APPENDIX-E

EXHIBIT

MIME-Version:1.0
From:SCDEfilingstat@scd.uscourts.gov
To:scd_ecf_nef@localhost.localdomain
Bcc:
--Case Participants: Melody Jane Brown (abennett@scag.gov, mbrown@scag.gov), Susannah R Cole (ddalessio@scag.gov, scole@scag.gov), Chief Judge R Bryan Harwell (harwell_ecf@scd.uscourts.gov)
--Non Case Participants:
--No Notice Sent:

Message-Id:<8972383@scd.uscourts.gov>
Subject:Activity in Case 9:18-cv-00748-RBH Barton v. Lewis Order on Report and Recommendation
Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** There is no charge for viewing opinions.**

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 3/29/2019 at 10:51 AM EDT and filed on 3/29/2019
Case Name: Barton v. Lewis
Case Number: 9:18-cv-00748-RBH
Filer:
WARNING: CASE CLOSED on 03/29/2019
Document Number: 71

Docket Text:
ORDER adopting Report and Recommendations of Magistrate Judge Bristow Marchant. The Court grants Respondent's second motion for summary judgment [ECF No. 29] and dismisses Petitioner's ◆ 2254 petition [ECF No. 1] with prejudice. Furthermore, the Court denies Petitioner's motion for a certificate of appealability [ECF No. 63]. Signed by Chief Judge R Bryan Harwell on 03/29/2019. (egra,)

9:18-cv-00748-RBH Notice has been electronically mailed to:

Melody Jane Brown mbrown@scag.gov, abennett@scag.gov

Susannah R Cole scole@scag.gov, ddalessio@scag.gov

9:18-cv-00748-RBH Notice will not be electronically mailed to:

Bobby Joe Barton
163629
Perry Correctional Institution
430 Oaklawn Rd
Pelzer, SC 29669

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=3/29/2019] [FileNumber=8972381-0
] [8c5ebc2879a898dbce5b7fa5fbf5f78e0799dcbce404dcedb2970251c6d2b0783e4
2293382433322a62b360e0df786a0d929065cbef9b373130f8101542760eb]]

PER CURIAM:

Bobby Joe Barton seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Barton's 28 U.S.C. § 2254 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). 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). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Barton has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, deny Barton's motion to place his appeal in abeyance, 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

Answers to Complaints

9:18-cv-00748-RBH-BM Barton v. Lewis

PRISONER,PROSE

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered by Cole, Susannah on 7/5/2018 at 2:34 PM EDT and filed on 7/5/2018

Case Name: Barton v. Lewis
Case Number: 9:18-cv-00748-RBH-BM
Filer: Scott Lewis
Document Number: 30

Docket Text:
RETURN and MEMORANDUM to Petition for Writ of Habeas Corpus [1] Petition for Writ of Habeas Corpus *filed* by Scott Lewis. (Attachments: # (1) State Court Documents Atth 1: Indictment, # (2) State Court Documents Atth 2: Trial Transcript of August 9-10, 2010, # (3) State Court Documents Atth 3: Final Brief of Appellant, # (4) State Court Documents Atth 4: Final Brief of Respondent, # (5) State Court Documents Atth 5: Appendix to Writ of Certiorari, # (6) State Court Documents Atth 6: Petition for Writ of Certiorari, # (7) State Court Documents Atth 7: Return to Petition for Writ of Certiorari, # (8) State Court Documents Atth 8: Order Denying Petition for Writ of Certiorari, # (9) State Court Documents Atth 9: PCR Application, filed September 12, 2014, # (10) State Court Documents Atth 10: Motion to Amend and Supplement Pleadings, # (11) State Court Documents Atth 11: Return to PCR Application, # (12) State Court Documents Atth 12: Appointment of Counsel, # (13) State Court Documents Atth 13: Objections Placed on the Record, # (14) State Court Documents Atth 14: Motion to preserve Record, # (15) State Court Documents Atth 15: Motion to Supplement Pleading, # (16) State Court Documents Atth 16: Motion to Relieve Counsel, # (17) State Court Documents Atth 17: Transcript, PCR Evidentiary Hearing of Feb 18, 2016, # (18) State Court Documents Atth 18: Order Relieving Counsel, # (19) State Court Documents Atth 19: Order Relieving Counsel, # (20) State Court Documents Atth 20: Motion for Reconsideration, # (21) State Court Documents Atth 21: Order Denying Motion for Reconsideration, # (22) State Court Documents Atth 22: Motion to Relieve Counsel/proceed Pro Se, # (23) State Court Documents Atth 23: Return to Motion to be Relieved, # (24) State Court Documents Atth 24: Order Warning Petitioner of Risks, # (25) State Court Documents Atth 25: Order Allowing Petitioner to Proceed Pro Se, # (26) State Court Documents Atth 26: Motion to Challenge Transcript, # (27) State Court Documents Atth 27: Order of Supreme Court Remanding for Hearing on Accuracy of Transcript, # (28) State Court Documents Atth 28: Transcript of Hearing Challenging the Accuracy of the PCR Hearing Transcript, # (29) State Court Documents Atth 29: Order Requiring Filing of Petition in Thirty Days, # (30) State Court Documents Atth 30: Petition for Writ of Certiorari, # (31) State Court Documents Atth 31: State's Motion to Compel, # (32) State Court Documents Atth 32:

Order Denying Petition ... Certiorari, # (33) Supporting Doc...nents Atth 33: Filed Remittitur, # (34) Certificate of Service)(Cole, Susannah)

9:18-cv-00748-RBH-BM Notice has been electronically mailed to:

Melody Jane Brown mbrown@scag.gov, tbrailey@scag.gov

Susannah R Cole scole@scag.gov, cmack@scag.gov

9:18-cv-00748-RBH-BM Notice will not be electronically mailed to:

Bobby Joe Barton
163629
Perry Correctional Institution
430 Oaklawn Rd
Pelzer, SC 29669

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=7/5/2018] [FileNumber=8513986-0]
[5a659e6d4eeadff424a6a5d5e46e1429e69247777ec5e13bc1c61742f9ad9b9bb9e1
090f53f9cc483a8dae356698442a59aece15c84468ebcf719660300e8cfb]]
Document description: State Court Documents Atth 1: Indictment
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=7/5/2018] [FileNumber=8513986-1]
[35618affc011331d2dbde8b00215b8b7c316a35c98d9b1a3d1a48b893e410b9d4a35
d7dbd5130f88b2e12456f3e166b6066fb2fcada6fab01c103a11c72a3ade]]
Document description: State Court Documents Atth 2: Trial Transcript of August 9-10, 2010
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=7/5/2018] [FileNumber=8513986-2]
[166a0fd518c26287bdfd0e20ef709f0f3cba63ce414f6a769ea9941fb6200f629505
a166d3bc90b4f658f448cf80c1a23359df5ebd9422beb56be2073441e67d]]
Document description: State Court Documents Atth 3: Final Brief of Appellant
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=7/5/2018] [FileNumber=8513986-3]
[adacefbbf64a2b38e9acadfa77823f80c37291e4182d80e06450a80a352fad01e178
6316e4654dbe3da2d04e34583e9a560ae2df2d6e3135168d12af4101ed3e]]
Document description: State Court Documents Atth 4: Final Brief of Respondent
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=7/5/2018] [FileNumber=8513986-4]
[a101affd2043182dc80001cba6fc5aaa0bcef67800c5a1b4ae045b4570d0503ddb8c

APPENDIX - F

EXHIBIT

FILED: September 4, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6650
(9:18-cv-00748-RBH)

BOBBY JOE BARTON

Petitioner - Appellant

v.

SCOTT LEWIS, 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

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6650

BOBBY JOE BARTON,

Petitioner - Appellant,

v.

SCOTT LEWIS, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. R. Bryan Harwell, Chief District Judge. (9:18-cv-00748-RBH)

Submitted: September 1, 2020 Decided: September 4, 2020

Before MOTZ and AGEE, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Bobby Joe Barton, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

FILED: October 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6650
(9:18-cv-00748-RBH)

BOBBY JOE BARTON

Petitioner - Appellant

v.

SCOTT LEWIS, Warden

Respondent - Appellee

ORDER

The court grants the motion to extend filing time and extends the time for filing the petition for rehearing to November 20, 2020. Appellant is advised that no further extensions will be granted absent a showing of extraordinary circumstances.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

F D: November 18, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6650
(9:18-cv-00748-RBH)

BOBBY JOE BARTON

Petitioner - Appellant

v.

SCOTT LEWIS, Warden

Respondent - Appellee

ORDER

The court grants the motion to extend filing time and extends the time for filing the petition for rehearing to December 07, 2020. No further extensions will be granted absent a showing of extraordinary circumstances.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

FILED: December 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6650
(9:18-cv-00748-RBH)

BOBBY JOE BARTON

Petitioner - Appellant

v.

SCOTT LEWIS, Warden

Respondent - Appellee

STAY OF MANDATE UNDER
FED. R. APP. P. 41(d)(1)

Under Fed. R. App. P. 41(d)(1), the timely filing of a petition for rehearing or rehearing en banc or the timely filing of a motion to stay the mandate stays the mandate until the court has ruled on the petition for rehearing or rehearing en banc or motion to stay. In accordance with Rule 41(d)(1), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

F): December 30, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6650
(9:18-cv-00748-RBH)

BOBBY JOE BARTON

Petitioner - Appellant

v.

SCOTT LEWIS, Warden

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

FILED: January 7, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6650
(9:18-cv-00748-RBH)

BOBBY JOE BARTON

Petitioner - Appellant

v.

SCOTT LEWIS, Warden

Respondent - Appellee

MANDATE

The judgment of this court, entered September 4, 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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Bobby Joe Barton, Petitioner, v. Scott Lewis, Warden, Respondent.	)	Civil Action No.: 9:18-cv-748-RBH **ORDER**

This matter is before the Court on the Report and Recommendation ("R&R") of United States Magistrate Judge Bristow Marchant.[1] [ECF No. 54]. The Magistrate Judge recommends the Court grant Respondent's second motion for summary judgment [ECF No. 29] and dismiss Petitioner's *pro se* petition under 28 U.S.C. § 2254 (the "§ 2254 petition") [ECF No. 1] with prejudice. Also pending is Petitioner's motion for a certificate of appealability [ECF No. 63].

Background[2]

Petitioner[3], a state inmate at the SCDOC's Perry Correctional Institution, brings this action *pro se* for a writ of habeas corpus by a person in state custody against Respondent. *See* Pet. at 1 [ECF No.

---

[1] The Magistrate Judge issued the R&R in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (D.S.C.), reviewing the § 2254 petition pursuant to the screening provisions of 28 U.S.C. §§ 1915(e)(2) and 1915A. The Court is mindful of its duty to liberally construe the pleadings of *pro se* litigants. *See Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978); *but see Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) ("Principles requiring generous construction of pro se complaints are not, however, without limits. *Gordon* directs district courts to construe pro se complaints liberally. It does not require those courts to conjure up questions never squarely presented to them.").

[2] The R&R summarizes the factual and procedural background of this case, as well as the applicable legal standards. *See* R&R at 1–8.

[3] The R&R's caption includes Petitioner's identification number with the South Carolina Department of Corrections ("SCDOC") as #182302; however, the § 2254 petition and a search of the SCDOC inmate locator indicate his identification number is #163629. *See* Inmate Search Detail Report, https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000163629 (last visited Mar. 21, 2019).

1].

A. State Court Proceedings

On August 10, 2010, Petitioner was convicted in South Carolina state court of armed robbery and sentenced to twenty-five years of imprisonment. R&R at 2; Verdict [ECF No. 30-1]; Trial Tr. at 267:10–12, 275:9 [ECF No. 30-2]. At trial, he was represented by attorney Susannah C. Ross ("trial counsel"). R&R at 2. On direct appeal, he was represented by attorney Lanelle Cantey Durant of the South Carolina Commission on Indigent Defense ("direct appeal counsel"). *Id.* The South Carolina Court of Appeals affirmed his conviction and sentence. *Id.* at 3; Ct. of Appeals Op. [ECF No. 30-5]. The South Carolina Supreme Court denied his petition for writ of certiorari. R&R at 3; Order Denying Writ [ECF No. 30-8].

Subsequently, Petitioner filed an application for post-conviction relief ("PCR") in state circuit court, raising as grounds: (1) ineffective assistance of trial counsel; (2) ineffective assistance of direct appeal counsel; (3) procedural due process; (4) prosecutorial misconduct; and (5) judicial misconduct. R&R at 3–4; Appl. for PCR [ECF Nos. 30-9, 30-10, 30-15]. Attorney Caroline Horlbeck ("PCR counsel") represented Petitioner during an evidentiary hearing on his PCR application, which the PCR judge denied. R&R at 4; Evidentiary Hr'g Tr. [ECF No. 30-17]; Order of Dismissal [ECF No. 30-18]. PCR counsel was relieved, and attorney R. Mills Arial, Jr. (also "PCR counsel"), who was subsequently appointed to represented Petitioner, filed a motion to reconsider [ECF No. 30-20], which was denied. R&R at 4; J. on Mot. to Recons. [ECF No. 30-21]. Petitioner then filed a motion to relieve counsel and for permission to proceed *pro se*. R&R at 4; Mot. to Relieve Counsel [ECF No. 30-22]. After warning Petitioner of the dangers of proceeding *pro se* and the advantages of allowing counsel to continue representing him, the South Carolina Supreme Court granted Petitioner's motion. R&R at 4; Orders

[ECF Nos. 30-24, 30-25].

On September 15, 2016, Petitioner filed a *pro se* motion challenging the accuracy of his PCR transcript. R&R at 5; Mot. Challenging PCR Tr. [ECF No. 30-26]. The South Carolina Supreme Court remanded the matter to the PCR judge for a hearing to determine the transcript's accuracy. R&R at 5; Remand Order [ECF No. 27]. The PCR judge determined there were no inaccuracies. R&R at 5; Hr'g on Mot. Challenging PCR Tr. [ECF No. 30-28]. Subsequently, Petitioner appealed the PCR court's order, raising four grounds alleging the PCR court erroneously rejected his claims that: (1) trial counsel was ineffective for failing to convey a formal plea offer, keep Petitioner reasonably informed of his case, and explain the plea offer so he could make an informed decision; (2) trial counsel was ineffective for failing to object to inadmissible evidence about prior convictions; (3) the prosecution knowingly used perjured testimony by prosecution witness Patricia Rice ("Rice"); and (4) the prosecution failed to tell investigators that they must not use Petitioner's arrest mug shot in its photo array. R&R at 5; Pet. for Cert. [ECF No. 30-30]. On February 15, 2018, the South Carolina Supreme Court denied a petition for writ of certiorari [ECF No. 30-32], and remittitur was filed with the state trial court on March 7, 2018 [ECF No. 30-33]. R&R at 5–6.

B. Federal Habeas Proceedings

On or about March 14, 2018[4], Petitioner timely filed his § 2254 petition, raising seventeen grounds.[5] Pet. at 5–11, 14–18; Resp. in Opp'n to Summ. J. at 2–5 [ECF No. 44]. On July 5, 2018, Respondent filed the instant second motion for summary judgment. [ECF No. 29]. On or about

---

[4] *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that a prisoner's pleading is filed at the moment of delivery to prisoner authorities for forwarding to the district court).

[5] As the R&R notes, Petitioner changed the grounds initially pursued in the § 2254 petition, clarifying his grounds in his response in opposition to Respondent's second motion for summary judgment. *See* R&R at 6–8.

November 2, 2018, after receiving three extensions of time, Petitioner filed a response in opposition [ECF No. 44], and on November 9, 2018, Respondent filed a reply thereto. [ECF No. 46]. On or about November 19, 2018, Petitioner filed a sur reply, which he subsequently supplemented twice. [ECF Nos. 48, 50, 51].

On December 11, 2018, the Magistrate Judge issued an order denying Petitioner's requests for a court-appointed attorney and an evidentiary hearing. [ECF No. 53]. On the same date, the Magistrate Judge issued the R&R, recommending the Court grant Respondent's second motion for summary judgment and dismiss the case with prejudice because: (1) the issues raised in grounds one through five were adjudicated on the merits in state court, the state court's decisions on those issues were not contrary to or an unreasonable application of clearly established federal law, and the decisions were not unreasonable determinations of the facts in light of the evidence presented, [R&R at 8–33]; and (2) Petitioner procedurally defaulted on the issues raised in grounds six through seventeen because he failed to properly pursue them in state court and he cannot overcome the defaults. R&R 33–36. The Magistrate Judge specifically advised the parties of the procedure for filing objections to the R&R and the consequences if they failed to do so. R&R at 52–53.

On or about February 11, 2019, after receiving two extensions of time, Petitioner timely filed objections to the R&R. [ECF No. 62]. On the same date, Petitioner filed the pending motion for a certificate of appealability. [ECF No. 63]. The matters are now ripe for the Court's consideration.

