 519 (1972). However, 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 viable federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Social Services, 901 F.2d 387 (4th Cir. 1990). Such is the case here.

I.

Petitioner raises numerous ineffective assistance of counsel claims. However, it is uncontested that all of Petitioner's grounds were procedurally defaulted at the state court level in his initial PCR proceeding.[10] Therefore, all of the Grounds for relief asserted by the Petitioner in this federal habeas petition were not properly preserved for review by this Court. See White v. Burtt, No. 06-906, 2007 WL 709001 at *1 & *8 (D.S.C. Mar. 5, 2007)(citing Pruitt v. State, 423 S.E.2d 127, 127-128 (S.C. 1992)[issue must be raised to and ruled on by the PCR judge in order to be preserved for review]); cf. Cudd v. Ozmint, No. 08-2421, 2009 WL 3157305 at * 3 (D.S.C. Sept. 25, 2009)[Finding that where Petitioner attempted to raise an issue in his PCR appeal, the issue was procedurally barred where the PCR court had not ruled on the issue and Petitioner never filed a motion to alter or amend requesting a ruling in regard to the issue]; State v. Dunbar, 587 S.E.2d at 693-694 ["In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."]; Miller v. Padula, No. 07-3149, 2008 WL 1826495 at **1-2 & **9-10 (D.S.C. Apr. 23, 2008); Sullivan v. Padula, No. 11-2045, 2013 WL 876689 at * 6 (D.S.C. Mar. 8, 2013)[Argument not raised in PCR appeal is procedurally barred]; see also Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 562 n.3 (1971)[Discussing lower court's finding that failure to appeal denial of his state post-conviction petition constituted non-exhaustion of remedies]; Wicker v. State, 425 S.E.2d 25, 26 (S.C. 1992).

[10]Although Petitioner attempted to raise Grounds Three, Five and Seven in his PCR appeal, they were already procedurally barred since he had not pursued them in his initial PCR proceeding. See (R.p. 1216); see also discussion, infra.

II.

Because Petitioner did not properly raise and preserve any of these issues in his PCR proceedings, they are barred from further state collateral review; Whiteley, 401 U.S. at 562 n. 3; Wicker v. State, supra; Ingram v. State of S.C., No. 97-7557, 1998 WL 726757 at **1 (4th Cir. Oct. 16, 1998); Josey v. Rushton, No. 00-547, 2001 WL 34085199 at * 2 (D.S.C. March 15, 2001); Aice v. State, 409 S.E.2d 392, 393 (S.C. 1991)[post-conviction relief]; and as there are no current state remedies for Petitioner to pursue these issues, they are fully exhausted. Coleman v. Thompson, 501 U.S. 722, 735, n.1 (1991); Teague v. Lane, 489 U.S. 288, 297-298 (1989); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) ["A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."], cert. denied, 117 S.Ct. 854 (1997); Aice, 409 S.E.2d at 393; Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) ["To satisfy the exhaustion requirement, a habeas Petitioner must fairly present his claim[s] to the state's highest court . . . the exhaustion requirement for claims not fairly presented to the state's highest court is technically met when exhaustion is unconditionally waived by the state...or when a state procedural rule would bar consideration if the claim[s] [were] later presented to the state court."], cert. denied, 522 U.S. 833 (1997); Ingram, 1998 WL 726757 at **1.

However, even though otherwise exhausted, because these issues were not *properly* pursued and exhausted by the Petitioner in the state court, federal habeas review of these claims is now precluded absent a showing of cause and prejudice, or actual innocence. Martinez v. Ryan, 566 U.S. 1, 9-10 (2012); Wainwright v. Sykes, 433 U.S. 72 (1977); Waye v. Murray, 884 F.2d 765, 766 (4th Cir. 1989), cert. denied, 492 U.S. 936 (1989).

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

Coleman, 501 U.S. at 750.

In an attempt to establish "cause" for why he did not raise these claims in state court, Petitioner argues that his PCR counsel failed to properly raise these claims. However, for the reasons set forth below, this argument fails to establish the necessary "cause" to overcome the procedural bar. See also 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."].

The United States Supreme Court has held that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . Ineffective assistance of counsel, then, is cause for procedural default." Murray v. Carrier, 477 U.S. 478, 488 (1986); see also Coleman v. Thompson, supra; McCleskey v. Zant, 499 U.S. 467, 494 (1991); Noble v. Barnett, 24 F.3d 582, 586, n.4 (4th Cir. 1994)["[C]onstitutionally ineffective assistance of counsel is cause per se in the procedural default context"]; Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994)(en banc). However, while ineffective assistance of counsel can constitute "cause" for a procedural default, it will only constitute "cause" if it amounts to an independent violation; Ortiz v. Stewart, 149 F.3d 923, 932 (9th Cir. 1998); Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir. 1996); and ineffective assistance of *PCR counsel* (as opposed to trial or direct appeal counsel) does not amount to an independent constitutional violation,

and does not therefore ordinarily constitute "cause" for a procedural default. Murray v. Giarratano, 492 U.S. 1-7, 13 (1989) [O'Connor, J., concurring] ["[T]here is nothing in the Constitution or the precedents of [the Supreme] Court that requires a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the State to provide such proceedings,...nor does...the Constitution require [ ] the States to follow any particular federal model in those proceedings."]; Mackall v. Angelone, 131 F.3d 442, 447-449 (4th Cir. 1997); Ortiz, 149 F.3d at 932; Pollard v. Delo, 28 F.3d 887, 888 (8th Cir. 1994); Lamp v. State of Iowa, 122 F.3d 1100, 1104-1105 (8th Cir. 1997); Parkhurst v. Shillinger, 128 F.3d 1366, 1371 (10th Cir. 1997); Williams v. Chrans, 945 F.2d 926, 932 (7th Cir. 1992); Gilliam v. Simms, No. 97-14, 1998 WL 17041 at *6 (4th Cir. Jan. 13, 1998).

