FILED: June 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7275
(4:18-cv-03234-JFA)

JAVAN FREDRICK MAYS, a/k/a Von Frederick Mayes

Petitioner - Appellant

v.

WARDEN SCOTT LEWIS

Respondent - Appellee

J U D G M E N T

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

FILED: July 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7275
(4:18-cv-03234-JFA)

JAVAN FREDRICK MAYS, a/k/a Von Frederick Mayes

Petitioner - Appellant

v.

WARDEN SCOTT LEWIS

Respondent - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

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

Javan Fredrick Mays, Petitioner, vs. Warden Scott Lewis, Respondent.	C/A No.: 4:18-03234-JFA **ORDER**

I. INTRODUCTION

Javan Fredrick Mays, ("Petitioner"), is currently incarcerated in the Perry Correctional Institution pursuant to orders of commitment from the Clerk of Court for Spartanburg County. Petitioner, proceeding *pro se*, filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). On February 5, 2019, Warden Scott Lewis ("Respondent") filed a Motion for Summary Judgment and filed a return with a memorandum of law in support. (ECF Nos. 14 & 15). On February 6, 2019, by order filed pursuant to *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975), Petitioner was advised of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion. (ECF No. 16). On March 28, 2019 Petitioner responded. (ECF No. 21). On April 4, 2019, Respondent replied to Petitioner's response. (ECF No. 22). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), the case was referred to the Magistrate Judge.

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 because (1) Ground Two is procedurally barred; (2) Grounds Three and Four are not cognizable federal claims appropriate for review; and (3) Petitioner cannot succeed on the merits on Grounds One, Five, and Six. (ECF No. 24). 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, 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).

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[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 May 23, 2019. (ECF No. 24). Petitioner filed objections to the Report ("Objections") on June 13, 2019. (ECF No. 27). Respondent replied to the Objections on June 14, 2019. (ECF No. 29). Thereafter, Petitioner filed a response to the Respondent's Reply on July 1, 2019. (ECF No. 33). 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 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

Petitioner's habeas petition raises the following issues:

> Ground One: The petitioner was denied the right to effective assistance of appellate counsel.
>
> Supporting Facts: The petitioner's appellate counsel failed to raise and argue the State's violation of his discovery request for the alleged robbery victim's medical records to refute the State's "attempted murder charge" that a bullet fired by petitioner grazed the robbery victim's head. The petitioner objected to the State's violation of his discovery request for appellate review, which his appellate counsel failed to raise and argue.
>
> Ground Two: The petitioner discovered after his trial that the solicitor used perjured testimony to obtain his conviction.
>
> Supporting Facts: The solicitor proffered testimony by petitioner's alleged codefendant, Kyndell Robinson, who testified against petitioner for a "deal with the solicitor" which was not disclosed at trial. When asked why he was testifying for the State, Robinson testified he was testifying to better his life.

> Ground Three: The petitioner was unlawfully deprived of an appellate review of his petition for writ of certiorari.
>
> Supporting Facts: The Deputy Clerk, Brenda F. Shealy, of the South Carolina Supreme Court, signed an order denying the petitioner's writ of certiorari.
>
> Ground Four: The trial court lacked subject matter jurisdiction to convict and sentence the petitioner.
>
> Supporting Facts: The petitioner's indictment indicate that his indictments were returned by the grand jury on October 18, 2012; however, the grand jury did not convene until October 22, 2012 to return indictments and Spartanburg County. Thus, as South Carolina law holds that no indictment may be presented outside of a term of general sessions court, the trial court lacked subject matter jurisdiction to convict and sentence petitioner.
>
> Ground Five: Petitioner did not knowingly and intelligently waive his right to assistance of counsel with a full understanding of the elements of his attempted murder charge and available defense(s).
>
> Ground Six: The petitioner was denied the right to a fast and speedy trial.

First, the Magistrate Judge correctly opines that Ground 2 is procedurally barred and Petitioner has failed to show cause for his procedural default on this issue. (ECF No. 24 p. 13). Petitioner attempts to object to this proposed finding; however, he fails to address or even mention the issue of procedural default. (ECF No. 27 p. 3; ECF No. 33 p. 1). Petitioner's "objections" and reply thereto are merely a rehash of his arguments asserted in his initial petition. (Compare ECF No. 27 p. 3; ECF No. 33 p. 1, with ECF No. 1-1 ps. 25–26). 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). Thus, Petitioner has failed to make a specific objection with regards to Ground Two being procedurally barred.