Standards of Review

A. R&R

The Magistrate Judge makes only a recommendation to the Court. The Magistrate Judge's recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court must conduct a

de novo review of those portions of the R&R 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 with instructions. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). However, the Court need not conduct a *de novo* review of "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate [Judge]'s proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of specific objections to the R&R, the Court reviews only for clear error. *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

B. Section 2254 Petition

The scope of a federal court's review of a habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is "highly constrained." *Lawrence v. Branker*, 517 F.3d 700, 707 (4th Cir. 2008). The Court cannot grant a § 2254 petition "with respect to any claim adjudicated on the merits in state court" unless the state court decision was "either contrary to, or an unreasonable application of, clearly established federal law as determined by the [United States] Supreme Court," *id.* (citing 28 U.S.C. § 2254(d)(1)), or if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Richey v. Cartledge*, 653 F. App'x 178, 184 (4th Cir. 2016) (per curiam) (citing 28 U.S.C. § 2254(d)(2)). The Court "must presume state court findings of fact to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *Id.* (citing 28 U.S.C. § 2254(e)(1)).

Objections

In his objections, Petitioner asserts the Magistrate Judge erred in: (1) concluding Petitioner failed to present anything other than conclusory allegations as to his claim that his counsel was ineffective, Objs. at 3; (2) rejecting Petitioner's claim that trial counsel was ineffective for failing to

convey a plea offer to him, Objs. at 7; (3) speculating that trial counsel had a legitimate tactical reason for failing to object to Rice's testimony where she blurted out, "he had already been incarcerated for something else . . . . He had made time for that!" Objs. at 15; (4) rejecting Petitioner's prosecutorial misconduct claim that the prosecutor knowingly used perjured testimony and failed to correct it, Objs. at 19; (5) rejecting Petitioner's prosecutorial misconduct claim that the prosecutor failed to tell investigators that they must not use Petitioner's arrest mug shot in their photo array lineup, Objs. at 28; (6) characterizing Petitioner's claim that he was denied the right to confront an adverse witness whose non-live testimony was used in trial as an ineffective assistance of counsel claim, Objs. at 33–34; (7) misconstruing Petitioner's claim that trial counsel failed to object to the prosecutor's closing statements, Objs. at 36; (8) rejecting Petitioner's claim that the 25-page limit for state appellate court briefs prejudiced him, Objs. at 41; (9) misconstruing that a mug-shot magazine was brought to light in Petitioner's state court hearing because the magazine was not admitted into evidence and any reference to it violated the rules of evidence, *id.*; and (10) denying Petitioner's request for appointment of counsel and an evidentiary hearing, Objs. at 43.

Petitioner also makes several objections related to the R&R's findings on Petitioner's PCR counsel, claiming the Magistrate Judge erroneously rejected Petitioner's claim that PCR counsel failed to raise ineffective-assistance-of-counsel claims against trial counsel for: (1) creating a conflict of interest, Objs. at 44; (2) failing to call prosecutor Mark Moyer as a witness to testify about a conversation he had with Rice while outside the presence of her attorney, Objs. at 46; (3) failing to investigate the circumstances of the case and possible witnesses present during the crime, Objs. at 48; (4) failing to put up a defense at trial, Objs. at 49; (5) failing to put the State's case to an adversarial testing, Objs. at 51; (6) failing to raise and argue a motion for an evidentiary hearing and motion to suppress a deadly weapon prior to trial, Objs. at 55; (7) advising Petitioner to not testify at trial, Objs.

at 56; and (8) failing to allege the prosecutor violated ethical rules and Petitioner's due process, Objs. at 58.

The Court notes Petitioner has not made specific objections to the R&R as required by 28 U.S.C. § 636(b)(1). His objections are general or merely rehash the same arguments made in his petition and response in opposition to Respondent's second motion for summary judgment. However, in an abundance of caution, the Court carefully reviews his objections and conducts a *de novo* review of Petitioner's grounds.

Discussion

A. Grounds One through Five (Claims Adjudicated on the Merits)

"Before seeking federal habeas review of a claim, a petitioner ordinarily must raise that claim in the state court, complying with state procedural rules and exhausting available state remedies." *Gray v. Zook*, 806 F.3d 783, 797–98 (4th Cir. 2015). "[I]f a claim is exhausted in state court and not procedurally defaulted, then it was adjudicated on the merits and is subject to review under the deferential standards set forth in [28 U.S.C.] § 2254(d)." *Id.*

The Court cannot grant habeas relief on the following claims unless the state court decision was "either contrary to, or an unreasonable application of, clearly established federal law as determined by the [United States] Supreme Court," *Lawrence*, 517 F.3d at 707 (citing 28 U.S.C. § 2254(d)(1)), or if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Richey*, 653 F. App'x at 184 (citing 28 U.S.C. § 2254(d)(2)).

1. **Ground One**: Trial court erred in denying motion to suppress victim's identification of Petitioner because photo lineup was unreliable and unduly suggestive

Petitioner presented this claim on direct appeal, and the South Carolina Court of Appeals rejected it, holding the trial court properly denied the motion to suppress. *See* Ct. of Appeals Op. [ECF

No. 30-5 at 4–5]. The trial court held a hearing on the photo lineup pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972). At a *Biggers* hearing, the trial court must assess the reliability of a victim's identification of a suspect via a photographic lineup. *See State v. Liverman*, 727 S.E.2d 422, 426 (S.C. 2012) (citing *Biggers*, 409 U.S. at 198) (recognizing two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification: (1) "whether the identification resulted from unnecessary and unduly suggestive police procedures"; and (2) "if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed"). During Petitioner's *Biggers* hearing, an issue arose about a mug-shot magazine featuring Petitioner's mug shot that the victim had allegedly seen prior to identification. *See* Trial Tr. 40:4–89:5. The trial court determined that the magazine was inadmissible and caused no *Biggers* issue because the magazine was not the result of governmental action. *Id.* at 88:6–89:2.

Later, during the PCR proceedings, Petitioner claimed that trial counsel was ineffective because she mentioned the magazine twenty-five time and the prosecutor mentioned it eight times when the magazine had been ruled inadmissible. At the PCR hearing, trial counsel testified that she had mentioned the magazine to discredit the lineup and the victim's identification. The PCR court found this testimony credible and further found that Petitioner failed to meet his burden of proving trial counsel should have objected to any mention of the magazine since it was part of trial counsel's defense and she had a valid strategic reason for mentioning it. The PCR court concluded that Petitioner failed to prove that trial counsel was deficient or that he was prejudiced. Order of Dismissal [ECF No. 30-18 at 14].

The Court finds that the PCR court's conclusion that the trial court held a proper *Biggers* hearing before denying Petitioner's motion to suppress was not contrary to, or involved an unreasonable application of clearly established federal law. Furthermore, nothing indicates that the PCR court's

decision was based on an unreasonable determination of the facts in light of the evidence presented in the PCR proceeding. The Court "must presume state court findings of fact to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *Richey*, 653 F. App'x at 184 (citing 28 U.S.C. § 2254(e)(1)). Petitioner fails to rebut that presumption. Therefore, the Court cannot grant habeas relief with respect to ground one of his § 2254 petition, and that claim is dismissed.

2. **Ground Two**: Trial counsel failed to inform Petitioner of plea offer and its terms and conditions, depriving his ability to make an informed decision

Petitioner presented this claim in his PCR proceedings and properly exhausted it. A federal court may grant habeas relief on "ineffective assistance" grounds even when the state court has already rejected such claims if the state court's decision was "contrary to, or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing 28 U.S.C. § 2254(d)(1)). When the state court's application of federal law is challenged, "it must be shown to be not only erroneous, but objectively unreasonable." *Id.* (citations omitted).

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012); *see Lafler v. Cooper*, 566 U.S. 156, 162 (2012) ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."). "[T]he two-part *Strickland v. Washington*[6] test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Lafler*, 566 U.S. at 162–63 (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). The performance prong of *Strickland* "requires a defendant to show 'that counsel's representation fell below an objective standard of reasonableness.'" *Id.* (quoting *Hill*, 474 U.S. at 57). The prejudice prong of

---

6 466 U.S. 668 (1984) (establishing the two-prong test for ineffective assistance of counsel claims).

Strickland requires a defendant to "show that there 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. "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163 (citations omitted).

Here, the PCR court properly applied *Strickland* to Petitioner's claim about the plea offer, finding that Petitioner failed to meet his burden of proving that trial counsel did not adequately convey and discuss the plea offer. Order of Dismissal [ECF No. 30-18 at 5–7]. Accordingly, the Court finds that the PCR court's decision was not contrary to, or involved an unreasonable application of clearly established federal law. Furthermore, nothing indicates that the PCR court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the PCR proceeding. The PCR court found credible trial counsel's testimony that she conveyed the plea offer and explained its terms to Petitioner and that Petitioner rejected the offer and refused to see her for several months, noting that trial counsel's file contained the plea offer letter from the State and her notes about meeting with Petitioner. *Id.* at 6–7. Accordingly, the PCR court concluded that trial counsel fulfilled her responsibilities with respect to the plea offer. The Court "must presume state court findings of fact to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *Richey*, 653 F. App'x at 184 (citing 28 U.S.C. § 2254(e)(1)). Petitioner has not rebutted that presumption. Therefore, the Court cannot grant habeas relief with respect to ground two of his § 2254 petition, and that claim is dismissed.

3. **Ground Three**: Trial counsel failed to object to Rice's testimony about Petitioner's character

Petitioner presented this claim in his PCR proceedings and properly exhausted it. During the PCR proceedings, Petitioner claimed that trial counsel was ineffective for failing to object to

inadmissible testimony when Rice testified about a past criminal domestic violence charge she brought against Petitioner that was subsequently dismissed because he "had already been incarcerated for something else. He had made time for that. That was in the past. Let it go." Order of Dismissal [ECF No. 30-18 at 11 (citing Trial Tr. at 175:7–18, ECF No. 30-2)]. The PCR court found that Petitioner failed to meet his burden of proving trial counsel should have objected to this testimony. *Id.* Trial counsel testified that she made a strategic decision to not object because Rice's comment was brief and she did not want to draw more attention to it. *Id.* The PCR court found trial counsel articulated a valid reason for not objecting and Petitioner failed to demonstrate he suffered any prejudice as a result of the testimony. *Id.* (citing *Roseboro v. State*, 454 S.E.2d 312, 313 (S.C. 1995); *White v. State*, 417 S.E.2d 529, 531 (S.C. 1992)). The Court "must presume state court findings of fact to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *Richey*, 653 F. App'x at 184 (citing 28 U.S.C. § 2254(e)(1)). Petitioner fails to rebut that presumption. Accordingly, nothing indicates that the PCR court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the PCR proceeding. Furthermore, the Court finds that the PCR court's decision was not contrary to clearly established federal law. Therefore, the Court cannot grant habeas relief with respect to ground three of his § 2254 petition, and that claim is dismissed.

4. **Ground Four**: Prosecutor knowingly used perjured testimony from Rice
Ground Five: Prosecutor engaged in misconduct by using photos from a mug-shot magazine in the lineup used to identify Petitioner

The PCR court discussed these issues as ineffective-assistance-of-counsel claims based on Petitioner's testimony that trial counsel failed to argue prosecutorial misconduct for using perjured testimony and a fundamentally unfair photo lineup. Order of Dismissal [ECF No. 30-18 at 10–11, 15–16]. However, in his PCR appeal and instant response in opposition, Petitioner re-characterized these claims as ones for prosecutorial misconduct. *See* Pet. for Cert. [ECF No. 30-30 at 18–22, 23–25];

Resp. in Opp'n [ECF No. 44 at 16–24, 24–29]. The Magistrate Judge noted that straight prosecutorial misconduct claims are direct appeal issues, and under South Carolina law, "[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for [PCR]." R&R at 29 (citing *Portee v. Stevenson*, C.A. No.: 8:15-cv-487-PMD-JDA, 2016 WL 690871, at *2 (D.S.C. Feb. 22, 2016)). Technically, these claims are procedurally defaulted. However, since Respondent failed to raise this, the Magistrate Judge discussed these claims as Petitioner presents them.[7]

To establish prosecutorial misconduct, Petitioner must demonstrate that "the prosecutor's conduct was improper and that it prejudicially affected his substantial rights." *United States v. Pepke*, 662 F. App'x 225, 226–27 (4th Cir. 2016) (per curiam) (citing *United States v. Caro*, 597 F.3d 608, 624–25 (4th Cir. 2010)). The PCR court noted the prosecutor's testimony that he had no concerns that Rice perjured herself and had no doubt she was telling the truth. ECF No. 30-18 at 10. The PCR court found that Petitioner failed to demonstrate Rice offered incorrect or perjured testimony. The Court "must presume state court findings of fact to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *Richey*, 653 F. App'x at 184 (citing 28 U.S.C. § 2254(e)(1)). Petitioner has not rebutted that presumption. Accordingly, nothing indicates that the PCR court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the PCR proceeding. Furthermore, the Court finds that the PCR court's decision was not contrary to

---

[7] Even if the Court construes grounds four and five as ineffective-assistance-of-counsel claims for PCR counsel's failure to raise appellate counsel's ineffectiveness for failing to pursue prosecutorial misconduct claims on direct appeal, such alleged deficiency by PCR counsel is one step removed from the scenario where *Martinez* applies: "where a claim of ineffective trial counsel asserted in a § 2254 petition is procedurally defaulted because of a lack of effective legal assistance during the first level of state-court collateral review." *See Portee*, 2016 WL 690871 at *3 ("Instead of PCR counsel's error defaulting the underlying § 2254 ground, it defaulted a basis for excusing the default of that underlying ground."). Moreover, any alleged deficiency by PCR counsel relates to ineffective appellate counsel, not trial counsel, and "*Martinez* does not apply to ineffective assistance of appellate counsel claims." *Neumon v. Cartledge*, No. 8:14-cv-2256-RMG, 2015 WL 4607732, at *11 n.12 (D.S.C. July 31, 2015). Additionally, *Martinez* does not apply where the underlying defaulted ground was one of prosecutorial misconduct. *Hilton v. McCall*, C/A No. 1:12-1540-TMC, 2013 WL 40117341, at *2 (D.S.C. Aug. 5, 2013).

clearly established federal law. Therefore, the Court cannot grant habeas relief with respect to grounds four and five of his § 2254 petition, and those claims are dismissed.

B. Grounds Six through Seventeen (Procedurally Defaulted Claims)

In his objections related to these grounds (listed from page 44 onward of his filing), Petitioner admits he procedurally defaulted on the claims raised therein; however, he asserts the R&R errs in recommending that he fails to overcome the default. *See* Objs. at 44.

Procedural default bars the Court's consideration of a habeas claim. *Richey*, 653 F. App'x at 184 (citing 28 U.S.C. § 2254(b)); *see Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule."). To overcome a default, a petitioner must show "sufficient cause for his failure to raise the claim below and actual prejudice resulting from that failure." *Richey*, 653 F. App'x at 184 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

Here, Petitioner bases his claims in grounds six through nine on the alleged ineffective assistance of trial counsel; his claims in grounds ten through seventeen are based on the alleged ineffective assistance of PCR counsel.

1. Ineffective Assistance of Trial Counsel (Grounds Six through Nine)

Although Petitioner raised the claims in grounds six[8] through nine in his initial PCR proceedings, he failed to pursue them in his PCR appeal. *Compare* Appl. for PCR [ECF Nos. 30-9, 30-10, 30-15] (raising these grounds), *with* Pet. for Writ (raising four unrelated grounds). Because he failed to preserve these issues, they are procedurally barred from federal review. 28 U.S.C. § 2254(b); *see Sullivan v. Padula*, 2013 WL 876689, at *6 (D.S.C. Mar. 8, 2013) (citing *Smith v. Murray*, 477 U.S. 527, 533 (1986)) (holding that ineffective-assistance-of-trial-counsel claim not pursued in PCR appeal was procedurally barred).

To overcome this default, Petitioner must show cause and prejudice. As "cause" for his default on grounds six through nine, Petitioner points to his *pro se* status and the state court's 25-page limit for briefs, which he contends prevented him from properly pursuing these claims. Resp. in Opp'n at 29–31 (stating Petitioner could litigate only four claims in a 25-page limit with no attorney to assist), 34 (ground six: "because of no attorney [Petitioner] has demonstrated cause and shown prejudice"), 38 (ground seven: "because there was no attorney . . . and [Petitioner] is a layman[,] he has demonstrated cause and shown prejudice to defeat procedural bar"), 41 (ground eight: same).[9]

Petitioner was specifically warned by the state court of the hazards of proceeding *pro se*, and

---

[8] As the R&R notes, in ground six, Petitioner alleges a Sixth Amendment Confrontation Clause violation, claiming he was denied the right to confront an adverse witness, the victim's brother, whose testimony was used at trial. R&R at 34 n.6; *see* Resp. at 31–34. However, during his PCR proceedings, Petitioner presented this as an ineffective-assistance-of-trial-counsel claim, and the PCR court ruled on that claim as presented. See ECF No. 30-18 at 9–10. The R&R correctly recommends that under either posture, this claim is procedurally barred. To the extent the claim is an alleged Sixth Amendment violation, Petitioner must have raised it on direct appeal, which he did not. In South Carolina, "[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for [PCR]." R&R at 29 (citing *Portee*, 2016 WL 690871 at *2). Construing the claim as one for ineffective assistance of trial counsel—as the PCR court did—Petitioner procedurally defaulted on it by failing to raise this claim in his PCR appeal.