Even so, in Martinez v. Ryan, the Supreme Court did carve out a "narrow exception" that modified

> "the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." Martinez, 566 U.S. at 9, 132 S.Ct. at 1315. [F]or three reasons. First, the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . . Indeed, the right to counsel is the foundation for our adversary system." Id. at 12, 132 S.Ct. at 1317.
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> Second, ineffective assistance of counsel on *direct appellate review* could amount to "cause", excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. Id. at 10-11, 132 S.Ct. at 1316, 1317. But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. Id. at 11-13, 132 S.Ct. at 1317-1318. That is because review of such a claim normally requires a different attorney, because it often "depend[s] on evidence outside the trial record," and because efforts to expand the record on direct appeal may run afoul of "[a]bbreviated deadlines," depriving the new attorney of "adequate time . . . to investigate the ineffective-assistance claim." Id. at 13, 132 S.Ct. at 1318.

> Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective assistance of counsel claim during initial-review collateral proceedings, could (were Coleman read broadly) deprive a defendant of any review of that claim at all. Martinez, supra at 9-10, 132 S.Ct. at 1316.
>
> We consequently read Coleman as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding." Martinez, supra at 13-18, 132 S.Ct. at 1318-1319, 1320-1321.

Trevino v. Thaler, 133 S.Ct. 1911, 1917-1918 (2013); see also Gray v. Pearson, 526 Fed. Appx. 331, 333 (4th Cir. June 7, 2013)["The Supreme Court had previously held in Coleman that because a habeas petitioner has no constitutional right to counsel in state post-conviction proceedings, the ineffectiveness of post-conviction counsel *cannot* establish 'cause' to excuse a procedural default. Coleman, 501 U.S. at 757. The Court established an exception to that rule in Martinez."] Therefore, because, under South Carolina law, a claim of ineffective assistance of trial counsel is raised in an APCR; cf. State v. Felder, 351 S.E.2d 852 (S.C. 1986); Bryant v. Reynolds, No. 12-1731, 2013 WL 4511242, at *19 (D.S.C. Aug. 23, 2013); Gray, 2013 WL 2451083, at *4, fn *; a petitioner's claim of ineffective assistance of PCR counsel as "cause" for his default may be considered under the revised standard of Martinez and Trevino.

Under the first requirement of the Martinez exception, Petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." Gray, 2013 WL 2451083 at

* 2. Here, however, the record [11] does not establish that Petitioners's claims are "substantial" ones, i.e., that they have merit. First, the PCR court found Petitioner's testimony about how the incident at issue occurred was wholly not credible. (R.p. 1221). The PCR court's credibility findings are entitled to great deference by this court in a habeas action. See Wilson v. Ozmint, 352 F.3d 847, 858-859 (4th Cir. 2003); Marshall v. Lonberger, 459 U.S. 422, 434 (1983)["28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court . . . ."]. While a district court may, in an appropriate case, reject the factual findings and credibility determinations of a state court; Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); this court may not substitute its own credibility determinations for those of the state court simply because it may disagree with the state court's findings (even assuming that were to be the case). See Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008) ["[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear . . . . Indeed, 'federal habeas courts [have] no license to redetermine credibility issues of witnesses whose demeanor has been observed by the state trial court, but not by them.'" (quoting Marshall, 459 U.S. at 434)]. Further, Petitioner has not shown that the state court's credibility findings were unreasonable under § 2254(d), nor has Petitioner overcome the presumption accorded the PCR

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[11] While Petitioner did not exhaust these claims in his PCR proceeding, the PCR court did make some factual findings that are relevant to the claims raised herein. However, while certain state court findings may be relevant and considered as to how they relate to the current issues at hand, the claims raised by Petitioner in his PCR proceeding are not the same grounds raised in the current petition. Cf. Joseph v. Angelone, 184 F.3d 320, 328 (4th Cir.1999), cert. denied, 528 U.S. 959 (1999) "In order to avoid procedural default, the 'substance' of[the] claim must have been'fairly presented' in state court.... That requires 'the ground relied upon [to] be presented face-up and squarely. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.] (quoting Townes v. Murray, 68 F.3d 840, 846 (4th Cir.1995)) (quoting Mallory v. Smith, 27 F.3d 991, 995 (4th Cir.1994)).

court's findings. See Pondexter v. Dretke, 346 F.3d 142, 147-149 (5th Cir. 2003)[finding that the district court "failed to afford the state court's factual findings proper deference" by "rejecting the state court's credibility determinations and substituting its own views of the credibility of witnesses."]; Evans, 220 F.3d at 312; see also Seymour v. Walker, 224 F.3d 542, 553 (6th Cir. 2000)["Given the credibility assessment required to make such a determination and the deference due to state-court factual findings under AEDPA, we cannot say that the trial court's finding was unreasonable under § 2254(d)(2)."].