Next, the Magistrate Judge correctly opines that Grounds Three and Four are not cognizable claims on habeas review. The Magistrate Judge explains that in Ground Three,

Petitioner argues that he was deprived of appellate review of his writ of certiorari because the order denying his writ from the State Supreme Court was signed by the Supreme Court's Deputy Clerk instead of a judge; however, alleged defects in state PCR proceedings are not cognizable in a federal habeas action. *Wright v. Angelone*, 151 F.3d 151 (4th Cir.1998). As to Ground Four, the Magistrate Judge opines:

> In Ground Four, Petitioner argues that the trial court lacked subject matter jurisdiction to convict and sentence him because he had not been formally indicted. Deficiencies in state court indictments "are not ordinarily a basis for federal habeas corpus relief unless the deficiency makes the trial so egregiously unfair as to amount to a deprivation of the defendant's right to due process." Ashford v. Edwards, 780 F.2d 405, 407 (4th Cir. 1985). Additionally, claims arising from state law are not cognizable. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Jurisdiction is a noncognizable state law issue. See Wright v. Angelone, 151 F.3d 151, 156-158 (4th Cir.1998).

Again, Petitioner does not make any specific objections. In his attempt to object, Petitioner does not even address the Magistrate Judge's proposed finding that Grounds Three and Four pertain to the state court's jurisdiction/state procedure, and thus should be dismissed because they are not cognizable claims on habeas review. Petitioner's "objections" regarding Ground Three are in fact the same argument, almost word for word, alleged in his initial habeas petition. (Compare ECF No. 27 p. 4 & ECF No. 33 p. 1, with ECF No. 1-1 ps. 26–27.) Once again, Petitioner's "objections" in regards to Ground Four reassert his arguments from his petition. (Compare ECF No. 27 ps. 4–5 & ECF No. 33 p. 2, with ECF No. 1-1 ps. 27–28). 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). Thus, Petitioner's objections are not specific.

The Magistrate Judge then correctly opines Petitioner cannot proceed on the merits on Ground One (ineffective assistance of counsel), Ground Five (knowing waiver of assistance of counsel), and Ground Six (claim of a speedy trial violation).

In regards to Ground One, the Magistrate Judge opines:

> The PCR court's rejection of the ineffective assistance of appellate counsel ground for relief did not result in an unreasonable application of Strickland and was not based upon an unreasonable determination of facts in light of the state court record. Moreover, Petitioner produced no witnesses or evidence at his PCR proceedings to support his assertions and to show prejudice. [. . .] Accordingly, Petitioner fails to show the PCR court's findings of no error and no prejudice involve an unreasonable application of Supreme Court precedent.

As to Ground One, Petitioner again reasserts his exact same arguments from his habeas petition. (Compare ECF No. 27 ps. 1–2 & ECF No. 33 p. 1, with ECF No. 1-1 ps. 23–24). Petitioner does not address the Magistrate Judge's proposed finding that the he failed to show the PCR court's unreasonable application of Supreme Court precedent.

As to Ground Five, the Magistrate Judge opines:

> The state court's determination was neither 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; nor a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2).

With regards to Ground Five, Petitioner does not address the Magistrate Judge's proposed findings. Petitioner's attempted objections again reassert his same arguments from his petition. (Compare ECF No. 27 p. 5 & ECF No. 33 p. 2, with ECF No. 1-1 ps. 29–30).

Regarding Ground Six, the Magistrate Judge again opines:

> The state court's determination was neither 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; nor a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2).

Petitioner's "objections" as to Ground Six, are almost a word for word reassertion from his arguments in his initial petition, and he does not address the Magistrate Judge's proposed findings. (Compare ECF No. 27 p. 6 & ECF No. 33 p. 2, with ECF No. 1-1 ps. 30–32).

Thus, Petitioner has failed to make specific objections as to Grounds One, Five, and Six. 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).

None of Petitioner's attempted objections address the Magistrate Judge's proposed findings or point to any errors in the Report. Petitioner continuously reasserts his same arguments from his initial petition. 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)).

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. 24). Thus, Respondent's Motion for Summary Judgment is **granted** (ECF No. 15) and Petitioner's habeas petition is **dismissed** with prejudice (ECF No. 1).