[9] Petitioner does not specifically argue any cause with respect to the default of ground nine; however, in light of the Court's duty to liberally review *pro se* pleadings, the Court assumes Petitioner intended to make the same "cause" argument for this ground as he does for grounds six through eight.

he chose to do so anyway. *See* ECF Nos. 30-24, 30-25. The Court finds that Petitioner's decision to proceed *pro se* and his inability to state his claims within the 25-page limit for briefs do not constitute cause to excuse his procedural default of grounds six through nine. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'ineffective assistance of counsel.'"); *see also* Holloway *v. Smith*, No. 95-7737, 81 F.3d 149 (Table), 1996 WL 160777, at *1 (4th Cir. 1996) (per curiam) (citing *Miller v. Bordenkircher*, 764 F.2d 245, 251–52 (4th Cir. 1985)) ("[Petitioner] does not meet the cause and prejudice standard because unfamiliarity with the law and his pro se status do not constitute adequate justification to excuse his failure to present the claim earlier."); *Petrick v. Thornton*, 2014 WL 6626838, at *4 (M.D.N.C. Nov. 21, 2014) (quoting *Jones v. Armstrong*, 367 F. App'x 256, 258 (2d Cir. 2010)) ("'[T]he right of self-representation does not exempt a party from compliance with relevant rules of procedural law. . . . [Petitioner's] pro se status, without more, cannot constitute cause sufficient to excuse the procedural default . . . ."). Accordingly, the Court cannot grant habeas relief with respect to grounds six through nine of his § 2254 petition, and those claims are dismissed.

2. Ineffective Assistance of PCR Counsel (Grounds Ten through Seventeen)

Grounds ten through seventeen were not raised in Petitioner's initial PCR proceedings. *See* Appl. for PCR [ECF Nos. 30-9, 30-10, 30-15]. Accordingly, those claims are procedurally barred. 28 U.S.C. § 2254(b); *see Cudd v. Ozmint*, C/A No. 0:08-2421-RBH, 2009 WL 3157305, at *3 (D.S.C. Sept. 25, 2009) (holding that issue not considered by PCR court was procedurally barred); *see also White v. Burtt*, 2007 WL 709001, at *8 (D.S.C. Mar. 5, 2007) (citing *Pruitt v. State*, 423 S.E.2d 127, 127–28 (S.C. 1992)) (holding that issue must be raised to and ruled on by the PCR court in order to be preserved for review). To overcome this default, Petitioner must show cause and prejudice. As "cause" for his default on grounds ten through seventeen, Petitioner points to the alleged ineffectiveness of his

PCR counsel for failing to raise these grounds. *See, e.g.*, Resp. in Opp'n at 46, 49 ("[Petitioner] has demonstrate[d] . . . cause to excuse default because [PCR] counsel . . . was ineffective . . . for failing to raise [ineffective assistance] of trial counsel).

Typically, "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings" is not a ground for relief under § 2254. 28 U.S.C. § 2254(i); *see Martinez*, 566 U.S. at 9 ("[A]n attorney's ignorance or inadvertence in a [PCR] proceeding does not qualify as cause to excuse a procedural default."). However, under *Martinez*, a narrow exception permits inadequate assistance of counsel at initial-review collateral proceedings—"a prisoner's 'one and only appeal'" for a claim of ineffective assistance at trial— to establish cause for his procedural default. *Id.* at 8, 9 (quoting *Coleman v. Thompson*, 501 U.S. 722, 756 (1991)). "Cause" to excuse a default exists where:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective-assistance-of-counsel [claim] . . . be raised in an initial-review collateral proceeding.

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (alteration in original) (citing *Martinez*, 556 U.S. at 14–16).

An underlying ineffective-assistance-of-counsel claim is "substantial" if it has 'some merit.'" *Richey*, 653 F. App'x at 184 (quoting *Martinez*, 566 U.S. at 14). "Relatedly, to show ineffective assistance, the petitioner must make a 'substantial' showing with respect to both counsel's competency (first-prong *Strickland*) and prejudice (second-prong *Strickland*)." *Teleguz v. Zook*, 806 F.3d 803, 815 (4th Cir. 2015). To make a substantial showing of incompetency, the petitioner must demonstrate "'that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment." *Id.* (quoting *DeCastro v. Branker*, 642 F.3d 442, 450 (4th Cir. 2011)). To make

a substantial showing of prejudice, the petitioner must demonstrate "that 'counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable' i.e., that there was 'a substantial, not just conceivable, likelihood of a different result." *Id.* (quoting *DeCastro*, 642 F.3d at 450).

Accordingly, the Court first examines whether the alleged ineffective assistance of trial counsel undergirding Petitioner's ineffective-assistance-of-PCR-counsel claims have "some merit," thus demonstrating cause. If the Court finds these claims lack merit, then there is no "cause" for Petitioner's procedural default on grounds ten through seventeen.

a. **Ground Ten**: PCR counsel was ineffective for failing to raise trial counsel's conflict of interest at trial

Petitioner contends that trial counsel created a conflict of interest because she divulged Petitioner's prior relationship with Rice to investigators. Resp. in Opp'n at 47–50. During pre-trial motions, Petitioner made a *pro se* motion to relieve trial counsel because of this divulgence, testifying that he told trial counsel in confidence that he had lived with Rice. Trial Tr. at 7:24–10:22. In response, trial counsel stated that she did not believe this information was given in confidence and during a motion to reconsider Petitioner's bond, she may have asked investigating officer Mike Jarvis whether he knew Petitioner and Rice had been in a relationship in an effort to persuade the court to reconsider giving Petitioner a bond. *Id.* at 10:24–11:23; 12:22–13:11. She further stated that because Rice was the prosecution's witness, they would learn this information regardless. *Id.* at 11:11–13. Prosecutor Mark Moyer responded that he knew about the relationship independently from Rice, not based on anything trial counsel said at the bond hearing. *Id.* at 15:8–16:1. The trial court denied Petitioner's motion. *Id.* at 16:12.

"To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must

establish that (1) his attorney labored under 'an actual conflict of interest' that (2) 'adversely affected his lawyer's performance.'" *Mickens v. Taylor*, 240 F.3d 348, 355 (4th Cir. 2001) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). In South Carolina, "[a]n actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant[']s." *State v. Gregory*, 612 S.E.2d 449, 450 (S.C. 2005). "The mere possibility defense counsel may have a conflict of interest is sufficient to impugn a criminal conviction." *Id.* (citation omitted).

Here, there is no actual conflict of interest because Petitioner's allegations fail to show that trial counsel owed any duty to another party. Thus, Petitioner fails to show "some merit" to the claim undergirding his ineffectiveness-of-PCR-counsel claim in ground ten. Accordingly, he fails to demonstrate "cause" to overcome his default. Therefore, the Court cannot grant habeas relief with respect to ground ten of his § 2254 petition, and that claim is dismissed.

b. **Ground Eleven**: PCR counsel was ineffective for failing to raise trial counsel's failure to call the prosecutor to the witness stand and question him about his conversation with Rice while she was outside her attorney's presence

Ground Seventeen: PCR counsel was ineffective for failing to raise trial counsel's failure to claim that the prosecutor violated the rules of professional ethics and cannons of law and denying Petitioner's due process

Petitioner contends trial counsel was ineffective for failing to call the prosecutor as a witness to question him about his conversation with Rice. Resp. in Opp'n at 50. Relatedly, he claims trial counsel was ineffective for failing to claim the prosecutor violated the law and legal ethics for his conversation with Rice. *Id.* at 63–64.

With respect to calling the prosecutor as a witness, a defendant who wishes to do so "must demonstrate a compelling and legitimate reason." *United States v. Regan*, 103 F.3d 1072, 1083 (2d Cir. 1997) (citation omitted), *cert. denied*, 521 U.S. 1106 (1997); *see also United States v. Roberson*, 897 F.2d 1092, 1098 (11th Cir. 1990) (quoting *United States v. Dupuy*, 760 F.2d 1492, 1498 (9th Cir. 1985))

("As the . . . Ninth Circuit has held, courts have properly refused to permit a prosecutor to be called as a defense witness 'unless there is a compelling need.'"); *United States v. Birdman*, 602 F.2d 547, 552–53 (3d Cir. 1979) (collecting cases) ("The courts have shared the legal profession's disapproval of the double role of advocate-witness. In particular, the federal courts have almost universally frowned upon the practice of a Government prosecutor testifying at the trial of the case he is prosecuting, whether for or against the defendant . . . ."). A participating prosecutor should not be called as a witness "unless all other sources of possible testimony have been exhausted." *United States v. West*, 680 F.2d 652, 654 (9th Cir. 1982) (citing *United States v. Torres*, 503 F.2d 1120, 1126 (2d Cir. 1974)).

Here, trial counsel cross-examined Rice about any bias she had to testify against Petitioner, including offers from the prosecution to testify in exchange for dismissal of criminal charges against her, which Rice denied. Trial Tr. 168:25–175:4. Rice herself was a source of testimony to probe her conversation with the prosecution, and there was no compelling or legitimate reason to call the prosecutor to the witness stand. Accordingly, trial counsel was not ineffective for failing to call the prosecutor as a witness.

With respect to any ethical or legal violation, there is no prohibition against a prosecutor meeting with a witness or co-defendant in a criminal case. There is no indication of any ethical or legal violations by the prosecutor here. In the absence of any indication of ethical or legal violations by the prosecutor, trial counsel was not ineffective for failing to claim otherwise.

Petitioner fails to show "some merit" to the claims supporting his ineffectiveness-of-PCR-counsel claim in grounds eleven and seventeen. Accordingly, he fails to demonstrate "cause" to overcome his default. Therefore, the Court cannot grant habeas relief with respect to grounds eleven and seventeen of his § 2254 petition, and those claims are dismissed.

c. **Ground Twelve**: PCR counsel was ineffective for failing to raise trial counsel's failure to investigate the case's circumstances and possible witnesses

Ground Thirteen: PCR counsel was ineffective for failing to raise trial counsel's failure to put up a defense

Ground Fourteen: PCR counsel was ineffective for failing to raise trial counsel's failure to put the State's case to an adversarial testing

Petitioner contends trial counsel was ineffective for various alleged failings, including failure to investigate, failure to put up a defense, and failure to test the State's case against him. Resp. in Opp'n at 53–60. However, the record refutes these claims. For example: (1) Petitioner gave trial counsel the names of several witnesses, and trial counsel interviewed some of them, but Petitioner did not ask trial counsel to contact several potential witnesses, Evidentiary Hr'g Tr. at 42:5–44:1 [ECF No. 30-17]; (2) trial counsel objected to the photo lineup used to identify Petitioner, moved to suppress it, cross-examined the officer who conducted the lineup and the victim who identified Petitioner, and retained an expert witness who testified about the unreliability of eyewitness identifications, Trial Tr. 40:4–9, 48:16–53:14, 64:15–68:6, 70:21–79:5; (3) cross-examined the responding officer about the victim's possible intoxication at the time of the robbery, *id.* at 152:11–156:5; (4) cross-examined Rice about her bias to testify against Petitioner, *id.* at 168:19–175:4; (5) moved for a directed verdict, which was denied, *id.* at 208:4–209:1; (6) questioned in closing arguments whether the prosecution met its burden of proof, *id.* at 229:14–245:4; and (7) successfully obtained Petitioner's acquittal on the weapon charge, *id.* at 267:12–15.

Even assuming trial counsel failed to investigate certain witnesses favorable to the defense, raise additional defenses, and further challenge the State's case, Petitioner fails to show the likelihood of a different trial outcome. Petitioner fails to show "some merit" to the claims supporting his ineffectiveness-of-PCR-counsel claim in grounds twelve, thirteen, and fourteen. Accordingly, he fails

to demonstrate "cause" to overcome his default. Therefore, the Court cannot grant habeas relief with respect to grounds twelve, thirteen, and fourteen of his § 2254 petition, and those claims are dismissed.

d. **Ground Fifteen**: PCR counsel was ineffective for failing to raise trial counsel's failure to argue a motion for an evidentiary hearing and to suppress a deadly weapon

Petitioner contends that trial counsel was ineffective for failing to move for an evidentiary hearing to suppress a knife introduced into evidence by the prosecution. Resp. in Opp'n at 60–61. Petitioner was indicted for armed robbery and possession of a weapon during the commission of a violent crime. The victim testified that when Petitioner attacked him, he held a knife to his throat, even though the victim could not see it. Trial Tr. at 128:1–3. Rice testified that she was present during the robbery but because it was dark and Petitioner had his back to her, she could not see a weapon. *Id.* at 167:1–10. The arresting officer, Johnny Brown, testified that when he arrested Petitioner and patted him down, he found a knife in one of Petitioner's front pockets. *Id.* at 182:5–10. With no objection from the defense, the prosecution introduced the knife into evidence during investigating officer Mike Jarvis's testimony. *Id.* at 194:6–18. However, the jury acquitted Petitioner of the weapon charge. Accordingly, Petitioner cannot show that even if trial counsel had made a motion to suppress the weapon, the outcome of his trial would have been different. Petitioner fails to show "some merit" to the claims supporting his ineffectiveness-of-PCR-counsel claim in ground fifteen. Accordingly, he fails to demonstrate "cause" to overcome his default. Therefore, the Court cannot grant habeas relief with respect to ground fifteen of his § 2254 petition, and that claim is dismissed.

e. **Ground Sixteen**: PCR counsel was ineffective for failing to raise trial counsel's bad advice to Petitioner to not testify in his own defense

Petitioner contends trial counsel was ineffective for failing to properly advise him to testify in his own defense. Resp. in Opp'n at 61–63. However, the record shows that Petitioner did not want to

testify. The trial court advised Petitioner of his right to testify, and he responded under oath that he and trial counsel discussed the matter and that he made the decision to remain silent. Trial Tr. at 209:11–210:13. In his response in opposition, Petitioner alleges trial counsel advised him to remain silent because testifying would allow the prosecution to introduce his past convictions into evidence. Resp. in Opp'n at 62. However, he alleges no improper threats or coercion.

"Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Id.* (citations omitted); *but see United States v. Stevens*, No. 96-7899, 129 F.3d 1261 (Table), 1997 WL 716228, at *1–2 (4th Cir. 1997) (per curiam) (remanding case for an evidentiary hearing after finding federal habeas prisoner's claim that counsel prevented him from testifying on his own behalf by threatening him with a more severe sentence if he testified was "potentially meritorious" because the trial court failed to resolve a factual dispute about the alleged threat).

Even assuming trial counsel failed to properly advise Petitioner about testifying in his own defense, Petitioner fails to show the likelihood of a different trial outcome given the evidence of his guilt presented at trial. Petitioner fails to show "some merit" to the claims supporting his ineffectiveness-of-PCR-counsel claim in ground sixteen. Accordingly, he fails to demonstrate "cause" to overcome his default. Therefore, the Court cannot grant habeas relief with respect to ground sixteen of his § 2254 petition, and that claim is dismissed.

In summation, Petitioner fails to show "some merit" to the alleged ineffective assistance of trial counsel undergirding Petitioner's ineffective-assistance-of-PCR-counsel claims. Accordingly, there is no "cause" for Petitioner's procedural default on grounds ten through seventeen. Therefore, the Court cannot grant habeas relief on these defaulted grounds, and they are dismissed.

C. Petitioner's Requests for an Evidentiary Hearing and Appointment of Counsel

The decision to grant an evidentiary hearing is in the Court's discretion. *Muquit v. McFadden*, Civil Action No.: 8:14-cv-03555-RBH, 2016 WL 4613398, at *5 (D.S.C. Sept. 6, 2016) (citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)); *see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). If a petitioner has failed to develop the factual basis of a claim in state-court proceedings, the Court will hold an evidentiary hearing only if the facts underlying the claim would be sufficient to establish by clear and convincing evidence that "but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense" and the claim relies on: (1) "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence[.]" 28 U.S.C. § 2254(e)(2). Here, the Court has the pertinent transcripts and filings of the state court proceedings, which it has thoroughly reviewed. There are no circumstances justifying an evidentiary hearing in this case. Accordingly, Petitioner's request for a hearing is denied.