The PCR court also found counsel's testimony and the record established that there was a detailed cross-examination of each witness. The PCR court additionally found that trial counsel moved for a mistrial when she did not feel that she had had the proper opportunity to cross-examine witness Lashonda Downing due to her hysterical state at trial. However, the trial court denied her motion. The PCR court then found that Petitioner had failed to show any other more effective strategy in handling and impeaching the witnesses. Therefore, the PCR court found Petitioner failed to meet his burden in proving deficiency and prejudice. (R.p. 1221). As previously noted, the South Carolina Supreme Court also denied Petitioner's PCR appeal wherein Petitioner presented the same issues raised in Grounds Three, Five and Seven through his counsel's Johnson petition and his pro se response brief to the Johnson petition. See Sanders v. State, Appellate Case No. 2016-000591 (Order filed August 9, 2018).

Substantial deference is to be given to the state court's findings of fact. Evans v. Smith, 220 F.3d 306, 311-312 (4th Cir. 2000), cert. denied, 532 U.S. 925 (2001) ["We . . . accord state court factual findings a presumption of correctness that can be rebutted only by clear and convincing evidence], cert. denied, 532 U.S. 925 (2001); Bell v. Jarvis, 236 F.3d 149 (4th Cir.

2000)(en banc), cert. denied, 112 S.Ct. 74 (2001).

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). See also Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000), cert. denied, 531 U.S. 1095 (2001); Frye v. Lee, 235 F.3d 897, 900 (4th Cir. 2000), cert. denied, 533 U.S. 960 (2001). Concededly, while the state court findings as to historical facts are presumed correct under 28 U.S.C. § 2254(e)(1), where the ultimate issue is a mixed question of law and fact, as is the issue of ineffective assistance of counsel, a federal court must reach an independent conclusion. Strickland v. Washington, 466 U.S. 668, 698 (1984); Pruett v. Thompson, 996 F.2d. 1560, 1568 (4th Cir. 1993), cert. denied, 114 S.Ct. 487 (1993) (citing Clozza v. Murray, 913 F.2d. 1092, 1100 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991)). Even so, with regard to the claims that were adjudicated on the merits by the South Carolina state court, this Court's review is limited by the deferential standard of review set forth in 28 U.S.C. §2254(d), as interpreted by the Supreme Court in Williams v. Taylor, 529 U.S. 362 (2000). See Bell v. Jarvis, supra; see also Evans, 220 F.3d at 312 [Under § 2254(d)(1) and (2), federal habeas relief will be granted with respect to a claim adjudicated on the merits in state court proceedings only where such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States", or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"]. Therefore, this Court must be mindful of this deferential standard of review in considering any findings made in Petitioner's initial PCR proceeding that may also be pertinent to the claims in this

we find on the defaulted claims (no adjudication) now review de novo

petition.

As for Petitioner's current claims, where allegations of ineffective assistance of counsel are made, the question becomes "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 694. In Strickland, the Supreme Court articulated a two prong test to use in determining whether counsel was constitutionally ineffective. First, the Petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel's performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment. Second, the Petitioner must show that counsel's deficient performance prejudiced the defense such that the Petitioner was deprived of a fair trial. In order to show prejudice a Defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir.1996). For the reasons set forth and discussed hereinbelow, Petitioner has failed to meet his burden of showing that his counsel was ineffective under this standard. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975)[Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus].

Ground One

(Failure to object to Trial Court's examples of malice)

At trial, the State presented evidence and testimony that Petitioner shot and killed the victim, Israel [Duane] Cannon, during the early morning hours of June 3, 2007. Earlier that evening, the victim, his wife Pam Cannon, and other friends were at a bar in Richland County to celebrate Pam's birthday. (R.pp. 216-218). Garry Green, who went to high school with the Petitioner, testified

that Petitioner was also there with friends. (R.pp. 373-374, 376-378). During the evening, the two groups got into an argument. (R.pp. 220, 378-380). Mrs. Cannon testified that after the bar closed and everyone left, the two groups continued to argue outside. (R.pp. 220-221, 380). Mrs. Cannon asked Justin Green, Garry's[12] brother, "You're trying to pick [up] girls driving your mama's Volvo?" (R.p. 221). Kimberly Goins, a friend of Mrs. Cannon's, testified that a guy then ran up behind Mrs. Cannon, pulled out a gun, and fired it at her head. (R.pp. 249-250). The bullet missed her, but she passed out. (R.pp 225-228). Mr. Cannon, the victim, believing that his wife had been shot, jumped into a white Chevrolet Tahoe and took off after the Petitioner, who had left the scene in a black Volvo. (R.pp. 222-223, 227-228, 250-251,380-381). The Petitioner was in the back seat while Justin was driving the Volvo and Garry was sitting in the passenger side of the front seat. (R.pp. 224, 381-383). The vehicles drove to a residential area, and the Tahoe hit the Volvo from behind. (R.pp. 389-390). Mr. Cannon got out of the Tahoe and yelled, "What? What?" and Justin replied, "You tell me." (R.p. 591). Petitioner ran up to Mr. Cannon, who did not have a weapon, and told him, "This is what's up," and shot him in the face. (R.pp. 237, 391, 595, 1001). When Mr. Cannon fell to the ground, the Petitioner walked over to him, stood over him, and shot him a second time in the head. (R.pp. 598, 1001). Garry testified that he heard Petitioner admit that he had killed someone. (R.pp. 415-416).

