FILED: August 20, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7744
(2:19-cv-01284-JFA)

WAYNE WELLS, JR.

Petitioner - Appellant

v.

TERRIE WALLACE, Warden

Respondent - Appellee

JUDGMENT

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

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

/s/ PATRICIA S. CONNOR, CLERK

Appendix A

PER CURIAM:

Wayne Wells, Jr., seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Well's 28 U.S.C. § 2254 (2018) petition. The 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 would 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)).

We have independently reviewed the record and conclude that Wells has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7744

WAYNE WELLS, JR.,

Petitioner - Appellant,

v.

TERRIE WALLACE, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Joseph F. Anderson, Jr., Senior District Judge. (2:19-cv-01284-JFA)

Submitted: April 14, 2020 Decided: August 20, 2020

Before WILKINSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Wayne Wells, Jr., Appellant Pro Se.

FILED: September 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7744
(2:19-cv-01284-JFA)

WAYNE WELLS, JR.

Petitioner - Appellant

v.

TERRIE WALLACE, Warden

Respondent - Appellee

M A N D A T E

The judgment of this court, entered 08/20/2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

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

Wayne Wells, Jr., #314139, Petitioner, vs. Terrie Wallace, Respondent.	C/A No.: 2:19-1284-JFA-MGB **ORDER**

I. INTRODUCTION

Wayne Wells ("Petitioner"), a *pro se* state prisoner, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). On July 18, 2019, Warden Terrie Wallace ("Respondent") filed a Motion for Summary Judgment along with a return to the petition and memorandum of law in support. (ECF Nos. 13 & 14). The court advised Petitioner of the summary judgment procedure and the possible consequences if he failed to respond via an order issued pursuant to *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) on the following day. (ECF No. 15). Petitioner filed a response on August 13, 2019, to which Respondent filed a reply on August 20, 2019. (ECF Nos. 17 & 18). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), this matter was referred to the Magistrate Judge.

Appendix B

The Magistrate Judge assigned to this action[1] prepared a thorough Report and Recommendation ("Report") and opines that this court should grant Respondent's Motion for Summary Judgment and dismiss the petition with prejudice. (ECF No. 19). The Report sets forth, in detail, the relevant facts and standards of law on this matter, and this court incorporates those facts and standards without a recitation.

The court is charged with making a *de novo* determination of those portions of the Report to which specific objections are made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b)(1). However, a district court is only required to conduct a *de novo* review of the specific portions of the Magistrate Judge's Report to which an objection is made. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); *Carniewski v. W. Virginia Bd. of Prob. & Parole*, 974 F.2d 1330 (4th Cir. 1992). In the absence of specific objections to portions of the Report of the Magistrate Judge, this court is not required to give an explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Thus, the court must only review those portions of the Report to which Petitioner has made a specific written objection. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 316 (4th Cir. 2005).

[1] The Magistrate Judge's review is made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.). The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a *de novo* determination of those portions of the Report and Recommendation 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 to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

"An objection is specific if it 'enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute.'" *Dunlap v. TM Trucking of the Carolinas, LLC*, No. 0:15-cv-04009-JMC, 2017 WL 6345402, at *5 n.6 (D.S.C. Dec. 12, 2017) (citing *One Parcel of Real Prop. Known as 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996)). A specific objection to the Magistrate's Report thus requires more than a reassertion of arguments from the complaint or a mere citation to legal authorities. *See Workman v. Perry*, No. 6:17-cv-00765-RBH, 2017 WL 4791150, at *1 (D.S.C. Oct. 23, 2017). A specific objection must "direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982).

"Generally stated, nonspecific objections have the same effect as would a failure to object." *Staley v. Norton*, No. 9:07-0288-PMD, 2007 WL 821181, at *1 (D.S.C. Mar. 2, 2007) (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)). The court reviews portions "not objected to—including those portions to which only 'general and conclusory' objections have been made—for *clear error*." *Id.* (emphasis added) (citing *Diamond*, 416 F.3d at 315; *Camby*, 718 F.2d at 200; *Orpiano*, 687 F.2d at 47).