Counsel may be appointed for state prisoners collaterally attacking their convictions under § 2254 to aid the litigant and the Court in the discovery process and during evidentiary hearings or in exceptional cases. *See Gordon v. Leeke*, 574 F.2d 1147, 1154 n.3 (4th Cir. 1978); *Phagan v. Weber*, Civil Action No. 8:18-564-TMC, 2018 WL 3100018 at *4 (D.S.C. June 25, 2018) (citing *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975)). "An exceptional case exists when 'it is apparent . . . that a *pro se* litigant has a colorable claim but lacks the capacity to present it . . . .'" *Phagan*, 2018 WL 3100018 at *4 (quoting *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984)). Because the Court denies Petitioner's request for an evidentiary hearing and finds no exceptional circumstances, the Court

denies his request for appointment of counsel.

Certificate of Appealability

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). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating reasonable jurists would find the court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484–85. In this case, the Court concludes that Petitioner has not made the requisite showing of "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Conclusion

The Court has thoroughly reviewed the entire record, including the R&R and objections, and the applicable law. For the foregoing reasons, the Court adopts and incorporates by reference the R&R [ECF No. 54]. Accordingly, the Court **GRANTS** Respondent's second motion for summary judgment [ECF No. 29] and **DISMISSES** Petitioner's § 2254 petition [ECF No. 1] with prejudice. Furthermore, the Court **DENIES** Petitioner's motion for a certificate of appealability [ECF No. 63].

IT IS SO ORDERED.

Florence, South Carolina
March 29, 2019

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

BOBBY JOE BARTON, #182302, Petitioner, v. SCOTT LEWIS, WARDEN, Respondent.	)	CIVIL ACTION NO. 9:18-748-RBH-BM **REPORT AND RECOMMENDATION**

Petitioner, an inmate with the South Carolina Department of Corrections, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was filed pro se on March 14, 2018.[1]

The Respondent filed a return and second motion[2] for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on July 5, 2018. As the Petitioner is proceeding pro se, a Roseboro order was entered by the Court on July 6, 2018, advising Petitioner of the importance of a motion for summary judgment and of the necessity for him to file an adequate response. Petitioner was specifically advised that if he failed to respond adequately, the Respondent's motion may be granted, thereby ending his case.

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

[2]Respondent filed an initial motion for summary judgment, which was moot after the Court granted Petitioner's motion to amend. See Court Docket No. 14.

After receiving three extensions of time to reply, Petitioner filed a memorandum in opposition on November 5, 2018, to which Respondent filed a reply on November 9, 2018. On November 26, 2018, Petitioner filed a second response in opposition to summary judgment, and two additional attachments (which made corrections to his earlier filing) on December 3 and 4, 2018. This matter is now before the Court for disposition.[3]

Procedural History

Petitioner was indicted in Greenville County in February 2010 for armed robbery and possession of weapon during the commission of a violent crime [Indictment No. 2009-GS-23-5047]. See Court Docket No. 30-1.[4] Petitioner was represented by Susannah C. Ross, Esquire, and after a jury trial on August 9-10, 2010, was found guilty of armed robbery and not guilty of the weapon charge. (R.p. 267). Petitioner was sentenced to twenty-five years imprisonment. (R.p. 275).

Petitioner filed a timely direct appeal. He was represented on appeal by Lanelle Cantey Durant of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, who raised the following issues:

> **Ground One:** Did the trial court err in denying [Petitioner's] motion to suppress the identification via the photo lineup when the lineup was not reliable because the alleged victim [Edwin Perez] was inebriated at the time of the incident, and had seen [Petitioner's] photo in a "mug shot" magazine prior to the lineup?

---

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

[4]According to the State's evidence, on July 25, 2009 Edwin Perez was sitting behind his trailer when two people, the Petitioner and a woman named Patricia Rice, approached. Petitioner allegedly pushed Perez down, held a knife to his throat, and stole his wallet which contained about $500.00. See Court Docket No. 30-3, p. 7.

> **Ground Two:** Did the trial court err in refusing to give [Petitioner's] complete Request to Charge #7 on the accuracy of identification?
>
> **Ground Three:** Did the trial court err in giving the jury a second charge on armed robbery at the request of the state just to include the words "or representation of a weapon" when neither the victim nor the co-defendant witness saw the knife allegedly used?
>
> **Ground Four:** Did the trial court err in refusing to relieve [Petitioner's] trial attorney and appoint another attorney after [Petitioner] argued that his attorney breached his confidentiality by bringing to light at the preliminary hearing that the co-defendant witness, Patricia Rice, had lived with [Petitioner] previously?

See Court Docket No.30-3, p. 5.

On January 30, 2013, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. See Court Docket No. 30-5, pp. 1-5. Petitioner filed a petition for rehearing, which the South Carolina Court of Appeals denied on March 20, 2013. See Court Docket No. 30-5, pp. 6-26. Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court addressing the same issues. See Court Docket No. 30-6, p. 4. On July 11, 2014, the South Carolina Supreme Court denied the petition. See Court Docket No. 30-8.

On September 12, 2014 (dated August 20, 2014), Petitioner filed an application for post-conviction relief ("APCR") in state circuit court. Barton v. State of South Carolina, No. 2014-CP-23-5047. See Court Docket No. 30-9. Petitioner raised the following grounds in his APCR:

> **Ground One**: Ineffective assistance of trial counsel;
>
> **Ground Two:** Ineffective assistance of appellate counsel;
>
> **Ground Three**: Procedural Due Process; and
>
> **Ground Four**: Prosecutorial Misconduct.

Petitioner also filed supplemental pleadings in his PCR action addressing additional arguments for

ineffective assistance of trial counsel, prosecutorial misconduct, and judicial misconduct. See Court Docket Nos. 30-10, 30-13, 3-14, and 30-15. On March 3, 2015, Caroline Horlbeck, Esquire, was appointed to represent the Petitioner. See Court Docket No. 13-12. Even so, Petitioner continued to file numerous pro se motions concerning his application including, but not limited to: 1) objections placed on the record specifically [Court Docket No. 13-13]; 2) motion to preserve the record [Court Docket No. 13-14]; and 3) motion to amend and supplemental pleadings [Court Docket No. 13-15]; as well as a motion for hearing to relieve his counsel [Court Docket No. 13-16].

An evidentiary hearing was held on Petitioner's PCR application on February 18, 2016, during which he withdrew his pro se motion to relieve counsel. See Court Docket No. 30-17. In an order filed March 30, 2016 (dated March 14, 2016), the PCR judge denied Petitioner relief on his APCR. See Court Docket No. 30-18. Thereafter, on April 5, 2016, the PCR judge granted a motion for counsel to be relieved due to her accepting a position as a full time associate judge on April 4, 2016, and ordered that alternative counsel be appointed. See Court Docket No. 30-19. On April 18, 2016, Petitioner's new counsel, R. Mills Arial, Jr., Esquire, then filed a motion to reconsider. See Court Docket No. 30-20. The motion to reconsider was denied on April 28, 2016. See Court Docket No. 30-21. On August 17, 2016, Petitioner filed a motion to relieve counsel and for permission to proceed pro se. See Court Docket No. 30-22. On August 25, 2016, Appellate Defender Taylor D. Gilliam filed a return to the motion to be relieved. See Court Docket No. 30-23. After entering an order specifically warning Petitioner of the dangers of proceeding pro se and of the advantages of allowing counsel to continue to represent him, the South Carolina Supreme Court entered an Order on September 19, 2016 granting Petitioner's request to proceed pro se. See Court Docket Nos. 30-24 and 30-25.

On September 15, 2016, Petitioner filed a motion to reconsider his challenge of the accuracy of the PCR transcript. See Court Docket No. 30-26. On November 9, 2016, the South Carolina Supreme Court remanded the matter to the PCR judge to hold a hearing to determine the accuracy of the transcript, and to notify the state Supreme Court of his findings. See Court Docket No. 30-27. On December 15, 2016, a hearing was held and the PCR court determined that there were no inaccuracies in the transcript of the PCR hearing. See Court Docket Nos. 30-28 and 30-29.

Petitioner then filed a pro se appeal of the PCR court's order, raising the following issues:

> **Ground One:** Whether P.C.R. court erred in denying relief to Petitioner when the court erroneously found counsel was not ineffective for failing to adequately convey a formal plea offer; failing to keep Petitioner reasonably informed of case and to explain offer for Petitioner to make an informed decision.
>
> **Ground Two:** Whether P.C.R. court erred in denying relief to Petitioner when the court erroneously found counsel was not ineffective for failing to object to inadmissible evidence through testimony attacking the [Petitioner's] character [sic] bring out prior incarcerations!
>
> **Ground Three:** Whether P.C.R. court erred in denying relief to Petitioner when the court erroneously found the prosecution did not commit misconduct by knowingly [sic] use of perjured testimony given by State's witness Patricia Rice in order to obtain a conviction, prosecution knew or should have known her testimony was [sic] perjury.
>
> **Ground Four:** Whether P.C.R. court erred in denying relief to Petitioner when the court erroneously found the prosecution did not commit misconduct by failing to communicate to investigators that they must not use the [Petitioner's] arrest mug-shot [sic] its' photo array lay out.

See Petition for Writ of Certiorari, p. 2 (See Court Docket No. 30-30, p. 3).

After considering several additional motions, the South Carolina Supreme Court denied certiorari on February 15, 2018. See Court Docket No. 30-32. The Remittitur was sent down on March 7, 2018,

and filed with the Clerk of Court for Greenville County on March 9, 2018. See Court Docket No. 30-33.

Petitioner then filed this federal habeas action. Prior to outlining Petitioner's issues that he is *currently* pursuing, the undersigned is constrained to note that Petitioner has changed the issues he initially wished to pursue. After filing his initial Petition with attachments and after the Respondent filed their initial motion for summary judgment, Petitioner filed a motion to amend his Petition, which was granted. The Respondent then filed a second motion for summary judgment addressing issues in Petitioner's original Petition, the attachment to that Petition, and the Amended Petition. However, in his Traverse in Opposition to Summary Judgment, Petitioner clarifies that the issues he is pursuing in his Petition for writ of habeas corpus filed in this United States District Court are as follows:

> **Ground One:** The trial court erred in declining to suppress the victim's identification of Petitioner because of out-of-court photographic lineup present to the victim was unreliable and unduly [sic]suggested.
>
> **Ground Two:** Counsel failed to adequately inform the Petitioner of formal plea offer and its terms and conditions where as to make an informed decision.
>
> **Ground Three:** Trial counsel failed to object to inadmissible evidence through testimony attacking the [Petitioner's] character by bring[ing] out prior incarcerations.
>
> **Ground Four:** The Prosecutor (Mark Moyer) knowingly used perjured testimony in order to obtain a conviction, the prosecutor knew or should have known the testimony was perjured yet [sic] though he did not attempt to correct it.
>
> **Ground Five:** The P.C.R. court erred in denying relief to Petitioner when the court erroneously found the prosecution did not commit misconduct by failing to communicate instructions to investigators that they must not use [Petitioner's] arrest mug-shot in its photo array lay out.

Ground Six[5]**:** The Petitioner was denied the right to confront an adverse witness [sic] who's testimony was used in form of testimonial but the witness was not present!

Ground Seven: Trial counsel was ineffective for failing to object to the Solicitor's closing comments to the jury [sic] ment to inflame the passions to prejudice the jury.

Ground Eight: Trial counsel was ineffective for failing to object to the wording mug-shot magazine.

Ground Nine: Trial counsel failed to move for suppression of a weapon during the commission of a violate crime in the preliminary stage.

Ground Ten: State appointed attorney was (I.A.) in collateral review proceeding for failing to raise (I.A.O.C.) at trial and created a conflict-of-interest.

Ground Eleven: State appointed attorney was (I.A.) In collateral review proceeding for failing to raise (I.A.O.C.) at trial when trial counsel failed to call the prosecutor (Mark Moyer) to the witness stand to cross-examine about the conversation he had with the co-defendant "Patricia Rice" while under indictment outside her attorney's presence.

Ground Twelve: State appointed attorney was (ineffective assistance) in (I.R.C.P.) for failing to raise (Ineffective assistance of counsel) at trial, when trial counsel failed to (investigate any of) the circumstances surrounding the case and possible witnesses that were present the morning of the crime.

Ground Thirteen: State appointed attorney was (ineffective assistance) at (I.R.C.P.) for failing to raise (I.A.D.C.) at trial, when trial counsel failed to put up a defense during the trial stage.

Ground Fourteen: State appointed attorney was (I.A.) at (I.R.C.P.) for failing to raise (I.A.O.C.) at trial, when trial counsel failed to put the state's case to an (sic) adversial testing.

Ground Fifteen: State appointed attorney was (I.A.) In (I.R.C.P.) for failing to raise (I.A.O.C.) at trial when trial counsel failed to argue motion for evidentiary hearing and motion to suppress a deadly weapon prior to trial.

Ground Sixteen: State appointed attorney was (I.A.) in (I.R.C.P.) for failing to raise (I.A.O.C.) At trial, when trial counsel rendered bad advice advising [Petitioner] not

---

[5]Some of the issues are numbered differently in Respondent's motion. However, the undersigned has used Petitioner's numbering of his issues in his Traverse for clarity purposes

to testify in his own defense.

Ground Seventeen: State appointed attorney was (I.A.) in (I.R.C.P.) for failing to raise (I.A.O.C.) At trial, when trial counsel failed to raise the prosecutor (Mark Moyer) violated rules of professional ethics and the cannons of law as a cardinal rule and denying the [Petitioner's] due process of law.

See Court Docket No. 44, pp. 2, 6, 12, 16, 24, 31, 34, 37, 41, 47, 50, 53-54, 57, 60-61. These are therefore the issues addressed herein.

Discussion

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

I.

Direct Appeal Issue

In Ground One, Petitioner alleges the trial court erred in failing to suppress the

victim's identification of Petitioner because the victim saw Petitioner's mug shot in a magazine before he was identified in a photo lineup, was intoxicated, and told police the perpetrator was younger than Petitioner's age. See Court Docket No. 6-1, p. 5. Petitioner presented this claim in his direct appeal, and the South Carolina Court of Appeals rejected this claim, as follows:

> As to [Petitioner's] motion to suppress the victim's identification, the trial court properly denied the motion. See State v. Liverman, 727 S.E.2d 422, 425 (S.C. 2012) ("Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion."). Here, the trial court did not abuse its discretion in declining to suppress the identification and allowing the jury to assess the reliability of the identification because the photographic lineup was not unduly suggestive. See id. at 138, 727 S.E.2d at 426 (recognizing the two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification: (1) "whether the identification resulted from unnecessary and unduly suggestive police procedures," and (2) "if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed" (citing Neil v. Biggers, 409 U.S. 188, 198 (1972)) (emphasis added)); State v. Cheeseboro, 552 S.E.2d 300, 307–08 (S.C. 2001) ("An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." (citing Manson v. Brathwaite, 432 U.S. 98 (1977))).
>
> [Petitioner] argues the photographic lineup was unreliable because the victim had prior exposure to the photograph of [Petitioner] that was used in the lineup. Specifically, [Petitioner] asserts that the victim's identification was tainted by his prior viewing of a privately published magazine displaying hundreds of mug shots taken in the Greenville area ("Mug Shot" magazine), including [Petitioner]'s mug shot. However, there is nothing in the record to show that law enforcement was involved in the publication or distribution of the magazine or the victim's viewing of the magazine. The victim testified that there were no representatives of law enforcement with him when he viewed the magazine. Further, nothing in the record shows any design by the officer conducting the photographic lineup to reinforce the victim's prior identification or even any awareness on the officer's part of the prior identification.
>
> "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Perry v. New Hampshire, 132 S.Ct. 716, 728 (2012). In other words, the reliability of an eyewitness identification may be determined by the jury when there is no improper police conduct involved. Id. at 726 ("A primary aim of excluding identification evidence

> obtained under unnecessarily suggestive circumstances ... is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.... This deterrence rationale is inapposite in cases ... in which the police engaged in no improper conduct." (citation omitted)); see also State v. Tisdale, 527 S.E.2d 389, 392 (S.C.Ct.App.2000) ("[T]he impetus behind the harsh remedy of exclusion is police deterrence.... Thus, we hold that the [Neil v. Biggers] analysis is inapplicable where there is a nongovernmental identification source.").
>
> In determining the reliability of the victim's identification of [Petitioner], the jury was allowed to consider the accuracy of the victim's initial description of the robber, the fact that the victim may have been inebriated at the time of the robbery, and the victim's prior viewing of "Mug Shot" magazine, all of which were highlighted during cross-examination of the victim and closing arguments. These circumstances did not require excluding the victim's identification of [Petitioner] from the jury's consideration because none of these circumstances were brought about by improper police conduct. See Tisdale, 527 S.E.2d at 393 ("The extent to which a suggestion from nongovernment sources has influenced the memory or perception of the witness, or the ability of the witness to articulate or relate the identifying characteristics of the accused, is a proper issue for the trier of fact to determine.").