Lashonda Downing, Petitioner's girlfriend, testified that Petitioner then came to her house, where they argued and he pulled a gun on her. (R.pp. 528-530). Anthony Smith, who shared a cell with Petitioner at the detention center, testified that Petitioner discussed his case with him.

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[12]Since both brothers have the same last name, the undersigned addresses them by their first names for purposes of clarity.

(R.pp. 797-798). While Petitioner did not admit to shooting the victim, he told his cellmate that he shot at Pam's head in the parking lot, and that after Mr. Cannon was shot he went to his girlfriend's house to try to come up with an alibi. (R.pp. 802-803).

The trial judge instructed the jury as follows:

> Now, the defendant is charged with murder. The State must prove beyond a reasonable doubt the defendant killed another person with malice aforethought. Malice is hatred, ill will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or other circumstances that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act itself.
>
> Malice aforethought may be express or inferred. These terms express and inferred do not mean different kinds of malice but merely the manner in which malice may have been shown to have existed; that is, either by direct evidence or by inference from the facts and circumstances that are proven.
>
> Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the defendant's mind would be express malice. Malice may be inferred also from conduct showing a total disregard for human life.
>
> Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. And whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. And certainly the following examples are instruments which may be deadly weapons. That is a pistol or a shotgun or a rifle or a dagger of a knife.

(R.pp. 1082-1083).

Petitioner has not shown a "substantial claim" that trial counsel was ineffective for not objecting to the jury charge. "Murder" is the killing of any person with malice, aforethought,

either express or implied. S.C. Code Ann. § 16-3-10. Based on a review of the charge, the facts of the case, and the relevant case law, Petitioner has not shown that the trial court improperly commented on the facts of the case during his charge to the jury on malice. The instruction given by the trial court was consistent with the statute defining murder, including the portion regarding express malice, and was not an improper comment on the facts. Petitioner has also not shown that any objection to the charge would have been sustained, nor has he shown that he was prejudiced by the charge.

Therefore, Petitioner has not shown that there is a substantial issue with respect to this claim of ineffective counsel and, accordingly, Ground One is without merit and should be dismissed. Trevino, 133 S.Ct. at 1917-1918 [In order to find cause for a procedural default, the claim of ineffective assistance of trial counsel must be a "substantial" claim].

Ground Two

(Failure to object to the Trial Court's statement "to seek the truth")

Near the end of the trial judge's charge to the jury, he stated:

> Your verdict must represent the considered judgment of each juror. In order to return a verdict it's necessary that each juror agree. In other words, your verdict must be unanimous. All 12 of you must agree on the verdict. Your verdict cannot be based on sympathy, passion, prejudice, emotion or any other consideration that's not in evidence in this case.
>
> Remember at all times that you are not partisans favoring one person over the other or one party over the other. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

(R.p. 1085). Petitioner contends that his trial counsel was ineffective for failing to object to the trial court's direction to the jury to seek the truth.

The South Carolina Supreme Court has cautioned that "[j]ury instructions on

reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to [the] defendant.'" See State v. Aleksey, 538 S.E.2d 248, 251 (S.C. 2000). However, courts nonetheless review jury charges as a whole to determine if there is a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. Id., at 252 [Finding that where "truth-seeking" instruction was "given in the context of the jury's role in determining the credibility of witnesses" there was "not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt."]; State v. Beaty, 813 S.E.2d 502 (S.C. 2018)[finding that preliminary instruction using the phrases "search for the truth", "true facts" and "just verdict" was delivered in error, but caused no prejudice where the instruction appeared in the preliminary remarks to the jury and did not speak to the State's burden of proof]; State v. Deleston, No. 13-2224, 2016 WL 526592 (S.C.Ct.App. Feb. 13, 2014)[Affirmed even though trial court used "truth-seeking" instruction based on a review of the instructions in their entirety]; Stanfield v. Reynolds, No. 16-1066, 2016 WL 11190486 at * 11 (D.S.C. Dec. 6, 2016)[Finding no state court error where although the state trial judge referred to "truth-seeking" instruction, the trial court instructed the jury numerous times on the State's burden to prove defendant's guilt beyond a reasonable doubt and based on the jury instructions in their entirety], report and recommendation adopted by, 2017 WL 104131 (D.S.C. Jan. 11, 2017).

In this case, the trial judge instructed the jury repeatedly that the State had the burden of proving Petitioner guilty beyond a reasonable doubt. (R.p. 1073-1079, 1081, 1084)[trial judge referred to "reasonable doubt" over eleven (11) times in his jury instructions]. Accordingly, viewing the jury instruction as a whole, Petitioner has not shown that there is a reasonable likelihood the jury

applied the charge in this case in a manner inconsistent with the burden of proof beyond a reasonable doubt. Therefore, Petitioner has not shown that his trial counsel was ineffective for failing to object to the charge at issue, nor has he shown that he was prejudiced by the charge.

As such, Petitioner has failed to shown a substantial issue with respect to this claim, and Ground Two should be dismissed.

Ground Three

(Failure to object to Solicitor's Improper Statement)

Petitioner contends that the his counsel was ineffective for failing to object to the Solicitor's statement about witness Anthony Smith's testimony that he feared for his safety in jail.