Petitioner was advised of his right to object to the Report, which was entered on the docket on August 29, 2019. (ECF No. 19). Petitioner filed objections to the Report on September 16, 2019[2] ("Objections"). (ECF No. 22). Respondent replied to the Objections

[2] *Houston v. Lack*, 487 U.S. 266, 271 (1988) (holding *pro se* prisoner's pleading is deemed filed at moment of delivery to prison authorities for forwarding to district court).

on October 4, 2019. (ECF No. 24). Petitioner also submitted what appears to be a second response or "sur-reply" to the motion for summary judgment after the Report was issued. (ECF No. 21). As sur-replies are not authorized by this court's Local Rules and this submission is otherwise untimely, this submission will not be considered. Additionally, Respondent argues that Petitioner's Objections are untimely as they were due by September 15, 2019. Despite this contention, Respondent will suffer no prejudice by this court's review of these objections as they were only submitted one day after the deadline and they do not ultimately affect the outcome below.[3] Petitioner also filed a "Response to Reply to Objections to the Report and Recommendation." (ECF No. 25). Because a response to replies to Reports and Recommendations are not authorized by the Local Rules, this document will not be considered.[4] Thus, this matter is ripe for review.

II. LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute of material fact is "genuine" if sufficient

[3] This is especially true as Petitioner asserts that any untimely delay in the filing date was caused by the State of Emergency declared during Hurricane Dorian that mandated an evacuation of Charleston County. (ECF No. 25 p. 2).

[4] This court would note that even if it chose to consider these additional arguments, the outcome of this order would not change because these arguments are a mere rehashing of all arguments previously asserted.

evidence favoring the non-moving party exists for the trier of fact to return a verdict for that party. *Anderson*, 477 U.S. at 248–49.

The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e). All inferences must be viewed in a light most favorable to the non-moving party, but he "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

III. DISCUSSION

Although this court incorporates the factual background discussed in the Report, a brief recitation of the relevant facts is necessary to properly address Petitioner's Objections. Petitioner was indicted for second-degree criminal sexual conduct with a minor and he went to trial in November 2010. The victim testified that when she first met Petitioner, she told him she was eighteen. The next time they met, however, he asked her if she was fifteen, as one of her friends had told him that. She admitted that was her real age; a couple of hours later, they had sex. Over the summer, they had sex several more times. Each time, he came over to her house after midnight, climbing through her bedroom window.

Petitioner testified in his defense. He told the jury the victim said she was eighteen and never told him anything different. He did not know she actually was fifteen until her stepfather found him in the house and confronted him. Had Petitioner known her true age,

he would not have had a sexual relationship with her. As he had done in his opening statement, Petitioner's trial counsel argued in closing that the victim lied to Petitioner about her age, causing him to mistakenly think she was eighteen.

After the jury began deliberations in Petitioner's criminal trial, they sent out the following questions: "If the defendant truly believed the victim was eighteen, does that matter and/or is ignorance of her age no excuse?" The trial court answered, "No, and ignorance is no excuse." Trial counsel did not object to the court's answer. It is this judge's response to the jury's questions along his counsel's failure to object that form the basis of the two grounds for relief asserted in Petitioner's habeas petition.

Petitioner's habeas petition raises the following two issues:

> **Ground One**: Trial Counsel was ineffective when [he] failed to object to Trial Court['s] erroneous instruction pertaining to Applicant's knowledge of victim's age to jury's question[.]
>
> **Supporting Facts**: The answers to the jury's question by the Court were an invasion of the province of the jury [] which remove[d] critical material facts from the consideration and violated the applicant's constitutional right to a fair and impartial trial by his peers. In the light Trial Counsel failure to object and make Court aware that if the jury reasonably believe that the applicant proved by the preponderance of the evidence that he believe the victim to be 18 years age was ultimately the jurors['] discretion and must be left free for their consideration only.
>
> **Ground Two**: Trial Judge['s] answers to jury questions violated Applicant['s] due process rights to a fair and impartial trial of his peers.
>
> **Supporting Facts**: Trial Court['s] answers to the jury's question did not allow[] the jury to consider the Applicant's defense and it remove[d] critical material facts from the jury['s] consideration. Criminal statutes are presumed to require a *mens rea* clause and some congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.

(ECF No. 1 p. 5,6-7).

As to Ground One, the Magistrate Judge concluded that Plaintiff's trial counsel was not ineffective when he failed to object to the trial judge's response to the questions from the jury during deliberations. In response, Petitioner claims that "trial counsel's understanding of the law was wrong if he thought that the trial judge's answers to the jury's questions were correct statements of law." (ECF No. 22 p. 2).[5] In support of this contention, Petitioner cites to the Model Penal Code for the proposition that statutory rape is not a strict liability crime. He maintains that "whatever is done under a mistaken impression of material fact is excused or provides grounds for relief" and the trial court's instructions to the contrary is clearly erroneous. (ECF No. 22 p. 7). Thus, his counsel's failure to object amounts to ineffective assistance of counsel.