State v. Barton, No. 2013-UP-058, 2013 WL 8482267, at *1–2 (S.C. Ct. App. Jan. 30, 2013)

The state court applied federal precedent in determining the identification was not tainted by any government action, when the police had nothing to do with the publication of the magazine. With regard to the mug shot photograph, Prosecutor Moyer testified at the PCR hearing that Petitioner had been arrested based on his co-defendant's statement, and that was how Petitioner's photograph got into Mugshot Magazine. After it was in the magazine, the victim saw it. Moyer testified that he called an investigator and asked him to set up a photograph lineup, but that he was not involved in the process. Rather, he was sent a copy of the lineup after it occurred. Moyer testified that he did not know about the Mugshot Magazine at the time of the photo lineup and did not even know about it until a month or two before trial. See Court Docket No. 13-17, pp. 68-70. Tracy King, an investigator with the Greenville County's Sheriff Department, testified that he did not have any involvement in Petitioner's case other than arranging the photographic lineup. King

testified at trial that there were six similar looking photographs in the lineup that were used from the actual computer-generated matches to the Petitioner, and that Petitioner's photograph from the date of his arrest was used. King testified that the victim examined the photographs and pointed to Petitioner's photograph. (R.pp. 41-49). Petitioner's trial counsel testified that she did not believe Moyer's conduct constituted prosecutorial misconduct; see Court Docket No. 13-17, p. 95; and Petitioner has made no showing that this evidence was tainted by any government action, when the police had nothing to do with the publication of the magazine or the viewing of the magazine by the victim. The undersigned can find no reversible error by the state court on this issue.

With regard to Petitioner's challenge concerning the victim's initial statement about the age of the perpetrator or that the victim was intoxicated at the time of the crime, those issues go to the weight of the evidence, not its admissibility. Pittato v. Hoffner, 722 Fed.Appx. 474, 478 (6th Cir. 2018)[To the extent that identification changed over time, inconsistencies went only to the weight of the testimony, not its admissibility]. The transcript shows that at trial, the victim was questioned on these issues. (R.pp. 120-127). Counsel also attempted to discredit the victim's identification on these matters in her closing argument. (R.pp. 234-244). Petitioner has failed to produce any evidence to show that the trial court erred in the admission of this evidence or that it violated his federal constitutional rights.

In sum, based on the evidence in the record and the applicable law, Petitioner has not shown that he was prejudiced or that his conviction violates due process due to these claims, nor has he shown that the state court's rejection of this claim was unreasonable. Evans v. Smith, 220 F.3d 306, 312 (4th Cir.2000) [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was based on an unreasonable determination of

the facts in light of the evidence presented in the state court proceeding]; Williams v. Taylor, 529 U.S. 362 (2000); Bell v. Jarvis, 236 F.3d 149, 157–158 (4th Cir.2000)(en banc), cert. denied, 112 S.Ct. 74 (2001); 28 U.S.C. § 2254(c)(1)[Determination of a factual issue by the state court shall be presumed correct unless rebutted by clear and convincing evidence]. Petiioner has also failed to show any violation of federal constitutional law. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975)[Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus]. Therefore, this claim is without merit and should be dismissed.

II.

(PCR Court Issues)

Petitioner raises numerous ineffective assistance of counsel claims in Grounds Two, Three, and Seven through Seventeen. Petitioner also raises two issues of prosecutorial misconduct in Grounds Four and Five, which are discussed herein as ineffective assistance claims. See, discussion, infra.

Petitioner's ineffective assistance of counsel claims in Grounds Seven through Seventeen were procedurally defaulted at the PCR court level and/or in the PCR appellate proceedings[6]. These issues have therefore been addressed separately. See discussion, infra. With

[6]With regard to Grounds Ten through Seventeen, Petitioner lists these issues as ineffective assistance of PCR counsel claims. See Petitioner's Traverse in Opposition to Summary Judgment. However, if Petitioner actually intended to pursue these claims as ineffective assistance of PCR counsel claims, they do not concern Petitioner's underlying conviction. Rather, they concern alleged errors in his state collateral proceedings, and such claims are not a basis for federal habeas relief since Petitioner (except for the limited Martinez v, Ryan, 566 U.S. 1, 9-10 (2012) exception) has no constitutional right to effective assistance of PCR counsel. See Murray v. Giarratano, 492 U.S. 1, 13 (1989). Alleged infirmities in PCR proceedings do not state a basis for federal habeas relief. See Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988) [finding claims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal habeas relief]; Nichols v. Scott, 69 F.3d (continued...)

regard to Petitioner's two remaining ineffective assistance of counsel claims (Grounds Two and Three) and his two prosecutorial misconduct claims (Grounds Four and Five), these claims were all pursued in his PCR action, where Petitioner had the burden of proving the allegations in his petition. Butler v. State, 334 S.E.2d 813, 814 (S.C. 1985), cert. denied, 474 U.S. 1094 (1986). The PCR court rejected these claims, making relevant findings of fact and conclusions of law in accordance with S.C.Code Ann. § 17-27-80 (1976), as amended. See Barton v. State of South Carolina, No. 2014-CP-23-5074. These issues were also raised in Petitioner's PCR appeal to the State Supreme Court. See Court Docket Nos. 18-6 and 18-7. Therefore, these four claims are all properly exhausted for consideration by this Court.

At the PCR hearing, the PCR judge found that: 1) Petitioner stated that trial counsel brought him a 15-year plea offer in January 2010; 2) Petitioner stated trial counsel never discussed the terms of the offer with him and never explained the offer was for Petitioner to plead to the lesser included charge of strong arm robbery; 3) trial counsel testified she received a plea offer (which was dated January 11, 2010) in which the State would reduce the armed robbery charge to strong arm robbery and recommend either a sentence of 15 years suspended to 8 years or a plea without a recommendation; 4) trial counsel testified that she visited the Petitioner on January 29, 2010 to

---

[6](...continued)
1255, 1275 (5th Cir. 1995) ["An attack on a state habeas proceeding does not entitle the petitioner to habeas relief. . . ."], cert. denied, 518 U.S. 1022 (1996); Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987) (per curiam) ["Because claim (1) goes to issues unrelated to the cause of [the] petitioner's detention, it does not state a basis for habeas relief."]; Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998) [stating errors in state post-conviction proceedings are collateral to the conviction and sentence and do not give rise to a claim for federal habeas relief]. However, based on Petitioner's discussion of these issues, it appears that he is simply alleging ineffective assistance of PCR counsel as the alleged "cause" to overcome the procedural bar of failing to properly raise these underlying issues in state court, and intended to pursue the underlying issues as ineffective assistance of trial counsel claims.

explain the plea offer and that she told him the plea was for strong arm robbery; 5) trial counsel testified, however, that Petitioner argued with her at the meeting; 6) trial counsel testified that Petitioner later refused to be transported on March 25, 2010 so they could discuss the case; 7) trial counsel testified she had explained the sentence ranges to the Petitioner for both armed robbery and strong arm robbery; 8) trial counsel testified the Petitioner never told her either that he wanted to accept this plea offer or that he wanted to plead guilty;

9) Petitioner failed to meet his burden of proving plea counsel did not adequately convey and discuss the plea offer; 10) trial counsel testified she conveyed the plea offer and explained its terms to Petitioner; 11) trial counsel testified, however, that the Petitioner rejected the offer and then refused to see her for several months; 12) trial counsel's testimony was more credible than the Petitioner's on this issue; 13) trial counsel's file contained both the plea offer letter from the State and her notes about her meeting with the Petitioner; 14) trial counsel also had a specific recollection of relaying the offer to the Petitioner and Petitioner opting to refuse it; 15) trial counsel fulfilled her responsibilities in this regard;

16) Petitioner stated that trial counsel refused to keep him reasonably informed of the status of his case; 17) Petitioner stated trial counsel stopped visiting him at the jail; 18) trial counsel testified that Petitioner refused to see her for several months; 19) trial counsel testified it was her practice to make notes if a client requested a jail visit and she did not indicate her file had any such notes; 20) Petitioner failed to meet his burden of proving trial counsel did not keep him informed about the status of his case; 21) trial counsel testified the Petitioner refused to see her for several months after he rejected the plea offer; 22) trial counsel testified that it was difficult to interact with the Petitioner and that it was difficult to explain things to the Petitioner that he did not want to hear;

23) trial counsel's testimony was credible; 24) if there was any breakdown in communication between the Petitioner and trial counsel in this case, it was due to Petitioner's conduct;

25) Petitioner stated that he requested a copy of the discovery material prior to trial and did not receive all of it; 26) trial counsel testified that she filed discovery motions, received those materials, and reviewed them with the Petitioner on October 5, 2009; 27) trial counsel testified she made a copy of the discovery material and sent it to the Petitioner on October 16, 2009; 28) Petitioner failed to meet his burden of proving he was not provided discovery materials in this case; 29) trial counsel testified she reviewed the discovery materials with the Petitioner and then sent him a copy of the materials shortly thereafter; 30) trial counsel's testimony was more credible; 31) even assuming arguendo that the Petitioner did not receive the discovery materials, he failed to demonstrate he suffered any prejudice as a result;

32) Petitioner stated trial counsel should have objected to testimony regarding Patricia Rice's prior conviction for providing a false statement; 33) Petitioner stated the assistant solicitor, Moyer, violated the rules by eliciting this testimony and that he was prejudiced as a result; 34) Moyer testified he ran a RAP sheet for Rice and provided it to trial counsel; 35) trial counsel testified that there was no reason to object to testimony that Rice had a prior conviction because this was helpful to the defense case; 36) Petitioner failed to meet his burden of proving trial counsel should have objected to Rice's prior conviction; 37) on direct examination, Rice admitted she had a 2008 conviction "for lying to police about [her] name"; 38) on cross-examination, trial counsel questioned Rice about this prior conviction and had her admit she gave a false name to police to avoid trouble; 39) the PCR court agreed with trial counsel's testimony that there was no basis to object to this line of questioning; 40) this line of questioning was helpful to the defense case, as it clearly placed Rice's

credibility at issue; 41) Petitioner failed to meet his burden on this issue;

42) Petitioner stated the victim only spoke Spanish and that the victim's brother interpreted for him to police officers; 43) trial counsel noted that the victim's brother was on the State's witness list but did not know why he was not called; 44) trial counsel testified she did not believe the victim's brother would have helped the defense case; 45) the Petitioner failed to meet his burden of proving trial counsel should have argued a violation of the Confrontation Clause; 46) the PCR court found that there was no violation of the Confrontation Clause in this case; 47) as such, the PCR court found trial counsel was not deficient in failing to raise a Confrontation Clause argument; 48) regardless, the PCR court examined the trial transcript and found trial counsel's testimony credible that she did not believe the victim's brother's testimony would have had an impact on the defense case; 49) the Petitioner failed to demonstrate he suffered from any prejudice from the lack of a Confrontation Clause argument;

50) the Petitioner stated Moyer met with Rice at the jail; 51) the Petitioner stated Rice was with him the night of the robbery - contrary to her trial testimony - and that he provided trial counsel with the names of witnesses who could support his story; 52) Moyer testified he had no concerns that Rice perjured herself and that he had no doubts she was telling the truth; 53) Aaron Jones, Jr. stated he recalled seeing the Petitioner and Rice around 1:15 a.m. on July 25, 2009; 54) Jones stated he saw them together for 30 minutes that night; 55) Jones admitted he was on drugs at the time; 56) when asked on cross-examination why he could recall that day in particular, Jones responded "that's a good question"; 57) trial counsel testified Petitioner told her Moyer met with Rice and that she confirmed this; 58) trial counsel testified that there was a letter in her file from Moyer to Rice's attorney; 59) Petitioner failed to meet his burden of proving trial counsel should have

objected because Rice perjured herself at trial; 60) the PCR court noted there is no prohibition against the prosecutor meeting with a co-defendant in a criminal case; 61) regardless, the PCR court found the Petitioner failed to demonstrate Rice offered incorrect or perjurious testimony; 62) while Jones testified he recalled seeing the Petitioner and Rice together for a 30 minute period on a specific date more than 6 years ago, the PCR court did not find that testimony to be credible; 63) as such, the Petitioner failed to present any credible evidence to support his allegation trial counsel should have objected to Rice's testimony about her whereabouts after the armed robbery;

64) Petitioner stated trial counsel should have objected to inadmissible testimony when Rice testified about dismissing a CDV charge; 65) Petitioner also stated Rice's testimony that he was incarcerated was inadmissible; 66) trial counsel testified Rice's comment was very quick and she did not object because she did not want to draw attention to it; 67) Petitioner failed to meet his burden of proving trial counsel should have objected to Rice's testimony; 68) during redirect examination, Rice admitted she previously called police because the Petitioner had committed domestic violence; 69) Rice explained she chose not to prosecute because "[h]e had already been incarcerated for something else. He had made time for that. That was in the past. Let it go."; 70) trial counsel articulated a valid strategic reason for why she did not object to Rice's testimony - that she did not want to draw further attention to it; 71) Petitioner also failed to demonstrate he suffered any prejudice as a result of the testimony;

72) Petitioner stated trial counsel should have objected when Moyer caused the jury to be inflamed during closing argument; 73) trial counsel testified that there was no reason to object because Moyer was referring to the victim, not the Petitioner, and this was not a Golden Rule violation; 74) Petitioner failed to meet his burden of proving trial counsel should have objected

during Moyer's closing argument; 75) the PCR court agreed with trial counsel that this testimony was not an objectionable argument because it was not a Golden Rule argument; 76) rather, it was merely commentary about the victim's motivation in this case; 77) the PCR court found Petitioner failed to prove either that trial counsel was deficient or that he was prejudiced as a result;

78) Petitioner stated trial counsel should have requested a "missing witness" instruction because the victim's brother was not a witness at trial; 79) trial counsel testified she did not contemplate asking for such a jury instruction and that she did not believe such an instruction would have been helpful to the defense case; 80) Petitioner failed to meet his burden of proving trial counsel should have requested a "missing witness" jury charge in this case; 81) regardless, the PCR court found Petitioner failed to articulate the nature of such an instruction, the basis upon which trial counsel should have argued for its inclusion, or how the lack of this instruction prejudiced his case;

82) Petitioner stated the trial judge ruled in the Biggers[7] hearing that the mug shot magazine could not be admitted at trial; 83) Petitioner argued trial counsel was ineffective because Moyer mentioned the magazine 8 times at trial and trial counsel mentioned it 25 times; 84) Moyer testified he did not know about the mug shot magazine until 1-2 weeks before trial; 85) Moyer testified the victim did not tell him about the mug shot magazine until after the Petitioner had already been arrested (based on Rice's statement); 86) Moyer testified Petitioner was arrested in August 2009; 87) trial counsel testified they litigated the admissibility of the mug shot magazine during the Biggers hearing; 88) trial counsel testified she mentioned the magazine during trial because it was central to the defense in attempting to discredit the lineup and the victim's identification; 89) the PCR court found Petitioner failed to meet his burden of proving trial counsel should have objected to

[7]Neil v. Biggers, 409 U.S. 188 (1972).

mention of the mug shot magazine during his trial; 90) trial counsel testified the existence of the mug shot magazine was a key part of the defense case; 91) the PCR court found trial counsel's testimony was credible; 92) the PCR court examined the trial transcript and found trial counsel articulated a valid strategic reason for mentioning the mug shot magazine, as she clearly argued to the jury that the victim only identified the Petitioner as the assailant in a photographic lineup because he had previously seen the Petitioner's photograph in a mug shot magazine; 93) Petitioner failed to prove either that trial counsel was deficient or that he was prejudiced as a result;

94) the Petitioner stated trial counsel should have objected when Investigator Jarvis' testimony at the trial differed from that at the preliminary hearing; 95) Petitioner stated trial counsel should have argued that Jarvis perjured himself; 96) trial counsel testified she was present at the preliminary hearing but did not recall if Jarvis' testimony was the same at the preliminary hearing and the trial; 97) Petitioner failed to meet his burden of proving trial counsel should have objected to Jarvis' trial testimony and argued he committed perjury; 98) Petitioner failed to prove Jarvis' testimony at trial differed from that at the preliminary hearing; 99) without such, Petitioner could not demonstrate trial counsel was deficient in not making an objection; 100) further even assuming arguendo that trial counsel should have objected, the PCR court found Petitioner failed to demonstrate he suffered any prejudice as a result;

101) the Petitioner stated trial counsel should have requested a "cautionary instruction charge" because - as she was an accomplice to the crime - Rice had motivation to testify against him; 102) Petitioner stated the jury should have been advised her testimony should be taken "with some form of caution"; 103) trial counsel testified she did not request this jury charge and did not believe there was any value in such a charge; 104) the Petitioner failed to meet his burden of proving trial

counsel should have requested a "cautionary instruction" jury charge in this case; 105) initially, the PCR court agreed with trial counsel that such an instruction would not have been merited in this case; 106) Petitioner failed to articulate the nature of such an instruction, the basis upon which trial counsel should have argued for its inclusion, or how the lack of this instruction prejudiced his case;

107) Petitioner stated trial counsel should have objected to prosecutorial misconduct because the State's photographic lineup was fundamentally unfair; 108) Petitioner stated Moyer should have told the police not to use the same photograph in the lineup as was seen in the mug shot magazine; 109) Moyer testified the Petitioner was arrested in August 2009; 110) Moyer testified he told Jarvis to do a photographic lineup in November 2009 and that the lineup was done in January 2010; 111) Moyer testified he did not know about the mug shot magazine when the lineup was put together; 112) trial counsel testified there was no prosecutorial misconduct in this case; 113) trial counsel testified Moyer was not aware of the mug shot magazine before the photographic lineup was made; 114) the PCR court found Petitioner failed to meet his burden of proving trial counsel should have made an argument about prosecutorial misconduct; 115) the crux of the Petitioner's argument was his contention that Moyer should have instructed law enforcement to use a different photograph for the photographic lineup than the one that was used in the mug shot magazine; 116) both Moyer and trial counsel, however, testified Moyer did not know about the mug shot magazine when the photographic lineup was created; 117) their testimony was credible; 118) trial counsel was not deficient for failing to argue prosecutorial misconduct because the Petitioner failed to demonstrate the existence of any such misconduct in this case;

119) Petitioner failed to prove the first prong of the Strickland[8] test that trial counsel failed to render reasonably effective assistance under prevailing professional norms; 120) the Petitioner failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Petitioner; 121) Petitioner also failed to prove the second prong of Strickland that he was prejudiced by trial counsel's performance; 122) Petitioner did not meet his burden of proving counsel failed to render reasonably effective assistance; 123) as to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in the PCR order, the PCR court found that Petitioner failed to present any testimony, argument, or evidence at the hearing regarding such allegations; 124) accordingly, the PCR court found that Petitioner had abandoned any such additional allegations; 125) Petitioner did not establish any constitutional violations or deprivations before or during his trial and sentencing proceedings; and 126) the PCR court dismissed the application with prejudice. See Court Docket Nos. 30-18 and 30-21. As previously noted, the South Carolina Supreme Court subsequently denied Petitioner's PCR appeal wherein Petitioner presented these some of these same issues. See Barton v. State, Appellate Case No. 2016-000995 (Order filed February 15, 2018).