Smith testified that he knew Petitioner previously and that he was Petitioner's cellmate at the detention center. (R.pp. 796-798). Petitioner talked to Smith about the murder and went over the discovery in his case. (R.p. 798). After Smith asked to change cells, he was soon approached by police who asked him if he knew anything about Petitioner's case. (R.pp. 798-799). Smith told Police that Petitioner said he fired a gun near a woman's head at a club, and that her husband got upset and chased after them in a car. (R.pp. 799-801). Smith provided details to the police, including the make, model, and color of the vehicles, as well as descriptions of the people involved. (R.pp. 800-801). Smith said that although Petitioner did not admit that he was the one who killed the victim, Petitioner did tell him that the victim was shot in the head and mouth. (R.p. 801). Smith also testified that Petitioner told him that he left the scene and went to his girlfriend's house to establish an alibi, he "put hands on everyone that was in the house", that his young son called the grandmother for help and she soon arrived, and that she took everyone away when Petitioner refused to leave. (R.pp. 801-803). Smith also acknowledged that his attorney had filed for a bond reduction, in part,

because, he would "fear for [his] safety" at the detention center after testifying in the case. (R.pp. 803-804).

During cross-examination, defense counsel questioned Smith as follows:

Q: Were you incarcerated with [Petitioner]?

A: Yes, ma'am.

Q: Okay. You were in jail up until last week, correct?

A: Yes, ma'am.

Q: And your attorney brought you into court for a motion?

A: Yes, ma'am.

Q: And that was to get your bond reduced?

A: Yes, ma'am.

Q: You knew you were going to testify in this trial?

A: Yes, ma'am.

Q: And you didn't want to go back to jail after testifying?

A: Yes, ma'am.

Q: Because you would be considered a snitch?

A: Yes, ma'am.

Q: And other people at the jail, they wouldn't like that?

A: No, ma'am.

(R.pp. 805-806).

In his closing statement, the Solicitor stated,

[Petitioner's] cell mate with Louis Sanders. . . . So what does common sense tell

> you? That man told his roommate too much information about what he was doing that night. And the police sought Smith out. Smith did not seek out the police. And he's not a government informant. He's not getting paid. And, yes, the judge let him out on a PR bond because his lawyer asked her to because he was scared his client was going to get hurt after testifying against [Petitioner] in this trial.

(R.pp. 1045-1046).

Based upon a review of this record, Petitioner has not shown his counsel was ineffective for failing to object to the solicitor's comments pertaining to Smith's fear, as this was a reasonable inference drawn from Smith's own testimony. Smith, 528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus]. As such, the solicitor's statements were a proper argument consistent with the testimony presented at trial. (R.pp. 803-806). Further, even assuming arguendo that the solicitor's comments regarding Smith's concern were improper, Petitioner has still not shown that he is entitled to relief on this claim, as he has failed to show the requisite prejudice. While it is a fundamental precept of American criminal jurisprudence that a prosecutor may not do or say anything that denies a defendant due process; Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Berger v. United States, 295 U.S. 78, 88 (1935)["He [the solicitor] may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."]; when considering whether comments by a prosecutor were improper, "the relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly, 416 U.S. at 643). "Moreover, the appropriate standard of review for such a claim on a writ of habeas corpus is the 'narrow one of due process, and not the broad exercise of supervisory power.'" Id. (quoting Donnelly, 416 U.S. at 642). Hence, this court must consider whether the comments made so infected Petitioner's trial with

unfairness as to make the resulting conviction a denial of due process; see California v. Ramos, 463 U.S. 992, 998-99 (1983); and in conducting this review, even comments being undesirable or "universally condemned" is not alone enough to warrant reversal. Darden, 477 U.S. at 180-81; see also Donnelly, 416 U.S. at 643.

In United States v. Harrison, 716 F.2d 1050 (4th Cir. 1983), cert. denied, 466 U.S. 972 (1984), the Fourth Circuit set forth the following four factors to be examined to determine whether the prosecutor's comments were so damaging as to require reversal:

> (1) the degree to which remarks misled the jury and prejudiced the defendant;
>
> (2) whether remarks were isolated or extensive;
>
> (3) whether absent remarks competent evidence established guilt; and
>
> (4) whether comments were deliberately placed before the jury to divert attention to extraneous matters.

Id. at 1052. Here, after a careful review of the record pursuant to the standards set forth by the Fourth Circuit in Harrison, the undersigned does not find that the solicitor's comments warrant a reversal in this case. The undersigned has carefully reviewed the transcript of the closing arguments, the allegations of Petitioner, the jury instructions from the court, and the memoranda of the parties, and does not find that the solicitor's comments so infected the trial with unfairness as to deny the Petitioner due process. The solicitor's comments concerning Smith's fear of retaliation for testifying were not such as to mislead the jury in any way, they were certainly not "extensive", and there was competent evidence on which the jury could have established Petitioner's guilt notwithstanding the cited remarks. Hence, applying the four-factor test employed by the Fourth Circuit Court of Appeals, even assuming arguendo that the cited comments were improper, they were not so damaging as to

require reversal in this case. United States v. Harrison, 716 F.2d at 1052; California v. Ramos, 463 U.S. at 998-99.

