FILED: October 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6514
(5:20-cv-00818-MBS)

JERMAINE L. COBBS

Petitioner - Appellant

v.

WARDEN OF GOODMAN CORRECTIONAL INSTITUTION

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer, Judge Harris, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

* Appendix-C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6514

JERMAINE L. COBBS,

Petitioner - Appellant,

v.

WARDEN OF GOODMAN CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Orangeburg. Margaret B. Seymour, Senior District Judge. (5:20-cv-00818-MBS)

Submitted: August 24, 2021, Decided: August 27, 2021

Before NIEMEYER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Jermaine L. Cobbs, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

*Appendix-A

PER CURIAM:

Jermaine L. Cobbs seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Cobbs' 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 Cobbs has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: August 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6514
(5:20-cv-00818-MBS)

JERMAINE L. COBBS

Petitioner - Appellant

v.

WARDEN OF GOODMAN CORRECTIONAL INSTITUTION

Respondent - Appellee

J U D G M E N T

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

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

/s/ PATRICIA S. CONNOR, CLERK

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

JERMAINE L. COBBS, Petitioner, v. WARDEN OF GOODMAN CORRECTIONAL INSTITUTION, Respondent.	)	Civil Action No.: 5:20-00818-MBS **ORDER**

Petitioner Jermaine L. Cobbs ("Petitioner"), proceeding *pro se*, filed this habeas relief action pursuant to 28 U.S.C. § 2254. ECF No. 1. In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c), D.S.C., this matter was referred to United States Magistrate Judge Kaymani D. West for pre-trial proceedings and a Report and Recommendation ("Report").

BACKGROUND

On May 6, 2020, Respondent Warden of Goodman Correctional Institution ("Respondent"), filed a motion for summary judgment, along with a return and memorandum. ECF Nos. 17, 18. Petitioner filed a response in opposition to the motion for summary judgment on May 15, 2020. ECF No. 22. Respondent did not file a reply. On October 30, 2020, the Magistrate Judge issued a Report recommending that Respondent's motion for summary judgment be granted and the petition for a writ of habeas corpus be denied. ECF No. 27.

The Magistrate Judge advised Petitioner of his right to file specific objections to the Report. ECF No. 27 at 25. Petitioner sought and received an extension of time, ECF No. 29, and filed his objections on November 16, 2020, ECF No. 35. The Report sets forth the relevant factual and procedural background from the trial and post-conviction relief ("PCR") proceedings, as well as

*Appendix-B

the relevant legal standards, none of which Petitioner disputes and which the court incorporates here without recitation.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to the court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter with instructions. 28 U.S.C. § 636(b)(1). The court need not conduct a *de novo* review when a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of a timely filed, specific objection, the Magistrate Judge's conclusions are reviewed only for clear error. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

DISCUSSION

A. Grounds for Relief

Petitioner filed his § 2254 petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 and therefore review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997). Petitioner raises two grounds for relief as follows[1]:

Ground One: Trial counsel ineffective for misadvice of the mandatory minimum of sentence.

[1] The court quotes the grounds for relief as quoted by the Magistrate Judge according to the § 2254 petition without the use of "[sic]". *See* ECF No. 27 at 7.

Supporting Facts: I was told by trial counsel that trafficking cocaine 28 to 100 grams was 17 to 25 years. Trafficking cocaine 28 to 100 grams carries 7 to 25 years.

Ground Two: The PCR judge erred in denying petitioner allegation that he was coerced into pleading guilty to avoid life sentence.

Supporting Facts: Due to counsel's misadvice because none of the state's charges levied against him carried life imprisonment penalties.

ECF No. 27 at 7 (citing ECF No. 1 at 5-7).

Each of these grounds for relief implicates the assistance of Petitioner's trial counsel. As the Magistrate Judge explained in the Report, the governing standard for adjudicating assistance of counsel claims is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner first must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and second must show that this deficiency prejudiced the defense. ECF No. 27 at 10 (citing *Strickland*, 466 U.S. at 687, 694). When a petitioner raises in a § 2254 habeas petition an ineffective-assistance-of-counsel claim that was denied on the merits by a state court, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable[,]" not "whether defense counsel's performance fell below *Strickland's* standard." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Where the claim is based on a petitioner's allegation that his guilty plea was involuntary, the court must uphold the guilty plea as constitutionally valid if it "'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

The Magistrate Judge engaged in a comprehensive discussion of these two grounds for relief and found each to be without merit. Accordingly, the Magistrate Judge recommends that the court grant the motion for summary judgment.

B. Objections

1. Ground One

Petitioner argues his trial counsel offered ineffective assistance because he misinformed Petitioner that the drug violation with which Petitioner had been charged carried an associated penalty range of 17 to 25 years when in fact it carries a penalty range of 7 to 25 years.

The Magistrate Judge first considered and rejected Respondent's argument that this claim is procedurally defaulted.[2] ECF No. 27 at 20. Upon finding the claim preserved, the Magistrate Judge noted that the PCR court's factual findings were based in part on its conclusion that trial counsel's testimony was more credible than that of Petitioner, and that Petitioner had provided no basis on which to "discount the PCR court's credibility determination." *Id.* at 20-21.

Petitioner objects that he has shown he is entitled to relief based on trial counsel's "erroneous sentencing advice," and cites to the transcript of his plea hearing and of the PCR hearing. ECF No. 35 at 3. Specifically, Petitioner cites to the following exchange during the plea hearing:

> Solicitor: Indictment 2010-GS-08-1722 is trafficking cocaine, 200 to 400. He's pleading to the lesser included of trafficking cocaine 28 to 100 for a negotiated 18 – first offense, for a negotiated 18-year sentence.
> The Court: And that carries – what's the range on that?
> Solicitor: That carries 17 to 25 years.
> The Court: You agree with that?
> Trial Counsel: Unfortunately, yes, sir.

Id. (citing ECF No. 17-1 at 4-5). Petitioner also cites to the following exchange during the PCR hearing:

> Q: All right. Let's go to page 3 line 1 through 4. Page 3 says, "[Solicitor]; It carries 17 to 25 years. The Court: You agree with that? [Trial Counsel]: Unfortunately yes, sir." So you're saying that based on where you were you were given the wrong

[2] Respondent did not object to this finding and the court finds no error in the Magistrate Judge's determination.

> information, even your lawyer didn't know what you were facing; is that correct?
> A: That's correct.
> Q: Okay.
> A: He never objected to it.
>
> . . . .
>
> A: No, sir. The seven came up because one of the trafficking was reduced down. I think it's a typographical error in the transcript. One of the trafficking was reduced down to 7 to 25. It was not – that's when the 300 or 200 to 400-gram range, I was able to negotiate that down to where the range was 7 to 25 instead of 25 mandatory.

Id. (citing ECF No. 17-1 at 51, 91). Petitioner asserts in his objection that but for the "erroneous sentenc[ing] advice]" he "would have never waive [sic] his right and plead guilty but insist on going to trial." ECF No. 35 at 4.

Petitioner's objection merely reasserts his original contention and does not provide a basis for setting aside the PCR court's credibility determination. As the Magistrate Judge noted, the PCR court's assessment of witness credibility is entitled to deference, and Petitioner has not shown that the PCR court's decision was "objectively unreasonable in light of the evidence presented in the state court proceeding." *Wilson v. Ozmint*, 352 F.3d 847, 858–59 (4th Cir. 2003). *See Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (instructing that "for a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear").[3] The court finds no error in the Magistrate Judge's findings as to Ground One and therefore overrules the objection.

2. Ground Two

Petitioner argues he agreed to plead guilty because his trial counsel incorrectly represented

[3] The court notes it appears that Petitioner would have faced a mandatory penalty of 25 years had he elected to go to trial and that the lower penalty range of 7 to 25 years was triggered only as a result of the plea agreement, by which Petitioner was allowed to plead to the lesser included offense. *See* S.C. Code Ann. § 44-53-370(e)(2).

that Petitioner would face a life sentence should he proceed to trial and that the PCR court erred in denying this claim that he was coerced into pleading guilty.

The Magistrate Judge reviewed the transcripts of the guilty plea hearing and the PCR hearing and concluded that Petitioner had offered no factual basis on which to overturn the state court's finding that Petitioner chose to enter a guilty plea freely and voluntarily, and therefore concluded that the PCR court "made reasonable findings of fact and reasonably applied federal law in denying Petitioner's involuntary guilty plea claim." ECF No. 27 at 22-23.

Petitioner objects and cites to the following excerpts from the transcripts of the guilty plea hearing and PCR hearing:

> Trial Counsel: But to look at it overall, 38 years old and this is really the first significant trouble he's ever been in, I think it's a good way for him to kind of put this to rest without taking the chance of spending the rest of his life in jail.

ECF No. 35 at 5 (citing ECF No. 17-1 at 12).

> Q. It says, "But to look at it overall 38 years old and this is really the first significant trouble he's ever been in. I think it's a good way for him to kind of put this to rest without taking the chance of spending the rest of his life in jail. He accepted responsibility. He's walking in here to take 18 years." Why don't you tell me what your problem is with that?
>
> . . . .
>
> Q. I read lines 5 through 10 where it talks about Attorney Thrower talking about it's a good way for him to put this to rest without taking the chance of spending the rest of his life in jail. Okay? Tell the Court what your problem is with that statement and how it relates to your understanding.
> A. I had an understanding that if I didn't take the 18-year sentence I was facing a life sentence in prison. That was my understanding, you know. So I was like life sentence, you know, or 18 months where he explained what the lesser included offense was. So I was like, you know, that's what induced me to plea. Had I known that I wasn't facing a life sentence, I was only facing a maximum mandatory 25.
> Q. Then you would have done what?
> A. I would have insisted on going to trial.

ECF No. 35 at 5 (citing ECF No. 17-1 at 52-53).

Petitioner asserts "it should have been made clear to the Petitioner what [trial counsel] meant by using the term spending the rest of your life in prison before the guilty plea, not at the PCR hearing," and that "[i]f counsel had not misinformed petitioner that he would face a potential life sentence, petitioner would have never plead guilty and insist on going to trial." ECF No. 35 at 5.

As an initial matter, the court agrees with the Magistrate Judge that the record reflects Petitioner's plea was given voluntarily and intelligently. *See* ECF No. 27 at 23. Petitioner's objection does not show otherwise. Nor does Petitioner provide in his objection a basis for finding that he would not have pleaded guilty but for the defective assistance he attributes to counsel.[4] The court agrees with the Magistrate Judge's finding that the PCR court's dismissal of the involuntary guilty plea claim does not constitute an unreasonable application of Federal law and was not based on an unreasonable determination of facts in light of the state court record. The court therefore overrules the objection.

For the reasons set forth herein, the court agrees with the Magistrate Judge's analysis and adopts and incorporates the Magistrate Judge's Report, ECF No. 27. The Motion for Summary Judgment, ECF No. 18, is granted and the habeas petition, ECF No. 1, is denied and dismissed with prejudice.

CERTIFICATE OF APPEALABILITY

The governing law provides that:

> (c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability. . . shall indicate which specific issue or

[4] The court notes that the state statute under which Petitioner was charged sets forth the sort of penalties that could very well have amounted to a life sentence in practical if not technical terms, had Petitioner proceeded to trial, been found guilty, and received consecutive sentences.

issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this Court's assessment of his constitutional claims to be debatable or wrong and that any dispositive procedural ruling by this Court is likewise debatable. *See Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is denied.

IT IS SO ORDERED.

/s/Margaret B. Seymour
Margaret B. Seymour
Senior United States District Judge

March 17, 2021
Charleston, South Carolina

*****

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure.

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

Jermaine L. Cobbs, Petitioner, v. Warden of Goodman Correctional Institution, Respondent.	)	C/A No.: 5:20-818-MBS-KDW REPORT AND RECOMMENDATION

Jermaine L. Cobbs ("Petitioner") is a state prisoner who filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c) DSC, for a Report and Recommendation on Respondent's Return and Motion for Summary Judgment. ECF Nos. 17, 18. On May 8, 2020, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the Summary Judgment Motion, dismissal procedures, and the possible consequences if he failed to respond adequately to Respondent's Motion. ECF No. 19. On May 15, 2020, Petitioner filed a Response in Opposition to Respondent's Motion for Summary Judgment. ECF No. 22.

Having carefully considered the parties' submissions and the record in this case, the undersigned recommends that Respondent's Motion for Summary Judgment, ECF No. 18, be granted, and this Petition be denied.

I. Background

Petitioner is currently incarcerated in the Goodman Correctional Institution of the South Carolina Department of Corrections. ECF No. 1 at 1. He was indicted at the October 2010 and September 2012 terms of the Berkeley County Grand Jury on counts of trafficking cocaine, 200 to

400 grams (2010-GS-08-1722); distribution of cocaine (2010-GS-08-1724); and trafficking cocaine, 10 to 28 grams (2012-GS-08-1787), App. 117–22.[1]

According to the facts as stated by the solicitor at Petitioner's plea hearing, on August 4, 2010, Petitioner sold cocaine to a confidential informant. App. 6. Law enforcement subsequently executed search warrants at Petitioner's home and business and discovered additional cocaine. *Id.* On June 14, 2012, after another controlled buy, law enforcement executed another search warrant at Petitioner's home and again discovered cocaine. App. 6–7.

On December 20, 2012, Petitioner appeared before Judge Markley R. Dennis, Jr., and pled guilty to the lesser included offenses of trafficking in cocaine, 28 to 100 grams, possession with intent to distribute cocaine, and distribution of cocaine, first offense. App. 1–12. Petitioner was represented by Attorney William Thrower. *Id.* Pursuant to a negotiated sentence, Judge Dennis sentenced Petitioner to concurrent terms of eighteen years for trafficking cocaine and possession with intent to distribute, and to time-served for the distribution charge. *Id.*

On March 19, 2013, plea counsel filed a motion to reconsider. App. 16. On December 12, 2013, while plea counsel's motion was still pending, Petitioner filed an application for post-conviction relief ("PCR") (2013-CP-08-2751). ECF No. 17-2. The State moved to dismiss Petitioner's application, ECF No. 17-3, and Judge Dennis granted the State's motion, ECF No. 17-4. Judge Dennis later denied plea counsel's motion for reconsideration. Petitioner did not file an appeal.

[1] Citations to "App." refer to the Appendix for Petitioner's guilty plea transcript and Post-Conviction Relief ("PCR") Proceedings. That appendix is available at ECF No. 17-1 in this habeas matter.

II. Procedural History

Petitioner filed an application for Post-Conviction Relief ("PCR") on March 9, 2016. (2016-CP-08-0593), alleging the following grounds for relief:

1. "Ineffective Assistance of Counsel," in that:

    a. Plea counsel informed Applicant he could "negotiate a plea deal where [Applicant] would plead to only one charge and be sentenced to approximately seven years . . . with credit for time served."

    b. Counsel informed Applicant that at that time Applicant "would be required to wear an ankle monitor which would be included in the time-served calculation."

    c. Counsel told Applicant he would only be required to serve 65% of his sentence.

    d. Applicant pleaded to three charges instead of one.

    e. The time Applicant wore the ankle monitor was not included in the time-served calculations. Applicant was informed at the sentencing that he would be required to serve at least 85% of his sentence, as opposed to the 65% promised by plea counsel.

    f. Plea counsel never discussed with Applicant the evidence of the case and potential strategies to be used during his defense.

    g. Plea counsel only met with or contacted Applicant three times in preparation of this case.

    h. Plea counsel "relied only on his contacts, and made no attempts to examine the evidence of the case."

App. 17–21 (as summarized in the Return to the PCR application, App. 23–24). On November 1, 2017, Petitioner filed an amended PCR application, alleging ineffective assistance of counsel because:

> Attorney Thrower informed Plaintiff that he could negotiate a plea deal where Plaintiff would plead to only one (1) charge and be sentenced to approximately seven (7) years in the penitentiary with credit for time served. Furthermore, Attorney Thrower informed Plaintiff that at that time, Plaintiff would be required

to wear an ankle monitor which would be included in the time served calculation. During a meeting, Attorney Thrower told Plaintiff that he would only be required to serve sixty-five percent (65%) of his sentence. At the plea hearing much to his surprise, Plaintiff pled to three charges (3), not to the one (1) charge Attorney Thrower initially suggested. Plaintiff was sentenced to eighteen years (18) for two (2) charges and twenty-seven (27) months for the final charge; to be served concurrently and credited with time served. Additionally, Plaintiff was informed at the sentencing that he would be required to serve at least eighty-five percent (85%) of his sentence, as opposed to the sixty-five percent (65%) promised by Attorney Thrower.

Attorney Thrower only met with and/or contacted the Plaintiff three (3) times in preparation of this case. Attorney Thrower made no attempts to examine the evidence of the case.

App. 28–31.

The Honorable Michael Nettles convened an evidentiary hearing on the matter on December 4, 2017. App. 36–105. Petitioner was represented by Eduardo Curry, and Julie Coleman appeared for the State. App. 36. The court heard from Petitioner, plea counsel, and Petitioner's parents. App. 37. The PCR court denied and dismissed Petitioner's PCR Application with prejudice in an order filed on December 28, 2017, making the following findings of fact and conclusions of law:

> This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).
>
> As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.
>
> INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in his representation surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

In the present case, this Court finds Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. The guilty plea transcript shows Applicant was fully advised of the terms of the plea deal and was aware of the negotiated sentence of eighteen years. The plea court advised him that he would have to serve at least 85 percent of the sentence. Applicant indicated on the record that he was satisfied with Plea Counsel's representation at the time. The record shows there was good communication between them at the time, and he had no complaints. The facts of the offenses were placed on the record, and Applicant agreed that they were true. Applicant was given credit for time served at Plea Counsel's request, including the time he was on ankle monitoring.

Plea Counsel credibly testified he fully discussed the evidence and plea negotiations with Applicant, and Applicant understood their discussions and chose to plead guilty. This Court finds Plea Counsel represented Applicant well within the bounds of professional norms, and none of his actions or advice were ineffective. Furthermore, this Court finds Applicant has failed to prove his allegation that Plea Counsel was ineffective for failing to investigate his case. The testimony presented show Plea Counsel investigated and worked on the case thoroughly, and Applicant has failed to present a valid defense that could have been used at trial. This Court finds neither deficiency nor prejudice on this ground or any other, and these allegations are denied and dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

To any extent that Applicant argues his plea was not given freely and voluntarily, this Court finds otherwise and concludes that Applicant's plea was

> entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.

App. 114–15.

Petitioner filed a timely notice of appeal. ECF No. 17-5. On August 17, 2018, Petitioner's appellate counsel, Deputy Chief Appellate Defender Wanda H. Carter, filed a *Johnson*[2] Petition for Writ of Certiorari in the South Carolina Supreme Court presenting the following issue:

> The PCR judge erred in denying petitioner's allegation that he was coerced into pleading guilty to avoid a life sentence due to counsel's misadvice because none of the state's charges levied against him carried life imprisonment penalties.

ECF No. 17-6 at 3. On September 25, 2018, Petitioner made a pro se response to the *Johnson* petition and presented the following additional issues:

> PCR judge erred in failing to find plea counsel ineffective for counsel incorrect sentencing advice on the lesser included offense on trafficking 28 to 100 grams of cocaine.
>
> PCR judge erred in failing to find plea counsel ineffective for incorrectly advising Petitioner about the enhancement statute, S.C. 44-53-470.
>
> PCR judge erred in failing to find plea counsel ineffective for filing an untimely motion for reconsideration of sentence and not mention anything to defendant about the filing of the motion for reconsideration of sentence, and the reason for the filing of the motion.

ECF No. 17-7 at 2. The petition was transferred to the South Carolina Court of Appeals, which denied certiorari on January 23, 2020. ECF No. 17-8. The Remittitur issued on February 10, 2020. ECF No. 17-9. This Petition followed on February 24, 2020. ECF No. 1.

III. Discussion

A. Federal Habeas Issues

[2] *See Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (S.C. 1988) (approving the withdrawal of counsel in meritless appeals of PCR actions by following *Anders* procedure).

Petitioner raises the following issues in his Federal Petition for a Writ of Habeas Corpus, quoted verbatim:

Ground One: Trial counsel ineffective for misadvice of the mandatory minimum of sentence.

Supporting Facts: I was told by trial counsel that trafficking cocaine 28 to 100 grams was 17 to 25 years. Trafficking cocaine 28 to 100 grams carries 7 to 25 years.

Ground Two: The PCR judge erred in denying petitioner allegation that he was coerced into pleading guilty to avoid life sentence.

Supporting Facts: Due to counsel's misadvice because none of the state's charges levied against him carried life imprisonment penalties.

ECF No. 1 at 5–7.

B. Standard for Summary Judgment

The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If a movant asserts that a fact cannot be disputed, it must support that assertion either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or "showing . . . that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In considering a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Further, while the federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, *see, e.g., Cruz v. Beto*, 405 U.S. 319, 323 (1972), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts that set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact when none exists. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

C. Habeas Corpus Standard of Review

1. Generally

Because Petitioner filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Breard v. Pruett*, 134 F.3d 615, 618 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(1)(2); *see Williams v. Taylor*, 529 U.S. 362, (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant

state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

a. Deference to State Court Decisions

Courts afford deference to state courts' resolutions of the habeas claims of state prisoners. *See Bell v. Cone*, 543 U.S. 447, 455 (2005). The Supreme Court has provided further guidance regarding the deference due to state-court decisions. *Harrington v. Richter*, 562 U.S. 86 (2011); *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). To obtain habeas relief from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. The Court further stated: "If this standard is difficult to meet, that is because it was meant to be." *Id.*; *see Richardson v. Branker*, 668 F.3d 128, 137-44 (4th Cir. 2012) (quoting *Harrington* extensively and reversing district court's grant of writ based on his ineffective assistance of counsel claims).

In interpreting § 2254(d)(1) and discussing the federal courts' role in reviewing legal determinations made by state courts, the United States Supreme Court held as follows:

> [A] federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . [clearly] established Federal law as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.

Williams v. Taylor, 529 U.S. 362, 404-05 (2000) (quoting from § 2254(d)(1)). "Clearly established Federal law in § 2254(d)(1) refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Carey v. Musladin*, 549 U.S. 70, 74

(2006) (quoting *Williams*, 529 U.S. at 412). In considering whether a state-court decision is "contrary to" clearly established federal law, the federal court may not grant relief unless the state court arrived at a conclusion opposite to that reached by the Supreme Court on a legal question, the state court decided the case differently than the Court has on facts that are materially indistinguishable, or if the state court "identifie[d] the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applie[d] that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 405-13. The "unreasonable application" portion of § 2254(d)(1) "requires the state court decision to be more than incorrect or erroneous[,]" it "must be objectively unreasonable," which is a higher threshold. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (internal citation omitted).

Section 2254(e)(1) requires the federal court give a presumption of correctness to state-court factual determinations and provides that a petitioner can only rebut such a presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Accordingly, a habeas petitioner is entitled to relief under § 2254(d)(2), only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court.

b. Ineffective Assistance of Counsel

The Sixth Amendment provides a criminal defendant the right to effective assistance of counsel in a criminal trial and first appeal of right. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court announced a two-part test for adjudicating ineffective assistance of counsel claims. First, a petitioner must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 687. Second, the petitioner must show that this deficiency prejudiced the defense. *Id.* at 694. The United States Supreme Court's 2011 decisions cited previously elaborate on the interplay between *Strickland* and § 2254,

noting the standards are "both highly deferential," and "when the two apply in tandem, review is doubly so." *Harrington*, 562 U.S. at 105 (internal quotation marks omitted); *Pinholster*, 131 S. Ct. at 1403. When a petitioner raises in a § 2254 habeas petition an ineffective-assistance-of-counsel claim that was denied on the merits by a state court, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable[,]" not "whether defense counsel's performance fell below *Strickland's* standard." *Harrington*, 562 U.S. at 101. "For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Id.* (citing *Williams*, 529 U.S. at 410) (emphasis in original). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.*

Where allegations of involuntary guilty pleas are concerned, the United States Supreme Court has held that a guilty plea is constitutionally valid if it "'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. at 56 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31(1970)). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). A plea is knowingly and intelligently made if a defendant is "'fully aware of the direct consequences' of his guilty plea and not induced by threats, misrepresentation, including unfulfilled or unfulfillable promises, or by "'promises that are by their nature improper as having no relationship to the prosecutor's business'" *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957)). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's

right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63, 74-75 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327, 350 (4th Cir. 1985); *Edmonds v. Lewis*, 546 F.2d 566, 568 (4th Cir. 1976). Insofar as the review of claims of ineffective assistance of counsel raised by persons who pleaded guilty is concerned, the United States Supreme Court has stated,

> Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial . . . . The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. . . .

Premo v. Moore, 562 U.S. 115, 132 (2011).

2. Procedural Bar

Federal law establishes this court's jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person "is in custody in violation of the Constitution or laws or treaties of the United States[,]" and requires that a petitioner present his claim to the state's highest court with authority to decide the issue before the federal court will consider the claim. 28 U.S.C. § 2254(a)-(b). The separate but related theories of exhaustion and procedural bypass operate in a similar manner to require that a habeas petitioner first submit his claims for relief to the state courts. A habeas corpus petition filed in this court before the petitioner has appropriately exhausted available state-court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

a. Exhaustion

Section 2254 contains the requirement of exhausting state-court remedies and provides as follows:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court, shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). Thus, a federal court may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal; or (2) by filing an application for PCR. State law requires that all grounds be stated in the direct appeal or PCR application. Rule 203 SCACR; S.C. Code Ann. § 17-27-10, *et seq.*; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767

(S.C. 1976). If the PCR court fails to address a claim as is required by section 17-27-80 of the South Carolina Code, counsel for the applicant must make a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Failure to do so will result in the application of a procedural bar by the South Carolina Supreme Court. *Marlar v. State*, 653 S.E.2d 266, 267 (S.C. 2007). Strict time deadlines govern direct appeals and the filing of a PCR in the South Carolina courts. A PCR must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

Furthermore, in filing a petition for habeas relief in the federal court, a petitioner may present only those issues that were presented to the South Carolina Supreme Court or the South Carolina Court of Appeals. *See State v. McKennedy*, 559 S.E.2d 850, 853 (S.C. 2002) (holding "that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error.") (quoting *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief*, 471 S.E.2d 454, 454 (S.C. 1990)).

b. Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner who seeks habeas corpus relief as to an issue failed to raise that issue at the appropriate time in state court and has no further means of bringing that issue before the state courts. In such a situation, the person has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. Procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings

if the state has procedural rules that bar its courts from considering claims not raised in a timely fashion.

The South Carolina Supreme Court will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. Further, if a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. As the United States Supreme Court explains: [state procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. *Reed v. Ross*, 468 U.S. 1, 10-11 (1984).

However, if a federal habeas petitioner can show both (1) "'cause' for noncompliance with the state rule[,]" and (2) "'actual prejudice resulting from the alleged constitutional violation[,]'" the federal court may consider the claim. *Smith v. Murray*, 477 U.S. at 533 (quoting *Wainwright v. Sykes*, 433 U.S. 23, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

If a federal habeas petitioner has failed to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state courts and in federal court. A federal court is barred from considering the filed claim (absent a showing of cause and actual prejudice). In such an instance, the exhaustion requirement is technically met and the rules of procedural bar apply. *See Teague*

v. Lane, 489 U.S. 288, 297-98 (1989); *Matthews*, 105 F.3d at 915 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996).

3. Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this court may consider claims that have not been presented to the South Carolina Supreme Court in limited circumstances in which a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or that a "fundamental miscarriage of justice" has occurred. *Murray*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor that hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim. *Id.* Absent a showing of cause, the court is not required to consider actual prejudice. *Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice in order to excuse a default. *Murray*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error.

IV. Analysis

A. Merits

In Ground One, Petitioner alleges his plea counsel was ineffective for telling him the potential sentencing range for his trafficking charge was 17 to 25 years, rather than 7 to 25 years. ECF No. 1 at 5. Respondent contends this claim is procedurally defaulted and Petitioner cannot show cause and prejudice to excuse the default. ECF No. 17 at 13. Petitioner submits he testified regarding this claim at the PCR evidentiary hearing and, if it was not preserved, that failure is attributable to his PCR counsel and thus he should be able to show cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2013) (allowing ineffective assistance of postconviction counsel to

establish cause for failing to raise a claim of ineffective assistance of trial counsel under certain circumstances).[3] ECF No. 22 at 4.

At the PCR hearing, while discussing the allegations asserted here in Ground Two, Petitioner had the following exchange with his PCR counsel:

> Q. What did you learn that you had actually been facing in your liability?
>
> A. As I learned the lesser included offense is 20 to 100, doesn't carry 17 to 25. It carries 7 to 25. Had I known that from counsel I would have insisted on going to trial.
>
> Q. Why would you have insisted on going to trial?
>
> A. Because the fact there was a possibility upon conviction I would have been facing either zero or mandatory 25.
>
> . . . .
>
> A. You know, that I knew about, you know, after my investigation, my own investigation that I was going to be facing mandatory 25.
>
> Q. So it was your belief that you were given the wrong information that induced you to plead, correct?
>
> A. Yes.
>
> Q. And based on that what are you asking the Court to do?
>
> A. Either remand or reverse for a new trial or vacate my sentence.
>
> Q. Let's move to the next one. You said that Attorney Thrower told you you were facing a minimum seven years; is that correct?
>
> A. No, he never told me what nothing was. He just came in there and told me I would be pleading to - - he said seven years when he first met me the second time. But when he came back the third time he said that I would be doing 18 years. So he never did tell me the minimum or maximum number. . . .

[3] In his response to the motion for summary judgment, Petitioner apparently addresses Ground One under the "Ground Two" heading and vice versa.

App. 47–49.

Plea counsel testified that, when he first reviewed the case, he figured Petitioner was facing 50 to 60 years in prison, assuming the State tried the two arrests separately and asked for consecutive sentences. App. 87. When asked if he ever told Petitioner he was only facing seven years, plea counsel responded:

> No, sir. The seven came up because one of the trafficking [charges] was reduced down. I think it's a typographical error in the transcript. One of the trafficking was reduced down to 7 to 25. It was not - - that's when the 300 or 200 to 400-gram range, I was able to negotiate that down to where the range was 7 to 25 instead of 25 mandatory.

App. 89. Plea counsel also denied ever telling Petitioner he would get 18 months, but stated he informed Petitioner he would get 18 years. *Id.*

Plea counsel further discussed the negotiated sentence and Petitioner's plea on cross-examination:

> Q. Mr. Thrower, was there ever any discussion between you and the applicant of agreeing to a deal for four and-a-half years?
>
> A. No, there was never. That wasn't even the deal after one arrest.
>
> Q. What about an 18-month sentence?
>
> A. No.
>
> Q. After time served?
>
> A. The fight was on to get credit for that ankle monitor time because the solicitor was - - he was saying he sold drugs with his ankle monitor on and he was angry about it and I was able to just calm him down on that. . . .
>
> Q. He did get credit for time served for those 27 months on the ankle monitor?
>
> A. Yes, every day of it.

Q. Did you ever have any question that the applicant understood your discussion about the 18-year negotiated sentence?

A. I didn't think he had any problems with it. He had some problems understanding - - I think both lawyers he had [before plea counsel] had inexplicably told him that they - - if you hire me I think I can get you out on probation and it was tough going to him and saying look, you never had an offer of probation. And that was - - it was erroneous advice, it was promises that put me in a bad position because he was expecting me to I guess to deliver the same kind of deal. I said there's a reason why neither one of those lawyers is here anymore because you are not getting probation and I thought he had a pretty good understanding of that.

Q. So you told him that he was pleading to an 18-year sentence negotiated serving 85 percent of that, right?

A. I showed him where it was marked as a violent crime.

Q. Okay. Did you advise him of the rights that he was waiving when he pled guilty?

A. Yes.

Q. Did he seem to understand that discussion?

A. Yes.

Q. And ultimately whose decision was it to plead guilty?

A. It was his. After we discussed the risk of going to trial and losing the suppression motion,[4] th[e]n there was no more plea bargain offer.

App. 96–98.

During his plea, Petitioner stated plea counsel had explained the charges and possible punishments and he pled guilty after the court explained that his plea would result in an 18-year sentence. App. 2–4. In addition, Petitioner told the court he was "totally satisfied" with plea

[4] Earlier in his testimony, plea counsel detailed the facts of Petitioner's arrests, described his case as "one-sided," and stated he did not file a suppression motion because that would have terminated the plea deal. App. 91–94.

counsel's representation and understood the consequences of the negotiated sentence and the rights he waived by pleading guilty. App. 4–6.

Turning to Petitioner's allegation of ineffective assistance of counsel, the undersigned disagrees with Respondent and finds Ground One preserved.[5] In order to exhaust state remedies, a § 2254 petitioner must provide the state court "the 'opportunity to pass upon and correct alleged violation of . . . federal rights.'" *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam)). "To provide the State with the necessary 'opportunity,' the [petitioner] must 'fairly present' his claim in each appropriate state court . . . , thereby alerting that court to the federal nature of the claim." *Id.* "[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim." *Id.* at 32. Here, Petitioner's amended PCR application alleged plea counsel was ineffective for "inform[ing] Plaintiff that he could negotiate a plea deal where Plaintiff would plead to only one (1) charge and be sentenced to approximately seven (7) years in the penitentiary with credit for time served." App. 31. Petitioner testified regarding the alleged bad advice at the evidentiary hearing and the PCR court's order discusses Petitioner's understanding of the terms of the plea deal. Petitioner raised this issue on appeal through his *pro se* response to the *Johnson* petition. *See* ECF No. 17-7 at 2. Accordingly, Ground One is preserved for federal habeas review.

However, the undersigned finds Petitioner fails to show he is entitled to relief. The PCR court's factual findings are based, in part, on its assessment that counsel's testimony was more

[5] Further, if Petitioner's claim is not preserved, for the following reasons, he fails to show his underlying claim of ineffective assistance of plea counsel has "some merit," and thus fails to meet his burden under *Martinez*.

credible than that of Petitioner. The PCR court's credibility determination is entitled to deference in this action. *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)) ("[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear."); *see also 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, but not by them."). Petitioner may overcome this presumption of correctness only by showing "'clear and convincing evidence to the contrary.'" *Wilson v. Ozmint*, 352 F.3d 847, 858 (4th Cir. 2003) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). Petitioner has shown no cause to discount the PCR court's credibility determination and the undersigned can find no basis in the record on which to overturn the state court decision regarding Ground One.

In Ground Two, Petitioner alleges the PCR court erred in denying his claim that he was coerced into pleading guilty to avoid a life sentence. ECF No. 1 at 7. Respondent asserts the state court's decision is not contrary to or an unreasonable application of clearly established Supreme Court precedent. ECF No. 17 at 29. In his response, Petitioner asserts:

> . . . a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty and the nature of the constitutional rights being waived, here the petitioner's charges levied against petitioner, none of them carried a life sentence, although counsel advised petitioner that he could receive the equivalent of a life sentence, this equivalency should have been made clear to petitioner so that he would not had been coerced into pleading guilty based on the misunderstanding that a life sentence was a penalty option via that statutes under which he was indicted.

ECF No. 22 at 3. As evidence, Petitioner offers statements from plea counsel during Petitioner's plea and the PCR hearing. *See* ECF No. 22-1 at 1–2.

During the mitigation portion of Petitioner's plea, counsel told the court, "But to look at it overall, 38 years old and this is really the first significant trouble he's ever been in, I think it's a good way for him to kind of put this to rest without taking the chance of spending the rest of his life in jail." App. 10. However, counsel continued, "Again, he's accepted responsibility. He's walking in here taking 18 years, and he's not contesting any of the forfeitures, so all we're asking is that you please impose the sentence and give him credit for time he's already done." *Id.*

Plea counsel directly addressed this allegation at the PCR hearing in the following exchange:

> Q. . . . Did you ever tell Mr. Cobbs he was facing a life sentence?
>
> A. If I used that term it was because the possibility of a 50 to 60-year sentence for a man around 40 years old. To me I said you don't want to spend the rest of your life in prison. You know, you made a mistake. It wouldn't have been life as far as that. It would have been in the context of this could - - eventually this could be a life sentence for you as far as you can spend the rest of your life in jail. It wouldn't have been life on the sentencing sheet, but it would have been life in practical terms.
>
> Q. So the answer is no, you never told him that, correct?
>
> A. I would not have told him the possible sentence was life because that's impossible.

App. 93.

Petitioner offers no evidence to rebut counsel's clear explanation and these portions of the record support the state court's finding that Petitioner chose to enter a guilty plea freely and voluntarily. The state court's finding is further supported by Petitioner's own representations during his plea. A guilty plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant," *North Carolina v. Alford*, 400 U.S. at 31, and may be invalid if it was induced by threats or misrepresentations. *See Brady v. United States*, 397

U.S. 742, 755 (1970). However, a defendant's statements at the guilty plea hearing are presumed to be true. *Blackledge v. Allison*, 431 U.S. at 73–74. Unsupported allegations on appeal or in a collateral proceeding are insufficient to overcome representations made during the guilty plea hearing. *See Via v. Superintendent, Powhatan Corr. Ctr.*, 643 F.2d 167, 171 (4th Cir. 1981) (holding that statements at plea hearing that facially demonstrate plea's validity are conclusive absent compelling reason why they should not be, such as ineffective assistance of counsel).

At his plea hearing, Petitioner stated he understood why he was there; that he had a right to a jury trial, right to confront witnesses, and the right to remain silent; he understood he was giving up those rights; he understood that the State would bear the burden of proving his guilt; he understood the charges he was facing and the benefit he was getting by entering a guilty plea; he acknowledged his guilt to the facts recited by the solicitor; he understood his conversations with his counsel; he entered the guilty plea voluntarily, of his own free will; and he pled guilty because he was guilty. App. 2–12. In light of the evidence presented, the undersigned finds the PCR court made reasonable findings of fact and reasonably applied federal law in denying Petitioner's involuntary guilty plea claim.

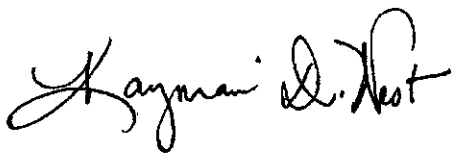
The undersigned finds the state court did not unreasonably apply the mandates of *Strickland*. Petitioner has failed to show the PCR court unreasonably applied United States Supreme Court precedent in deciding his involuntary guilty plea and ineffective assistance of counsel claims. Additionally, Petitioner has failed to show by clear and convincing evidence that the PCR court reached an unreasonable factual determination of these issues given the evidence and record before it. *Evans v. Smith*, 220 F.3d 306, 312 (4th Cir. 2000) (holding that 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. 420 (2000); *Bell v. Jarvis*, 236 F.3d 149, 157–58 (4th Cir. 2000); 28 U.S.C. § 2254(e)(1) (finding the determination of a factual issue by the state court shall be presumed correct unless rebutted by clear and convincing evidence). Accordingly, Petitioner has failed to overcome the deferential standard of review accorded the state PCR court's determinations of these issues. The undersigned recommends Petitioner's habeas petition be dismissed.

III. Conclusion and Recommendation

Therefore, based upon the foregoing, the undersigned recommends that Respondent's Motion for Summary Judgment, ECF No. 18, be GRANTED and the Petition be DENIED.

IT IS SO RECOMMENDED.



October 30, 2020
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

Notice of Right to File Objections to Report and Recommendation

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

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

Robin L. Blume, Clerk
United States District Court
Post Office Box 2317
Florence, South Carolina 29503

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

FILED: September 14, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6514
(5:20-cv-00818-MBS)

JERMAINE L. COBBS

Petitioner - Appellant

v.

WARDEN OF GOODMAN CORRECTIONAL INSTITUTION

Respondent - Appellee

TEMPORARY STAY OF MANDATE

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

/s/Patricia S. Connor, Clerk

*Appendix-C

FILED: April 19, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6514
(5:20-cv-00818-MBS)

JERMAINE L. COBBS

Petitioner - Appellant

v.

WARDEN OF GOODMAN CORRECTIONAL INSTITUTION

Respondent - Appellee

O R D E R

The court grants leave to proceed in forma pauperis.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

*Appendix-D