Despite Petitioner's objections, the Model Penal Code has no bearing on this matter. The South Carolina statute at issue, S.C. Code Ann. § 16-3-655(B)(2), does not include mistake-of-age as a defense. Moreover, the version of the statute in effect at the time of the incident in question is a version wherein the General Assembly removed a previously included mistake-of-age defense. (ECF No. 19 p. 9–10). Therefore, the Magistrate Judge correctly opined that Petitioner has failed to show his trial counsel's understanding of the law was not reasonable. Petitioner's objections fail to identify any specific legal authority supporting his contention that a mistake-of-age was a viable defense to the South Carolina

[5] Initially, this argument appears to be a mere disagreement with the Magistrate Judge's conclusion supported by a rehashing of the same arguments previously presented to the court in Petitioner's initial petition and in response to the motion for summary judgement.

criminal statute under which he was convicted in 2009. Accordingly, this claim must be denied.

As to Ground Two, the Magistrate Judge concluded that the trial judge's response to the jury's questions were correct because the South Carolina statute at issue has no explicit intent element. The statue, S.C. Code Ann. § 16-3-655(B)(2), states in relevant part:

> A person is guilty of criminal sexual conduct with a minor in the second degree if:
> . . . .
> (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

The trial judge instructed the jury that:

> The State must prove, beyond a reasonable doubt, that the victim was at least fourteen years old and less than sixteen years old at the time of the sexual battery. The State must also prove that the defendant was older than the victim at the time of the sexual battery. Consent, willingness, or indifference, or ignorance on the part of the minor, if any, as to what was taking place does not affect, in any way, the charge of criminal sexual conduct with a minor because an unmarried woman under the age of sixteen cannot legally consent to sexual intercourse with anyone over the age of eighteen.

Petitioner argues that the Report "clearly indicated that the State did not read the statute as a whole, or give full effect to each section, nor did the State read the Petitioner as 'ejusdem generis' or treated him similar to the three groups that the statute specifically enumerated." (ECF No. 22 p. 12–13). This is the same argument previously asserted by

Petitioner and specifically addressed in the Report. In response to this argument, the Magistrate Judge correctly opined that

> [Petitioner's] argument overlooks that the State can prove the element two ways: (1) by showing the defendant was in one of the enumerated positions of authority, *or* (2) by showing the defendant was older than the victim. *See In re Clinton P.*, No. 2005-UP-220, 2005 WL 7083861, at *2 (S.C. Ct. App. Mar. 24, 2005) (stating the statute "requires either" of those things). Wells' indictment alleged only the second option; following suit, the trial court charged the jury only on that option. (Dkt. No. 13-1 at 197, 342.) Unlike the first option, the second option does not have "to coerce" or any other language that might suggest intent; chronology is the only criterion. Because Wells was indicted and convicted under that second option, the Court need not determine whether intent must be shown to satisfy the first option.

(ECF No. 19 p. 13).

Accordingly, Petitioner has failed to provide any proof that intent is an element of his offense of conviction. Accordingly, Petitioner has failed to show any error in the trial court judge's answers to the contrary, let alone that his Constitutional rights were violated as a result.

Additionally, to the extent that Petitioner asserts any new claims for relief not included in his original petition, including the argument the Petitioner faults trial counsel for not objecting to a portion of the trial court's jury charge, those arguments were not addressed by the Magistrate Judge and are likewise not addressed here. Habeas petitioners cannot assert new claims for the first time in response to summary judgment motions. *Neumon v. Cartledge*, No. 8:14-cv-2556-RMG, 2015 WL 4607732, at *9 (D.S.C. July 31, 2015).

None of Petitioner's attempted objections point to any errors in the Report. Petitioner continuously reasserts the same arguments from his initial petition and opposition to the summary judgment motion. Thus, Petitioner has not asserted any specific objections. "Generally stated, nonspecific objections have the same effect as would a failure to object." *Staley v. Norton*, No. 9:07-0288-PMD, 2007 WL 821181, at *1 (D.S.C. Mar. 2, 2007) (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)). To the extent that any of Petitioner's arguments could constitute specific objections, they fail to indicate any errors within the Report as discussed above.

IV. CONCLUSION

After carefully reviewing the applicable laws, the record in this case, the Report and Recommendation, and the objections thereto, this Court finds the Magistrate Judge's recommendation fairly and accurately summarizes the facts and applies the correct principles of law. Accordingly, the Court adopts the Report and Recommendation. (ECF No. 19). Thus, Respondent's Motion for Summary Judgment (ECF No. 14) is granted and Petitioner's habeas petition (ECF No. 1) is dismissed with prejudice.