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).[2]

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

August 15, 2019
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

[2] 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*, 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
FLORENCE DIVISION

JAVAN FREDRICK MAYS, Petitioner, vs. WARDEN SCOTT LEWIS, Respondent.	)	C/A No. 4:18-03234-JFA-TER REPORT AND RECOMMENDATION

Petitioner, appearing *pro se*, filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254[1] on November 30, 2018. Respondent filed a motion for summary judgment on February 5, 2019, along with a return and memorandum. (ECF No.14 and No.15). The undersigned issued an order filed February 6, 2019, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately. (ECF No.13). Petitioner filed a response on March 28, 2019, and Respondent filed a reply on April 4, 2019.

PROCEDURAL HISTORY

In Petitioner's response to the motion for summary judgment, he concedes to

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

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

Petitioner is currently incarcerated in the Perry Correctional Institution pursuant to orders of commitment from the Clerk of Court for Spartanburg County. Petitioner was indicted in October 2012 by the Spartanburg County Grand Jury for two counts of attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. Petitioner represented himself at trial and J. Roger Poole, Esquire, acted as standby counsel. Petitioner's jury trial was held on November 18, 2013, before the Honorable Alexander S. Macaulay and a jury. Petitioner was found guilty as indicted. Judge Macaulay sentenced Petitioner to concurrent terms of twenty years on each count of attempted murder, twenty years for armed robbery, and five years for the firearm charge.

Direct Appeal

A timely Notice of Appeal was served on behalf of Petitioner, and an appeal was perfected with the filing of a Final Anders[2] Brief of Appellant. On appeal, Petitioner was represented by Susan B. Hackett, Esquire, of the Office of Appellate Defense. In his Anders Brief, Petitioner raised the following issue:

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[2] Anders v. California, 386 U.S. 738 (1967).

> In violation of Appellant's right to a jury trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 14 of the South Carolina Constitution, did the trial judge err in failing to instruct the jury that in order to convict Appellant of attempted murder the jury must find that Appellant acted with a specific intent to kill?

(Attachment 1, at 267 of 365). On April 8, 2015, the South Carolina Court of Appeals dismissed the appeal affirming Petitioner's convictions and sentences in an unpublished decision. The Remittitur was returned on April 28, 2015.

PCR

Petitioner filed his application for post-conviction relief (PCR) on April 28, 2015. In the PCR application, Petitioner argued as follows:

1. Ineffective Assistance of Appellate Counsel, in that:

a. Appellate Counsel failed to argue on appeal that Appellant was deprived by the State of his right to a speedy trial as required by the Sixth and Fourteenth Amendments to the United States Constitution; and

b. Appellate counsel failed to raise and argue the State's Brady violation.

2. Due Process violation, in that:

a. Court failed to adequately explain dangers and disadvantages of self-representation as required by Sixth and Fourteenth Amendments to the U. S. Constitution.

3. The trial court lacked subject matter jurisdiction.
4. The applicant discovered after his trial that the solicitor used

perjured testimony.

An evidentiary hearing was convened November 9, 2016, before the Honorable Frank R. Addy. Petitioner proceeded on the allegations of ineffective assistance of appellate counsel for failure to argue preserved issues on appeal, and violation of due process in that Petitioner was not adequately advised of the dangers and disadvantages of proceeding pro se. Rodney Richey, Esquire, represented Petitioner at the hearing. Assistant Attorney General Alicia Olive represented the State. On March 31, 2017, Judge Addy entered an order denying and dismissing with prejudice the application for PCR. (ECF No. 14-1at 331-339 of 365.)

PCR Appeal

Petitioner filed a notice of appeal and was represented by Wanda H. Carter with the South Carolina Office of Appellate Defense. Ms. Carter filed a petition for writ of certiorari in the Supreme Court of South Carolina on June 21, 2018, pursuant to Johnson v. State.[3] The following issue was raised:

> The PCR judge erred in dismissing petitioner's PCR claim under 2015-CP-42-01784 that his trial court convictions and sentences were obtained unconstitutionally in violation of his Sixth Amendment right to counsel, which he did not waive properly prior to trial, because he was not warned

[3] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988),

> sufficiently of the details of the dangers and disadvantages associated with self-representation.

(ECF No. 14-14).