Substantial deference is to be given to the state court's findings of fact. Evans, 220 F.3d at 311-312 ["We . . . accord state court factual findings a presumption of correctness that can be rebutted only by clear and convincing evidence], cert. denied, 532 U.S. 925 (2001); Bell v. Jarvis, 236 F.3d 149, 157–158.

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

[8]Strickland v. Washington, 466 U.S. 668 (1984).

of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). See also Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000), cert. denied, 531 U.S. 1095 (2001); Frye v. Lee, 235 F.3d 897, 900 (4th Cir. 2000), cert. denied, 533 U.S. 960 (2001). However, although the state court findings as to historical facts are presumed correct under 28 U.S.C. § 2254(e)(1), where the ultimate issue is a mixed question of law and fact, as is the issue of ineffective assistance of counsel, a federal court must reach an independent conclusion. Strickland, 466 U.S. at 698; Pruett v. Thompson, 996 F.2d. 1560, 1568 (4th Cir. 1993), cert. denied, 114 S.Ct. 487 (1993) (citing Clozza v. Murray, 913 F.2d. 1092, 1100 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991)).

Nonetheless, with regard to the ineffective assistance of counsel claims that were adjudicated on the merits by the South Carolina state court, this Court's review is limited by the deferential standard of review set forth in 28 U.S.C. §2254(d), as interpreted by the Supreme Court in Williams v. Taylor, 529 U.S. 362 (2000). See Bell v. Jarvis, supra; see also Evans, 220 F.3d at 312 [Under § 2254(d)(1) and (2), federal habeas relief will be granted with respect to a claim adjudicated on the merits in state court proceedings only where such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States", or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"]. Therefore, this Court must be mindful of this deferential standard of review in considering the ineffective assistance of counsel claims asserted by Petitioner in his Grounds Two and Three. With regard to Grounds Four and Five, although those issues would appear to be direct appeal issues, they were presented to the PCR court as ineffective assistance of trial counsel claims,

and the PCR court's findings as to those issues are therefore also subject to this same deferential standard as discussed above. See discussion, infra.

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

Ground Two

(Failure to adequately inform the Petitioner of formal plea offer)

Petitioner contends that his counsel was ineffective for failing to inform him of a formal plea offer and its terms and conditions so that he could make an informed decision. Petitioner testified at his PCR hearing that counsel told him they were offering him a 15 year sentence, and he became very angry. However, Petitioner testified that counsel never went into any details with him

MI

about the plea offer. Petitioner also testified that counsel never told him that the State was willing to reduce the charges and never showed him a copy of the plea offer. See Court Docket No. 13-17, pp. 18-19, 23, 25.

Counsel testified that sometimes it was difficult to engage with Petitioner about his case. Id. at pp. 93-94. However, Petitioner's trial counsel testified at his PCR hearing that she explained the elements and the sentencing ranges to the Petitioner for armed robbery and the weapons charge. See Court Docket No. 13-17, p. 83. Counsel testified that she received a plea offer that the State was willing to allow Petitioner to plead to strong arm robbery and either recommend a 15 year sentence, suspended to eight years, or a straight up plea with no recommendation, and that she went to meet with the Petitioner on January 29, 2010, where she tried to explain the plea to the Petitioner. However, counsel testified that he became upset and would not stop talking, said that the Solicitor could "kiss his a–", and proceeded to argue with her. Counsel testified that thereafter, on March 25, 2010, Petitioner refused to be transported to discuss the case with her. Even so, counsel testified that she does make her clients aware of the charges and their plea offers and that she is very thorough about it. Counsel testified that she definitely explained the difference between strong arm robbery and armed robbery to the Petitioner, but that Petitioner subsequently refused to see her to discuss his case with her. Id. at pp. 85-86, 99, 102. On cross-examination, counsel testified that when Petitioner would hear something that he did not like, he would start talking, but that the idea that he did not understand the strong arm robbery plea offer was ridiculous. Counsel also testified that she made it abundantly clear to him, because she would have loved for him to have accepted the plea. Id. at p. 99. She testified that she would not have left the jail without making sure he understood, and further opined that he understood the differences in the sentencing ranges. Id. at pp. 101-102.

The PCR court found that Petitioner failed to meet his burden of proving plea counsel did not adequately convey and discuss the plea offer. Rather, the PCR court found that trial counsel conveyed the plea offer and explained its terms to Petitioner, that the Petitioner rejected the offer, and then refused to see counsel for several months. The PCR court found that trial counsel's testimony about what had transpired was more credible than the Petitioner's on this issue, that trial counsel had a specific recollection of relaying the offer to the Petitioner and Petitioner opting to refusing it, and that trial counsel fulfilled her responsibilities in this regard. Although Petitioner claimed that trial counsel refused to keep him reasonably informed of the status of his case, trial counsel testified it was her practice to make notes if a client requested a jail visit and that she did not indicate her file had any such notes, that Petitioner refused to see her for several months after he rejected the plea offer, that it was difficult to interact with the Petitioner, and to explain things to the Petitioner that he did not want to hear, all of which the PCR Court found was credible. The PCR court concluded that if there was any breakdown in communication between the Petitioner and trial counsel in this case, it was due to Petitioner's own conduct.

The state court's credibility findings are entitled to great deference by this court in a habeas action. Wilson v. Ozmint, 352 F.3d 847, 858-859 (4th Cir. 2003); Marshall v. Lonberger, 459 U.S. 422, 434 (1983)["28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court . . . ."]. While a district court may, in an appropriate case, reject the factual findings and credibility determinations of a state court; Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); the court may not substitute its own credibility determinations for those of the state court simply because it may disagree with the state court's findings (assuming that were to be the case). See Cagle v. Branker, 520 F.3d 320, 324 (4th

Cir. 2008) ["[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear . . . . Indeed, 'federal habeas courts [have] no license to redetermine credibility issues of witnesses whose demeanor has been observed by the state trial court, but not by them.'" (quoting Marshall, 459 U.S. at 434)]. Further, Petitioner has not shown that the state court's findings were unreasonable under § 2254(d), nor has Petitioner overcome the presumption accorded the PCR court's findings. See Pondexter v. Dretke, 346 F.3d 142, 147-149 (5th Cir. 2003)[finding that the district court "failed to afford the state court's factual findings proper deference" by "rejecting the state court's credibility determinations and substituting its own views of the credibility of witnesses."]; Evans, 220 F.3d at 312; see also Seymour v. Walker, 224 F.3d 542, 553 (6th Cir. 2000)["Given the credibility assessment required to make such a determination and the deference due to state-court factual findings under AEDPA, we cannot say that the trial court's finding was unreasonable under § 2254(d)(2)."].

Therefore, Petitioner has failed to meet his burden of showing that trial counsel's performance was deficient in failing to adequately advise him of the formal plea agreement, and this claim should be dismissed. Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding]; Williams v. Taylor, supra; Strickland v. Washington, supra.; Greene, 132 S.Ct. at 43 [observing that AEDPA's "standard of 'contrary to, or involv[ing] an unreasonable application of, clearly established Federal law' is difficult to meet, because its purpose] is to ensure that federal habeas relief functions as guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction"].

Ground Three

(Failure to object to inadmissible evidence by Rice regarding Petitioner's character)

Petitioner contends that his counsel was ineffective for failing to object to testimony by co-defendant Patricia Rice attacking Petitioner's character by bringing out the fact of his prior incarceration. The PCR court found that Petitioner failed to meet his burden of proving trial counsel should have objected to Rice's testimony. The PCR court noted that during redirect examination, Rice admitted she had previously called police because the Petitioner had committed domestic violence but that she had chosen not to prosecute because he had already been prosecuted for something else and she "felt like he had done his time and that was old so let him go." At the time that Rice referred to Petitioner's incarceration, Petitioner's counsel was attempting to attack her credibility by pointing out that Rice had previously alleged Petitioner committed criminal domestic violence, but then changed her story and claimed the assault did not happen. (R.p. 172). At the PCR hearing, Petitioner's counsel testified that Rice made a quick, passing statement about Petitioner being previously incarcerated, and that she did not object as part of her trial strategy, because she did not want to draw attention to the statement and make a big deal out of it. See Court Docket No. 13-17, pp. 89-90. The PCR court held that trial counsel articulated a valid strategic reason for why she did not object to Rice's testimony - that she did not want to draw further attention to it, and that Petitioner had further failed to demonstrate he suffered any prejudice as a result of this testimony.

The undersigned can discern no reversible error in the state court's decision. While Petitioner now disagrees with his trial counsel's strategy of not objecting to this testimony with the benefit of hindsight, tactical and strategic choices made by counsel after due consideration do not

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

Petitioner's claim that his counsel was ineffective on this ground should therefore be dismissed. Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding]; Williams v. Taylor, supra; Strickland v. Washington, supra.; Greene, 132 S.Ct. at 43 [observing that AEDPA's "standard of 'contrary to, or involv[ing] an unreasonable application of, clearly established Federal law' is difficult to meet, because its purpose] is to ensure that federal habeas relief functions as guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction"].

Grounds Four and Five

(Alleged Prosecutorial Misconduct)

Petitioner presents two grounds of prosecutorial misconduct: 1) that Prosecutor Moyer used perjured testimony from Rice to obtain Petitioner's conviction, and 2) that the prosecutor engaged in misconduct by using the magazine photos in the line-up. In the PCR Court's order, the PCR judge discussed these issues as ineffective assistance of counsel claims based on counsel failing to argue prosecutorial misconduct. However, Petitioner then raised Grounds Four and Five in his PCR appeal as straight prosecutorial misconduct claims [Court Docket No. 13-30, pp. 18-26] and also presents them in the same manner in this traverse in this federal habeas petition [Court Docket No. 44, pp. 12-24]. Straight prosecutorial misconduct claims are direct appeal issues, and

> [u]nder South Carolina law, "[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief . . . ." Drayton v. Evatt, 430 S.E.2d 517, 520 (S.C. 1993)(citing Hyman v. State, 299 S.E.2d 330 (S.C. 1983)). Prosecutorial misconduct is such an issue. See, e.g. State v. Inman, 720 S.E.2d 31, 43-45 (S.C. 2011)(addressing, on direct appeal, trial judge's finding that prosecutors engaged in misconduct by intimidating witness).

See Portee v. Stevenson, No. 15-487, 2016 WL 690871 at * 2 (D.S.C. Feb. 22, 2016). However, since the Respondent has not objected or argued that these two claims should be barred on the basis of Petitioner not properly pursuing them in state court in his direct appeal, the undersigned has discussed them herein as currently raised by the Petitioner.[9]

Petitioner testified that Rice gave perjured testimony at the trial about what happened

---

[9]In analyzing these claims as ineffective assistance of counsel claims, the PCR court discussed the merits of the claims when making its finding that Petitioner suffered no prejudice as a result of counsel not raising these prosecutorial misconduct issues. Therefore, the PCR court's findings as they relate to these underlying issues are relevant and considered herein in accord with Bell and Evans.

the night of the robbery after meeting with the Solicitor. At his PCR hearing, Petitioner testified that Moyer either knew that Rice was going to testify falsely or he should have known. See Court Docket No. 13-17, p. 32. Petitioner also testified at his PCR hearing that he saw Rice and Moyer meeting at the jail. See Court Docket No. 13-17, pp. 38-39. While Rice testified she and the Petitioner separated on the evening of the robbery, purported witness Aaron Jones testified at the PCR hearing that he saw Petitioner with Rice on the night of the incident at the same approximate time as the incident and saw them together the next morning. See Court Docket No. 13-17, pp. 73-77. Jones testified that even though he was on drugs at the time and the incident had occurred years before, he specifically remembering seeing Petitioner and Rice together at that certain time on that certain date. Id. Counsel testified Petitioner told her that he had seen Moyer meeting with Rice, and counsel confirmed that Moyer had met with Rice. Counsel also testified that a couple of days prior to that meeting, Moyer told her that he was dismissing charges against Rice, and that Moyer sent Petitioner's counsel a copy of a letter he had sent to Rice's attorney explaining his reasons for dismissing the charges against her. Petitioner's counsel testified at the PCR hearing that she did not see any basis to object to Moyer's questioning of Rice, and also saw no basis to object to Moyer meeting with Rice. See Court Docket No. 13-17, pp. 88-89. For his part, Moyer testified at Petitioner's PCR hearing that he did not have any question about the truthfulness of Rice's testimony or any concerns that she was perjuring herself. See Court Docket No. 13-17, p. 72. Moyer testified that he met with her several times and did not have any doubt that she was telling him the truth about that night. Id.

With regard to the mug shot photograph, Moyer testified that Petitioner had been arrested based on his co-defendant's statement, and that was how Petitioner's photograph got into Mugshot Magazine. After it was in the magazine, the victim saw it. Moyer testified that he

subsequently called an investigator and asked him to set up a photograph lineup, but that he was not involved in the process. Rather, he was sent a copy of the lineup after it occurred. Moyer testified that he did not know about the Mugshot Magazine at the time of the photo lineup and did not even learn about it until a month or two before trial. See Court Docket No. 13-17, pp. 68-70. Petitioner's trial counsel testified that she did not believe Moyer's conduct constituted prosecutorial misconduct. See Court Docket No. 13-17, p. 95.

To establish prosecutorial misconduct, Petitioner must demonstrate that the prosecutor's conduct was improper and that it prejudicially affected his substantial rights. United States v. Pepke, No. 16-4271, 2016 WL 6575082 at * 1 (4th Cir. Nov. 7, 2017)(citing United States v. Caro, 597 F.3d 608, 624–25 (4th Cir. 2010); see also United States v. Armstrong, 517 U.S. 456, 464 (1996) [noting presumption of regularity accorded prosecutorial decisions]). The State Court found no prosecutorial misconduct occurred in this case. The PCR court found that Moyer testified he had no concerns that Rice perjured herself and that he had no doubts she was telling the truth, while also noting that Jones (who testified that he recalled seeing the Petitioner and Rice together) admitted he was on drugs at the time and that when asked on cross-examination how he could recall that day in particular, Jones had responded "that's a good question". The PCR court then discussed trial counsel's testimony that Petitioner told her Moyer met with Rice and that she confirmed this, and that there was a letter in her file from Moyer to Rice's attorney. The PCR court found that there is no prohibition against the prosecutor meeting with a co-defendant in a criminal case, and also found that Petitioner had failed to demonstrate Rice offered incorrect or perjurious testimony. Therefore, the PCR court found that Petitioner had failed to present any credible evidence to support his allegation that trial counsel should have objected to Rice's testimony about her whereabouts after

the armed robbery. The PCR court also made findings regarding Moyer's knowledge of Petitioner's mugshot being used in his photograph lineup, and found credible Moyer's testimony that he did not know about the mug shot magazine when the lineup was put together and that trial counsel also testified Moyer was not aware of the mug shot magazine before the photographic lineup was made.