It is further ordered that a certificate of appealability is denied because Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[6]

[6] A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*,

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

October 31, 2019
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

252 F.3d 676, 683 (4th Cir. 2001). In the instant matter, the Court finds that Petitioner has failed to make "a substantial showing of the denial of a constitutional right."

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Wayne Wells, Jr., #314139, Petitioner, v. Terrie Wallace, Respondent.	Case No. 2:19-cv-1284-JFA-MGB **REPORT AND RECOMMENDATION**

Wayne Wells, a *pro se* state prisoner, seeks habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 1.) The Warden seeks summary judgment. (Dkt. No. 14.) Under 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), the undersigned is authorized to review the motion and submit a recommendation to the District Judge. For the following reasons, the undersigned recommends granting the Warden's motion and dismissing this case with prejudice.

BACKGROUND

In the summer of 2009, Wells was in a sexual relationship. (Dkt. No. 13-1 at 44–45.) He was twenty-five. (*Id.* at 47.) She was fifteen. (*Id.* at 33.) The relationship came to a halt when the victim's stepfather discovered Wells in their house and called the police. (*Id.* at 48–50.)

Wells admits having sexual contact with the victim. He maintains, however, she said she was eighteen and he believed her.

Trial and Direct Appeal

Wells was indicted for second-degree criminal sexual conduct with a minor. (Dkt. No. 13-1 at 342.) He went to trial in November 2010. (*Id.* at 1.) The victim testified that when she first met Wells, she told him she was eighteen. (*Id.* at 36, 39.) The next time they met, however, he asked her if she was fifteen, as one of her friends had told him that. (*Id.* at 42.) She admitted that

Appendix C

was her real age; a couple of hours later, they had sex. (*Id.* at 42–43.) Over the summer, they had sex several more times. Each time, he came over to her house after midnight, climbing through her bedroom window. (*Id.* at 43–46.)

Wells testified in his defense. He told the jury the victim said she was eighteen and never told him anything different. (Dkt. No. 13-1 at 145, 154.) He did not know she actually was fifteen until her stepfather found him in the house and confronted him. (*Id.* at 148.) Had Wells known her true age, he would not have had a sexual relationship with her. (*Id.* at 152.)

As he had done in his opening statement, Wells' trial counsel argued in closing that the victim lied to Wells about her age, causing Wells to mistakenly think she was eighteen. (Dkt. No. 13-1 at 32, 175, 177.) After the State made its closing argument, the trial court charged the jury. (*Id.* at 179–196.) Its instructions included the following:

> The State must prove, beyond a reasonable doubt, that the victim was at least fourteen years old and less than sixteen years old at the time of the sexual battery. The State must also prove that the defendant was older than the victim at the time of the sexual battery. Consent, willingness, or indifference, or ignorance on the part of the minor, if any, as to what was taking place does not affect, in any way, the charge of criminal sexual conduct with a minor because an unmarried woman under the age of sixteen cannot legally consent to sexual intercourse with anyone over the age of eighteen.

(*Id.* at 197.)

During deliberations, the jury sent the court a question: "If the defendant truly believed the victim was eighteen, does that matter and/or is ignorance of her age no excuse?" (Dkt. No. 13-1 at 198.) The court answered, "No, and ignorance is no excuse." (*Id.*) Trial counsel did not object to the court's answer. (*Id.*)

The jury found Wells guilty. (Dkt. No. 20-1 at 329.) The court sentenced him to twenty years in prison. (*Id.* at 207.)

Wells appealed. (Dkt. No. 13-1 at 209–20.) His appointed appellate attorney argued the trial court erroneously admitted the victim's testimony about her friend telling Wells the victim's true age. (*Id.* at 212.) However, appellate counsel conceded the appeal lacked sufficient merit to warrant reversal. (*Id.* at 219.) Wells then filed his own brief, arguing the trial court (1) gave an answer to the jury's question that violated the Sixth and Fourteenth Amendments; (2) improperly refused to instruct the jury on mitigating circumstances; and (3) erred by not directing a verdict in his favor. (*Id.* at 222–32.) The Court of Appeals dismissed the appeal without a hearing. (*Id.* at 233–34.)

PCR Proceedings

After his direct appeal ended, Wells applied for post-conviction relief ("PCR"). (Dkt. No. 13-1 at 236–43.) He alleged that the trial court was biased, that trial counsel provided ineffective assistance, and that he was denied a fair trial. (*Id.* at 238.) Wells was appointed a lawyer, and the State filed a return. (*Id.* at 244–49.)

The PCR court held a hearing. (Dkt. No. 13-1 at 250–75.) Wells and his trial counsel testified; neither side introduced any exhibits. (*Id.* at 251–52.) Wells testified the State made two plea offers before trial, but trial counsel failed to discuss them with him. (*Id.* at 255–56.) He also faulted trial counsel for not objecting to what the trial court told the jury about mistake of age. (*Id.* 258–60.) The court's answer, Wells noted, undermined his trial testimony that he did not know the victim's real age, as well trial counsel's jury arguments that Wells made a mistake. (*Id.* at 258–61.) Wells testified he told counsel to object, but counsel refused. (*Id.* at 260–61.)

Trial counsel testified that, in pre-trial meetings, Wells said he had been mistaken about the victim's age. (*Id.* at 267–68.) Counsel told him mistake was no defense to the charge, but Wells was adamant about going to trial and telling his story "regardless of what [counsel] said."

(*Id.* at 267–68, 271.) Although counsel felt the State's case was "overwhelming," he went to trial based on Wells' wishes. (*Id.* at 268.) At trial, he tried to present a defense consistent with Wells' side of the story. (*Id.*) When the jury asked its question, counsel did not object to the court's answer because he thought it was correct. (*Id.* at 70.)

The PCR court denied Wells' application in July 2014. (Dkt. No. 13-1 at 276–85.) As to the trial court's answer to the jury question, the PCR court found counsel reasonably declined to object because he thought the answer was correct. (*Id.* at 284.) The PCR court also rejected Wells' claim about plea offers. (*Id.* at 281–84.) Finally, the court found Wells had abandoned all other claims in his application by not pursuing them at the hearing. (*Id.*)

Wells filed a second PCR application in April 2015. (Dkt. No. 13-1 at 292–307.) Among other things, he alleged PCR counsel failed to pursue an appeal for him. (*Id.* at 293, 301.) With the State's consent, a different PCR court granted Wells an opportunity to file a belated appeal. (*Id.* at 331, 334–337.)

Through appointed counsel, Wells then petitioned for certiorari. (Dkt. No. 13-5.) Wells raised one issue: whether the first PCR court erred in denying his ineffective-assistance claim about the trial court's answer to the jury's question. (*Id.* at 3.) The state Supreme Court transferred the case to the Court of Appeals, which summarily denied Wells' petition. (Dkt. No. 13-6 at 8; Dkt. No. 13-7.)

PROCEDURAL HISTORY

Wells filed his habeas petition in April 2018. (Dkt. No. 1-2 at 1.) He asserts two grounds:

> **Ground One**: Trial Counsel was ineffective when [he] failed to object to Trial Court['s] erroneous instruction pertaining to Applicant's knowledge of victim's age to jury's question[.]
> **Supporting Facts**: The answers to the jury's question by the Court were an invasion of the province of the jury [] which remove[d] critical material facts from the consideration and violated the applicant's constitutional right to a fair and

> impartial trial by his peers. In the light Trial Counsel failure to object and make Court aware that if the jury reasonably believe that the applicant proved by the preponderance of the evidence that he believe the victim to be 18 years age was ultimately the jurors['] discretion and must be left free for their consideration only.
>
> **Ground Two**: Trial Judge['s] answers to jury questions violated Applicant['s] due process rights to a fair and impartial trial of his peers.
> **Supporting Facts**: Trial Court['s] answers to the jury's question did not allow[] the jury to consider the Applicant's defense and it remove[d] critical material facts from the jury['s] consideration. Criminal statutes are presumed to require a *mens rea* clause and some congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.

(Dkt. No. 1 at 5, 6–7.) Wells asks for a new trial. (*Id.* at 14.)

The Warden seeks summary judgment on both claims. (Dkt. No. 14.) Wells has filed a response, and the Warden has replied. (Dkt. Nos. 17 & 18.) Thus, the Warden's motion is ripe.

LEGAL STANDARD

Habeas corpus in federal court exists to "guard against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citation and internal quotation marks omitted). Federal habeas is neither an alternative to state-court relief nor an additional chance to appeal erroneous state-court rulings. *See id.* That preference for, and deference to, state courts is borne out in the various constraints placed on federal courts. *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (stating § 2254 "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases"); *see also Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (stating § 2254 "reflect[s] a presumption that state courts know and follow the law" (citation and internal quotation marks omitted)).

For instance, state prisoners who challenge matters "adjudicated on the merits in State court" cannot get relief in federal court unless they show that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" announced by the Supreme Court or "was based on an unreasonable determination of the facts in

light of the evidence presented in the State court proceeding." § 2254(d). That means a state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Federal courts must also defer to state courts' factual determinations, which are presumed correct until the prisoner rebuts that presumption with clear and convincing evidence. § 2254(e)(1).

In addition, before state prisoners may try to clear those high hurdles, two rules steer them to first pursue all relief available in the state courts. *See* § 2254(b)(1). The first, known as exhaustion of remedies, requires a prisoner to present his claims to the highest state court with jurisdiction to decide them. *Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010). A federal court cannot grant a prisoner's habeas petition until he exhausts his state-court remedies. § 2254(b)(1), (c). The second rule, called procedural default, comes into play when a prisoner failed to present a claim to the state courts at the appropriate time and has no means of doing so now. *Stewart*, 701 F. Supp. 2d at 790. Federal courts may not consider a procedurally defaulted claim unless the prisoner shows either that he has cause for defaulting and that the alleged violation of federal law prejudiced him, or that not addressing the claim would be a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The ultimate issue in this case is, of course, whether Wells should receive habeas relief under these standards. However, the Warden's summary judgment motion presents narrower questions. Summary judgment is appropriate only if the moving party shows that "there is no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Rule 12, Rules Governing § 2254 Cases (stating courts may apply in habeas cases any of the Federal Rules of Civil Procedure to the extent they are not

inconsistent with statutes or the § 2254 rules). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Viewing the habeas rules through the lens of Rule 56, the Court has three questions to answer at this juncture:

(1) Are there genuine issues of fact as to whether Wells' claims are properly before the Court?
(2) Are there genuine issues of fact as to the merits of Wells' claims?
(3) If the answer to either (or both) of the first two questions is "no," is the Warden entitled to judgment as a matter of law?

In answering those questions, the undersigned has carefully considered the record before the Court and has liberally construed the materials Wells has submitted. *See, e.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

DISCUSSION

The Warden contends that both of Wells' grounds lack merit and that Ground Two also fails because it is not a valid habeas claim. Wells resists those arguments, and he appears to assert a new claim in his response brief.

I. Ground One

The Sixth Amendment guarantees criminal defendants effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A petitioner proves ineffective assistance by showing his attorney's performance was deficient and prejudiced him. *Id.* at 687. An attorney's

performance is deficient if it was unreasonable under the circumstances of the case and under then-prevailing professional norms. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Kimmelman*, 477 U.S. at 384.

Strickland is highly deferential to counsel, and § 2254(d) is highly deferential to state courts. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). That makes this Court's review "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The question here is "not whether counsel's actions were reasonable" but "whether there is any reasonable argument that [Byrd's] counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.[1] The record before the Court demonstrates the answer is yes.

Although the PCR court found trial counsel reasonably declined to challenge the trial court's answer, it did not say whether the answer was correct. (Dkt. No. 13-1 at 284.) Wells insists mistake of age was a valid defense, and thus the trial court was wrong and counsel should have objected. The Warden argues just as forcefully that South Carolina law afforded Wells no such defense, which means counsel acted reasonably because the trial court was right.

These arguments invite the Court to decide a question of state law. The Court need not go that far. The PCR court based its decision on counsel testifying he thought the trial court stated the law correctly. (Dkt. No. 13-1 at 284.) Under *Knowles*, all this Court must do is satisfy itself that counsel's understanding of South Carolina law was not unmistakably wrong.

---

[1] Subsection 2254(d)'s standards are to be applied to the decision from the highest state court to decide the claim at issue on the merits. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Where, as here, the highest state court rules summarily, the federal habeas court should "look through" that unexplained decision to the last state-court decision that provides a relevant rationale, and "should then presume that the unexplained decision adopted the same reasoning." *Id.* In this case, the PCR court was the only one to issue a reasoned decision on Wells' claims. As neither party contends the Court of Appeals denied certiorari on different reasoning than what the PCR court provided, the undersigned has applied *Sellers* by using the PCR court's decision to analyze Ground One.

The definition of the crime at issue here is found at subsection 16-3-655(B)(2) of the South Carolina Code. Since 2008, it has read as follows:

> A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> . . . .
>
> (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

2008 Act No. 335, § 18. The statute itself does not say whether a mistake of age matters, but related legal authorities and the history of the statute shed some light.

In 1973, South Carolina's Supreme Court addressed the constitutionality of a statute outlawing sex with mental patients. *State v. Guinyard*, 195 S.E.2d 392 (S.C. 1973). The statute created no exception for people who were ignorant of their partner's status. *Id.* at 395. The Supreme Court held the State could make the crime a strict-liability offense, as that helped protect a larger portion of mental patients. *Id.* Of relevance here, the court found the offense's lack omission of an intent element "in harmony with the rule adopted by practically all of the courts that, under a charge of statutory rape, the honest belief of the accused that the complainant was of the age of consent when in fact she was not constitutes no defense." *Id.* at 395–96.

Thirty-three years later, South Carolina's Attorney General's Office issued an opinion letter discussing some recent amendments to subsection 16-3-655(B)(2). *See* 2006 WL 2382448 (S.C.A.G. July 14, 2006). Reviewing the statute's history, the opinion states the "common law did not recognize a 'mistake of age' defense to statutory rape or the sexual battery of a female under the age of consent." *Id.* at *5. Rather, the opinion explains, "[s]tatutory rape has typically

been viewed as a "strict liability crime . . . in which the victim's apparent maturity is not a defense [and is] . . . a recognized exception to the general rule requiring *mens rea* in criminal statutes." *Id.* (citation and quotation marks omitted). Notably, the opinion bases that discussion in part on *Guinyard*. *Id.* at * 4.

The Attorney General's office issued that 2006 opinion to a legislator who had expressed concern about an amendment to subsection 16-3-655(B)(2) that the General Assembly had passed several weeks earlier. *See* 2006 WL 2382448, at *1. The General Assembly added a sentence to the statute stating mistake of age was a defense. 2006 Act No. 346, § 1. Two years later, however, the legislature amended subsection 16-3-655(B)(2) again; the amended version removed the sentence. 2008 Act No. 335, § 18.[2] The 2008 version of the statute was in effect during Wells' liaisons with the victim. *See id.* § 23 (providing the version became effective in June 2008).

Comparing the two versions of the statute suggests the General Assembly intended to eliminate the mistake-of-age defense and return to the common law. Importantly, Wells has not identified any legal authority saying that, despite the 2008 amendment, mistake of age was a viable defense in 2009. In other words, Wells has not shown trial counsel's understanding of the law was—right or wrong—anything other than reasonable. Wells has thus failed to show the PCR court reached a legally or factually unreasonable result under § 2254(d). The undersigned recommends denying this claim.

II. Ground Two

Wells claims the trial court's answer to the jury's question denied him due process, as it invaded the jury's exclusive power to decide a factual issue relating to an element of the charged crime. (Dkt. No. 1 at 7.)

---

[2] The 2008 amendment made other changes not relevant here.

A. Legal Validity

The Warden argues Ground Two is not cognizable in habeas because it is merely a state-law claim to which Wells has attached a federal label. (Dkt. No. 13 at 18.) It is true that "[s]imply citing to the due process or equal protection clauses of the United States Constitution does not transform a claim grounded in state law into a federal law claim." *Kitt v. Cohen*, No. 2:11-cv-2876-TMC, 2012 WL 12952688, at *2 (D.S.C. July 20, 2012) (citation omitted). But the undersigned views Wells' claim as more than that. Jury instructions that have the "effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime" can violate the Fourteenth Amendment's Due Process Clause. *Francis v. Franklin*, 471 U.S. 307, 313 (1985). Although Wells phrases his claim in terms of invading the jury's province, he is in substance asserting the trial court's answer enabled the State to win without proving the essential element of intent. As *Francis* was a habeas case, 471 U.S. at 312, it shows that Wells' claim can be heard here.

B. Procedural Default

No state court ever ruled on this claim. In the abstract, that might raise questions about whether the claim may be procedurally defaulted and, if so, whether merits review is nevertheless appropriate. However, procedural default is an affirmative defense, *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999), and the Warden did not raise it here. To the contrary, he asserted procedural default does not apply because the claim is not cognizable in habeas. (Dkt. No. 13 at 11.)

Although federal courts have discretion to raise procedural default themselves and deny habeas claims on that basis, *Yeatts*, 166 F.3d at 261, the undersigned recommends instead resolving Ground Two on the merits. Because the Warden did not assert procedural default for Ground Two,

Wells has not had a fair opportunity to address it. *See id.* at 262 (directing courts who raise procedural default themselves to consider whether justice requires giving the petitioner an opportunity to brief that issue).

C. Merits Review

Like its ineffective-assistance counterpart, Well's due-process claim turns on an important premise of state law: that South Carolina second-degree criminal sexual conduct with a minor has an intent element that can be negated by a mistake about the victim's age. As discussed above, the statute has no explicit intent element. Wells, however, insists intent is an implicit element. (Dkt. No. 17 at 17.)

Wells bases his position on two Supreme Court cases. In *Staples v. United States*, the Supreme Court discussed the general presumption that intent is an implied element in a statutory crime with no explicit intent requirement. *See* 511 U.S. 600, 605–06 (1994). That presumption against strict-liability crimes, the Court explained, comes from the common law's "firmly embedded" requirement that crimes typically have "some *mens rea*." *Id.* at 605. Similarly, in *Morissette v. United States*, the Supreme Court explained the presumption has roots in states' codification of the common law. *See* 342 U.S. 246, 251–52 (1952). Because the "concurrence of an evil-meaning mind with an evil-doing hand" was engrained in almost all common-law crimes, the omission of intent language from statutes codifying those crimes reflected the states' recognition "that intent was so inherent in the offense that it required no statutory affirmation." *Id.*

Relying on *Staples* and *Morissette*, Wells argues subsection 16-3-655(B)(2) must be presumed to include an implied intent element. Wells' argument has two flaws. First, in a more recent discussion of the presumption, the Supreme Court pointed out that statutory rape is an

exception to it. *Dean v. United States*, 556 U.S. 568, 580 (2009). Second, the *Morissette* Court explained the presumption is really a smaller piece of a larger one: that, when the states codified common-law crimes, they intended not to change those crimes' established elements. As two branches of South Carolina's government have stated, the crime we now sometimes call statutory rape was, at common law, a strict-liability offense that did not countenance mistakes of age. Thus, if any presumption about the common law attaches to subsection 16-3-655(B)(2), it would be a presumption that the crime has no intent element.

Wells also argues subsection 16-3-655(B)(2) itself suggests the State must prove intent. He focuses on its language that "the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim." He appears to be asserting that because coercion is an intentional act, the use of "to coerce" shows intent is an essential part of the offense. (*See* Dkt. No. 17 at 17.)

Wells' argument overlooks that the State can prove the element two ways: (1) by showing the defendant was in one of the enumerated positions of authority, *or* (2) by showing the defendant was older than the victim. *See In re Clinton P.*, No. 2005-UP-220, 2005 WL 7083861, at *2 (S.C. Ct. App. Mar. 24, 2005) (stating the statute "requires either" of those things). Wells' indictment alleged only the second option; following suit, the trial court charged the jury only on that option. (Dkt. No. 13-1 at 197, 342.) Unlike the first option, the second option does not have "to coerce" or any other language that might suggest intent; chronology is the only criterion. Because Wells was indicted and convicted under that second option, the Court need not determine whether intent must be shown to satisfy the first option.

It appears South Carolina's courts have not decided whether mistake of age is a defense to any version of subsection 16-3-655(B)(2) (other than the short-lived 2006 version). The

undersigned stresses she is not attempting to do so here. Rather, she addresses only a narrow question: has Wells come forward with proof that intent is an element of his offense of conviction? The undersigned concludes only that he has not. His failure to do so prevents him from showing the trial court told the jury something that relieved the State of its burden to prove an element of the crime. The undersigned therefore recommends denying this claim on the merits.

III. New Claim

In his response brief, Wells faults trial counsel for not objecting to a portion of the trial court's jury charge. (Dkt. No. 17 at 7–8.) This appears to be a new claim; Wells did not assert it in his habeas petition. Habeas petitioners cannot assert new claims for the first time in response to summary judgment motions. *Neumon v. Cartledge*, No. 8:14-cv-2556-RMG, 2015 WL 4607732, at *9 (D.S.C. July 31, 2015). The undersigned therefore recommends not addressing Wells' claim.[3]

IV. Certificate of Appealability

If the Warden's summary judgment motion is granted, the District Judge will need to decide whether to issue a certificate of appealability. *See* Rule 11(a), Rules Governing § 2254 Cases. A certificate may be issued only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a petitioner's constitutional claims have been denied on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003) (citation and quotation marks omitted). Where a petitioner's constitutional claims are dismissed on procedural grounds, the petitioner must show both (1) that jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right,

[3] The Warden argues the claim is also procedurally barred, is untimely, and lacks merit. (Dkt. No. 18 at 2–4.) Because Wells' failure to raise the claim in his habeas petition is dispositive, the Court need not reach those issues.

and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Rose v. Lee*, 252 F.3d 676, 684 (4th Cir. 2001). The undersigned does not see a basis for issuing a certificate in this case.

CONCLUSION

For the above reasons, the undersigned recommends the Court grant the Warden's motion, dismiss this case with prejudice, and decline to issue a certificate of appealability.

IT IS SO RECOMMENDED.

August 29, 2019
Charleston, South Carolina

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

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