Finally, although Petitioner speculates that the outcome may have been different if his counsel had objected, he has produced no evidence to support his assertions. Cf. Green v. State of South Carolina, 569 S.E.2d 318, 324 (S.C. 2002)[Speculation as to whether a juror wished to convict not sufficient to warrant relief]. Nor has he shown that he was prejudiced by any impropriety in the Solicitor's closing argument. Bradford v. Whitley, 953 F.2d 1008, 1012 (5th Cir. 1989)[Speculation and conjecture does not satisfy the prejudice prong of Strickland]. Accordingly, Petitioner has not shown any prejudice from these alleged deficiencies.

By failing to show any substantial ineffective assistance on this claim, Petitioner has failed to show cause for his procedural default on this issue. Accordingly, Ground Three is procedurally barred from consideration by this Court. Rodriguez, 906 F.2d at 1159.

Grounds Four, Five and Six

(Failure to Object to Hearsay statements, "Bad Act" testimony, and Solicitor's Closing Argument)

Petitioner also asserts trial counsel was ineffective for failing to object to: 1) hearsay testimony from two witnesses about what non-testifying children saw on the night of the deadly shooting; 2) the Solicitor eliciting "bad act" testimony from a witness about the Petitioner pointing a gun at her; and 3) the Solicitor's closing argument that bolstered the State's case by referring to previous testimony.

At trial, Downing testified that she had three children, and that Petitioner was the father of her two-year-old daughter. (R.pp. 527-528). Downing stated Petitioner arrived at her home

shortly after the shooting, they got into an argument, and he pulled a gun on her. (R.pp. 528-530). The children woke up because they heard Downing screaming, saw Petitioner's gun, and started crying. (R.p. 531). Downing testified that Petitioner "was out of it" and was not acting like himself, and that she wanted her mother to come over to the house. (R.pp. 531-532). Downing and her children then left with her mother. (R.p. 532). The children later told their grandmother they saw Petitioner with a gun. (R.p. 533). Downing and her mother called Petitioner's mother to ask her to pick up her son, telling her that he had a gun. (R.pp. 533-534). Maria Jackson, Downing's mother, testified when she got to her daughter's house, Petitioner was pulling Downing "back and forth, back and forth" and the children were screaming and yelling. (R.pp. 541, 543). Petitioner refused to leave, so Jackson got everyone else out of the house. (R.pp. 543-544). Jackson testified that the children told her Petitioner had a gun, so she "backed up out of the driveway and [ ] just took off." (R.p. 544). Jackson confirmed that she called Petitioner's mother and stated "[s]he wanted to argue with me on the phone. And I told her, 'Look, your son has a gun. He had my daughter in the house and you need to come get him.'" (R.p. 544).

During his closing argument, the Solicitor referenced the evidence by mentioning the testimony from Downing and Jackson:

> Now, what factors that Judge Cooper is to instruct you about? The demeanor of the witness on the stand. Does that remind you of anyone's testimony? Lashonda Downing? Maria Jackson? That's demeanor. That's powerful evidence, ladies and gentlemen, they are terrified of [Petitioner]. And why? Because they saw him with a gun that night. Or at least Lashonda did and her children. That's demeanor, ladies and gentlemen. And that's important for you to look at when a person is taking this witness stand. And there is no coincidence that you are seated in the box right next to this box, so you can look firsthand and see their demeanor.

(R.pp. 1030-1031).

The trial transcript shows that Petitioner's counsel objected several times to testimony from Downing and Jackson on the basis of hearsay, leading, and bolstering. (R.pp. 532, 534, 542). However, Downing's testimony that she saw Petitioner pull a gun on her, that her children woke up when they heard her screaming, and they began crying when they saw Petitioner had a gun, all are personal observations of Downing and not hearsay. Therefore, Petitioner has not shown that his counsel had a valid objection to make to that testimony. See Rule 602, SCRE [providing a witness may testify to matters if she has personal knowledge of them]; Rule 701, SCRE [providing a lay witness may testify about matters which are rationally based on the perception of the witness]. While some of Jackson's testimony was technically hearsay, her testimony could have been admitted as either an excited utterance or present sense impression given the children were crying and upset at the time and under the stress of the situation. See State v. Sims, 558 S.E.2d 518, 520-521 (S.C. 2002)["A statement that is admissible because it falls under an exception in Rule 803, SCRE, such as the excited utterance exception, may be used substantively, that is, to prove the truth of the matter asserted."]; see also Rule 803(1) & (2)[providing a present sense impression is a statement describing an event made while the declarant was under the stress of the excitement caused by the event]. Petitioner contends that his counsel should have objected in a different manner. However, the trial court noted where the objection should have been hearsay, but that he was overruling it. (R.p. 542). Accordingly, the Petitioner has not shown any deficiency or prejudice from counsel's conduct with regard to this testimony.

Respondent also correctly argues that testimony regarding Petitioner having a gun that night was not "prior bad act" evidence. Rather, "[u]nder the res gestae theory, 'evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to

aid the fact finder in understanding the context in which the crime occurred." See State v. Dennis, 742 S.E.2d 21, 25 (S.C.Ct.App. 2013)(citations omitted). See also State v. King, 514 S.E.2d 578, 582-583 (S.C. 1999); State v. Adams, 470 S.E.2d 366, 370-371 (S.C. 1991)[Noting that the *res gestate* theory recognizes that evidence of bad acts may be an integral part of the crime with which a defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred], overruled on other grounds by State v. Giles, 754 S.E.2d 261 (S.C. 2014).