As previously noted, substantial deference is to be given to the state court's findings of fact. Evans, 220 F.3d at 311-312 ["We . . . accord state court factual findings a presumption of correctness that can be rebutted only by clear and convincing evidence], cert. denied, 532 U.S. 925 (2001); Bell, 236 F.3d at 157-158.

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

28 U.S.C. § 2254(e)(1).

Here, despite Petitioner's claim of prosecutorial misconduct, there is no evidence in the record to show that Moyer engaged in prosecutorial misconduct through either Rice's testimony or Petitioner's mugshot photograph being used in the photograph lineup, and the PCR court's credibility findings on these issues are entitled to substantial deference on habeas corpus review. Marshall, 459 U.S. at 434 ["28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court ..."]. As noted earlier, while a district court may, in an appropriate case, reject the factual findings and credibility determinations of a state court; Miller-El, 537 U.S. at 340; the court may not substitute its own credibility determinations for those of the state court simply because it disagrees with the state court's findings (assuming that were to be the case). See Seymour, 224 F.3d at 553 ["Given the credibility

assessment required to make such a determination and the deference due to state-court factual findings under AEDPA, we cannot say that the trial court's finding was unreasonable under § 2254(d)(2).”].

Petitioner has not presented any evidence to show that Moyer engaged in any prosecutorial misconduct. Smith, 528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus]. Nor has he shown that he was prejudiced by the prosecutor's actions in this case, or that the state court's rejection of these claims was unreasonable. Evans, 200 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding]. As such, while Petitioner does not currently allege these claims as ineffective of assistance of counsel claims, even if he had, he has failed to present any cogent argument or evidence that would have provided a basis for his counsel to object to Rice's testimony or the use of his mugshot photograph in the photograph lineup on the basis of prosecutorial misconduct. Williams v. Taylor, 529 U.S. 362 (2000); Bell, 236 F.3d at 157-158l; Smith, 528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus.]. Therefore, Petitioner's prosecutorial misconduct claim in Grounds Four and Five are without merit and should be dismissed.

III.

(Procedurally Barred Issues)

Petitioner's remaining ineffective assistance of counsel claims in Grounds Seven through Seventeen, along with Ground Six (which is not an ineffective assistance claim), were not properly pursued in state court and are therefore procedurally barred. Specifically, Grounds Ten

through Seventeen were not properly pursued in the initial PCR proceedings prior to his appeal. With regard to Grounds Six[10] through Nine,[11] although Petitioner did initially pursue these issues in his PCR proceedings, he failed to raise them in his PCR appeal.

Because Petitioner did not properly raise and preserve these remaining issues in his state court proceedings as noted above, they are barred from further state collateral review; Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 562 n. 3 (1971); Wicker v. State, 425 S.E.2d 25 (S.C. 1992); Ingram v. State of S.C., No. 97-7557, 1998 WL 726757 at **1 (4th Cir. Oct. 16, 1998); Josey v. Rushton, No. 00-547, 2001 WL 34085199 at * 2 (D.S.C. March 15, 2001); Aice v. State, 409 S.E.2d 392, 393 (S.C. 1991)[post-conviction relief]; see also White v. Burtt, No. 06-906, 2007 WL 709001 at *1 & *8 (D.S.C. Mar. 5, 2007)(citing Pruitt v. State, 423 S.E.2d 127, 127-128 (S.C.

---

[10]In Ground Six, Petitioner claims that he was denied the right to confront an adverse witness, the victim's brother, whose testimony was used in the form of a testimonial. At his PCR proceeding, Petitioner presented this issue as an ineffective assistance of counsel claim, and the PCR court ruled on that claim as presented. See Court Docket No. 30-18, pp. 9-10. However, Petitioner now attempts to raise the underlying claim itself, rather than as an ineffective assistance of counsel claim. See Court Docket No. 44, pp. 31-34. In either posture, this claim is procedurally bared. To th extent that Petitioner attempts to raise it as stated in his traverse, it is a direct appeal issue and is procedurally barred because it was not preserved at trial and therefore could not be raised on direct appeal. Moreover, the only "cause" Petitioner has asserted for his procedural default of this claim related to his PCR appellate proceedings. See Court Docket No. 44, pp. 29-30. However, to the extent that Petitioner is attempting to raise it as an ineffective assistance of counsel claim, which was the claim presented in his initial PCR proceeding, his claim is procedurally barred due to his own failure to raise it in his pro se PCR appellate proceedings. See discussion, infra.

[11]With regard to Ground Nine, Petitioner testified at the PCR hearing about his counsel's alleged ineffectiveness for not moving to suppress the weapon. See Court Docket No. 13-17, p. 9. In his memorandum, he also discusses the PCR court's discussion of him being found not guilty on the weapon charge. See Court Docket No. 44, p. 45. However, this was not a claim addressed in the PCR Court order. Even so, since neither Respondent or Petitioner discuss this issue as not having been properly pursued in the initial PCR proceeding, the undersigned has discussed this issue as one that was not properly pursued in Petitioner's PCR appeal. See Court Docket No. 44, pp. 41-46; Court Docket No. 30, pp. 52-53.

1992)[issue must be raised to and ruled on by the PCR judge in order to be preserved for review]); cf. Cudd v. Ozmint, No. 08-2421, 2009 WL 3157305 at * 3 (D.S.C. Sept. 25, 2009)[Finding that where Petitioner attempted to raise an issue in his PCR appeal, the issue was procedurally barred where the PCR court had not ruled on the issue and Petitioner's motion to alter or amend did not include any request for a ruling in regard to the issue]; Sullivan v. Padula, No. 11-2045, 2013 WL 876689 at * 6 (D.S.C. Mar. 8, 2013)[Argument not raised in PCR appeal is procedurally barred]; and as there are no current state remedies for Petitioner to pursue these issues, they are otherwise fully exhausted. Coleman v. Thompson, 501 U.S. at 735; Teague v. Lane, 489 U.S. 288, 297-298 (1989); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) ["A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."], cert. denied, 117 S.Ct. 854 (1997); Aice, 409 S.E.2d at 393; Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) ["To satisfy the exhaustion requirement, a habeas Petitioner must fairly present his claim[s] to the state's highest court . . . the exhaustion requirement for claims not fairly presented to the state's highest court is technically met when exhaustion is unconditionally waived by the state...or when a state procedural rule would bar consideration if the claim[s] [were] later presented to the state court."], cert. denied, 522 U.S. 833 (1997); Ingram, 1998 WL 726757 at **1.

However, even though otherwise exhausted, because these issues were not *properly* pursued and exhausted by Petitioner in the state court, federal habeas review of these claims is now precluded absent a showing of cause and prejudice, or actual innocence. State v. Powers, 501 S.E.2d 116, 118 (S.C. 1998); Martinez, 566 U.S. at 9-10; Wainwright v. Sykes, 433 U.S. 72 (1977); Waye v. Murray, 884 F.2d 765, 766 (4th Cir. 1989), cert. denied, 492 U.S. 936 (1989).

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

Coleman, 501 U.S. at 750.

In his response, Petitioner initially argues as "cause" for failing to raise Grounds Six through Nine that he was proceeding pro se and that the state court's twenty-five page limitation on his brief prevented him from properly pursuing these claims. See Petitioner's Traverse in Opposition to Summary Judgment [Court Docket No. 44, pp. 29, 34, and 38]. With regard to Grounds Ten through Seventeen, Petitioner contends that his cause for failing to properly pursue these claims was that his PCR counsel was ineffective for failing to raise them. However for the reasons set forth below, Petitioner has failed to show the necessary "cause" to overcome the procedural bar with respect to any of these claims.

Pro Se Argument

As noted, Petitioner argues as "cause" for failing to raise Grounds Six through Nine[12] that he was proceeding pro se and that the state court's twenty-five page limitation on his brief prevented him from properly pursuing these claims. See Petitioner's Traverse in Opposition to Summary Judgment [Court Docket No. 44, pp. 29, 34, and 38]. However, the Petitioner has offered no legal support for this position, and the undersigned does not find this assertion constitutes "cause"

[12]Although Petitioner does not specifically repeat this pro se "cause" argument for Ground Nine, he discusses the PCR court's findings [Court Docket No. 44, p. 45] and did not raise it in his PCR appeal. Therefore, rather than finding Petitioner did not even make an argument as to "cause" with respect to this issue, in consideration of Petitioner's pro se status the undersigned has assumed that Petitioner intended to make his same pro se cause argument with respect to this claim.

for his failure to properly raise these Grounds Six through Nine in his PCR appeal. See Petrick v. Thornton, No. 09-551, 2014 WL 6626838, at *4 (M.D.N.C. Nov. 21, 2014)(citing See, e.g., Siluk v. Beard, 395 Fed. Appx. 817, 820 (3d Cir.2010) ("[T]he right of self-representation does not exempt a party from compliance with relevant rules of procedural law. We must therefore conclude that [the petitioner's] pro se status, without more, cannot constitute cause sufficient to excuse the procedural default of his federal claims in state court."](internal citations omitted); Jones v. Armstrong, 367 Fed. App'x 256, 258 (2d Cir.2010) ("[The petitioner's] own ineffectiveness while proceeding pro se does not constitute cause for his procedural default because it is not 'something external to the petitioner, something that cannot be fairly attributed to him.' It is, in fact, precisely the opposite, a conclusion that many courts have reached. Moreover, ... [t]he Supreme Court has held that 'a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to denial of effective assistance of counsel.' " (internal citations and emphasis omitted) (quoting Coleman, 501 U.S. at 753, and Faretta v. California, 422 U.S. 806, 834 n. 46 (1975), respectively)).

The record reflects that Petitioner was specifically warned by the state court of the hazards of proceeding pro se, and he chose to do so anyway. See Court Docket Nos. 30-24 and 30-25. Therefore, this claim is without merit. Holloway v. Smith, No. 95–7737, 81 F.3d 149 (table), 1996 WL 160777, at *1 (4th Cir. Apr. 8, 1996) (unpublished) ["[The petitioner] does not meet the cause and prejudice standard because unfamiliarity with the law and his pro se status do not constitute adequate justification to excuse his failure to present the claim earlier...."]; see also Coley v. Clarke, No. 14-120, 2014 WL 11513134, at *5 (E.D. Va. Sept. 23, 2014), report and recommendation adopted, No. 2:14CV120, 2014 WL 11512403 (E.D. Va. Dec. 17, 2014)(citing Eaton v. Virginia, 13-367, 2014 WL 688137, at *5 (W.D. Va. Feb. 21, 2014)[holding that Martinez did not apply to excuse

default based on pro se petitioner's failure to properly present assignments of error in his appeal to the Supreme Court of Virginia]).

PCR Counsel

With respect to Petitioner's PCR counsel argument, the United States Supreme Court has held that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . Ineffective assistance of counsel, then, is cause for procedural default." Murray, 477 U.S. at 488; see also Coleman v. Thompson, supra; McCleskey v. Zant, 499 U.S. 467, 494 (1991); Noble v. Barnett, 24 F.3d 582, 586, n.4 (4th Cir. 1994)["[C]onstitutionally ineffective assistance of counsel is cause per se in the procedural default context"]; Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994)(en banc).

However, while ineffective assistance of counsel can constitute "cause" for a procedural default, it will only constitute "cause" if it amounts to an independent violation. Ortiz v. Stewart, 149 F.3d 923, 932 (9th Cir. 1998); Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir. 1996). Ineffective assistance of *PCR counsel* (as opposed to trial or direct appeal counsel) does not amount to an independent constitutional violation, and therefore will not ordinarily constitute "cause" for a procedural default. Murray v. Giarratano, 492 U.S. 1-7, 13 (1989) [O'Connor, J., concurring] ["[T]here is nothing in the Constitution or the precedents of [the Supreme] Court that requires a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the State to provide such proceedings,...nor does...the Constitution require [ ] the States to follow any particular federal model in those proceedings."]; Mackall v. Angelone, 131 F.3d 442, 447-449 (4th Cir. 1997); Ortiz, 149 F.3d at 932;

Pollard v. Delo, 28 F.3d 887, 888 (8th Cir. 1994); Lamp v. State of Iowa, 122 F.3d 1100, 1104-1105 (8th Cir. 1997); Parkhurst v. Shillinger, 128 F.3d 1366, 1371 (10th Cir. 1997); Williams v. Chrans, 945 F.2d 926, 932 (7th Cir. 1992); Gilliam v. Simms, No. 97-14, 1998 WL 17041 at *6 (4th Cir. Jan. 13, 1998).

However, in Martinez v. Ryan, the Supreme Court carved out a "narrow exception" that modified

> "the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." Martinez, 566 U.S. at __, 132 S.Ct. at 1315. [F]or three reasons. First, the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . . Indeed, the right to counsel is the foundation for our adversary system." Id. at ___, 132 S.Ct. at 1317.
>
> Second, ineffective assistance of counsel on *direct appellate review* could amount to "cause", excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. Id. at ___, 132 S.Ct. at 1316, 1317. But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. Id. at ___, 132 S.Ct. at 1317-1318. That is because review of such a claim normally requires a different attorney, because it often "depend[s] on evidence outside the trial record," and because efforts to expand the record on direct appeal may run afoul of "[a]bbreviated deadlines," depriving the new attorney of "adequate time . . . to investigate the ineffective-assistance claim." Id. at ___, 132 S.Ct. at 1318.
>
> Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective assistance of counsel claim during initial-review collateral proceedings, could (were Coleman read broadly) deprive a defendant of any review of that claim at all. Martinez, supr a at ___, 132 S.Ct. at 1316.
>
> We consequently read Coleman as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel

> [claim] . . . be raised in an initial-review collateral proceeding." Martinez, supra at ___, 132 S.Ct. at 1318-1319, 1320-1321.

Trevino v. Thaler, 133 S.Ct. 1911, 1917-1918 (2013); see also Gray v. Pearson, 526 Fed. Appx. 331, 333 (4th Cir. June 7, 2013)["The Supreme Court had previously held in Coleman that because a habeas petitioner has no constitutional right to counsel in state post-conviction proceedings, the ineffectiveness of post-conviction counsel *cannot* establish 'cause' to excuse a procedural default. Coleman, 501 U.S. at 757. The Court established an exception to that rule in Martinez."]

Therefore, because, under South Carolina law, a claim of ineffective assistance of trial is raised in an APCR; cf. State v. Felder, 351 S.E.2d 852 (S.C. 1986); Bryant v. Reynolds, No. 12-1731, 2013 WL 4511242, at * 19 (D.S.C. Aug. 23, 2013); Gray, 2013 WL 2451083, at * 4, fn *; a petitioner's claim of ineffective assistance of PCR counsel as "cause" for his default may be considered under the revised standard of Martinez and Trevino. Even so, under the first requirement of the Martinez exception, the Petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." Gray, 2013 WL 2451083 at * 2. As discussed below, Petitioner's claims fail to meet this standard.

Ground Ten

In Ground Ten, Petitioner contends that counsel created a conflict of interest in her representation because she divulged Petitioner's prior relationship with Ms. Rice to investigators. In a motion to remove counsel prior to his trial, Petitioner testified that he told his counsel in confidence that he had lived with Rice. Petitioner also testified that he wanted to surprise the State with this information, and he opined that the State believed they were strangers. (R.pp. 10-12).

However, Petitioner's counsel testified that she questioned Investigator Mike Jarvis at Petitioner's bond reconsideration hearing as to whether he knew that Petitioner and Rice had been in a prior relationship in an effort to the get the court to reconsider giving Petitioner a bond. Counsel testified that she asked the question to show that Rice had lied about their prior relationship. Counsel also testified that the information was not confidential. (R.pp. 10-13). Moreover, Moyer testified that he learned this information from Rice herself. (R.p. 15).

Petitioner asserts that counsel should have been replaced due to a conflict of interest because of this alleged disclosure. However, Petitioner has not shown how, even if counsel disclosed the relationship without Petitioner's permission, that created a conflict of interest with his counsel. The trial court held that while Petitioner could proceed pro se, it was not going to replace his counsel on this basis. (R.pp. 13-16). Petitioner also raised a related claim in his direct appeal that the trial court had erred in not granting his motion to relieve counsel, but the South Carolina Court of Appeals held that Petitioner waited until the first day of trial to submit the motion to the trial court, and he did not express a willingness to represent himself. The state Appellate court further noted that the prosecutor indicated that he had independently gained the information that Petitioner alleged to have been improperly revealed by his trial counsel, and held that even if this information was confidential in nature, Petitioner was not prejudiced by counsel's alleged revelation of the information prior to trial. See State v. Barton, Appellate No. 201-0169826 (S.C.Ct.App. Jan. 30, 2013), cert. denied,(S.C. July 11, 2014) [Court Docket Nos. 13-5, pp. 4-5 and 13-8].

"To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under 'an actual conflict of interest' that (2) 'adversely affected his lawyer's performance.'" Henderson v. McFadden, No. 14-511, 2015 WL

433492, at *3 (D.S.C. Feb. 3, 2015)(quoting Mickens v. Taylor, 240 F.3d 348 (4th Cir.2001) (citing Cuyler, 446 U.S. at 348)), appeal dismissed, 609 F. App'x 160 (4th Cir. 2015). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance of counsel." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). Moreover, even if an actual conflict of interest is established, the burden remains on Petitioner to demonstrate that the conflict had an adverse effect on his defense. Henderson, 2015 WL 433492 at * 3 (citing Cudd v. Ozmint, No. 08-2421, 2009 WL 3157305 at ** 2-3 (D.S.C. Sept. 25, 2009)[holding petitioner's argument failed on merits because he did not demonstrate that conflict of interest adversely affected counsel's performance]).

"[T]he Sullivan standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Mickens v. Taylor, 535 U.S. 162, 172 n. 5 (2002). Cf. Russell v. Lynaugh, 892 F.2d 1205, 1214 (5th Cir. 1989), cert. denied, 501 U.S. 1259, rehearing denied, 501 U.S. 1277 (1991)[finding no conflict of interest where "no evidence that the lawyer representing [the witness at issue] on any active matter; nor is there any evidence he questioned [this witness] any less aggressively as a result of the alleged representation than he otherwise would have done."]; Simmons v. Lockhart, 915 F.2d 372, 378 (8th Cir. 1990)[in finding lack of prejudice: "We have studied the transcript of the trial, with particular reference to counsel's cross-examination of the witness [ ], and we are unable to fault that effort at discrediting [witness at issue] and his testimony"]; Wright v. Smith, 348 Fed.Appx. 612, 613 (2d Cir. 2009)[noting "uninhibited cross-examination," finding "the record does not support the contention that counsel failed to represent [the Defendant] to the best of his ability because of any prior

representation"].

In this case, Petitioner has not shown any conflict of interest in his counsel questioning the investigator about his prior relationship with Rice, nor has Petitioner shown that he was prejudiced due to this alleged disclosure. Accordingly, Petitioner has not shown that the state court findings on this issue were in error. (R.pp. 13-16); see also State v. Barton, Appellate No. 201-0169826 (S.C.Ct.App. Jan. 30, 2013), cert. denied,(S.C. July 11, 2014) [Court Docket Nos. 13-5 and 13-8]. See State v. Gregory, 612 S.E.2d 449, 450 (S.C. 2005)["An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's]. As such, Petitioner has also not shown a substantial issue of ineffective assistance of counsel on this basis.

Grounds Eleven and Seventeen

In Ground Eleven, Petitioner contends that his counsel was ineffective for failing to call Moyer to testify about the alleged prosecutorial misconduct. In a related issue (Ground Seventeen), Petitioner contends that his counsel was ineffective for failing to raise that Moyer violated rules of professional ethics and the cannons of law as cardinal rule and, as a result, denied the Petitioner due process.

In order for a defendant to call a prosecutor as a witness, the defendant must "demonstrate a compelling and legitimate reason to do so." United States v. Regan, 103 F.3d 1072, 1083 (2d Cir. 1997). Additionally, a defendant has an obligation to exhaust other available sources of evidence before a court should sustain a defendant's efforts to call a participating prosecutor as a witness. United States v. West, 680 F.2d 652, 654 (9th Cir. 1982). Petitioner has not met either of these standards to justify the relief he seeks. In this case, Petitioner's trial counsel thoroughly cross-examined Rice on any bias she had to testify against the Petitioner in exchange for dismissal of

charges against her. (R.pp. 169-170). Moreover, Solicitor Moyer testified at Petitioner's PCR hearing that he did not have any question about the truthfulness of Rice's testimony or any concerns that she was perjuring herself. See Court Docket No. 13-17, p. 72. Moyer testified that he met with Rice several times and did not have any doubt that she was telling him the truth about that night. Id. Moreover, when ruling on a related issue, the PCR court noted there is no prohibition against the prosecutor meeting with a co-defendant in a criminal case and found that, regardless, Petitioner failed to demonstrate that Rice offered incorrect or perjurious testimony. The PCR court also found that while Jones testified he recalled seeing the Petitioner and Rice together for a 30 minute period on a specific date more than 6 years ago, that testimony was not credible. See Court Docket No. 13-8, p. 10.

With regard to any ethical violation due to the mug shot photograph, Moyer testified that Petitioner had been arrested based on his co-defendant's statement and that was how Petitioner's photograph got into Mugshot Magazine. After it was in the magazine, the victim saw it. Moyer testified that he subsequently called an investigator and asked him to set up a photograph lineup, but that he was not involved in the process. Rather, he was sent a copy of the lineup after it occurred. Moyer testified that he did not know about the Mugshot Magazine at the time of the photo lineup and did not even learn about it until a month or two before trial. See Court Docket No. 13-17, pp. 68-70. Petitioner's trial counsel testified that she did not believe Moyer's conduct constituted prosecutorial misconduct. See Court Docket No. 13-17, p. 95.

The PCR court found that there is no prohibition against the prosecutor meeting with a co-defendant in a criminal case, and that Petitioner failed to demonstrate Rice offered incorrect or perjurious testimony. The PCR court also found Moyer's testimony credible that he did not know

about the mug shot magazine when the lineup was put together and that trial counsel also testified Moyer was not aware of the mug shot magazine before the photographic lineup was made. Petitioner has failed to show that the Solicitor violated any rules of professional ethics and the cannons of law. Therefore, even if counsel had attempted to raise this issue, Petitioner has not shown any prejudice. See also discussion Grounds Four and Five, supra [discussing the underlying claims of prosecutorial misconduct]. Accordingly, Petitioner has failed to show any substantial ineffective assistance of counsel claims regarding these issues.

Grounds Twelve, Thirteen and Fourteen

Petitioner next contends in related grounds that counsel was ineffective for failing to investigate the circumstances surrounding the case and possible witnesses (Ground Twelve), for failing to put up a defense during the trial stage (Ground Thirteen), and for failing to put the state's case to adversarial testing (Ground Fourteen).

At the PCR hearing, Petitioner testified that he asked his counsel to investigate a lot of things, but that she did not. See Court Docket No. 13-17, pp. 42-43. Petitioner testified that he told his counsel about people who might have knowledge of the events and what happened. However, he also testified that he did not tell her to contact potential witnesses Childs, Jones, or Davis. See Court Docket No. 13-17, pp. 43-44. While Petitioner did present Jones' testimony at his PCR hearing, the PCR court found it not to have been credible. See discussion, supra. Petitioner's counsel testified at the PCR hearing that Petitioner had told her that his cellmate might have some information about his case, but counsel believed this witness would not be a reliable source of information at trial. See Court Docket No. 13-17, pp. 83-84. The record also reveals that trial counsel adamantly objected to the photo lineup and moved to suppress the identification. (R.pp. 40,

86-89). Counsel also made other motions, including a motion to quash the indictment. (R.pp. 89-91). Counsel throughly cross-examined witnesses on their testimony including, but not limited to, the victim and Rice. (R.pp. 64, 69, 170-174). Counsel also hired an expert to testify about the reliability of eyewitness identifications (R.pp. 70-78), and argued the eyewitness testimony was unreliable to the jury and cross-examined the witness on inconsistent descriptions of the perpetrator and his state of sobriety at the time of the robbery. (R.pp. 103-104, 126-127). Counsel later also questioned the responding officer on his incident report describing the victim as intoxicated . (R.p. 154). With regard to Rice, counsel thoroughly cross-examined her as to her bias to testify against the Petitioner in exchange for dismissal of her charges, as well as Rice's statement saying she did not see a knife. (R.pp. 169-171). Counsel moved for a directed verdict following the State's case, and in her closing argument challenged whether the State had met its burden of proof. (R.pp. 208, 230). Counsel also questioned the State's thoroughness in proving its case when it failed to call the victim's brother to testify. (R.p. 234). At the PCR hearing, counsel testified that Petitioner told her that he did not want to testify, so she preferred to not put up a defense so she would have the last closing argument. See Court Docket No. 13-17, p. 87. Notably, counsel was successful in getting the jury to find Petitioner not guilty on the weapon charge. (R.p. 267).

Petitioner has failed to meet his burden to show his counsel failed to take further action which prejudiced him in her representation of him. While Petitioner makes numerous unsupported allegations in his traverse, Petitioner has failed to point to any evidence counsel failed to discover, or any evidence to support additional defenses that could have been pursued had counsel been more fully prepared or had additional time prior to the case being called to trial. Petitioner has failed to show that trial counsel's performance was deficient in not further investigating possible

witnesses, for failing to put up a defense during the trial stage, and for failing to put the state's case to adversarial testing. Furthermore, even assuming arguendo that defense counsel had further investigated witnesses, put up any additional alleged defenses, and further challenged the state's case, Petitioner has not shown the likelihood of a different outcome, and as a result has failed to show any prejudice as a result of counsel's failure to do so. Smith, 528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus.]; cf, Clark v. State, 434 S.E.2d 266, 267-268 (S.C. 1993)[pure conjecture as to what a witness' testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different].

Accordingly, Petitioner has not shown a substantial issue of ineffective assistance of counsel on this basis.

Ground Fifteen

In Ground Fifteen, Petitioner argues that his counsel was ineffective for failing to argue for an evidentiary hearing or moving to suppress a deadly weapon prior to trial.

Petitioner was indicted for armed robbery and possession of a weapon during the commission of a violent crime. During the State's case in chief, the victim testified that when Petitioner attacked him, he held a weapon to his throat. However, the victim also acknowledged that he did not see the weapon. (R.p. 128). Rice testified that it was dark when the Petitioner attacked the victim, and that she could not see whether or not he had any weapon in his hands. (R.p. 167). However, the arresting officer, Johnny Brown, testified that when he arrested the Petitioner and patted him down, he found a "lock blade knife" in one of Petitioner's front pockets. (R.p. 182). The knife was introduced into evidence during the testimony of Investigator Mike Jarvis. (R.p. 194). As noted, the jury convicted the Petitioner of armed robbery, but acquitted him of the weapons charge.

(R.p. 267).

At his PCR hearing, Petitioner testified that he tried to get his counsel to file a motion for an evidentiary hearing and to suppress the weapon, but she refused to do so. See Court Docket No. 13-17, p. 26. Petitioner testified that although he was acquitted of the weapon charge, that he believed he was prejudiced by its introduction into evidence. He testified that he believed his counsel should have filed a motion for an evidentiary hearing and to suppress, and opined that the jury could have believed that if he had a weapon on him when he was arrested, maybe he was smart enough not to let the victim see the weapon. See Court Docket No. 13-17, p. 9. However, the undersigned does not find that Petitioner has met his burden to show that trial counsel was deficient, or that he was in any way prejudiced by her failure to argue the motion to suppress the weapon.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See Rule 401, SCRE. "Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. See State v. Salley, 727 S.E.2d 740, 744 (S.C. 2012). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . . " See Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggestion decision on an improper basis." See State v. Dickerson, 535 S.E.2d 119, 123 (S.C. 2000). For example, the South Carolina Court of Appeals has allowed the admission of a gun into evidence, finding the probative value of the gun substantially outweighed its prejudicial impact. See State v. Garris, 714 S.E.2d 888, 895 (S.C.Ct.App. 2011); State v. Spears, 713 S.E.2d 324, 331 (S.C.Ct.App. 2011). Here, the knife at issue in this case was offered by the State to prove Petitioner possessed a knife consistent with the purported weapon held

to the victim's throat. Petitioner has not shown that the weapon was not relevant to the State's burden of proof on the weapon and armed robbery charges. To the contrary, the admission of the knife was directly related to an element of the weapons charge and was not unfairly prejudicial to the Petitioner. Even so, the claim that Petitioner used a weapon during the robbery was effectively rebutted at trial and he was found not guilty on that charge.

Therefore, Petitioner has not shown that even if counsel had made a motion to suppress the weapon, that it would have been granted, or that the outcome of his trial would have been different. Accordingly, Petitioner has failed to show a substantial issue of ineffective of assistance of counsel regarding this issue.

Ground Sixteen

In Ground Sixteen, Petitioner contends that his counsel was ineffective for failing to properly advise him to testify in his own defense. However, the record and evidence support that Petitioner did not want to testify. Counsel testified that Petitioner told her that he did not want to testify so the defense would have the last closing argument. See Court Docket No. 13-17, p. 87. Although this issue was not specifically addressed by the PCR court, the PCR court consistently found counsel's testimony credible. Petitioner did not testify at his PCR hearing about this issue.

Additionally, the record further shows that the trial court itself advised Petitioner of his right to testify, and that Petitioner told the judge under oath that he and his counsel had discussed the matter, and that he had made the decision not to testify. (R.p. 209). Petitioner also represented to the Judge that he understood his right to testify, that he did not have any questions about his right to testify, and that he did not have any hesitancy in his mind about his decision not to testify. (R.p.

210).[13] Petitioner has presented no evidence to contradict his earlier statements made to the trial court. See Blackledge v. Allison, 431 U.S. 63, 74 (1977)["Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."](citations omitted). Although Petitioner alleges that his counsel was ineffective for failing to properly advise him to testify in his own defense, his own statements contradict his assertions, and there is no evidence in the record to support his allegation. Further, as previously discussed, based on the evidence of Petitioner's guilt presented at his trial, Petitioner has not shown that the outcome of his trial would have been different even if he had testified, nor has he shown prejudice from his counsel's actions. Therefore, Petitioner has not shown that any substantial issue of ineffective assistance of counsel on this basis.

In sum, while ineffective assistance of PCR counsel can constitute the necessary cause for overcoming the procedural bar on these issues, as noted, under the first requirement of the Martinez exception, the Petitioner must first "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." Gray, 526 Fed. Appx. at 333. Petitioner has not shown that any of these underlying claims, which Petitioner contends that his PCR counsel should have raised, have any merit. See discussion, supra. Accordingly, Petitioner has failed to establish that his remaining ineffective assistance of counsel claims in Grounds Ten through Seventeen are substantial ones in

---

[13]As Respondent points out, the Petitioner had a lengthy criminal record, with many of his crimes admissible for impeachment if he chose to testify. (R.p. 270).

order to be able to proceed on those claims. Gray, 526 Fed. Appx. at 333. Therefore, Petitioner has failed to show cause for his procedural default on these issues. Rodriguez v. Young, 906 F.2d 1153, 1159 (7th Cir. 1990), cert. denied, 498 U.S. 1035 (1991) ["Neither cause without prejudice nor prejudice without cause gets a defaulted claim into Federal Court."].

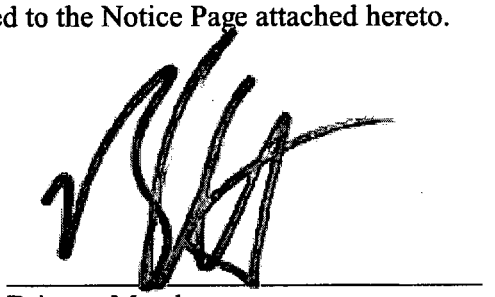
Finally, to the extent Petitioner is arguing that he is actually innocent, cognizable claims of "actual innocence" are extremely rare and must be based on "factual innocence not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998); see also Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004). Petitioner has failed to present any new, reliable evidence of any type that was not presented in any of his prior court proceedings which supports his innocence on the criminal charges to which he was found guilty. See Schlup v. Delo, 513 U.S. 298, 324 (1995)[to present a credible claim of actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial."]; Doe, 391 F.3d at 161 (quoting Schlup for the evidentiary standard required for a court to consider an actual innocence claim). Further, Petitioner has also failed to make any showing that a fundamental miscarriage of justice will occur if these claims are not considered. Wainwright v. Sykes, supra; Murray v. Carrier, 477 U.S. 478 (1986); Rodriguez, 906 F.2d at 1159 [a fundamental miscarriage of justice occurs only in extraordinary cases, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"](citing Murray v. Carrier, 477 U.S. at 496); Sawyer v. Whitley, 505 U.S. 333, 348 (1992); Bolender v. Singletary, 898 F.Supp. 876, 881 (S.D.Fla. 1995).

Therefore, these issues are procedurally barred from consideration by this Court.

Conclusion

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

The parties are referred to the Notice Page attached hereto.



Bristow Marchant
United States Magistrate Judge

December 11, 2018
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

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

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

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

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

Additional material from this filing is available in the Clerk's Office.