Appellate counsel also moved to be relieved as counsel. On July 17, 2018, Petitioner filed his pro se response to the Johnson petition. (Attachment 5). In that response, Petitioner presented the following issue:

> The PCR judge erred in denying the petitioner's claim that he was denied the right to effective assistance of appellate counsel by counsel's failure to raise his preserved issue of the State's violation of his discovery request for the robbery victims' medical records to disprove the state's attempted murder charges against him in his PCR action 2015-CP-42-01784.

(ECF No. 14-5).

The Supreme Court of South Carolina issued an order on October 10, 2018, denying the petition for writ of certiorari. (ECF No. 14-6). The remittitur was issued on October 26, 2018, and filed on October 29, 2018.

HABEAS ALLEGATIONS

In the petition, Petitioner raised the following issues:

Ground One: The petitioner was denied the right to effective assistance of appellate counsel.

Supporting Facts: The petitioner's appellate counsel failed to raise and argue the State's violation of his

discovery request for the alleged robbery victim's medical records to refute the State's "attempted murder charge" that a bullet fired by petitioner grazed the robbery victim's head. The petitioner objected to the State's violation of his discovery request for appellate review, which his appellate counsel failed to raise and argue.

Ground Two: The petitioner discovered after his trial that the solicitor used perjured testimony to obtain his conviction.

Supporting Facts: The solicitor proffered testimony by petitioner's alleged codefendant, Kyndell Robinson, who testified against petitioner for a "deal with the solicitor" which was not disclosed at trial. Tr. p. 43, L. 5-8. When asked why he was testifying for the State, Robinson testified he was testifying to better his life.

Ground Three: The petitioner was unlawfully deprived of an appellate review of his petition for writ of certiorari.

Supporting Facts: The Deputy Clerk, Brenda F. Shealy, of the South Carolina Supreme Court, signed an order denying the petitioner's writ of certiorari. Exhibit A, supra.

Ground Four: The trial court lacked subject matter jurisdiction to convict and sentence the petitioner.

Supporting Facts: The petitioner's indictment indicate that his indictments were returned by the grand jury on October 18, 2012; however, the grand jury

did not convene until October 22, 2012 to return indictments and Spartanburg County. Thus, as South Carolina law holds that no indictment may be presented outside of a term of general sessions court, the trial court lacked subject matter jurisdiction to convict and sentence petitioner.

Ground Five: Petitioner did not knowingly and intelligently waive his right to assistance of counsel with a full understanding of the elements of his attempted murder charge and available defense(s).

Ground Six: The petitioner was denied the right to a fast and speedy trial.

(ECF No. 1).

STANDARD FOR SUMMARY JUDGMENT

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Dep't of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists.

If none can be shown, the motion should be granted. Fed. R. Civ. P. 56(c).

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

evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

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

STANDARD OF REVIEW

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

> States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the State court proceeding.

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

PROCEDURAL BAR

The United States Supreme Court has clearly stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts, Smith v. Murray, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings, if a state has procedural rules which bar its courts from

considering claims not raised in a timely fashion. The two routes of appeal in South Carolina are described above, (i.e., direct appeal, appeal from PCR denial) and the South Carolina Supreme Court will refuse to consider claims raised in a second appeal which could have been raised at an earlier time. Further, if a prisoner has failed to file a direct appeal or at PCR and the deadlines for filing have passed, he is barred from proceeding in state court.

If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. State procedural rules promote

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

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

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

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

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

Stated simply, if a federal habeas Petitioner can show (1) cause for his failure to raise the claim in the state courts, and (2) actual prejudice resulting from the failure, a procedural bar can be ignored and the federal court may consider the claim. Where a Petitioner has failed to comply with state procedural requirements and cannot make the required showing(s) of cause and prejudice, the federal courts generally decline to hear the claim. See Murray v. Carrier, 477 U.S. 478, 496 (1986).

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

ANALYSIS[4]

Procedurally Barred Claim

Ground Two

As an initial matter, Respondent contends that Petitioner's claim in Ground Two is procedurally defaulted in state court and barred from federal habeas review. Specifically, Respondent argues that Petitioner's claim of prosecutorial misconduct was presented in Petitioner's PCR application, but was not ruled upon by the PCR court. Petitioner did not file a Rule 59(e) motion. Respondent asserts that Petitioner cannot show cause and prejudice for his failure to preserve the claim in state court. In his response to the motion for summary judgment, Petitioner does not address this argument but basically repeated the same grounds he raised in his petition. This issue was not addressed in the PCR court order and was not raised or addressed in the PCR appeal. Therefore, this issue was procedurally defaulted in state court. Thus, it is procedurally barred from federal habeas review absent a showing of cause and actual prejudice, or by showing actual innocense. Martinez v. Ryan, 132 S. Ct. 1309 (2012); Wainwright v. Sykes, 433 U.S. 72, 87, 90-91 (1977). Because Petitioner has failed to show cause for his procedural default on this issue, his claim is procedurally barred.

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

Rodriguez v. Young, 906 F.2d 1153, 1159 (7th Cir. 1990), cert. denied, 498 U.S. 1035 (1991) ("Neither cause without prejudice nor prejudice without cause gets a defaulted claim into Federal Court."); Turner v. Jabe, 58 F.3d 924 (4th Cir.1995) (Absent a showing of "cause", the court is not required to consider "actual prejudice."). Petitioner has not presented any arguments to show cause for his procedural default of this claim. Therefore, it is recommended that Ground Two be dismissed as procedurally barred.

Grounds Three and Four

Respondent argues that Petitioner's Grounds Three and Four are not cognizable federal claims appropriate for review so that the procedural analysis does not apply. In Ground Three, Petitioner argues that he was deprived of appellate review of his writ of certiorari because the order denying his writ from the State Supreme Court was signed by the Supreme Court's Deputy Clerk instead of a judge. Petitioner's argument pertains to a procedural decision of the State Supreme Court to authorize its Deputy Clerk to sign orders of dismissal which is not cognizable for federal habeas review. Further, as this pertains to the appeal from his PCR, it should be dismissed. Alleged defects in state PCR proceedings are not cognizable in a federal habeas action. Wright v. Angelone, 151 F.3d 151 (4th Cir.1998); Bryant v. Maryland, 848

F.2d 492, 493 (4th Cir.1988) (holding that errors and irregularities in connection with state PCR proceedings are not cognizable on federal habeas review).

In Ground Four, Petitioner argues that the trial court lacked subject matter jurisdiction to convict and sentence him because he had not been formally indicted. Deficiencies in state court indictments "are not ordinarily a basis for federal habeas corpus relief unless the deficiency makes the trial so egregiously unfair as to amount to a deprivation of the defendant's right to due process." Ashford v. Edwards, 780 F.2d 405, 407 (4th Cir. 1985). Additionally, claims arising from state law are not cognizable. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Jurisdiction is a non-cognizable state law issue. See Wright v. Angelone, 151 F.3d 151, 156-158 (4th Cir.1998). Accordingly, as Grounds Three and Four pertain to the state court's jurisdiction/state procedure, these issues should be dismissed. Therefore, it is recommended that Grounds Three and Four be dismissed.

Ground One

In Ground One, Petitioner alleges ineffective assistance of appellate counsel for failing to raise his preserved claim of a Brady violation instead of an unpreserved issue regarding the court's jury instruction on intent. Petitioner argues that he was charged with attempted murder, and one of the victims testified in addition to being

shot in his toe and leg, a bullet grazed his head. During deliberations, the jury sent a note to the trial judge asking whether or not the bullet grazed the victim's head. Petitioner argues that there was prosecutorial misconduct because the solicitor should have acquired the medical records of the victim and given them to Petitioner to assist in his defense. Respondent filed a response arguing that the Petitioner has not shown the decision of the PCR court constituted an unreasonable determination of the facts in light of the evidence presented, nor was the decision contrary to clearly established federal law. Therefore, Respondent asserts Petitioner is not entitled to relief on this ground and summary judgment should be granted.

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

To meet the first requirement, "[t]he defendant must show that counsel's

representation fell below an objective standard of reasonableness." Strickland, at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985) (quoting Strickland, reversed on other grounds, 476 U.S. 28 (1986)). The Court further held at page 695 that:

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

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

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

Strickland, at 694.

This issue was raised and ruled upon by the PCR court and raised in the PCR appeal. In the order of dismissal, the PCR court discussed the standard for analyzing

claims of ineffective assistance of appellate counsel under Strickland and concluded as follows:

> Precisely this procedure was followed here. Appellate Counsel testified she filed an Anders brief in this case because based upon her review of the entire record, she could discern no preserved, meritorious issues and she saw no basis for arguing that Applicant was not adequately advised of the dangers and disadvantages of self-representation. As Counsel testified, she argued the only potentially meritorious issue she could ascertain, but that the issue was not preserved due to Applicant's failure to preserve the issue at trial. The Court of Appeals dismissed the appeal pursuant to Anders. State v. Mays, 2015-UP-0179 (S.C. Ct. App. Filed April 8, 2015). Had the Court discovered any meritorious issues upon its independent review of the record, it would not have dismissed the appeal . . .
>
> In considering the record, the testimony and arguments presented at the evidentiary hearing, and this Court finds Applicant has shown neither deficiency nor prejudice with respect to this allegation. Appellate Counsel followed the procedure outlined in Anders and gave her basis for doing so and for raising the particular issue she addressed therein. Given that Applicant represented himself and clearly did so freely and voluntarily after appearing before three different judges on three separate occasions who inquired as to his understanding of the dangers and disadvantages of self-representation, Appellate Counsel's choice to file an Anders brief was objectively reasonable. Furthermore, because the Court of Appeals was required to conduct its own independent review of the record and nevertheless chose to dismiss the appeal, Applicant has failed to demonstrate the outcome of the appeal would have been different but for the alleged error of counsel. Accordingly, this Court finds Applicant failed to satisfy his burden of proving his allegations, and this application for post-conviction relief is therefore denied and dismissed with prejudice.

The PCR court found that Petitioner failed to meet the first and second prongs of Strickland. A presumption of correctness attaches to state court factual findings.

28 U.S.C. §2244(e)(1). Evans v. Smith, 220 F.3d 306 (4th Cir. 2000). The state PCR court's findings of fact are not only entitled to the presumption of correctness, 28 U.S.C. § 2254(e)(1), but also are supported by the record. The PCR court found no error on the part of appellate counsel. It found appellate counsel followed the Anders procedure and gave her basis for raising the issue she addressed in the Anders brief. By filing an Anders brief, the Court of Appeals was required to conduct its own independent review of the record to ensure the merits of the appeal were not overlooked. After conducting an independent review of the record, the Court of Appeals found no merit to the appeal in this case. The PCR court found that Appellate Counsel's choice to file the Anders brief was objectively reasonable.

The PCR court's rejection of the ineffective assistance of appellate counsel ground for relief did not result in an unreasonable application of Strickland and was not based upon an unreasonable determination of facts in light of the state court record. Moreover, Petitioner produced no witnesses or evidence at his PCR proceedings to support his assertions and to show prejudice. Bassette v. Thompson, 915 F.2d at 939, 941; cf. Bannister v. State, 509 S.E.2d at 809; Clark v. State, 434 S.E.2d at 267–268.

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

recommended that Respondent's motion for summary judgment be granted with respect to Petitioner's Ground One.

Ground Five

In Ground Five, Petitioner argues that he did not knowingly and intelligently waive his right to assistance of counsel. Specifically, Petitioner asserts he did not waive his right to assistance of counsel with a full understanding of the elements of his attempted murder charge and the available defenses.

Respondent filed a response in opposition asserting that the PCR court made a reasonable determination of the facts and its holding was not contrary to clearly established federal law. Additionally, Respondent argues that Petitioner was informed of the disadvantages of self-representation and advised to obtain counsel on multiple occasions before three different judges. However, Petitioner still elected to proceed *pro se.* Respondent argues that at the time Petitioner waived his right to counsel, Petitioner understood the legal proceedings, was aware of the nature of the charges against him, and said he understood the penalties he faced if convicted so that his election to proceed *pro se* was knowing, intelligent, and voluntary.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the

assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). "[C]ourts must take care not to force counsel upon a defendant, because in addition to the right to the assistance of counsel, the Sixth Amendment implicitly provides an affirmative right to self-representation." United States v. Singleton, 107 F.3d 1091, 1095–96 (4th Cir.1997) (citing Faretta, 422 U.S. at 806). A defendant may waive his right to counsel; however, a waiver of counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (citation omitted). Although no "precise procedure or litany for this evaluation" is required, the court must consider the record as a whole, including "the defendant's background capabilities and understanding of the dangers and disadvantages of self-representation." Singleton, 107 F.3d at 1097–98. "The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances-even though the defendant may not know the specific detailed consequences of invoking it." Iowa v. Tovar, 541 U.S. 77, 124 S.Ct. 1379,

158 L.Ed.2d 209 (2004)(citing United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002)).

In denying relief on this claim, the PCR court concluded as follows:

> Here, Applicant appeared before three different judges on three separate occasions prior to trial, and, each time, Applicant reiterated his desire to relieve counsel- and represent himself. (Tr. at 1-43). Applicant first appeared before Judge Cole on June 21, 2013. (Tr. at 1-13). Judge Cole questioned him about his education, whether he had faced criminal charges before, whether he had been represented by an attorney before, whether he had been to trial before, whether he understood the rules of court and rules of evidence, and what kind of experience or education he had concerning legal matters. (Tr. at 4-7). Judge Cole also asked Applicant if he thought he was capable of representing himself, (Tr. at 8:5-10), if he wished to represent himself if he could not afford to retain a different attorney, (Tr. at 8:11-9:6), whether he understood the "advantages and disadvantages and the pitfalls of attempting to represent" himself, (Tr. at 9:7-10), and whether he understood that he "assumed the risk of deficient representation" by choosing to represent himself. (Tr. at 9:14-17). Applicant acknowledged that he understood that if he chose to represent himself, he would have to follow the same rules that a lawyer would follow in court and that if he did not understand what to do, he would be at a distinct disadvantage. (Tr. at 10:12-20). Applicant confirmed that he was sure he wished to represent himself; however, he then stated that he would be amenable to having a different attorney from the public defender's office as long as it was not his current attorney. (Tr. at 10-1 1), As a result, Judge Cole stated he would consult with the Chief Public Defender to determine whether another public defender could be appointed. (Tr. at 13).

> Thereafter, on August 9, 2013, Applicant appeared before the Honorable Brian M. Gibbons to ask that his second appointed attorney be relieved. (Tr. at 15-19). Judge Gibbons again questioned Applicant about, whether he understood the perils of representing himself and whether he understood he would be held to the same standards as an actual attorney and that he would have to know all of the rules of procedure, rules of evidence, and courtroom decorum. (Tr. at 18-21). Applicant acknowledged that he understood by representing himself he could severely impact his case. (Tr. at 19).
>
> Lastly, on the third occasion, which was just prior to the start of trial, Judge Macaulay questioned Applicant and made a finding that Applicant "knowingly and intelligently and freely and voluntarily waived his right to counsel." (Tr. at 42:21-43:3).
>
> This Court finds the record clearly reflects that the trial judge ensured that Applicant made a knowing choice to represent himself with "eyes open" after being appropriately advised of the dangers and disadvantages of self-representation. Accordingly, Applicant has failed to present any evidence in support of this allegation and it is therefore denied and dismissed.

(ECF No. 14-1 at 334-335 of 365).

As argued by the Respondent, a review of the record shows the state court was not unreasonable in denying the petitioner relief under 2254(d)(1) since the PCR court found, as a factual matter, that the petitioner's waiver was made by a knowing choice with "eyes open" after being advised of the dangers and disadvantages of self-representation. The PCR court cited the three occasions that Petitioner went before

three different judges stating that he wanted to represent himself. He was appointed a second attorney which he also asked to be relieved. The three different judges questioned Petitioner on his understanding of the waiver and self representation. Additionally, the PCR court found that Petitioner failed to present any evidence in support of his allegation and the record reflects that he "knowingly and voluntarily waived his right to counsel after being advised by several judges of the perils of self-representation." (ECF No. 14-1 at 334 of 365). Further, a review of the record from the motion hearing to relieve counsel reveals the an attorney with the public defenders ' office was put on standby by the judge when relieved as second counsel. (ECF No. 14-9 at 25 and 35 of 310). The South Carolina Court of Appeals upon an Anders review did not find any meritorious issues including no error on the part of the trial court finding that Petitioner knowingly waived his right to counsel and was informed of the dangers of self-representation by the trial judge. A presumption of correctness attaches to state court factual findings. 28 U.S.C. §2244(e)(1); Evans v. Smith, 220 F.3d 306 (4th Cir. 2000). The State court's findings of fact are not only entitled to the presumption of correctness, 28 U.S.C. § 2254(e)(1), but also are supported by the record. The state court's determination was neither 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; nor a decision that was based

on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2). Accordingly, it is recommended that Respondent's motion for summary judgment be granted with regard to Ground Five.

Ground Six

In Ground Six, Petitioner argues that he was denied the right to a speedy trial. Petitioner states that the fourteen-month delay between his arrest and the trial resulted from the solicitor's efforts to convince Petitioner's co-defendant to testify against him.

In Barker v. Wingo, 407 U.S. 514, 530–32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Supreme Court adopted a four-part balancing test to evaluate speedy trial violation claims: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant timely asserted the right to a speedy trial; and (4) whether the defendant has suffered prejudice as a result of the delay. Under this test, the petitioner must show "that on balance, the four separate factors weigh in his favor." United States v. Thomas, 55 F.3d 144, 148 (4th Cir.1995). No one factor is determinative and all four factors must be considered together. Barker, 407 U.S. at 533. Additionally, the first factor (length of delay) acts as a triggering mechanism, i.e., if the delay is within normal limits, there is no need to consider the remaining factors. The length-of-delay

factor serves two functions in the speedy trial analysis. First, it operates as a preliminary inquiry to aid the court in determining whether "the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett v. United States, 505 U.S. 647, 651-52 (1992) (quoting Barker, 407 U.S. at 530). Once this hurdle is surpassed, the length of delay is balanced as one of the four factors in the remainder of the speedy trial analysis. See id. at 652. As noted by the Supreme Court, "as the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry." Doggett, 505 U.S. at 652 n.1.

Respondent asserts that the record has not been fully developed as to the length and reason for the delay, Petitioner's assertion of his right, and prejudice. However, Respondent contends that at the August 9, 2013, hearing on Petitioner's second motion to relieve counsel, the solicitor informed the court that efforts were being made to call the case for trial but Petitioner's co-defendant had a conflict of interest with the public defenders' office and had to be appointed a new attorney. (ECF No. 14-9 at 23-24 of 310). The solicitor stated that he tried to call the case that week for trial, but Petitioner fired his public defender so that the case was set for a later docket but again had to be removed because Petitioner moved to relieve his replacement

counsel and proceed *pro se*. At the September 30, 2013, motion hearing for Petitioner's motion for speedy trial, Petitioner said he had been detained for fourteen-months without trial, and the solicitor informed the court the case was set for trial on the next upcoming docket, the week of October 7. (ECF No. 14-9, at 32 of 310).The judge informed Petitioner that if his case was not brought to trial the week of October 7, he could petition for a modification of his bond. (ECF No. 14 at 34 of 310).

Based on the record, petitioner did file a motion asserting his right to a speedy trial. As pointed out during the hearings on Petitioner's motions to relieve counsel and for speedy trial, some of the delay was contributed to the filings of motions by Petitioner having counsel relieved on two different occasions.[5] Also, there was a delay due to the co-defendant's conflict with the public defender's office and new counsel had to be appointed for the co-defendant. Based on the motion hearings, the Solicitor indicated that he was attempting to schedule the trial as quickly as possible but unforeseen circumstances were causing delay. As the Respondent asserted, Petitioner has made no showing of how the alleged delay prejudiced him and did not present any witnesses at trial or at the PCR hearing to testify as to any harm.

[5] Petitioner was indicted during the October 2012 by the Spartanburg County Grand Jury. His first hearing on his motion to relieve counsel was held June 21, 2013. His second hearing on his motion to relieve counsel was held on August 9, 2013. Additionally, the trial date had to be postponed to appoint the co-defendant new counsel due to a conflict. (ECF No. 14-9 ar 23 of 310). Petitioner's trial began November 18, 2013.

Therefore, Petitioner has failed to show that the Anders review by the South Carolina Court of Appeals finding of no meritorious issues was unreasonable. The state court's determination was neither 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; nor a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2). Accordingly, it is recommended that Respondent's motion for summary judgment be granted with regard to Ground Six.

CONCLUSION

Based on the foregoing, it is RECOMMENDED that Respondent's motion for summary judgment (ECF No. 15) be GRANTED in its ENTIRETY, and the petition be dismissed without an evidentiary hearing and any outstanding motions be deemed moot.

Respectfully submitted,

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

May 23, 2019
Florence, South Carolina

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

~~Exhibit A~~

The Supreme Court of South Carolina

Javan Frederick Mays, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-000891

ORDER

Based on the vote of the Court, after careful consideration of the record and petitioner's *pro se* response, as required by *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), the petition for a writ of certiorari is denied and counsel's request to withdraw is granted.

FOR THE COURT

BY Brenda J. Healy
Chief Deputy CLERK

Columbia, South Carolina

October 10, 2018

cc:
Wanda H. Carter, Esquire
Jordan Adraine Cox, Esquire
Javan Fredrick Mays, 250287

Appendix D