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context . . . . And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae. As the Court said in United States v. Roberts, 548 F.2d 665, 667 [(6th Cir. 1977)], "[t]he jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge."

United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)(internal citations, some quotation marks, and footnotes omitted). In this case, the evidence showed that Petitioner had a gun on the night of the shooting, kept it with him, and used it later to intimidate and scare his girlfriend while he was trying to establish an alibi. These events were part of the context of the crime. Specifically, Downing testified about Petitioner's emotional state after the crime saying that he was "out of it" and was not acting like himself.

While Petitioner now disagrees with his trial counsel's strategy for dealing with this testimony or with the solicitor's closing comments with the benefit of hindsight, tactical and strategic choices made by counsel after due consideration do not constitute ineffective assistance of counsel.

Strickland, 466 U.S. at 689. There is a strong presumption that counsel's conduct during trial was within the wide range of reasonable professional assistance, and this Court should not scrutinize counsel's performance by looking at the decisions made in an after the fact manner. Id. at 688–689; Bunch v. Thompson, 949 F.2d 1354 (4th Cir.1991), cert. denied, 505 U.S. 1230 (1992); Horne v. Peyton, 356 F.2d 631, 633 (4th Cir.1966), cert. denied, 385 U.S. 863(1966); Burger v. Kemp, 483 U.S. 776 (1987); see also Harris v. Dugger, 874 F.2d 756, 762 (11th Cir.1989), cert. denied, 493 U.S. 1011 (1989) [An informed decision by trial counsel should not be second guessed by a reviewing court.]. Moreover, Petitioner has not met his burden of showing that if counsel had acted differently, it would have resulted in a different outcome in his case. Rather, he only speculates that it may have done so. Therefore, he has failed to meet his burden of showing that trial counsel's performance was deficient, or that he suffered any prejudice as a result of counsel's decisions.

Accordingly, Petitioner has not shown any prejudice from these alleged deficiencies. Additionally, by failing to show any substantial ineffective assistance on this claim, Petitioner has failed to show cause for his procedural default on these issues. Accordingly, Grounds Four, Five, and Six are procedurally barred from consideration by this Court. Rodriguez, 906 F.2d at 1159.

Ground Seven

(Failure to object to Bowers' identification testimony)

Petitioner asserts that trial counsel was ineffective for failing to object to identification testimony of Kim Bowers, a friend of Mrs. Cannon, after the State told the court that she would not be called as a witness. Prior to the trial, the State indicated that Bowers would not do an in-court identification of Petitioner because she could not identify him to police with 100% certainty during an out-of-court lineup. (R.pp. 69-70). However, the Solicitor did qualify that statement by saying

"[y]our Honor, as far as I know, in her statement where she signed the affidavit, she puts down I'm pretty sure it's number 2. Well, number 2 is Mr. Sanders' photograph. Now, she could come in here and see Mr. Sanders and remember him from that night. Well, in that case we would seek an in-court ID, but we'll bring that to the Court's attention. But as far as we know for now . . . ." (R.p. 71). However, the State did end up calling Bowers as a witness for this testimony. Bowers testified she was friends with the victim and was with them at the club on the night of the shooting. (R.pp. 264-266). Bowers described a man trying to hit on her, and told the jury what he looked like, including his hair style of dreads or braids, age, height, weight, and skin tone, but acknowledged the lighting in the club was "dim". (R.pp. 266-268). Bowers also testified that they were asked to leave the club after an altercation involving Pam and the man with dreads or braids. (R.p. 269). Once outside, Bowers testified that she saw the man and that she heard a gun click and then fire and movement from the man with dreads or braids, and saw Pam hit the ground and pass out. (R.pp. 273-274). Bowers testified that when she initially gave a statement to police she admitted that she could only identify Garry, who had been one of the other people in the Volvo. (R.pp. 278-279). However, later Bowers met with police again to look at a series of photographs. (R.pp. 281-282).

At that point, the court excused the jury and held a mid-trial Neil v. Biggers hearing. (R.p. 282). Bowers testified she met investigators to look at photographs to see if she could identify the shooter, and she was able to point to Petitioner's photograph given the facial features, although the hair "seemed different,"' but Bowers admitted that she was reluctant to sign her name at first. (R.pp. 282-285). However, in-court, Bowers identified Petitioner as the shooter. She stated she remembered Petitioner's face and there was "no doubt" he was the shooter. (R.p. 285). Bowers also testified that none of the investigators suggested she pick any particular photo, and an officer

confirmed that during the hearing. (R.pp. 285-301). The trial court ruled the identification was admissible, finding:

> [T]he fact that she did go through an out-of-court identification process, the question in my mind becomes, was that process unduly suggestive, first, and then what is the – just looking at the totality of the circumstances, what's the reliability of the out-of-court identification? The in-court identification seems positive. The out-of-court identification is subject to some question.
>
> But it seems to me that that goes to the weight of the identification and the certainty or uncertainty with which the out-of-court identification is made. I think it's admissible and meets the admissibility threshold. Whether that out-of-court identification was credible, reliable, I think that's a weight issue and not an admissibility issue.
>
> Certainly the condition of the witness when she met the defendant is subject to cross examination, subject to a credibility analysis in front of the jury. If it's reliable or not reliable, she describes somewhat - - I may use the word loosely - - offensive behavior on behalf of the person in the club which would give rise to some degree of attention that she wouldn't have ordinarily given to somebody just passing by.
>
> It was a close encounter. She was shown three different line-ups from which she could not identify anybody with a degree of certainty, that she identified the defendant in the third lineup. And even though she doesn't positively identify; in other words, with no doubt, the level of certainty that she displayed at the line-up, photo line-up is certainly subject to question and whether or not it's reliable, don't think that's for me to decide. That's for the jury to decide.
>
> But the fact that she makes an in-court identification and has a demonstrated level of certainty, a greater level of certainty now that she sees the defendant firsthand I think makes it admissible. So I'm going to allow the in-court identification. . . .

(R.pp. 303-305).

Bowers then continued her testimony before the jury, and when Bowers identified the Petitioner in-court and in the photo lineup, defense counsel objected both times. (R.p. 313). Counsel also throughly cross examined Bowers about the conditions at the club, her level of intoxication, and the lineup itself to attack the certainty of her identification of Petitioner. (R.pp. 314-319).

At the PCR hearing, trial counsel testified she believed Bowers' credibility was shaky given her level of intoxication, and that she tried to point that out to the jury. (R.pp. 1194-1195). Further, counsel stated Bowers had picked out numerous individuals and she also asked her about that during cross examination. Counsel noted at trial that Bowers was intoxicated and had identified numerous individuals as the shooter. (R.p. 1195). Further, in her closing argument, trial counsel argued to the jury that Bowers could not remember events from that night because she had had eight to ten drinks, as well as that Bowers viewed two photo lineups with her picking out two possible men in one and three days later going back and forth between the Petitioner and a fourth man in another lineup. Counsel also attacked the credibility of her in-court identification, arguing that she could not pick him up out of a line up three days after the event, but thirteen months later points him out as the man that she was talking to that night. (R.p. 1067).

This record shows that the Court conducted a hearing on the matter and found that the identification testimony should be allowed, and that any deficiencies in the identification went to credibility, with Petitioner's counsel vigorously pointing out the weaknesses in Bowers' credibility. Based on the trial court record, the Petitioner has not shown that counsel was deficient for not making additional objections to the identification, or that he was prejudiced by her not doing so. For these reasons, Petitioner has not shown a substantial issue of ineffective assistance of plea counsel on this basis. Therefore, Ground Seven should be dismissed.

In sum, while ineffective assistance of PCR counsel can constitute the necessary cause for overcoming the procedural bar on these issues, as noted, under the first requirement of the Martinez exception, the Petitioner must first "demonstrate that the underlying ineffective-assistance-

of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." Gray, 526 Fed. Appx. at 333. Petitioner has not shown that any of these underlying claims, which Petitioner contends that his PCR counsel should have raised or more vicariously pursued, have any merit. See discussion, supra. Accordingly, Petitioner has failed to establish that his ineffective assistance of counsel claims are substantial ones in order to be able to proceed on those claims. Gray, 526 Fed. Appx. at 333. Therefore, Petitioner has failed to show cause for his procedural default on these issues. 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."].

Finally, to the extent Petitioner's claim is that he is entitled to relief because he is actually innocent of these crimes, cognizable claims of "actual innocence" are extremely rare and must be based on "factual innocence not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998); see also Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004). In this case, Petitioner has not presented any evidence that he is factually innocent. Accordingly, Petitioner has failed to present any new, reliable evidence of any type that was not presented in any of his court proceedings which supports his innocence on the criminal charges on which he pled guilty. See Schlup v. Delo, 513 U.S. 298, 324 (1995)[to present a credible claim of actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial"]; Doe, 391 F.3d at 161 (quoting Schlup for the evidentiary standard required for a court to consider an actual innocence claim). Further, Petitioner has also failed to make any showing that a fundamental miscarriage of justice will occur if this claim is not considered. Wainwright v. Sykes,

supra; Murray v. Carrier, supra; Rodriguez, 906 F.2d at 1159 [a fundamental miscarriage of justice occurs only in extraordinary cases, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"] (citing Murray, 477 U.S. at 496); Sawyer v. Whitley, 505 U.S. 333, 348 (1992); Bolender v. Singletary, 898 F.Supp. 876, 881 (S.D. Fla. 1995).

Therefore, based upon the evidence and the record, Petitioner has failed to show his trial counsel's performance was deficient or the necessary prejudice under Strickland. Accordingly, Petitioner has failed to establish that any underlying ineffective assistance of counsel claims are substantial so as to be able to proceed on the claim. Gray, 526 Fed. Appx. at 333. Furthermore, Petitioner's claim of actual innocence lacks merit. Rodriguez, 906 F.2d at 1159. Petitioner has failed to overcome his procedural default on these issues.

Conclusion

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

The parties are referred to the Notice Page attached hereto.

Bristow Marchant
United States Magistrate Judge

July 23, 2019
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

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

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

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

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

FILED: June 30, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6090
(9:18-cv-02783-MGL)

LOUIS SANDERS

Petitioner - Appellant

v.

WARDEN, PERRY CORRECTIONAL INSTITUTION

Respondent - Appellee

ORDER

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

Entered at the direction of the panel: Judge Agee, Judge Quattlebaum, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk