UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7686

TREMAINE RASHON WRAY,

Petitioner - Appellant,

v.

WARDEN DENNIS BUSH,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Bruce H. Hendricks, District Judge. (9:17-cv-03066-BHH)

Submitted: December 1, 2020 Decided: February 25, 2021

Before KEENAN, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Tremaine Rashon Wray, Appellant Pro Se.

PER CURIAM:

Tremaine Rashon Wray seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Wray'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 Wray has not made the requisite showing. Accordingly, we deny Wray's motions for 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: May 18, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7686
(9:17-cv-03066-BHH)

TREMAINE RASHON WRAY

Petitioner - Appellant

v.

WARDEN DENNIS BUSH

Respondent - Appellee

ORDER

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

Entered at the direction of the panel: Judge Keenan, Judge Richardson, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

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

TREMAINE RASHON WRAY, Petitioner,	)	Civil Action No.: 9:17-03066-BHH
v.	)	**ORDER**
WARDEN DENNIS BUSH, Respondent.	)	

Petitioner Tremaine Rashon Wray ("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 Bristow Marchant, for pre-trial proceedings and a Report and Recommendation ("Report").

BACKGROUND

On May 1, 2018, Respondent Warden Dennis Bush ("Respondent"), filed a motion for summary judgment, along with a return and memorandum. (ECF Nos. 23, 24). On May 2, 2018, the Magistrate Judge entered an order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the importance of a dispositive motion and of the need for him to file an adequate response to Respondent's motion. (ECF No. 25). In that order, the Magistrate Judge advised Petitioner of the possible consequence of dismissal if he failed to respond adequately. Petitioner sought and received an extension of time (ECF Nos. 36, 37) and filed a response in opposition to the motion for summary judgment on August 10, 2018. (ECF No. 39). Respondent did not file a reply. On January 10, 2019, 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. 41).

The Magistrate Judge advised Petitioner of his right to file specific objections to the Report. (ECF No. 41). Petitioner sought and received an extension of time (ECF Nos. 43, 44) and filed his objections on February 27, 2019, (ECF No. 46). Petitioner submitted 72 pages of handwritten objections. *See id.* Respondent did not file a response. The case was subsequently reassigned to the undersigned. (ECF No. 47). The Report sets forth the relevant factual and procedural background from the trial and post-conviction relief ("PCR") proceedings, as well as the relevant legal standards, which the Court incorporates here without recitation.[1]

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). However, 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).

[1] As always, the Court says only what is necessary to address Petitioner's objections against the already meaningful backdrop of a thorough Report, which contains a comprehensive recitation of law and the relevant facts.

DISCUSSION

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 twenty-four grounds for relief, which can be grouped into the following general categories with respect to subject matter: issues concerning the search and arrest warrants and underlying probable cause (Grounds One, Fourteen, Fifteen, Sixteen, Seventeen, and Eighteen); trial court error in failing to grant motion for mistrial following state's eliciting of certain testimony (Ground Two); trial court error in granting state's motion for continuance (Ground Three); all matters concerning Officer Gregory's incident report and eye witness Ricky Jacobs's testimony (Grounds Four, Five, Six, Ten, and Twenty-Three); the state vouching for a witness's credibility during closing argument (Ground Seven); all matters related to gun shot residue ("GSR") (Grounds Eight, Nine, Twelve, and Thirteen); all matters concerning the theory of accomplice liability (Grounds Eleven and Twenty); incorrect application of the South Carolina Rules of Criminal Procedure governing expert testimony (Grounds Nineteen and Twenty-Two); trial court's denial of motion for directed verdict regarding the state's failure to prove Petitioner's identity (Ground Twenty-One); and PCR counsel's failure to preserve appealable issues (Ground Twenty-Four).

As discussed below, the Magistrate Judge further organized the claims according to procedural posture and whether they are based on ineffective assistance of counsel.

I. Grounds for Relief One, Two, and Three

The Magistrate Judge determined that the first, second, and third grounds for relief do not implicate ineffective assistance of counsel and were properly raised in a direct appeal. Ground One asks whether the trial court erred "by not granting [Petitioner's] motion to suppress the fruits

of the execution of the search warrant because the warrant lacked probable cause." (ECF No. 1 at 5). Ground Two asks whether the trial court erred "by not granting [Petitioner's] motion for a mistrial when the solicitor improperly elicited testimony from the witness that cooperating with the police would get her killed." (*Id.* at 7). Ground Three asks whether the trial court "erred by granting the State's continuance motion." (*Id.* at 8).

With respect to Ground One, the Magistrate Judge explained that "a freestanding Fourth Amendment allegation is not cognizable on federal habeas corpus relief," and that Petitioner can proceed with the claim only "if he can show that he was denied a full and fair opportunity to pursue this issue in state court." (ECF No. 41 at 10-11). The Magistrate Judge found that Petitioner can make no such showing because he fully litigated the issue of probable cause in a motion to suppress, which the trial court decided subsequent to a hearing. The Magistrate Judge also noted that Petitioner raised the claim in his direct appeal and that the South Carolina Court of Appeals denied relief. (*Id.* at 11).

With respect to Ground Two, the Magistrate Judge reviewed the basis on which the South Carolina Court of Appeals denied relief on the claim. The Court of Appeals relied in large part on the fact that in ruling on Petitioner's objection, the trial court had instructed the jury to disregard the state's question and the witness's answer. Then, in charging the jury, the trial court had directed the jurors to disregard any testimony stricken from the record. The Court of Appeals further noted that "the inflammatory insinuations in the solicitor's questions were not referred to again during the six and one-half days of trial that followed the witness's appearance," and that Petitioner had offered "only conclusory arguments to support that he was irremediably prejudiced by the questions and resulting testimony." (ECF No. 23-13 at 4-5). The Magistrate Judge found no error in the Court of Appeals's ruling. He noted that a curative jury instruction is generally

deemed to have cured any alleged error and, furthermore, whether to grant a mistrial lies within the sound discretion of the trial court. (ECF No. 41 at 13). The Magistrate Judge also reviewed the evidence supporting Petitioner's guilty conviction and determined that Petitioner had not shown how the colloquy between the state and the witness had caused Petitioner prejudice. Accordingly, the Magistrate Judge found that Petitioner had not shown that the denial of this claim was unreasonable. (*Id.* at 15).

With respect to Ground Three, the Magistrate Judge reviewed the Court of Appeals's decision that the trial court's grant of the state's motion to continue was a proper use of the court's discretion. (ECF No. 41 at 16). The Court of Appeals found that the state's motion complied with Rule 7(a), SCRCrimP, and included "a showing of good and sufficient legal cause to postpone the trial, namely the existence of newly discovered information, that notwithstanding diligent efforts by law enforcement, could not be fully investigated before the scheduled trial." (ECF No. 23-13 at 5). The Magistrate Judge found no error in the Court of Appeals's ruling.

Petitioner does not object to the Report with respect to Grounds One and Three. As to Ground Two, Petitioner reasserts the arguments raised in response to the motion for summary judgment. *Compare* (ECF No. 46 at 3-5) *with* (ECF No. 39 at 19-21). The Court therefore considers this objection to be general and conclusory. The Court has thoroughly reviewed the record and the Report and finds no clear error with respect to these claims. Accordingly, the Court grants the motion for summary judgment as to Grounds One, Two, and Three.

II. Grounds for Relief Five, Six, and Twenty-Three

The Magistrate Judge found that Grounds Five, Six, and Twenty-Three implicate the

effectiveness of legal counsel and were raised to and decided by the PCR court.[2] Ground Five asks whether Petitioner:

> was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Laws and Statutes by Trial Counsel's failure to impeach the State's Eyewitness Ricky Jacobs with the Report of the Responding Officer, Weldon Gregory, and by his failure to move to admit the Police Report into evidence as a part of [Petitioner's] defense as an official report excepted from the hearsay rule under Federal Rule of Evidence 803(8)(c).

(ECF No. 41 at 5). Ground Six asks whether Petitioner:

> was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution Laws and Statutes by Trial Counsel's failure to investigate potentially exculpatory information in the police report, and to interview and subpoena Officer Ray Weldon Gregory, to testify pursuant to his Police Report and to [sic] authentice his handwritten Police Report and verify that he is the Officer who prepared the report.

(*Id.* at 6). Ground Twenty-Three asks whether Petitioner:

> [was denied the right to effective assistance of counsel] in failing to cross examine the State's sole eyewitness about the fact that he initially did not identify Petitioner or his codefendant by name despite knowing both of them, and described the suspects involved in the shooting as one black male with dreadlocks and one black male with a close cut haircut and a striped shirt driving a white SUV, possibly a Nissan with a black stripe down the side, descriptions that matched two other individuals stopped shortly after the shooting took place in a White Isuzu Rodeo SUV with ammunition consistent with the shell casings found at the scene of the shooting?

(*Id.* at 9).

A. Magistrate Judge's Findings

The Magistrate Judge observed that "the PCR court rejected these claims after a full hearing, making relevant findings of fact and conclusions of law," and that "[f]acts related to these

[2] In affording Petitioner's papers the liberal construction to which they are due, the Magistrate Judge disagreed with Respondent that Ground Twenty-Three is procedurally defaulted.

issues were also raised in Petitioner's PCR appeal to the State Supreme Court"; he therefore determined that these claims were "properly exhausted" for the purpose of reviewing the motion for summary judgment. (ECF No. 41 at 17-18). He then reviewed the PCR court's findings with respect to those claims according to the requisite deferential standard, (ECF No. 41 at 27-28), and as to whether Petitioner had demonstrated (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense such that Petitioner was deprived of a fair trial, (*id.* at 28 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

With respect to Grounds Five and Six, the Magistrate Judge noted that Officer Gregory "was the first responder on the scene following the shooting and that he prepared a short, handwritten report after the incident." (ECF No. 41 at 29). The Magistrate Judge summarized the PCR court's findings as follows:

> the PCR court found that Petitioner failed to establish any deficiency of trial counsel with respect to his allegations involving Gregory. The PCR court noted that trial counsel testified that as a general rule he does not like to call members of law enforcement as defense witnesses because to do so is more harmful than helpful to defendants based on his more than forty years of experience; and additionally, counsel testified that he was able to successfully cross-examine Jacobs without calling Gregory as a defense witness and was able to impeach Jacobs with other documents and testimony, including Gregory's report, although not all documents were admitted into the record at trial. The PCR court found that trial counsel's assessment was correct, and that Jacobs was thoroughly examined as to his recollection of events and his identification of Petitioner and his co-defendant. The PCR court found that trial counsel's performance was not deficient and that Petitioner failed to meet his burden of proof. The PCR court also found that Petitioner failed to show any resulting prejudice from this alleged deficiency. The PCR court noted that Gregory's testimony added very little to the overall presentation and likely would have had no impact on the result of the proceeding, explaining that trial counsel challenged Jacobs on virtually every aspect of his recollection. Specifically, the PCR court was not convinced that testimony from Gregory would have had any impact on the jury's view of Jacobs or his credibility, much less the result of Petitioner's trial.

(ECF No. 41 at 29-30) (internal citations to the record omitted). The Magistrate Judge observed

that "the PCR court concluded that Petitioner failed to show the requisite prejudice and/or establish either of the required prongs needed for relief," and he concluded that he could "discern no reversible error in the PCR Court's findings and conclusion." (*Id.* at 30).

The Magistrate Judge further considered Officer Gregory's testimony during the PCR hearing and Mr. Jacobs's testimony during the trial. During the PCR hearing, Officer Gregory testified that Mr. Jacobs told him that after he denied the suspects entry to the club, one commented, "I've got something for you"; and, as relayed by Mr. Jacobs, a few minutes later, one of the suspects began shooting towards the club, firing from a white SUV. (ECF No. 41 at 30). The Magistrate Judge observed that Mr. Jacobs "testified at trial about the fact that Petitioner and his co-defendant were denied entry to the club because it was closing"; and he testified "about seeing a shot fired by someone in a white Isuzu Rodeo, which was after the initial shots were fired." (*Id.* at 31) (internal citations to the record omitted). Nonetheless, the Magistrate Judge explained, "the record shows that trial counsel thoroughly challenged Jacobs on his recollection of the events at issue," and, "[t]herefore, Petitioner has failed to show that trial counsel's performance was deficient for failing to further impeach Jacobs with Gregory's report and for failing to move that report into evidence." *Id.*

The Magistrate Judge reached the same conclusion with respect to Petitioner's contention regarding trial counsel's failure to investigate potentially exculpatory evidence in Officer Gregory's report or interview or subpoena Officer Gregory to authenticate his report and testify. (ECF No. 41 at 31). The Magistrate Judge found that "even assuming that counsel had further investigated this issue and taken the additional steps outlined by the Petitioner, Petitioner has not shown the likelihood of a different outcome, and as a result he has failed to show any prejudice due to counsel's failure to investigate these matters." *Id.*

With respect to Ground Twenty-Three, the Magistrate Judge summarized the PCR court's findings as follows:

> [t]he PCR court discussed that trial counsel testified that he was able to successfully cross-examine Jacobs without calling Gregory as a defense witness and was able to impeach Jacobs with other documents and testimony, including Gregory's report, although not all documents were admitted into the record at trial. The PCR court also found that trial counsel challenged Jacobs on virtually every aspect of his recollection. The PCR court found that trial counsel's assessment was correct that Jacobs was thoroughly examined as to his recollection of events and his identification of Petitioner and his codefendant; that trial counsel's performance was not deficient, and that Petitioner had failed to meet his burden of proof.

(ECF No. 41 at 32) (internal citations to the record omitted). The Magistrate Judge found no error in the PCR court's conclusion that Petitioner had failed to show deficiency or resulting prejudice.

B. Objections

Petitioner objects to the Magistrate Judge's findings. (ECF No. 46 at 18-31). Petitioner asserts in relevant part that:

> trial counsel's failure to put the Report into evidence prejudiced Petitioner because it would have been used to impeach and refute the State's star witness testimony and used as proof to the jury that Ricky Jacobs committed perjury when he testified "repeatedly" on direct and cross examination that he never gave any information to "anyone" else at the scene prior to Inv. Dan McRae's arrival and that the first and only time he explained what he observed was to Inv. Dan McRae. This Police Report would have been able to impeach Mr. Jacobs to the extent that he could not have said anything of any significance without being trapped by his inconsistencies. There is a reasonable probability that this evidence would have produced a different outcome.
>
> . . . .
>
> Because of trial counsel's unprofessional errors, the jury never knew that this police report even exists.
>
> . . . .
>
> If it had not been for trial counsel's unprofessional errors, there is a reasonable probability that the results of the trial would have been different because Officer Weldon Gregory's testimony and Police Report would have revealed to the jury

> that Rick Jacobs's initial statements to the Police implicated the white SUV vehicle and suspects, rather than me and Mr. Watts and my vehicle; therefore establishing to the jury that Mr. Jacobs changed the direction of the shots from this white vehicle from "initially" being "fired over the top of the vehicle towards the club," to "one time, straight up in the air."
>
> . . . .
>
> Officer Gregory's missing testimony would have presented a theory of the case that would have exonerated my vehicle and directly contradicted the prosecution's evidence. The Jury might well have viewed the otherwise impeachable testimony of the state's key witness in a different light.

(ECF No. 46 at 20, 23, 24, 25). And, with respect to Ground Twenty-Three, Petitioner asserts in relevant part:

> During the Evidentiary Hearing Trial Counsel admitted that he did not question Jacobs about what he initially told Officer Weldon Gregory. (App. P. 2292, p. 2293). When asked if he questioned Jacobs about the statement he provided to Officer Gregory, Trial Counsel testified, "No, I did not. As I said, I think it came out in other ways, with the exception of the thing about firing into the club. I just did not. In the scheme of things, I thought that was a minor point." (App. P. 2293).

(ECF No. 46 at 29).

The Court commends Petitioner for presenting his position in so thorough and articulate a manner. And the Court would emphasize the Magistrate Judge's comment that "[i]n hindsight, there are a few, if any, cross-examinations that could not be improved upon." *Willis v. United States*, 87 F.3d 1004, 1006 (8th Cir. 1996). However, the Court agrees with the findings of the Magistrate Judge and the PCR court before him. The record reflects that trial counsel engaged in a comprehensive examination of Mr. Jacobs during which counsel highlighted the very inconsistencies that Petitioner references in his objections. The record further confirms trial counsel's testimony that although he did not put up Officer Gregory as a witness or introduce Officer Gregory's report, he (along with counsel for Petitioner's co-defendant) elicited the testimony necessary to inform the jury about the Isuzu Rodeo, the suspects therein, and the shot

that was fired from that vehicle. (ECF No. 23-2 at 170-171, 179-182, 253-259, 261-313; ECF No. 23-5 at 187, 267-281). Accordingly, the Court finds that Petitioner has failed to show either that trial counsel's performance was deficient or that the deficiency resulted in prejudice to the defense. The Court therefore grants the motion for summary judgment as to Grounds Five, Six, and Twenty-Three.

III. Procedurally Defaulted Claims

The Magistrate Judge found that Grounds for Relief Four and Seven through Twenty-Two were procedurally defaulted and, with two exceptions, implicate ineffective assistance of counsel. The Magistrate Judge noted that in his response to the motion for summary judgment, Petitioner did not appear to contest that these claims were procedurally defaulted; rather, he argued that his PCR counsel was ineffective for failing to raise them in his initial PCR court proceeding, for declining to amend the PCR petition to address all issues, and for failing to assert the appropriate issues in a Rule 59 motion. Petitioner further argued that his PCR appellate counsel was ineffective in that she raised only one issue in the PCR appeal. (ECF No. 39 at 3-10).

The Magistrate Judge agreed with Respondent that Grounds Ten through Eighteen and Grounds Twenty through Twenty-Two were not properly pursued in the initial PCR proceedings; and Grounds Four, Seven, Eight, Nine, and Nineteen, while initially pursued in the PCR proceedings, were not raised in the PCR appeal. *See* (ECF No. 41 at 34-63). Therefore, the Magistrate Judge found, the claims are barred from further state collateral review, (*id.* at 35 (citing in part *Wicker v. State*, 425 S.E.2d 25 (S.C. 1992)), and federal habeas review of these claims is precluded absent a showing of cause and prejudice, or of actual innocence, (*id.* at 36 (citing in part *State v. Powers*, 501 S.E.2d 116, 118 (S.C. 1998)).

Petitioner objects to the Magistrate Judge's finding regarding default and asserts the

following:

> [Petitioner] did properly pursue in state court grounds Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, and Nineteen. These claims were raised by Petitioner at his PCR hearing. The PCR judge did not address any of Petitioner's claims regarding Grounds ten, eleven, twelve, thirteen, fourteen, fifteen, in its order. Petitioner submits that his right and opportunity to preserve these claims for further collateral review were prevented by PCR counsel's refusal and failure to file a proper 59(e) motion to alter or amend judgment, after these claims were not specifically ruled upon in the final order of dismissal, and any procedural bar or default should be excused because the Petitioner was impeded in complaining with the State's established procedures . . . .
>
> . . . .
>
> Petitioner expresses that his efforts to comply with the State's procedural rule and Federal procedural rule were impeded by PCR Counsel's actions and ineffective representation . . . .

(ECF No. 46 at 31, 34). Petitioner essentially restates his position as articulated in his response to the motion for summary judgment, and the Court interprets the objection as general and conclusory. The fact remains that these claims were not properly pursued and exhausted in the PCR proceedings and Petitioner blames his counsel for the resulting procedural bar. The Court finds no error in the Magistrate Judge's analysis and turns to consider the specific bases for the Magistrate Judge's finding that Petitioner cannot cure the default.

A. Grounds for Relief Seven, Eight, Nine, Nineteen, Twenty, and Twenty-One

The Magistrate Judge found that these claims are not cognizable for habeas review either because they are based on ineffective assistance of PCR appellate counsel or failure of PCR counsel (or PCR appellate counsel) to raise an underlying claim of ineffective assistance of direct appeal counsel. The Magistrate Judge explained that ineffective assistance of PCR appellate counsel is not a cause for default. (ECF No. 41 at 40 (citing *Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012)). He further explained that Petitioner cannot show the necessary "cause" to cure default by

claiming ineffective assistance of direct appeal counsel. *See Davila v. Davis*, 137 S. Ct. 2058 (2017). Accordingly, the Magistrate Judge found these claims should be dismissed. (ECF No. 41 at 40-42).

Petitioner does not object to the Magistrate Judge's application of *Martinez* and *Davila*. The Court agrees that the *Martinez* exception applies only to initial PCR counsel. *See Martinez*, 566 U.S. at 10-11 (explaining that the concerns attendant to permitting review of attorney error in initial-review collateral proceedings are not present for other stages of a federal habeas proceeding: "While counsel's errors [in other kinds of postconviction] proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding"). The Court further agrees that the *Martinez* exception does not extend to allow a federal court to hear a substantial but procedurally defaulted claim of ineffectiveness of appellate counsel when a prisoner's state PCR counsel provides ineffective assistance by failing to raise it. *Davila*, 137 S. Ct. at 2065-66. Accordingly, the motion for summary judgment is granted as to Grounds Seven, Eight, Nine, Nineteen, Twenty, and Twenty-One.

B. Grounds for Relief Eleven through Eighteen, and Twenty-Two

With respect to Grounds Eleven through Eighteen, and Twenty-Two, these claims implicate PCR counsel's failure to properly raise and preserve certain issues. As the Magistrate Judge explained, "inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. For our purposes, Petitioner may establish cause for a default of an ineffective-assistance of counsel claim by demonstrating that his PCR counsel was ineffective under the standards of *Strickland v. Washington*. *See Martinez*, 566 U.S. at 14. Additionally,

Petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* The Magistrate Judge examined the Parties' arguments and the underlying record and determined that Petitioner failed to demonstrate that these claims have merit, as follows.

Ground Eleven: Petitioner was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment[s] to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to object to; and challenge the alternate theory of "the hand of one is the hand of all" under accomplice liability, being charged to the Jury as an alternate basis for conviction in this First Degree Murder Case.

(ECF No. 1-1 at 2).

The Magistrate Judge set forth South Carolina law regarding the theory of accomplice liability and found that there was no error in trial counsel's failure to object to the jury charge. (ECF No. 41 at 45-46). The Magistrate Judge relied on the fact that "[t]he evidence presented at trial was that both Petitioner and his codefendant were in the tan Suburban and shots were fired from that vehicle," and trial counsel's testimony during the PCR hearing that "there was evidence to support the accomplice liability charge that was given at trial." (*Id.* at 46).

Petitioner objects to the Magistrate Judge's finding and essentially reasserts the arguments advanced in his response to the motion for summary judgment. *Compare* (ECF No. 46 at 45-48) *with* (ECF No. 39 at 64-66). The court finds no clear error in the Report as to this claim and accordingly grants the motion for summary judgment as to Ground Eleven.

Ground Twelve: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution Laws and Statutes by Both Trial Counsel's failure to object to the Prosecutor's and the assistant solicitor's improper comments, remarks, and argument that [Petitioner's] tan Suburban was positive for Gunshot Residue which so infected the [Petitioner's] trial with unfairness that it

made the resulting conviction a denial of Due Process, due to Prosecutorial Misconduct.

(ECF No. 1-1 at 2).

The Magistrate Judge reviewed the trial record and found that the testimony the assistant solicitor referenced in his closing argument was consistent with the testimony of the state's expert, Agent Moskal, regarding the particles of lead found in Petitioner's vehicle. (ECF No. 41 at 48 (citing ECF No. 23-3 at 457-460, 465; ECF No. 23-4 at 5-11)). The Magistrate Judge further found that the solicitor's statements made in response to the motion for directed verdict were consistent with the evidence presented at trial. *Id.* *See also* (ECF No. 23-4 at 368-369). The Magistrate Judge thus concluded that as there was no basis for trial counsel to object, his failure to do so did not constitute a deficiency.

Petitioner objects to the Magistrate Judge's finding and again reasserts the arguments advanced in his response to the motion for summary judgment. *Compare* (ECF No. 46 at 48-51) *with* (ECF No. 39 at 69-72). The court finds no clear error in the Report as to this claim and accordingly grants the motion for summary judgment as to Ground Twelve.

Ground Thirteen: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Both Trial Counsel's failure to object to misleading and prejudicial statements during the State's GSR (Gunshot Residue) expert witness testimony while giving his opinion and conclusion, from the actual Forensic Evidence results.

(ECF No. 1-1 at 2).

The Magistrate Judge reviewed the trial record and determined that prior to Agent Moskal taking the stand, defense counsel in fact objected to his testimony on the basis that the testimony would not be consistent with SLED protocol and that the prejudicial effect of the Agent's findings

would outweigh their probative value. (ECF No. 41 at 49 (citing ECF No. 23-3 at 447-460)). The Magistrate Judge noted that defense counsel renewed his objection when the state offered into evidence the results of the ballistics testing. (*Id.* (citing ECF No. 23-3 at 470)). The Magistrate Judge found that Petitioner had not shown that his counsel was deficient for failing to object to Agent Moskal's testimony and the associated evidence regarding the GSR testing and, in light of the objections raised by defense counsel, Petitioner had failed to show any prejudice caused by his counsel not raising further objections. *Id.*

Petitioner objects and reasserts his contentions raised in response to the motion for summary judgment. *Compare* (ECF No. 46 at 51-54) *with* (ECF No. 39 at 76-79). Petitioner cites to additional parts of the record to support his position, but the objection is still without merit. As the Magistrate Judge found, the record shows that trial counsel objected to the very testimony and evidence that is the subject of this claim. Given the nature of the objections, the Court agrees that Petitioner cannot show that he was prejudiced by counsel failing to object further. The motion for summary judgment is granted as to this claim.

Ground Fourteen: Petitioner was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to request a hearing, pursuant to Frank's Hearing, by making a substantial preliminary showing that false statements knowingly and intentionally, or with reckless disregard for the truth was included by the Affiant (Investigator Don McRae) in the Affidavits In Support of the Search Warrants.

(ECF No. 1-1 at 2).

The Magistrate Judge explained that according to binding precedent, the search warrants for Petitioner's home and vehicle were presumptively valid and that presumption could be rebutted only by showing that: (1) the affiant gave statements that were made knowingly and intentionally

or with reckless disregard for the truth; and (2) the false statements were necessary to establish probable cause. (ECF No. 41 at 50 (citing *Simmons v. Poe*, 47 F.3d 1370, 1383 (4th Cir. 1995)) (further citations omitted). Petitioner argued that trial counsel should have challenged the affidavit's reference to "witnesses," because, he contends, only one witness identified his vehicle. The Magistrate Judge reviewed the affidavit, which was attested to by Officer McRae, and noted that trial counsel did in fact object to the affidavit on the basis that it contained conclusory statements and failed to establish probable cause. (*Id.* at 51 (citing ECF No. 23-22 at 3; ECF No. 23-1 at 303-304)). The Magistrate Judge further noted that during the PCR hearing, defense counsel testified to the fact that he had cross examined Officer McRae regarding the affidavit and argued that there was a lack of probable cause and no information to establish the reliability of the witnesses referred to in the affidavit. (*Id.* at 52 (citing ECF No. 23-5 at 288-290)). The Magistrate Judge determined that although Petitioner appears to now disagree with the strategy his counsel pursued with respect to the affidavit, he had not shown that defense counsel was deficient in objecting to the affidavit for failing to show probable cause. The Magistrate Judge further determined that Petitioner failed to show any prejudice he suffered as a result of his counsel's failure to ask for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); or, considering a litany of other evidence admitted to the jury, how the outcome of his trial would have changed had the court suppressed the evidence obtained from the search. (*Id.* at 52-54).

Petitioner relies on the arguments asserted in his response to the motion for summary judgment to object to the Magistrate Judge's findings. *Compare* (ECF No. 46 at 54-59) *with* (ECF No. 39 at 80-84). He also asserts that his attorney's failure to request a *Franks* hearing prejudiced him in that without the products of the search, the jury would not have heard the state's evidence regarding GSR. However, as the Magistrate Judge noted, there was other evidence that supported

the guilty verdict, such as Mr. Jacobs's testimony, the location of Petitioner's vehicle, and the type of projectile and shell casing recovered from the victim and the scene of the shooting. The Court finds that Petitioner cannot show that he was prejudiced by counsel failing to request a *Franks* hearing. Accordingly, the Court grants the motion for summary judgment as to this claim.

Ground Fifteen: Petitioner was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to request a Franks hearing to make a substantial preliminary showing that the Police deliberately omitted material facts with intent to make, or in reckless disregard of whether they thereby made the arrest warrant affidavit misleading and if omitted information would have been included in affidavit, the information would render Affidavit for arrest warrant insufficient to support finding of probable cause. (See Exhibit Q, App. p. 2620-2621).

(ECF No. 1-1 at 3).

The Magistrate Judge explained that, as with the search warrant, the arrest warrant was presumptively valid, and the presumption could be rebutted only by showing that: (1) the affiant gave statements that were made knowingly and intentionally or with reckless disregard for the truth; and (2) the false statements were necessary to establish probable cause. (ECF No. 41 at 55 (citing *Simmons*, 47 F.3d at 1383)) (further citations omitted). Petitioner argued that the arrest warrant omits information regarding the suspects in the Isuzu Rodeo and the fact that shell casings and projectiles found in the Isuzu Rodeo were consistent with the shell casings and projectiles recovered from the crime scene and from the victim. The Magistrate Judge found that Petitioner had not made "a substantial preliminary showing that the statements made by the agent in his affidavit were false, or that the agent recklessly or deliberately passed on false information to the county magistrate." (*Id.* at 56). Rather, the Magistrate Judge noted, "the facts contained in the arrest warrant were borne out by the statements given by Jacobs to law enforcement, and were

supported by the testimony of both Jacobs and McRae at Petitioner's trial." *Id.* The Magistrate Judge further noted that Petitioner had not demonstrated that the omitted information was "necessary to the finding of probable cause for Petitioner's arrest." *Id.* The Magistrate Judge thus concluded that Petitioner had not shown that defense counsel was deficient for failing to ask for a *Franks* hearing with regard to the arrest warrant, and furthermore had not shown that such failure caused him prejudice. The Magistrate Judge additionally noted that "[a]n illegal arrest, without more, has never been viewed as a bar to a subsequent prosecution, nor as a defense to a valid conviction." (*Id.* at 57 (quoting *United States v. Crews*, 445 U.S. 463, 474 (1980)).

Petitioner objects to the Magistrate Judge's findings but does so by reasserting, almost verbatim, the arguments raised in the response to the motion for summary judgment. *Compare* (ECF No. 46 at 59-61) *with* (ECF No. 39 at 84-87). Accordingly, the Court finds that the objection is general and conclusory. The Court perceives no clear error in the Magistrate Judge's analysis and therefore overrules the objections. The motion for summary judgment is granted as to this claim.

Ground Sixteen: Petitioner was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment(s) to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to object to the State using the fruits of the search to bolster their argument for finding of probable cause and to show preexisting probable cause.

(ECF No. 1-1 at 3).

The Magistrate Judge interpreted this claim as Petitioner contending that "trial counsel should have objected to the State advising the trial court of the fruits of the search warrant during the suppression motion"; specifically, he interpreted the claim as an objection "to the State's reference to the fact that law enforcement was seeking forensic evidence inside of Petitioner's

vehicle with the search warrant and found evidence inside of the vehicle." (ECF No. 41 at 58). The Magistrate Judge found as follows:

> Petitioner has not shown that it was improper for the State to mention the results of the search to the court, and based on a review of the arguments by both counsel and the Court's ruling on the suppression motion, there is also no indication that the reference to the results had any bearing on the trial court's finding of probable cause. Rather, the trial court specifically detailed the basis of its finding of probable cause, which did not include the results of the search.

(*Id.* (citing ECF No. 23-1 at 355-356)). Therefore, the Magistrate Judge found that Petitioner had failed to demonstrate that trial counsel acted deficiently in failing to object, and, furthermore, had failed to demonstrate any prejudice that resulted from counsel's failure to object.

Petitioner objects generally that "trial counsel was deficient for failing to object to the state using the fruits of the search to bolster their argument for finding of probable cause." (ECF No. 46 at 62). *Cf.* (ECF No. 39 at 87-89). The Court finds no merit in the objection, but rather agrees with the Magistrate Judge's review of the trial transcript. In rendering a decision on the motion to suppress, the trial court did not rely on evidence collected upon execution of the search warrant. *See* (ECF No. 23-1 at 355-356). Accordingly, there is no basis on which to find that the trial court considered the state's reference to the fruits of the search in reaching its decision. Petitioner has not shown any prejudice that resulted from trial counsel's failure to object to the state's arguments during the hearing on the motion to suppress. The Court grants the motion for summary judgment as to this claim.

Ground Seventeen: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendment(s) to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to request a Franks hearing to make a substantial preliminary showing that the Affiant deliberately omitted facts with intent to make, or in reckless disregard of whether they thereby made, the Affidavit to Search Warrant and Arrest Warrant misleading and if omitted information would have been included

in Affidavit, the information would render Affidavit insufficient to support finding of probable cause.

(ECF No. 1-1 at 3).

The Magistrate Judge noted that with this claim, Petitioner argued that trial counsel should have requested a *Franks* hearing with respect to the search warrant on the basis that the affiant omitted facts with the intent to mislead the magistrate. (ECF No. 41 at 59). The Magistrate Judge found that Petitioner failed to show, however, that "the affiant knowingly or with reckless disregard made a false statement in the affidavit." The Magistrate Judge noted that, to the contrary, "[t]he record shows that the facts contained in the search warrant were supported by the statements given to law enforcement by Jacobs, and were also supported by the testimony of Jacobs and McRae at trial." *Id.* The Magistrate Judge determined that because Petitioner "has not met his burden to show that the agent's affirmations were false . . . he has failed to show that his counsel performed deficiently by not challenging the warrant under [*Franks*]." (*Id.* at 60). The Magistrate Judge further noted that Petitioner "has presented no evidence in this proceeding to show that he would have succeeded in his challenge to the search warrant even if his counsel had requested a *Franks v. Delaware* hearing." Accordingly, the Magistrate Judge found, Petitioner failed to show a substantial issue with respect to this claim.

Petitioner does not object to this finding. *See* (ECF No. 46 at 62). The Court finds no clear error in the Magistrate Judge's analysis and, accordingly, grants the motion for summary judgment as to this claim.

Ground Eighteen: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendment(s) to the United States Constitution by Trial Counsel's failure to object to the Trial Court's ruling that the search warrant was supported by probable cause and therefore valid, but not by limiting itself to an examination of the Affidavit before the Magistrate.

(ECF No. 1-1 at 40).

The Magistrate Judge next considered the contention that trial counsel was ineffective for failing to object to the trial court's ruling that the search warrant was supported by probable cause. The Magistrate Judge found there was no basis in the contention because the record reflects that trial counsel did in fact argue the search warrant was not supported by probable cause. (ECF No. 41 at 60). Trial counsel therefore preserved the issue for appeal. Petitioner's appellate counsel raised the issue in the direct appeal, and the South Carolina Court of Appeals considered and denied the claim on the merits. Therefore, the Magistrate Judge found, Petitioner had not shown that his trial counsel was ineffective in failing to object to the trial court's ruling.

Petitioner objects that "trial counsel was ineffective for failing to object to the trial court's ruling that the search warrant was supported by probable cause and therefore valid, but not by limiting itself to an examination of the affidavit before the magistrate." (ECF No. 46 at 62). Petitioner's objection restates the arguments asserted in his response to the motion for summary judgment. *See* (ECF No. 39 at 91-93). Accordingly, the Court reviews the Report for clear error. Upon review of the record, the Court agrees with the Magistrate Judge. Even if the trial court had improperly relied on information that was not before the magistrate, there is no basis for finding that trial counsel was deficient in addressing the error. As the Magistrate Judge observed, trial counsel objected and preserved the matter for appeal. Petitioner has shown no deficiency in trial counsel's assistance with respect to the trial court's ruling and the Court therefore grants the motion for summary judgment as to this claim.

Ground Twenty-Two: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Both Trial Counsels' failure to object to

> the Trial Court, improperly allowing the admission of the scientific evidence without considering several factors for the admission of scientific evidence, under Rule 702 and determining that or if this evidence is relevant, reliable, and helpful to the Jury and then balancing and making a determination whether or not the probative value of the evidence is outweighed by its prejudicial effect, under Rule 403, SCRE (South Carolina Rules of Evidence)

(ECF No. 1-1 at 47).

The Magistrate Judge found as follows:

> With regard to Petitioner's complaint that defense counsel did not challenge the GSR evidence under Rule 702, the record reflects that during the motion to suppress Moskal's testimony, counsel initially presented arguments that the testimony should not be admitted under Rule 702 (as well as under Rule 403). (R.pp. 1443-1444). However, counsel later noted that he did not intend to argue gunshot residue was unreliable under Rule 702 (R.p.p. 1447), and proceeded to instead make the argument against its admissibility under Rule 403, presenting a strong argument regarding its unduly prejudicial effect. (R.pp. 1443-1456). Counsel's position with respect to Rule 702 was clearly reasonable in light of the fact that gunshot residue evidence has consistently been found to be admissible in South Carolina Courts. To the extent Petitioner asserts that trial counsel was ineffective for not contending that the GSR evidence should not be allowed under Rule 403 because the probative value of the evidence did not outweigh the prejudicial effect of its admission, defense counsel did argue at trial that the GSR evidence should not be admitted for that reason. (R.pp. 1449, 1451-1453, 1456). However, after full argument on this issue, the trial court denied Petitioner's counsel's motion and admitted this evidence. (R.p. 1457). The Respondent also correctly notes that the PCR court found the GSR evidence was admissible under Rule 403, SCRE. (R.pp. 2431-2433).

(ECF No. 41 at 62 (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions.")). The Magistrate Judge determined that Petitioner simply disagrees with trial counsel's strategy regarding the GSR evidence and that disagreement regarding trial strategy alone does not constitute a deficiency with respect to counsel's representation. The Magistrate Judge further determined that the record reflects "no reversible error in the state courts' consideration of this issue." (ECF No. 41 at 62). The Magistrate Judge concluded that Petitioner had not met his burden

of showing that "if his counsel had objected to the GSR evidence on the basis of Rule 702 in a different manner, it would have resulted in a different outcome in his case." (*Id.* at 63).

Petitioner reasserts the arguments he presented in the response to the motion for summary judgment, *see* (ECF No. 39 at 100-102), but also objects as follows:

> Petitioner submits that yes, gunshot residue evidence has been found to be admissible in South Carolina courts, but it's only in cases where there has been a "full result." Meaning, where there was actually "Gunshot residue" found. Where someone's hand, someone's clothes, or someone's vehicle tested "positive for gunshot residue"; meaning elevated levels of the required elements that make up Gunshot Residue, which are (Lead, Barium, Antimony) found together at the same time.

(ECF No. 46 at 63). The Court finds that this objection does not provide a basis for disagreeing with the Magistrate Judge's reasoning. As noted above with respect to Ground Thirteen, trial counsel did in fact object to the state's proffer of Agent Moskal's testimony as not consistent with SLED protocol, and again objected when the state offered the results of the testing into evidence. The Court overrules the objection and grants the motion for summary judgment as to this claim.

C. Grounds for Relief Four and Ten

The Magistrate Judge determined that Grounds Four and Ten were also procedurally defaulted at the PCR court or in the PCR appeal but that the underlying claims do not implicate ineffective assistance of counsel. Petitioner contends in Ground Four that he "was denied the right to a fair trial by the State's submitting discovery evidence without the authoring officer's name on it in violation of [*Brady v. Maryland*, 373 U.S. 83 (1963)]." (ECF No. 1-1 at 1). This concerns Officer Gregory's incident report, discussed above. The Magistrate Judge found that Ground Four "was a direct appeal issue," and noted that Petitioner's "alleged 'cause' for not properly raising Ground[] Four . . . in his PCR appeal is based on alleged ineffective assistance of PCR appellate counsel." (ECF No. 41 at 40 & n.18, 41). As discussed above, ineffective assistance of PCR

appellate counsel is not a cause for default. *Martinez*, 132 S. Ct. at 1316. Accordingly, the Magistrate Judge found, this claim should be dismissed. *See* (ECF No. 41 at 40 n.18).

In Ground Ten, Petitioner contends he was denied the right to a fair trial due to prosecutorial misconduct; that is, the state knowingly presented false or perjured material testimony from Mr. Jacobs and/or failed to correct Mr. Jacobs's false or perjured material testimony. (ECF No. 1-1 at 2). The Magistrate Judge found that Ground Ten presents "a direct appeal issue that was not properly preserved at trial for appellate review," and explained that under South Carolina law, "an application for post-conviction relief is not a substitute for an appeal." (ECF No. 41 at 42 (quoting *Simmons v. State*, 215 S.E.2d 883, 885 (S.C. 1975)). The Magistrate Judge further found that because Ground Ten "is not an underlying ineffective assistance of counsel claim, it does not even fall under the *Martinez* exception." (*Id.* at 43). Additionally, the Magistrate Judge reviewed the record with respect to Mr. Jacobs's testimony at trial and determined that, even if Petitioner could have raised this issue in his application for post-conviction relief, "Petitioner has not shown Jacobs offered perjured or false testimony." (*Id.* at 43-45).

Petitioner objects that Grounds Four and Ten "are not direct appeal issues," and that "they are both Post Conviction Relief issues," which he raised at his PCR hearing. (ECF No. 46 at 31). Petitioner's response to the motion for summary judgment concedes that he did not raise Ground Four in his direct appeal and that Ground Ten either was not raised to the PCR court, or the PCR court did not rule on it. *See* (ECF No. 39 at 10-11). The Court agrees with Respondent that because Petitioner did not properly present the claim "to the South Carolina appellate courts in a procedurally viable manner when he had the opportunity, and the state courts would find any attempt to raise [it] now to be procedurally improper, the[] claim [is] procedurally barred from review in federal habeas corpus." (ECF No. 23 at 23 (citing *Coleman v. Thompson*, 501 U.S. 722,

(1991) (holding that issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996) (issues not presented to the state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now)). Additionally, because Ground Ten was not ruled on by the PCR Court, it was unavailable for further collateral review. *See, e.g., Pruitt v. State*, 423 S.E.2d 127, 128 n.2 (S.C. 1992) (noting issue must be raised to and ruled on by the PCR judge in order to be preserved for review).

To the extent Petitioner argues that failure to properly pursue these claims should be excused because he "was impeded in complying with the State's established rules," (ECF No. 46 at 31), the Court finds no merit to the objection because Petitioner has not shown a reasonable likelihood that the issues raised in these claims would have impacted the outcome of his trial. Petitioner has not shown any prejudice that resulted from the omission of Officer Gregory's name from the bottom of the incident report. Nor has Petitioner shown prejudice resulting from Mr. Jacobs's testimony. As discussed with respect to Grounds Five, Six, and Twenty-Three, concerning Officer Gregory's incident report and Ricky Jacobs's testimony, the record confirms trial counsel's testimony that he elicited the testimony necessary to inform the jury about the Isuzu Rodeo, the suspects therein, and the shot that was fired from that vehicle, which is the very evidence that Officer Gregory would have testified to and that would have been presented had the incident report been offered into evidence. The record also reflects that trial counsel engaged in a comprehensive examination of Mr. Jacobs that highlighted the numerous inconsistencies that Petitioner complains of in his briefs. Finally, the Court agrees that Petitioner has not shown that the PCR court unreasonably applied federal law in denying the claim asserted in Ground Four. For

these reasons, the Court overrules Petitioner's objections and grants the motion for summary judgment as to these claims.

D. Actual Innocence

Finally, to the extent Petitioner asserts actual innocence as an excuse for the procedural default of the above claims, the Magistrate Judge explained that "cognizable claims of 'actual innocence' are extremely rare and must be based on 'factual innocence not mere legal insufficiency.'" (ECF No. 41 at 64 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). To present a 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." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The Magistrate Judge found that Petitioner has not presented any new, reliable evidence. (ECF No. 41 at 64). The Magistrate Judge further found that Petitioner has not shown that a fundamental miscarriage of justice will result if the court does not consider the defaulted claims. *See Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). Therefore, the Magistrate Judge confirmed that the aforementioned claims are procedurally barred. Petitioner does not object to these findings and, following a thorough review of the record and the Report, the Court finds no clear error. Accordingly, the Court determines that these claims are procedurally barred.

IV. Ground Twenty-Four

With this claim, Petitioner contends that his PCR counsel was ineffective for not raising certain issues and for failing to file a proper Rule 59(e) motion. (ECF No. 1-1 at 52). Specifically,

Petitioner argues that PCR counsel failed to amend the PCR application to raise all possible claims for relief, prevented Petitioner from testifying to all possible claims for relief at the PCR hearing, and failed to file a Rule 59(e) motion to address the claims raised to the PCR court but on which the PCR court did not rule. *Id.* The Magistrate Judge found that these contentions concern "alleged infirmities in Petitioner's state PCR proceeding, and as such are not a basis for federal habeas relief." (ECF No. 41 at 65). *See Bryant v. State of Md.*, 848 F.2d 492, 494 (4th Cir. 1988). To the extent Petitioner objects to this finding, *see* (ECF No. 46 at 65-66), the Court finds the objection to be general and conclusory. The Court finds no clear error in the Magistrate Judge's analysis and therefore grants the motion for summary judgment as to this claim.

Finally, to the extent Petitioner raises general and conclusory objections to which the Court has not specifically responded, the Court has carefully reviewed the record and the Report and finds no clear error in the Magistrate Judge's findings. For the reasons set forth herein, the Court agrees with the analysis and recommendation of the Magistrate Judge. Accordingly, Petitioner's objections are overruled and the Report is adopted.

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 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.

CONCLUSION

For the reasons stated above and by the Magistrate Judge, the Court overrules Petitioner's objections, and adopts and incorporates the Magistrate Judge's Report (ECF No. 41). Accordingly, the motion for summary judgment (ECF No. 24) is GRANTED. The habeas petition (ECF No. 1) is DENIED and DISMISSED *with prejudice*.

IT IS SO ORDERED.

/s/Bruce H. Hendricks
The Honorable Bruce H. Hendricks
United States District Judge

September 4, 2019
Charleston, South Carolina

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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

TREMAINE RASHON WRAY, #337442, Petitioner, v. WARDEN DENNIS BUSH, Respondent.	)	CIVIL ACTION NO. 9:17-3066-DCN-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 November 2, 2017.[1]

The Respondent filed a return and motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on May 1, 2018. As the Petitioner is proceeding pro se, a Roseboro order was entered by the Court on May 2, 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.

After receiving three extensions of time to reply, Petitioner filed a memorandum in

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

opposition on August 10, 2018. This matter is now before the Court for disposition.[2]

Procedural History

Petitioner was indicted in Richland County in August 2007 for murder [Indictment No. 2007-GS-40-5914]. (R.pp. 2050-2051). The State alleged that in the early morning hours of June 30, 2017, the Petitioner and co-defendant Taurus Watt shot and killed Dumuria "Hank" Johnson outside of the H & J Club in Richland County. Petitioner was represented by Jack Swerling, Esquire, and Arie Bax, Esquire, and after a jury trial on October 5-15, 2009[3], was (along with his co-defendant) found guilty as charged. See Court Docket No. 23-9, p. 15. Petitioner was then sentenced to forty (40) years imprisonment. See Court Docket No. 23-9, p. 31.

Petitioner filed a direct appeal. He was represented on appeal by Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, who raised the following issues:

> **Ground One:** Whether the trial court judge erred by not granting [Petitioner's] motion to suppress the fruits of execution of the search warrant because the warrant lacked probable cause?
>
> **Ground Two:** Whether the trial court judge erred by not granting [Petitioner's] motion for a mistrial when the solicitor improperly elicited testimony from the witness that cooperating with police would get her killed?
>
> **Ground Three:** Whether the trial court judge erred by granting the State's continuance motion when he released the [S]tate from its obligation to comply with SCRCP, Rule 7?

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[2]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.

[3]Petitioner was tried along with co-defendant Taurus Watts, who was also charged with murder. (R.p. 154).

See Court Docket No. 23-11, p. 4.

On August 8, 2012, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. See Court Docket No. 23-13. The Remittitur was issued on August 27, 2012 (filed August 29, 2012). See Court Docket No. 23-14.

On November 29, 2012 (dated November 26, 2012), Petitioner filed an application for post-conviction relief ("APCR") in state circuit court. Wray v. State of South Carolina, No. 2012-CP-40-7909. See Court Docket No. 23-15. Petitioner then filed an Amended APCR petition, raising the following issues:

> **Ground One:** Trial counsel was deficient in failing to call at least three additional witnesses, including a refuting GSR expert, the initial responding officer Weldon Gregory, and eyewitness Timothy Weldon. Such deficiency prejudiced [Petitioner], depriving him of a fair trial.
>
> **Ground Two:** Trial counsel was deficient in failing to object and therefore preserve for appeal the state for vouching for the credibility of a witness during closing argument. But for this failure to object, the jury may have been instructed to disregard the State's vouching for the witness or the [Petitioner] would have been able to assert the State's error in his appeal.
>
> **Ground Three:** Trial counsel was ineffective in not interviewing or investigating the initial responding officer to the scene Weldon Gregory and his handwritten police report. The officer had evidence favorable to [the Petitioner] and not discussing it with him before trial prejudiced [Petitioner] such that he did not receive a fair trial.
>
> **Ground Four:** [Petitioner] was denied the right to a fair trial by the State's submitting discovery evidence without the authoring officer's name on it in violation of Brady.[4]
>
> **Ground Five:** Appellant counsel was ineffective in not raising on appeal that the trial was tainted by the improper GSR testimony and improper conclusions drawn by [S]tate's expert testimony. [Petitioner] was denied the opportunity to present this

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

> argument to the Court of Appeals, and had it been presented the Court would have found the testimony improper and/or deficient.
>
> **Ground Six:** Trial counsel was ineffective for failing to impeach the State's eyewitness Ricky Jacobs with report of the responding officer, Weldon Gregory, which contradicted his testimony. This deficiency prejudiced [Petitioner] such that he did not have a fair trial.

(R.pp. 2074-2078).[5]

Petitioner was represented in his APCR by L. Marshall Coleman, Esquire, and an evidentiary hearing was held on Petitioner's application on November 3, 2014. (R.pp. 2079-2311). In an order filed February 12, 2015 (dated February 2, 2015), the PCR judge denied Petitioner relief on his APCR. (R.pp. 2396-2434).

On February 24, 2015, Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP. In his motion, Petitioner did not identify any claims that were not ruled upon by the PCR court. (R.pp. 2435-2436). The State filed its return to the motion on March 3, 2015. (R.pp. 2437-2442). Thereafter, Petitioner, through counsel, filed what was essentially a pro se Motion to Supplement or Amend his Previously filed Motion on March 26, 2015. (R.pp. 2443-2459). In this motion, Petitioner contended that his due process rights to a fair trial were violated because prosecutorial misconduct occurred when the prosecution failed to correct false or perjured testimony given by their sole key witness. (R.p. 2443). On March 27, 2015, the PCR court filed an Order denying the motion to alter or amend. (R.pp. 2460-2464).

Petitioner filed a timely appeal of the PCR court's order, in which he was represented by Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense. Petitioner raised

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[5]The PCR court found that Petitioner proceeded on the grounds listed in his amended APCR at his PCR hearing. (R.pp. 2397-2398).

the following issue in his appeal:

> Did the PCR judge err in refusing to find trial counsel ineffective in failing to cross examine the State's sole eye witness about the fact that he initially did not identify Petitioner or his codefendant by name despite knowing both of them, and described the suspects involved in the shooting as one black male with dreadlocks and one black male with a close cut haircut and a striped shirt driving a white SUV, possibly a Nissan with a black stripe down the side, descriptions that matched two other individuals stopped shortly after the shooting took place in a white Isuzu Rodeo SUV with ammunition consistent with the shell casings found at the scene of the shooting?

See Petition for Writ of Certiorari, p. 2 (See Court Docket No. 23-17, p. 3).

The South Carolina Supreme Court denied certiorari on March 7, 2017. See Court Docket No. 23-19.

The Remittitur was sent down on March 23, 2017, and filed with the Clerk of Court for Richland County on March 28, 2017. See Court Docket No. 23-20.

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

> **Ground One:** Whether the trial court judge erred by not granting [Petitioner's] motion to suppress the fruits of the execution of the search warrant because the warrant lacked probable cause?
>
> **Ground Two:** Whether the trial court judge erred by not granting [Petitioner's] motion for a mistrial when the solicitor improperly elicited testimony from the witness that cooperating with the police would get her killed?
>
> **Ground Three:** The trial court judge erred by granting the State's continuance motion.
>
> **Ground Four:** Brady violation by the State regarding Officer Deputy Weldon Gregory and his Incident Report.
>
> **Ground Five:** [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Laws and Statutes by Trial Counsel's failure to impeach the State's Eyewitness Ricky Jacobs with the Report of the Responding Officer, Weldon Gregory, and by his failure to move to admit the Police Report into evidence as a part of [Petitioner's] defense as an official report

excepted from the hearsay rule under Federal Rule of Evidence 803(8)(c).

Ground Six: [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution Laws and Statutes by Trial Counsel's failure to investigate potentially exculpatory information in the police report, and to interview and subpoena Officer Ray Weldon Gregory, to testify pursuant to his Police Report and to [sic] authentice his handwritten Police Report and verify that he is the Officer who prepared the report.

Ground Seven: [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment[s] to the United States Constitution and the corresponding provisions of the South Carolina Constitution Laws and Statutes by Trial Counsel's failure to object ot the State vouching for the credibility and veracity of the State's Sole Eyewitness. Trial Counsel was also deficient, by failing to preserve this issue for appeal, in failing to object.

Ground Eight: [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Laws and Statutes by Ms. Elizabeth Franklin Best's (Appellant Counsel) failure in not raising on appeal that the trial was tainted by improper GSR testimony and improper conclusions drawn by State's GSR expert testimony and also by improper comments and arguments that my tan Suburban was Positive for Gunshot Residue by the State. [Petitioner] was denied the opportunity to present this argument to the Court of Appeals and had it been presented, the court would have found the testimony improper and/or deficient.

Ground Nine: [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution Laws and Statutes by Trial Counsel's failure to call a refuting Gunshot Residue Expert Witness.

Ground Ten: [Petitioner] was denied his right to a fair trial, and was deprived of liberty without Due Process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws, and Statutes, due to Prosecutorial Misconduct, by prosecuting authorities knowing presentation of false or perjured material testimony and when it failed to correct Ricky Jacobs (the State's Sole Star Eyewitness) false or perjured testimony while testifying against the [Petitioner], and not eliciting the truth which requires that his conviction and sentence be vacated and be granted a new trial.

Ground Eleven: [Petitioner] was denied the right to effective assistance of counsel

as guaranteed by the Sixth and Fourteenth Amendment[s] to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to object to; and challenge the alternate theory of "the hand of one is the hand of all" under accomplice liability, being charged to the Jury as an alternate basis for conviction in this First Degree Murder Case.

Ground Twelve: [Petitioner] was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution Laws and Statutes by Both Trial Counsel's failure to object to the Prosecutor's and the assistant solicitor's improper comments, remarks, and argument that [Petitioner's] tan Suburban was positive for Gunshot Residue which so infected the [Petitioner's] trial with unfairness that it made the resulting conviction a denial of Due Process, due to Prosecutorial Misconduct.

Ground Thirteen: [Petitioner] was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Both Trial Counsel's failure to object to misleading and prejudicial statements during the State's GSR (Gunshot Residue) expert witness testimony while giving his opinion and conclusion, from the actual Forensic Evidence results.

Ground Fourteen: [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to request a hearing, pursuant to Frank's Hearing, by making a substantial preliminary showing that false statements knowingly and intentionally, or with reckless disregard for the truth was included by the Affiant (Investigator Don McRae) in the Affidavits In Support of the Search Warrants.

Ground Fifteen: [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to request a Franks hearing to make a substantial preliminary showing that the Police deliberately omitted material facts with intent to make, or in reckless disregard of whether they thereby made the arrest warrant affidavit misleading and if omitted information would have been included in affidavit, the information would render Affidavit for arrest warrant insufficient to support finding of probable cause. (See Exhibit Q, App. p. 2620-2621).

Ground Sixteen: [Petitioner] was denied the right to effective assistance of counsel,

as guaranteed by the Sixth and Fourteenth Amendment(s) to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to object to the State using the fruits of the search to bolster their argument for finding of probable cause and to show pre-existing probable cause.

Ground Seventeen: [Petitioner] was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendment(s) to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Trial Counsel's failure to request a Franks hearing to make a substantial preliminary showing that the Affiant deliberately omitted facts with intent to make, or in reckless disregard of whether they thereby made, the Affidavit to Search Warrant and Arrest Warrant misleading and if omitted information would have been included in Affidavit, the information would render Affidavit insufficient to support finding of probable cause.

Ground Eighteen: [Petitioner] was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendment(s) to the United States Constitution by Trial Counsel's failure to object to the Trial Court's ruling that the search warrant was supported by probable cause and therefore valid, but not by limiting itself to an examination of the Affidavit before the Magistrate.

Ground Nineteen: [Petitioner] was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Ms. Elizabeth Franklin Best's (Appellant Counsel) failure in not raising on Appeal that the Trial Court abused its discretion by improperly allowing the admission of the scientific evidence without considering several factors for the admission of scientific evidence under Rule 702 and determining that or if the evidence is relevant, reliable, and helpful to the Jury and then balancing and making a determination whether or not the probative value of the evidence is outweighed by its prejudicial effect, under Rule 403, SCRE.

Ground Twenty: [Petitioner] was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Ms. Elizabeth Franklin Best's (Appellant Counsel) failure to raise issue that the trial court erred by charging the jury that "the hand of one is the hand of all."

Ground Twenty-One: [Petitioner] was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution,

Laws and Statutes by Ms. Elizabeth Franklin Best (Appellant Counsel) failure to raise issue that the Trial Court erred in denying [Petitioner's] Directed Verdict motion because the State failed to present any substantial circumstantial evidence to prove the identity of the defendant as the person who committed the charged crime. Whether it was Mr. Wray or Mr. Watts, who inflicted the injury that caused the victim's death. Also that the State did not prove that Mr. Wray or Mr. Watts aided and abetted the other in committing the offense of first degree murder.

Ground Twenty-Two: [Petitioner] was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by Both Trial Counsels' failure to object to the Trial Court, improperly allowing the admission of the scientific evidence without considering several factors for the admission of scientific evidence, under Rule 702 and determining that or if this evidence is relevant, reliable, and helpful to the Jury and then balancing and making a determination whether or not the probative value of the evidence is outweighed by its prejudicial effect, under Rule 403, SCRE (South Carolina Rules of Evidence).

Ground Twenty-Three: [Petitioner was denied the right to effective assistance of counsel] in failing to cross examine the State's sole eyewitness about the fact that he initially did not identify Petitioner or his codefendant by name despite knowing both of them, and described the suspects involved in the shooting as one black male with dreadlocks and one black male with a close cut haircut and a striped shirt driving a white SUV, possibly a Nissan with a black stripe down the side, descriptions that matched two other individuals stopped shortly after the shooting took place in a White Isuz Rodeo SUV with ammunition consistent with the shell casings found at the scene of the shooting?

Ground Twenty-Four: [Petitioner] was denied the right to effective assistance of PCR counsel, in his Post Conviction Relief proceeding, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, Laws and Statutes by PCR Counsel's failure and refusal to amend (all) of the [Petitioner's] known available grounds for relief as a basis for attacking the judgment and sentence; for causing [Petitioner] not to raise seven (7) of his issues while [Petitioner] was on the stand at his PCR hearing amending his issues that PCR Counsel refused to amend before the hearing; for failing to file a proper 59(e) Motion to Alter or Amend the Judgment; pursuant to Rule 59(e), SCRCP, to properly preserve for Appellate review, the [Petitioner's] issues that were properly raised at the hearing, but not ruled upon by the PCR Court, and for filing an improper 59(e) Motion to Alter or Amend Judgment, to Reconsider, which did not preserve any of the [Petitioner's] claims/issues/arguments that were properly raised, but not ruled upon.

See Petition, pp. 6, 8-9, 11 & Attachment.

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. Further, 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). Such is the case here.

I.

Direct Appeal Issues[6]

(Ground One)

In Ground One, Petitioner contends that the trial court judge erred by not granting Petitioner's motion to suppress the fruits of the execution of the search warrant because the warrant lacked probable cause. However, a freestanding Fourth Amendment allegation is not cognizable on federal habeas corpus relief. Stone v. Powell, 428 U.S. 465, 482 (1976); Todd v. Warden, Livesay Corr. Inst., No. 14-00221, 2015 WL 424573, at *6 (D.S.C. Feb. 2, 2015) appeal dismissed, No. 15-

[6]With regard to direct appeal issues that are procedurally barred, those issues are discussed under the procedural bar section of this opinion. See, discussion, infra.

6620, 2016 WL 212510 (4th Cir. Jan. 19, 2016). Rather, Petitioner can only proceed with this claim if he can show that he was denied a full and fair opportunity to pursue this issue in state court. Stone, 428 U.S. at 494; Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir.1978) [applying Stone and holding that where a state court provides a mechanism under state practice to litigate Fourth Amendment claims, then this court "need not inquire further into the merits of the petitioner's case ... unless the prisoner alleges something to indicate his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired"].

In this case, Petitioner had a full and fair opportunity to litigate this Fourth Amendment issue during his suppression hearing in state court, and did so. (R.pp. 326-353). Petitioner also raised this issue in his direct appeal, and the South Carolina Court of Appeals denied relief on this issue, holding that according to the search warrant affidavit,

> (1) several witnesses saw the vehicle to be searched leaving the crime scene and identified it as the vehicle from which several rounds were fired and (2) a witness identified both the driver and the passenger in the vehicle and stated that the gunfire that struck the victim came from the vehicle at the incident location. None of the witnesses were confidential informants; therefore, evidence of past reliability was not necessary. See State v. Driggers, 473 S.E. 2d 57, 59 (S.C.Ct.App. 1996). Moreover, law enforcement personnel located the vehicle at the residence of the individual identified by the witness as the driver, thus independently corroborating the witness's account. See State v. Bellamy, 519 S.E.2d 347, 349 (S.C. 1999)(upholding a finding that a search warrant was based on probable cause even though the informant's reliability was suspect and citing, among other reasons, that weapons described by the informant matched those that had been stolen from the police department just days earlier.) Finally, although the affidavit did not include the names of the witnesses, it noted that the witness who identified the occupants of the vehicle had also given a separate statement to law enforcement. See [Illinois v.] Gates, 562 U.S. [213,], 241-242 ("[A]n affidavit relying on hearsay 'is not deemed to be insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." (quoting Jones v. United States, 362 U.S. 257, 269 (1960)).

See Court Docket No. 23-13, pp. 2-3.

Therefore, having determined that Petitioner was provided a full and fair opportunity to pursue his Fourth Amendment claim in state court in accordance with Stone, this court need not inquire further into the merits. Petitioner's Ground One issue should be dismissed.

(Ground Two)

In his Ground Two, Petitioner argues that the trial court judge erred by not granting Petitioner's motion for a mistrial when the solicitor improperly elicited testimony from the witness that cooperating with the police would get her killed. Petitioner raised this issue in his direct appeal, and the South Carolina Court of Appeals denied relief on this issue, holding that:

> Without objection, the solicitor asked [the witness at issue] if she remembered being reluctant to talk with the police when they came to her home to question her about the incident, and the witness answered in the affirmative. The solicitor then asked, "Isn't it true you were scared to talk to them"? [Petitioner] objected on the basis that the solicitor was attempting to lead the witness, and the trial judge sustained the objection. Immediately after the trial judge ruled on the objection, the solicitor asked the witness about the statement she made to an investigator about her fear. Although [Petitioner] promptly objected again, the witness answered the question in the negative before [Petitioner] could elaborate on his objection. The trial judge then instructed the jury "to disregard both the question and answer in that line of questioning." The witness went on to testify that despite her initial reluctance, she eventually went to the sheriff's department and provided a statement.
>
> The jury was then excused, and [Petitioner] moved for a mistrial, arguing the solicitor improperly injected the issue of the witness's fear of retaliation if she discussed the case with law enforcement. He also contended the question was unduly suggestive and resulted in obvious prejudice to him. The trial judge refused to declare a mistrial, noting she had given a curative instruction, but offered to restate the precautionary statement to the jury. [Petitioner] declined the offer.
>
> . . .
>
> Here, in ruling on [Petitioner's] objection, the trial judge instructed the jury to disregard both the question and the witness's answer. Also, when charging the jury, she directed the jurors to disregard any testimony stricken from the record. Although [Petitioner] argued both at trial and on appeal that he was adversely affected by the two questions to which he objected, he offered only conclusory arguments to support his assertion that he was irremediably prejudiced by the questions and resulting testimony. Moreover, the inflammatory insinuations in the solicitor's questions were

> not referred to again during the six and one-half days of trial that followed the witness's appearance. Finally, neither the questions at issue nor any answers that the witness gave implicated either defendant in the victim's murder. Considering all these circumstances, we hold the trial judge's remedial measures were sufficient to cure any prejudice from the solicitor's questions; therefore, the case for mistrial presented here was not one of such manifest necessity that warrants reversal of the trial judge's refusal to invoke this drastic measure. See State v. Patterson, 522 S.E.2d 845, 851 (S.C.Ct.App. 1999)("A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons."); id. (stating that a mistrial should not be ordered in every case in which incompetent evidence is received and that "the trial judge should exhaust other methods to cure possible prejudice before aborting a trial.")

See Court Docket No. 23-13, pp. 4-5.

The undersigned can discern no reversible error in the State court's ruling. As a matter of state court practice, a curative instruction is generally deemed to have cured any alleged error. State v. Patterson, 522 S.E.2d 845, 850–851 (S.C.Ct.App.1999); State v. Greene, 499 S.E.2d 817, 822 (S.C.Ct.App.1997); see State v. Kelsey, 502 S.E.2d 63, 70 (S.C.1998) [curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission]. Moreover,

> [t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Harris, 530 S.E.2d 626, 627–28 (2000).

Cf. Vestry and Church Wardens of Church of Holy Cross v. Orkin, 682 S.E.2d 489, 491 (S.C. 2009)[dealing with alleged juror misconduct on a motion for a mistrial]; see also Carson v. CSX Transp., Inc., 734 S.E.2d 148, 152 (S.C. 2012)[granting or refusing a motion for a new trial is within sound discretion of trial judge and will not be disturbed absent an abuse of discretion].

> An abuse of discretion exists if ... the defendant [can] show prejudice; no prejudice exists, however, if the jury could make individual guilt determinations by following the court's cautionary instructions." [United States v. Wallace, 515 F.3d 327, 330 (4th Cir. 2008)] (quoting United States v. Dorsey, 45 F.3d 809, 817 (4th Cir. 1995)). "We

> normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (quoting Richardson v. Marsh, 481 U.S. 200, 208 (1987); Bruton v. United States, 391 U.S. 123, 136 (1968)).

United States v. Lewis, 719 F. App'x 210, 218 (4th Cir. 2018).

Based on the evidence of Petitioner's guilt and the curative instruction in this case, Petitioner has failed to show the necessary prejudice. After the statement at issue was made and the corrective instruction was given, the issue was never raised again during the six and one-half days of trial that followed. With regard to Petitioner's guilt, the evidence presented at trial included testimony from witness Ricky Jacobs, who identified the Petitioner and Watts as being in the vehicle from which the shots were fired. Jacobs testified that the shots were fired from the driver's side of the vehicle, and that Petitioner was driving the vehicle. Jacobs also testified that he saw Watts with a gun in his hand, he identified the type of gun for law enforcement, and that he witnessed the shooting. Jacobs specifically testified that he saw shots coming out of the driver's side of Petitioner's car (in which Petitioner was the driver). He also subsequently saw shots fired by another individual (who he was also able to identify) who was in a white Rodeo, but those shots were fired up in the air. (R.pp. 667-681). Law enforcement recovered projectiles following the shooting, including one from the victim, that were consistent with having been fired from a brand of weapon which would have included an M-11 styled weapon. (R.pp. 1583-1587, 1593-1594). Law enforcement also determined the shell casings recovered from the scene of the shooting were consistent with being fired from an M-11 type firearm, which the firearms and toolmarks examiner referred to as a MAC styled M-11

weapon. (R.p. 1581, 1593).[7] Jarrell Dansby, the Petitioner's cousin, testified that the Petitioner brought a gun to his house (R.pp. 1117-1118), and Brian Watson, the uncle of Dansby's wife, testified that Dansby showed him the gun, and it was a Mac 10 gun. (R.p. 1145). All three witnesses, Dansby, Rashonda Simpson (Miller), Dansby's wife, and Watson also testified about their involvement in the disposal of a gun following the shooting. See also (R.pp. 1030-1034).

Accordingly, Petitioner has not shown resulting prejudice from the cited testimony of such a magnitude to affect the outcome of the trial in light of the competent evidence presented at trial, and in light of the curative instruction given by the Court. See State v. Goldman, 392 S.E.2d 787, 789 (S.C. 1990)[Finding improper question by solicitor did not warrant mistrial because prejudice limited by competent evidence presented at trial]. Furthermore, a crucial assumption underlying our constitutional jury system is that jurors carefully follow instructions, and juries are presumed to follow their instructions. Cf. United States v. Love, 134 F.3d 595, 603 (4th Cir.1998), cert. denied, 524 U.S. 932 (1998); Weeks v. Angelone, 528 U.S. 225, 234 (2000)["A jury is presumed to follow its instructions."]; United States v. Bryant, 655 F.3d 232, 252 (3d Cir. 2011)["[W]e generally presume that juries follow their instructions."].

Therefore, Petitioner has failed to present evidence sufficient to show that the state court's rejection of this claim was unreasonable. See Evans v. Smith, 220 F.3d 306, 312 (4th Cir. 2000)[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

[7]The expert testified that an "M-11 is a type of semi-automatic pistol". (R.p. 1593).

based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"], cert. denied, 532 U.S. 925 (2001). As such, Petitioner has not shown that he is entitled to relief on this claim.

(Ground Three)

In his Ground Three, Petitioner contends that the trial court erred by granting the State's continuance motion. Petitioner raised this issue in his direct appeal, and the South Carolina Court of Appeals denied relief on this issue, holding as follows:

> Here, as required by Rule 7, the State's motion was made in writing and filed with the clerk of court. Rule 7(a), SCRCrimP. The motion also included a showing of good and sufficient legal cause to postpone the trial, namely the existence of newly discovered information, that notwithstanding diligent efforts by law enforcement, could not be fully investigated before the scheduled trial. Furthermore, contrary to [Petitioner's] argument at trial, the requirement that the State present testimony to support its motion applies only when the continuance is sought because of the absence of a witness. Rule 7(b), SCRCrimP. In this case, the State requested a continuance to investigate a new lead about the location of the missing murder weapon, not because a witness failed to appear. Based on these circumstances, we hold the grant of the State's motion to continue the case was within the trial judge's discretion.

See Court Docket No. 23-13, p. 5.

Petitioner has not shown any reversible error in this decision. Cf. Polite v. Miller, No. 08-330, 2012 WL 1038555 at * 3 (N.D.Okla. Mar. 27, 2012)[Although Petitioner contended that trial court erred in granting the State multiple continuances despite their noncompliance with state procedural law, the Court held that Petitioner's claim failed because he did not demonstrate that the State court's finding were an unreasonable applicable of Supreme Court precedent]. In any event, the issue of whether or not the State complied with Rule 7 in its request for a continuance is an issue of state law, and "[i]t is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)["federal

habeas corpus relief does not lie for errors of state law."]

Accordingly, Petitioner has failed to present any evidence of a federal violation sufficient to avoid summary judgment on this claim.

II.

Ineffective Assistance of Counsel Claims

Petitioner raises numerous ineffective assistance of counsel claims,[8] in addition to two other claims (Grounds Four and Ten), which are direct appeal issues. However, Respondent contends, and the undersigned agrees, that the following ineffective assistance of counsel claims were procedurally defaulted at the PCR court or PCR appellate levels: Grounds Seven through Nine, and Eleven through Twenty-Two. Those claims (along with Grounds Four and Ten) have therefore been addressed separately. See discussion, infra.

With regard to Petitioner's remaining ineffective assistance of counsel claims that were properly pursued in his PCR action (Grounds Five, Six, and Twenty-Three)[9], Petitioner had the burden of proving the allegations in his PCR petition. Butler v. State, 334 S.E.2d 813, 814 (S.C. 1985), cert. denied, 474 U.S. 1094 (1986). However, the PCR court rejected these claims after a full

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[8]Although Ground Twenty-Four involves an ineffective assistance of counsel claim, that claim addresses the conduct of Petitioner's PCR counsel, and is therefore in a different procedural posture than Petitioner's other ineffective assistance of counsel claims. As such, it is discussed separately. See discussion, infra.

[9]While Respondent contends that PCR appellate counsel raised the issues in Grounds Five and Six only in Petitioner's PCR appeal, Petitioner contends that only Ground Twenty-Three was raised in his appeal. See Petitioner's Memorandum in Opposition, p. 9. A review of the record reveals overlapping and related arguments that the PCR judge made factual findings on as to as least some of the issues raised in these claims. Therefore, giving Petitioner's pleadings the liberal construction to which he is entitled as a pro se litigant, and out of an abundance of caution, the undersigned has addressed all three of these issues as exhausted claims.

hearing, making relevant findings of fact and conclusions of law in accordance with S.C.Code Ann. § 17-27-80 (1976), as amended. See Wray v. State of South Carolina, No. 2012-CP-40-7909. Facts relating to these issues were also raised in Petitioner's PCR appeal to the State Supreme Court. (R.pp. 2396-2464). Therefore, the undersigned finds these claims are all properly exhausted for consideration by this Court for purposes of Respondent's motion for summary judgment.

At the PCR hearing, after outlining the trial and PCR testimony[10], the PCR judge found that: 1) Petitioner asserted that trial counsel was ineffective for failing to call a gunshot residue expert to testify at trial to refute the State's expert, SLED Analyst Michael Moskal; 2) Petitioner alleged that because gunshot residue was not found in his vehicle, but only round lead particles, Moskal's testimony to the jury was incorrect and misleading and his trial counsel should have called their own expert to refute Moskal; 3) Petitioner argued that the Court of Appeals' opinion, which incorrectly states gunshot residue was found in his car, is evidence of the prejudice he suffered; 4) in support of his allegation, Petitioner presented firearms' analyst Kelly Fite, who was admitted as an expert and testified that he did not agree with Mosal's characterization that the round lead particles were consistent with a weapon being fired from Petitioner's vehicle; 5) Mr. Fite disagreed with the testimony as an ultimate conclusion that the round lead particles were consistent with a gun being

[10]Although Petitioner failed to properly pursue Grounds Four, Seven through Nine, and Nineteen in his PCR appeal, he did raise these issues in his initial APCR, and the PCR court addressed them. Therefore, while the reasoning for dismissal of these issues are discussed in a separate analysis, the factual findings by the PCR court on these issues are also included in this section. Grounds Ten through Eighteen, and Twenty through Twenty-Two were not properly pursued at the lower PCR court level. Therefore, no findings were made by the PCR court as to those specific grounds.

fired[11]; 6) after reviewing all of the testimony presented at trial and at the PCR hearing, Petitioner failed to meet his burden of proof in regards to this allegation; 7) Petitioner failed to establish any deficiencies in trial counsel's representation; 8) the uncontroverted testimony presented revealed that trial counsel retained and consulted extensively with gunshot residue expert Jeffrey Hollifield prior to and during Petitioner's trial; 9) this testimony was supported by evidence presented during the PCR evidentiary hearing; 10) Hollifield not only reviewed the forensic aspects of Petitioner's case, but helped prepare trial counsel (both of whom were already well versed in gunshot residue evidence) for cross-examination of State expert Moskal; 11) Hollifield was present during Petitioner's trial and conferred with the defense team and Petitioner about whether he should testify based on the testimony already extracted from Moskal, much of which was favorable to the Petitioner; 12) trial counsel testified that the defense team and Petitioner made a strategic decision not to call Hollifield based on their combined experience and their expert's recommendation, and that all agreed that Hollifield's testimony would be largely duplicative; 13) the record and testimony also showed that trial counsel moved to exclude the gunshot residue testimony, preserved the issue for appeal, and objected when appropriate; 14) based on the foregoing, trial counsel's performance in regard to the gunshot residue aspects of Petitioner's case went well-above the professional standards required, and Petitioner failed to establish deficiency of counsel; 15) Petitioner also failed to meet his burden regarding prejudice stemming from this alleged deficiency; 16) the gunshot residue expert presented at the evidentiary hearing was unpersuasive and of not much benefit to Petitioner's case; 17) Fite was

[11]The PCR court noted that Fite agreed with Moskal's underlying testimony, including that round lead particles are a crucial component on gunshot residue and their presence can indicate that a weapon has been fired. Rather, Fite appeared to just take issue with the way Moskal presented this information to the jury, as discussed in his opinion.

unable to recall what materials he had reviewed or how he formed his expert opinions, and his testimony generally relied on conclusory statements without any documentation to support his propositions; 18) Petitioner did not establish any prejudice from the alleged deficiency of trial counsel for failing to call an expert to testify at trial; 19) Petitioner failed to establish both of the requisite prongs entitling an applicant to relief, and his allegation was denied with prejudice;

20) Petitioner asserted that his trial counsel was ineffective for failing to investigate initial responding officer Weldon Gregory and for failing to call him to testify; 21) Petitioner also asserted that trial counsel was ineffective for failing to impeach State's witness Ricky Jacobs with the initial handwritten incident report prepared by Gregory; 22) Gregory, a former Sheriff's Deputy with the Richland County Sheriff's Department who retired in 2008 after nearly twenty years in law enforcement, was the first responder on the scene following the shooting; 23) Gregory prepared a short, handwritten report after the incident; 24) Petitioner alleged trial counsel was ineffective for failing to call Gregory as a defense witness to refute and impeach the State's witness, Ricky Jacobs; 25) Petitioner presented testimony from Gregory and relied upon Gregory's handwritten incident report; 26) Petitioner failed to establish any deficiency of trial counsel in regards to his allegations involving Gregory; 27) trial counsel testified that as a general rule, he does not like to call members of law enforcement as defense witnesses because it is more harmful than helpful to defendants based on his more than forty years of experience; 28) additionally, counsel testified that he was able to successfully cross-examine Jacobs without calling Gregory as a defense witness and was able to impeach Jacobs with other documents and testimony, including Gregory's report, although not all documents were admitted into the record at trial; 29) the PCR court agreed with trial counsel's assessment, as Jacobs was thoroughly examined as to his recollection of events and his identification

of Petitioner and his co-defendant; 30) trial counsel's performance was not deficient and Petitioner failed to meet his burden of proof; 31) Petitioner also failed to show any resulting prejudice from this alleged deficiency; 32) Gregory's testimony added very little to the overall presentation and likely would have had no impact on the result of the proceeding; 33) as already discussed, trial counsel challenged Jacobs on virtually every aspect of his recollection; 34) the PCR court was not convinced that testimony from Gregory would have had any impact on the jury's view of Jacobs or his credibility, much less the result of Petitioner's trial; 35) Petitioner failed to show the requisite prejudice; 36) Petitioner failed to establish either of the required prongs needed for relief, and this allegation was denied and dismissed with prejudice;

37) Petitioner asserted that trial counsel was ineffective for failing to call Timothy Weldon as a defense witness at trial because he would have presented favorable testimony; 38) Weldon, a patron present at the club the morning of the shooting, gave various statements to investigators but was not called as either a State or defense witness; 39) Petitioner failed to present Weldon as a witness or offer any evidence as to what his testimony at trial might have been; 40) therefore, as a preliminary matter, this allegation failed; 41) Petitioner did not show any deficiency in trial counsel's performance; 42) trial counsel testified that Weldon was interviewed by all three investigators and gave information that was not only inconsistent but also damning to Petitioner and his co-defendant; 43) trial counsel testified that he made the strategic decision not to call Weldon based on his previous statement and his assessment that Weldon would be an unfavorable witness for Petitioner; 44) this strategy was valid and prudent based on all of the testimony presented, and therefore trial counsel's performance was not deficient; 45) this allegation was denied and dismissed with prejudice;

46) Petitioner asserted that trial counsel was ineffective for failing to object to the State's vouching for the credibility of eyewitness Ricky Jacobs during its closing; 47) the particular comment which Petitioner found objectionable was "He's telling the truth"; 48) Petitioner alleged that because Jacobs was a crucial witness for the State, this comment impermissibly bolstered the State's case and caused him irreparable prejudice; 49) trial counsel testified that this comment was not improper and does not amount to vouching, and therefore he did not object; 50) the PCR court agreed with trial counsel's assessment; 51) this comment amounted to arguing the credibility of the State's witness based on facts in the record, particularly when read in conjunction with the comments immediately prior and after the sentence in question; 52) as this comment was not impermissible vouching, trial counsel was not deficient for failing to object and this allegation, which was dismissed with prejudice;

53) Petitioner asserted that the State committed a discovery violation under Brady v. Maryland, 373 U.S. 83 (1963), by providing defense counsel with initial responding officer Weldon Gregory's incident report with his name omitted from the bottom of the report; 54) Petitioner relied on a photocopy of the report, introduced and admitted, which appeared to have a small portion of the bottom of the report missing, including the author's name; 55) Petitioner asserted the State intentionally supplied the report without Gregory's name to prevent defense counsel from learning his identity and calling him as an impeachment witness to refute Jacob's testimony; 56) trial counsel testified that he could not recall if he received Gregory's initial report with the bottom cut off or if the omission came from later copying of the document; 57) counsel testified that he has an exceptionally good working relationship with the solicitor's office and if he thought that any document or portion of a document had been omitted from discovery, or any other discovery violation

had occurred, he would contact the solicitor's office to rectify the problem and file a motion if necessary; 58) counsel testified that even if he had received the document with the portion missing, he does not think that this amounted to a discovery violation and that he easily could have found the author of the report; 59) Petitioner failed to satisfy his burden of establishing a discovery violation pursuant to Brady occurred; 60) Petitioner was not able to establish that the State withheld any evidence; 61) the document in question was turned over to the Petitioner and was located in trial counsel's file; 62) trial counsel was unsure if the document had been turned over with the bottom portion omitted or if subsequent reproduction by copy machine had created the omission; 63) regardless, trial counsel testified that he easily could have discovered who the author of the report was if the report had come to him in its present condition; 64) the State did not withhold evidence; 65) Petitioner failed to show that this document was material for impeachment purposes; 66) as discussed earlier, the testimony presented by Gregory added very little if anything to Petitioner's case and likely would not have had an impact on his trial; 67) trial counsel thoroughly cross-examined and impeached the State's eyewitness without the need to call a member of law enforcement as a defense witness; 68) based on the foregoing, the Court found that Petitioner failed to establish any Brady violation and this allegation was denied and dismissed without prejudice;

69) Petitioner alleged that appellate counsel was ineffective for not raising on appeal that the trial was tainted by improper GSR testimony and improper conclusions drawn by the State's expert testimony[12]; 70) Franklin, who represented Petitioner during his appeal, testified during his

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[12]The PCR court noted that the State Court of Appeals overstated the gunshot residue evidentiary summary in its decision when it upheld the convictions, specifically, the Appeals Court's statement that "the location of the gunshot residue on the vehicle in which [Petitioner and his co-defendant] were riding." (R.p. 2426, n. 5)(quoting State v. Wray, 2012-UP-477 (S.C.Ct.App. Aug.

(continued...)

PCR hearing; 71) Petitioner failed to establish his burden of both deficiency of appellate counsel and requisite prejudice entitling him to relief; 72) Franklin testified that she had been practicing law for fourteen years and a vast majority of her practice is criminal defense; 73) she testified she was currently in private practice, bu that she was an Appellate Defender at the South Carolina Commission on Indigent Defense - Division of Appellate Defense when she was appointed to represent the Petitioner on his appeal; 74) Franklin testified that she briefly reviewed the materials before her testimony, but could not independently recall what issues she raised in her brief or the content of the South Carolina Court of Appeals' decision; 75) Franklin testified that she did not review the transcript or read her brief in anticipation of her testimony; 76) Franklin testified her standard practice when receiving an appellate case was to read the entire record and determine what issues were preserved for appellate review; 77) Franklin testified that she then determines which issues appear to have merit and might be successful on appeal; 78) Franklin testified that she felt it was her duty to raise any and all meritorious issues on appeal, regardless of the strength of the issue; 79) after reviewing her brief while on the witness stand, Franklin testified that she raised three issues in Petitioner's appeal, all of which she thought were meritorious at the time; 80) Franklin testified that she had no recollection as to why she did not raise the gunshot residue issue, but since she generally raises all issues she believes to be meritorious, she concluded she must have determined the issue was not meritorious at the time; 81) Franklin reiterated that she would have raised the gunshot residue issue if she had believed it to be meritorious at the time; 82) Petitioner's trial counsel Bax testified that he primarily handled the gunshot residue portion of Petitioner's case; 83) Bax

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[12](...continued)
8, 2012)(emphasis added)).

testified that he made a motion in limine to exclude testimony from the State's GSR expert, SLED Agent Moskal, arguing to the trial court that the evidence would be more prejudicial than probative under Rule 403, SCRE, because only one component of gunshot residue (round lead particles) was found in Petitioner's car; 84) Bax testified the trial court denied his motion and allowed the State to present Moskal, who testified that the round lead particles were consistent with a weapon being fired; 85) Bax testified that Moskal was very careful in his testimony, only stating that the round lead particles were consistent with a gun being fired, but never testifying before the jury that gunshot residue was found; 86) Bax testified that he believed he preserved the issue for appellate review because his motion in limine was immediately preceding Moskal's testimony; 87) Bax testified that he believed the trial court erred in allowing Moskal's testimony, but did not express an opinion as to whether the issue would have been successful on appeal;

88) Petitioner failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief; 89) first, Petitioner failed to show his appellate counsel's performance was deficient where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised three stronger, meritorious issues on Petitioner's behalf; 90) second, Petitioner failed to establish prejudice, as there was no reasonable likelihood that he would have prevailed on appeal had the gunshot residue issue been raised; 91) Franklin reviewed the record and determined what issues could be raised based on both preservation and merit; 92) while she had no independent recollection as to why she did not raise the gunshot residue issues, she testified that she must have not thought the issue had merit at the time; 93) when appellate counsel reviews all possible issues and elects to raise those issues deemed most meritorious, she has performed in accordance with professional standards and is not deficient; 94) moreover,

despite appellate counsel's statement that she personally raises every issue with any possible merit, regardless of the strength of the claim, on appeal, that was simply not the standard on which the PCR Court found it was required to analyze such claims of ineffective assistance of appellate counsel; 95) as appellate counsel raised three meritorious issues on appeal, her performance was in accordance with professional norms; 96) Petitioner failed to show any prejudice from this alleged deficiency, as there is no reasonable likelihood he would have prevailed on appeal had the gunshot residue been raised;

97) given the testimony of eyewitness Jacobs, as well as other evidence which circumstantially linked him to the crime, Petitioner probably would have been convicted without the presentation of the gunshot residues witness; 98) at trial, Petitioner moved to exclude the gunshot residue testimony based on Rule 403, SCRE, arguing that the prejudicial effect of Moskal's testimony outweighed its probative value; 99) after listening to argument from the State and Petitioner, the trial court allowed the testimony evidence to be presented to the jury; 100) the trial court's decision was not a clear abuse of discretion and would be upheld on appeal; 101) the evidence presented was clearly relevant; 102) Petitioner was charged with murder and an eyewitness testified that he saw Petitioner shooting out of the driver's side window of his vehicle; 103) the State presented evidence that round lead particles, a crucial component of gunshot residue, were found in multiple locations on the driver's side of Petitioner's vehicle; 104) as the State properly noted during the motion in limine, Petitioner's arguments for suppression based on prejudice were appropriately addressed through cross-examination of the State's witness, not through suppression; 105) therefore, the trial judge properly allowed the evidence to be presented to the jury; 106) the trial court's ruling on this issue was an evidentiary ruling, and the PCR court did not find she abused her discretion in allowing

that information admitted as evidence; 107) as the trial court's ruling was not an abuse of discretion amounting to an "exceptional circumstance," its ruling would have been upheld on appeal; 108) the Petitioner cannot establish any requisite prejudice because he would not have prevailed on appeal had the gunshot residue issue been raised; and 108) therefore, Petitioner failed to establish both deficiency and prejudice in regards to this allegation. (R.pp. 2396-2433). As previously noted, the South Carolina Supreme Court subsequently denied Petitioner's PCR appeal wherein Petitioner arguably[13] presented the issues raised in Grounds Five, Six, and Twenty-Three. See Court Docket Nos. 23-17 & 23-19.

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 (4th Cir. 2000)(en banc), cert. denied, 112 S.Ct. 74 (2001).

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

28 U.S.C. § 2254(e)(1). See also Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000), cert. denied, 531 U.S. 1095 (2001); Frye v. Lee, 235 F.3d 897, 900 (4th Cir. 2000), cert. denied, 533 U.S. 960 (2001). 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 v. Washington, 466 U.S. 668, 698 (1984); Pruett v. Thompson, 996 F.2d. 1560, 1568 (4th Cir. 1993),

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[13]See, n. 9, supra.

cert. denied, 114 S.Ct. 487 (1993) (citing Clozza v. Murray, 913 F.2d. 1092, 1100 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991)).

Even so, with regard to the 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 Petitioner's ineffective assistance of counsel claims.[14]

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

[14]To the extent that the undersigned analyzes issues in the procedural bar section of this opinion that the PCR court also made findings on that are now procedurally barred due to Petitioner's failure to properly pursue them in his PCR appeal, those findings also are entitled to this deferential standard of review.

objective standard of reasonableness guaranteed by the Sixth Amendment. Second, the Petitioner must show that counsel's deficient performance prejudiced the defense such that the Petitioner was deprived of a fair trial. In order to show prejudice a Defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir.1996). For the reasons set forth and discussed hereinbelow, Petitioner has failed to meet his burden of showing that his counsel was ineffective under this standard. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975)[Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus].

(Grounds Five and Six)

In Ground Five, Petitioner contends that his counsel was ineffective for failing to impeach the State's eyewitness Jacobs with Gregory's report and failing to move that report into evidence. In Ground Six, Petitioner contends that his counsel was ineffective for failing to investigate potentially exculpatory evidence in Gregory's police report, and to interview and subpoena Gregory to authenticate his report and testify concerning the information in the report. As these issues are related, they are discussed together.

The PCR court found that Gregory, who retired in 2008 after nearly twenty years in law enforcement, was the first responder on the scene following the shooting. Gregory prepared a short, handwritten report after the incident. Petitioner alleged trial counsel was ineffective for failing to call Gregory as a defense witness to refute and impeach Jacobs, and in support of this claim Petitioner presented testimony from Gregory at the PCR hearing and relied upon Gregory's handwritten incident report. However, the PCR court found that Petitioner failed to establish any deficiency of trial counsel with respect to his allegations involving Gregory. The PCR court noted

that trial counsel testified that as a general rule he does not like to call members of law enforcement as defense witnesses because to do so is more harmful than helpful to defendants based on his more than forty years of experience; and additionally, counsel testified that he was able to successfully cross-examine Jacobs without calling Gregory as a defense witness and was able to impeach Jacobs with other documents and testimony, including Gregory's report, although not all documents were admitted into the record at trial. See (R.pp. 2264-2278). The PCR court found that trial counsel's assessment was correct, and that Jacobs was thoroughly examined as to his recollection of events and his identification of Petitioner and his co-defendant. The PCR court found that trial counsel's performance was not deficient and that Petitioner failed to meet his burden of proof. (R.pp. 2421-2422). The PCR court also found that Petitioner failed to show any resulting prejudice from this alleged deficiency. The PCR court noted that Gregory's testimony added very little to the overall presentation and likely would have had no impact on the result of the proceeding, explaining that trial counsel challenged Jacobs on virtually every aspect of his recollection. Specifically, the PCR court was not convinced that testimony from Gregory would have had any impact on the jury's view of Jacobs or his credibility, much less the result of Petitioner's trial. Therefore, the PCR court concluded that Petitioner failed to show the requisite prejudice and/or establish either of the required prongs needed for relief. (R.pp. 2421-2422). The undersigned can discern no reversible error in the PCR Court's findings and conclusion.

At the PCR hearing, Gregory testified Jacobs told him that after the suspects were denied entry to the club, one made a comment "I've got something for you", and a few minutes later a white SUV with the suspects in it began shooting towards the club. (R.p. 2184). Jacobs also testified at trial about the fact that Petitioner and his co-defendant were denied entry to the club

because it was closing. (R.pp. 667-668). He also testified about seeing a shot fired by someone in a white Isuzu Rodeo, which was after the initial shots were fired. (R.pp. 676-679, 791-799, 803-806). Even so, the record shows that trial counsel thoroughly challenged Jacobs on his recollection of the events at issue. (R.pp. 758-810). Therefore, Petitioner has failed to show that trial counsel's performance was deficient for failing to further impeach Jacobs with Gregory's report and for failing to move that report into evidence.

Petitioner has also failed to show that trial counsel's performance was deficient for failing to investigate potentially exculpatory evidence in that police report, or to interview and subpoena Gregory to authenticate his report and testify concerning the information. Furthermore, even assuming that counsel had further investigated this issue and taken the additional steps outlined by the Petitioner, Petitioner has not shown the likelihood of a different outcome, and as a result he has failed to show any prejudice due to counsel's failure to investigate these matters. Petitioner's claim that his counsel was ineffective on these grounds 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 v. Fisher, 132 S.Ct. 38, 43 (2011)[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 Twenty-Three)

Petitioner contends that his trial counsel was ineffective for failing to cross-examine

Jacobs about the fact that he did not initially identify the Petitioner and his co-defendant by name, and that his initial description of the perpetrators did not fit the description of the vehicle driven by the Petitioner and his co-defendant. While Respondent contends that this issue was not ruled on by the PCR court judge and was therefore not preserved as an issue for Petitioner's PCR appeal, Petitioner notes that this is the only issue that was raised on appeal by his PCR appellate counsel. Moreover, a review of the state court record does show that the PCR judge made findings related to this issue, and Petitioner's appellate counsel did raise this issue. See Court Docket No. 23-17. There is also no indication in the order of the State Supreme Court dismissing Petitioner's PCR appeal that it had been determined this claim was barred as having been defaulted. See Court Docket No. 23-19. Therefore, the undersigned has considered this claim as having been exhausted at the State level for purposes of federal habeas review.

As referenced in the discussion of Grounds Five and Six, the PCR court discussed that trial counsel testified that he was able to successfully cross-examine Jacobs without calling Gregory as a defense witness and was able to impeach Jacobs with other documents and testimony, including Gregory's report, although not all documents were admitted into the record at trial. The PCR court also found that trial counsel challenged Jacobs on virtually every aspect of his recollection. See (R.pp. 2265-2277). The PCR court found that trial counsel's assessment was correct that Jacobs was thoroughly examined as to his recollection of events and his identification of Petitioner and his co-defendant; see (R.pp. 758-810); that trial counsel's performance was not deficient, and that Petitioner had failed to meet his burden of proof. Cf. Cardwell v. Netherland, 971 F.Supp. 997, 1019 (E.D.Va. 1997). The PCR court also found that Petitioner also failed to show any resulting prejudice from this alleged deficiency. Therefore, the PCR court concluded that Petitioner failed to show the requisite

prejudice and/or establish either of the required prongs needed for relief. (R.pp. 2421-2422). Again, the undersigned can discern no reversible error in the state court's findings on this claim.

"In hindsight, there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional ineffectiveness, few would be the counsel whose performance would pas[s] muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996); see also United States v. Munoz, 605 F.3d 359, 381 (6th Cir. 2010)[finding counsel not ineffective for not impeaching witness]. Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available. Millender v. Adams, 187 F.Supp.2d 852, 872 (E.D.Mich. 2002), aff'd, 376 F.3d 520 (6th Cir. 2004); cf. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000)["[C]ounsel's tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must similarly meet only objectively reasonable standards."](citing Strickland v. Washington, supra). Here, the trial record shows that defense counsel thoroughly cross-examined Jacobs on the contents of his statements to Investigator McRae, his recollection of the events of the night of the shooting including the description of the two vehicles, and his involvement in the investigation afterwards. Petitioner has failed to show his counsel was deficient for not further cross-examining Jacobs.

In addition, Petitioner has failed to show prejudice. Jacobs was extensively questioned about the fact that he did not initially provide law enforcement with the names of Petitioner and his co-defendant. (R.pp. 753-754, 764-768). Moreover, trial counsel for Petitioner's co-defendant also asked questions regarding the other vehicles that Jacobs had identified in his first statement to Gregory. (R.pp. 750-756). Jacobs was also questioned about the descriptions that he

gave of people involved. (R.pp. 765-767, 776). Therefore, even assuming that counsel had or could have further cross-examined Jacbos on these issues, Petitioner has not shown the likelihood of a different outcome, and as a result he has failed to show any prejudice due to counsel's failure to further cross-examine Jacobs.

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 v. Fisher, 132 S.Ct. 38, 43 (2011)[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"].

III.

(Procedurally Barred Issues)

Petitioner's remaining ineffective assistance of counsel claims in Grounds Seven through Nine and Eleven through Twenty-Two[15], along with Grounds Four and Ten (which are not ineffective assistance claims[16]), were not properly pursued in state court and are therefore

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[15]As previously referenced, Plaintiff's Ground Twenty-Four, which raises an ineffective assistance of PCR counsel claim, is discussed in a separate section.

[16]In Grounds Four and Ten, Petitioner attempts to raise direct appeal issues that were not preserved at trial. See discussion, infra. South Carolina case law provides that an APCR is not a substitute for direct appeal issues. See Simmons v. State, 215 S.E.2d 883, 885 (S.C. 1975)["It is (continued...)

procedurally barred. Specifically, Respondent contends that Grounds Ten through Eighteen along with Grounds Twenty through Twenty-Two were not properly pursued in the initial PCR proceedings, while Grounds Four, Seven, Eight, Nine, and Nineteen (although Petitioner did initially pursue these issues in his PCR proceedings) were not raised in his PCR appeal. Significantly, although Petitioner's assertions about where certain issues were defaulted varies slightly from the Respondent's arguments, he does not contest that these claims were defaulted.

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. 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

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[16](...continued)
uniformly held that an application for post-conviction relief is not a substitute for an appeal."]; Ashley v. State, 196 S.E.2d 501, 502 (S.C. 1973).

exhausted. Coleman v. Thompson, 501 U.S. at 735; Teague v. Lane, 489 U.S. 288, 297-298 (1989). However, even though otherwise exhausted; see 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; 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 (presumably as a potential "cause" for his default) that his PCR counsel was ineffective for failing to raise in his initial PCR court proceeding

the issues in this Petition that were not originally presented and/or ruled on by the PCR court judge. Petitioner contends that he requested that his counsel file a motion to amend his PCR petition to address all of these issues, but that his counsel failed to do so. Petitioner argues that at the PCR hearing his counsel told him at some point during his testimony to only raise one more issue due to one witness needing to leave and to avoid making the judge mad for raising so many additional issues that had not been part of his filed amended Petition. Petitioner also complains at length about his PCR counsel's handling of his Rule 59 motion, arguing that he had requested that counsel withdraw and that he be allowed to raise all of his issues in his Rule 59 motion, but that instead counsel filed a bare boned Rule 59 motion without outlining the issues and/or providing any support for reconsideration. (R.pp. 2435-2436). See Petitioner's Response to Summary Judgment, pp. 3-9. As for the issues defaulted at the PCR appellate court level, Petitioner contends that even though he forwarded all fifteen issues that were raised in his PCR proceeding and requested that his PCR appellate counsel present all of those issues, she instead raised only one issue in his PCR appeal.[17] See Petitioner's Response to Summary Judgment, pp. 9-10.

However, as set forth below, the undersigned finds that Petitioner has failed to show the necessary "cause" to overcome the procedural bar with respect to any of these claims.

PCR Counsel and PCR Appellate 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

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[17]As previously discussed, while the Respondent contends that PCR appellate counsel raised the issues in Grounds Five and Six only in Petitioner's PCR appeal, Petitioner contends that only Ground Twenty-Three was raised in his appeal. See Petitioner's Memorandum in Opposition, p. 9. For the reasons already discussed, the undersigned addressed all three of these issues on the merits. See also discussion, infra.

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

that modified

> "the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." Martinez, 566 U.S. at __, 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 counsel is raised in an APCR; cf. State v. Felder, 351 S.E.2d 852 (S.C. 1986); Bryant v. Reynolds, No. 12-1731, 2013 WL 4511242, at * 19 (D.S.C. Aug. 23, 2013); Gray, 526 Fed. Appx. 333; a claim of ineffective assistance of PCR counsel as "cause" for a default may be considered under the revised standard of Martinez and Trevino.

Procedurally Barred Claims Due to PCR Appellate Counsel

Notwithstanding the exception created by Martinez, it is clear in the caselaw that the Martinez exception only applies to *initial* PCR counsel. As such, ineffective assistance of PCR *appellate* counsel (which is what Petitioner argues in Grounds Four[18], Seven, Eight, Nine and Nineteen), as opposed to initial PCR counsel, is *not* cause for a default. Martinez, 132 S.Ct. at 1316; see Johnson v. Warden of Broad River Corr., No. 12-7270, 2013 WL 856731 at * 1 (4th Cir. Mar. 8, 2013)[PCR appellate counsel error cannot constitute cause under Martinez exception]; Cross v. Stevenson, No. 11-2874, 2013 WL 1207067 at * 3 (D.S.C. Mar. 25, 2013)["*Martinez* . . . does not hold that the ineffective assistance of counsel in a PCR appeal establishes cause for a procedural default. In fact, the Supreme Court expressly noted that its holding 'does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate

[18]With regard to Ground Four, as previously discussed, this issue was a direct appeal issue. Accordingly, while Petitioner makes the argument that his PCR appellate counsel was the cause for his failure to properly raise and preserve this issue, this issue was defaulted at the trial level and could not have been properly raised in his direct appeal, initial PCR, and/or PCR appellate proceeding. See also, n. 16, supra. Petitioner has offered no other cause, other than his PCR appellate counsel's actions, for his procedural default of this issue.

courts."](quoting Martinez, 132 S.Ct. at 1320); Rodriguez v. Padula, No. 11-1297, 2014 WL 1912345 at * 7 (D.S.C. May 12, 2014); Johnson v. Cartledge, No. 12-1536, 2014WL 1159591 at *10 (D.S.C. Mar. 21, 2014](same); Abney v. Warden, Perry Corr. Inst., No. 14-4084, 2015WL 5783295 at * 23 (D.S.C. Sept. 29, 2015)["Under *Martinez*, ineffective assistance of initial PCR counsel, not appellate PCR counsel, may constitute cause for a procedural default."]; Lewis v. Williams, No. 12-3214, 2013 WL 3929993 at *4 (C.D.Ill. July 29, 2013)[Ineffective assistance of PCR appellate counsel is not a ground for relief under § 2254]; Flowers v. Norris, No. 07-197, 2008 WL 5401675 at * 11 (E.D.Ark. Dec. 23, 2008)[same].

Therefore, since Petitioner's alleged "cause" for not properly raising Grounds Four, Seven, Eight, Nine and Nineteen in his PCR appeal is based on alleged ineffective assistance of PCR appellate counsel, Petitioner has not shown the necessary cause to proceed on those Grounds of this Petition.[19] 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."]. Since these claims are procedurally barred from consideration by this Court, they must be dismissed. Id.; see 28 U.S.C. § 2254; see also discussion, supra.

Procedurally Barred Claims Relating to Direct Appeal Counsel

The Supreme Court has also declined to extent the Martinez exception to underlying claims of ineffective assistance by direct appeal counsel. See Davilla v. Davis, 137 S.Ct. 2058 (2017). In Davilla, the Petitioner asked the Supreme Court to extend Martinez to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate

[19]Claims Eight and Nineteen are also barred as they relate to direct appeal counsel. See, discussion, infra.

counsel when a prisoner's state post conviction counsel provides ineffective assistance by failing to raise that claim. The Supreme Court specifically declined to do so. Id, at 2065.

Therefore, because Petitioner's alleged "cause" for his default of Grounds Eight, Nineteen, Twenty, and Twenty-one are based on PCR counsel's (or PCR appellate counsel's) failure to raise an underlying claim of ineffective assistance of direct appeal counsel, he has not, pursuant to Davilla, shown the necessary "cause" to cure the default of these claims. Davilla, 137 S.Ct. at 2065-2070. As such, these claims are procedurally barred from consideration by this Court, and must be dismissed. See also Bowen v. Williams, No. 18-620, 2019 WL 125945, at * 4-5 (D.S.C. January 7, 2019).

Procedurally Barred Claims Due to PCR Counsel

With regard to Petitioner's procedurally barred claims for which he asserts his initial PCR counsel's failure to properly raise and preserve them as "cause" for their default, 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, 2013 WL 2451083 at * 2. As discussed below, Petitioner's claims fail to meet this standard.

(Ground Ten)

In his Ground Ten, Petitioner contends that he was denied the right to a fair trial due to prosecutorial misconduct, by the prosecuting authorities knowingly presenting false or perjured material testimony, or by failing to correct testimony of Jacobs. However, this is a direct appeal issue that was not properly preserved at trial for appellate review. As previously noted, South Carolina case law provides that an APCR is not a substitute for direct appeal issues. See Simmons, 215 S.E.2d

at 885 ["It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."]; Ashley, 196 S.E.2d at 502. Moreover, as this is not an underlying ineffective assistance of counsel claim, it does not even fall under the Martinez exception.

Additionally, even if this *was* an issue that Petitioner could have raised in this Petition, to the extent that Petitioner asserts this claim as a violation of the South Carolina Constitution, Laws, and/or Statutes,[20] those alleged violations are a matter of state law, and "[i]t is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions." Estelle, 502 U.S. at 67-68 ["federal habeas corpus relief does not lie for errors of state law."]. Nor has Petitioner shown a violation of any federal law with respect to this issue. The fact that a witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollections of events, does not establish that the testimony offered at trial was false, or that the prosecution committed misconduct by submitting knowingly false or perjured testimony. United States v. Croft, 124 F.3d 1109, 1119 (9th Cir. 1997); Overton v. United States, 450 F.2d 919, 920 (5th Cir. 1971).

> Generally, due process is denied if the government knowingly uses perjured testimony against the accused to obtain a conviction. See Napue v. Illinois, 360 U.S. 264, 269 (1959). The government does not have to solicit the false evidence; it is enough if the government allows the evidence to go uncorrected when it surfaces. Id. . . . A defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured. See Dansby v. United States, 291 F.Supp. 7990, 793 (S.D.N.Y. 1968). Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony. See Overton v. United States, 450 F.2d 919, 920 (5th Cir. 1971).

United States v. Griley, 814 F.2d 967, 970-971 (4th Cir. 1987).

Petitioner contends that Jacobs testified falsely when he indicated that the first officer

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[20]As is noted when discussing several of Petitioner's procedurally barred claims, in addition to asserting a federal ineffective assistance claim, Petitioner also asserts these claims as being violations of state law.

he discussed the incident in detail with was Investigator McRae, when Jacobs had previously spoken with Deputy Gregory. Petitioner also alleges that Jacobs testified falsely when he stated that he initially advised law enforcement about a tan Suburban (driven by the Petitioner), which was not included in the incident report completed by Deputy Gregory. However, Jacobs testified at trial that he met with law enforcement when they first arrived on the scene, telling them that he was the owner of the bar, but that he did not initially provide descriptions of both vehicles to the first officer who arrived because that officer just wanted to secure the scene because he was concerned about evidence being tampered with or cars running over evidence. (R.pp. 681-684). Gregory also testified at the PCR hearing that although he talked to Jacobs and wrote down what he told him, he was not the investigator and his primary role was to secure the scene. (R.pp. 2185-2187, 2189, 2192-2193). Gregory further testified that while he did not recall Jacobs telling him anything about a tan Suburban, he may have told other investigators. (R.pp. 2185-2186). For his part, Jacobs testified at trial that he did not recall if there was a uniformed officer, but that he talked with Officer McRae and told McRae about what had transpired that he observed. (R.pp. 684-686).

Specifically, Jacobs testified that he saw Petitioner and his co-defendant in the parking lot, that he did not have any trouble seeing their faces, and that he recognized them from his bar. (R.pp. 674-675). Jacobs also testified that he heard shots and saw them coming from the driver's side of the tan Suburban. (R.p. 676). Jacobs further testified about shots being fired later from a white Rodeo, although this shot was up into the air, and that he was taken to identify its occupants after the police stopped them. (R.pp. 676-680, 684-685). The inconsistency between the report which was authored by Gregory and the trial testimony of Jacobs is whether the vehicle Petitioner and his co-defendant were in was a white SUV or tan SUV. However, Jacobs later testified under oath

definitively on this issue.

Therefore, Petitioner has not shown Jacobs offered perjured or false testimony. Overton, 450 F.2d at 920. As such, to the extent that this issue could have even been raised in Petitioner's APCR, Petitioner has failed to show a substantial issue.

(Ground Eleven)

Petitioner contends that his trial counsel was ineffective for failing to object to and challenge the alternative theory of "the hand of one is the hand of all" under accomplice liability. Respondent correctly points out that while Petitioner arguably raised this issue by testifying about it in his PCR hearing, the PCR court did not rule on it and it was not preserved for appellate review. See (R.pp. 2396-2434).

Initially, the undersigned again notes that to the extent Petitioner is asserting a violation of the South Carolina Constitution, Laws, and/or Statutes, those alleged violations are a matter of state law and "[i]t is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions." Estelle, 502 U.S. at 67-68 ["federal habeas corpus relief does not lie for errors of state law."]. As for Petitioner's claim that trial counsel was ineffective, "[i]t is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Condrey, 562 S.E.2d 320, 325 (S.C.Ct.App. 2002)(quoting State v. Dickman, 534 S.E.2d 268, 269 (S.C. 2000)(citations omitted). "[I]n South Carolina, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Bradley v. McMaster, No. 04–1278, 2005 WL 3475770 at *6 (D.S.C. Apr. 5, 2005) (citing State v. Langley, 515 S.E.2d 98, 101 (S.C.1999)); Condrey, 562 S.E.2d at 324.

"Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of that crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" Condrey, 562 S.E.2d at 325 (citing Langley, 515 S.E.2d at 101).

Here, Petitioner was convicted as a principal on the charges under the theory of "the hand of one is the hand of all." The evidence presented at trial was that both Petitioner and his co-defendant were in the tan Suburban and shots were fired from that vehicle. See discussion, supra. At the PCR hearing, Petitioner's lead trial counsel testified that there was evidence to support the accomplice liability charge that was given at trial:[21]

> I mean, the evidence is that somebody in the Suburban – in the driver's side, according to the evidence – was firing a weapon and one was a passenger. Well, whether the weapon was being fired from the passenger's side or the driver's side, you know, you get, you get the charge of hand of one is the hand of all, accomplice liability. Plus you also ask for the other charges that go along with accomplice liability: mere presence, mere association, mere knowledge. So, I mean, I don't know how that would not be an appropriate charge, frankly. I mean, I'm not sure how it would not.
>
> . . .
>
> You know, if there's an accomplice liability charge, I believe I would have, but somebody was firing the gun and somebody was not firing the gun and they were both in the vehicle. So, it seems it would be an appropriate charge, but I'm not the judge.

(R.pp. 2284-2285).

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution

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[21]"The law to be charged must be determined from the evidence presented at trial." State v. Patterson, 625 S.E.2d 239, 245 (S.C.Ct.App. 2006). If there is any evidence to support a charge, the trial court should grant the request. State v. Williams, 624 S.E.2d 443, 445 (S.C.Ct.App. 2005)(quoting State v. Burriss, 513 S.E.2d 104, 108 (S.C. 1999)); see also State v. Cottrell, 657 S.E.2d 451, 452 (S.C. 2008).

of the common design or purpose". Condrey, 562 S.E.2d at 324 (citing Langley, 515 S.E. 2d 98). Therefore, Petitioner has not shown that it was reversible error for the accomplice liability charge to be given.

Additionally, as has previously been noted, even assuming arguendo that it was error for trial counsel not to have objected to the accomplice liability charge being given, any error was harmless because of the evidence in the record to support the Petitioner's guilty verdict. See discussion, supra; see also State v. Hendon, No. 07-80, 2007 WL 8325960 at ** 2-3 (S.C.Ct.App. Feb. 14, 2007)[Finding that even assuming it was error to give accomplice liability charge, the error would be harmless where there was competent evidence to support the guilty verdict]. In any event, the undersigned is also constrained to note that whether the jury charge was appropriate is a matter of state law, and it is not the province of a federal habeas corpus court to reexamine state court determinations of state law questions absent the presentation of an underlying federal claim for relief. Estelle, 502 U.S. at 67 ["federal habeas corpus relief does not lie for errors of state law"]; see also Washington v. Rushton, No. 05-2394, 2006 WL 2050582 at * 1 (D.S.C. July 13, 2006)["[T]he question of whether a jury charge is given was adequate or appropriate is a state law issue to be resolved by the state court."].

Accordingly, Petitioner has not shown his counsel was ineffective for failing to object to the charge, and as a result has failed to show a substantial issue with regard to Ground Eleven to overcome the procedural bar.

(Ground Twelve)

Petitioner contends that his trial counsel was ineffective for failing to object to the solicitor's and assistant solicitor's improper comments, remarks, and argument that Petitioner's tan

Suburban was positive for gunshot residue, which so infected Petitioner's trial with unfairness that it made the resulting conviction a denial of due process due to prosecutorial misconduct. This issue was not raised or ruled on in Petitioner's PCR proceedings.

The record reflects that in his closing argument, the assistant solicitor referenced testimony from Agent Moskal noting that three round particles of lead were found in the automobile. The solicitor also noted that Moskal testified that the presence of those particles was most consistent with a firearm being fired from the driver's side of the vehicle. (R.p. 1937). These statements were consistent with Moskal's testimony. (R.pp. 1454-1456, 1462, 1502-1508). To the extent that Petitioner also contends that the solicitor's statements during his response to the motion for a directed verdict were improper, those statements were also consistent with the evidence presented at trial. (R.pp. 1454-1456, 1462, 1502-1508, 1865-1866). Accordingly, Petitioner cannot show that his counsel was ineffective for failing to object when an objection was not warranted. See e.g. Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000)["counsel cannot be ineffective for failing to raise a meritless claim"]; see Almon v. United States, 302 F.Supp.2d 575, 586 (D.S.C. 2004)["There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable."].

Therefore, Petitioner has not shown a substantial claim with regard to Ground Twelve.

(Ground Thirteen)

Petitioner contends that his trial counsel was ineffective for not objecting to statements from Moskal, who testified about the findings regarding the gunshot residue analysis. Petitioner asserts that the testimony was misleading and prejudicial. Petitioner did not raise this claim in his PCR proceeding, and it was likewise not ruled upon by the PCR judge. Therefore, it was not preserved for appellate review.

Moskal testified that gunshot residue consists of round lead particles, barium, and antimonium, and that in his analysis of a swab taken from Petitioner's driver's side door frame he found three round lead particles. (R.pp. 1462, 1503, 1506). Moskal determined that the presence of the three round lead particles was consistent with a weapon being fired in the driver's area of the car. (R.p. 1507). He then explained his conclusions and differentiated his findings from being the result of lead particles being left from other sources. (R.pp. 1507-1510). Prior to Moskall's testimony, defense counsel objected, contending that the testimony was not going to be consistent with SLED protocol and that the prejudicial admission of Moskall's findings would outweigh its probative value. (R.pp. 1444-1457). See also (R.p. 2429). Counsel renewed his objection when the results of the testing was offered into evidence by the State. (R.p. 1467).

Based upon the record showing defense counsel's strenuous objection prior to Moskall's testimony and the renewal of that objection, Petitioner has failed to show that his counsel was deficient for not objecting to the testimony and evidence regarding the GSR testing. Petitioner has also failed to show any prejudice by his counsel not taking additional action or making additional objections regarding this issue. Therefore, Petitioner has failed to show Ground Thirteen to be a substantial issue.

(Ground Fourteen)

Petitioner contends that his trial counsel was ineffective for not requesting a Franks[22] hearing to challenge the affidavit to the search warrant. See United States v. Caldwell, 114 Fed.Appx. 178, 181 (6th Cir. Nov. 5, 2004) ["A so-called Franks hearing is based upon the case of Franks v. Delaware, . . . which calls for an evidentiary hearing where a defendant raises a substantial

[22]Franks v. Delaware, 438 U.S. 154 (1978).

question as to whether the affidavit supporting the search warrant contained materially false information."]. This claim was not presented to or ruled on by the PCR court. Accordingly, it was not preserved for PCR appellate court review.

Initially, the undersigned again notes that to the extent Petitioner asserts a violation of the South Carolina Constitution, Laws, and/or Statutes, those alleged violations are a matter of state law, and "[i]t is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions." Estelle, 502 U.S. at 67-68 ["federal habeas corpus relief does not lie for errors of state law."]. As for whether Petitioner's counsel was ineffective for not requesting a Franks hearing,

> [a] defendant challenging the validity of a search warrant is entitled to a *Franks* hearing if he makes a preliminary showing that: "(1) the warrant affidavit contain[s] a 'deliberate falsehood' or statement made with 'reckless disregard for the truth' and (2) without the allegedly false statement, the warrant affidavit is not sufficient to support a finding of probable cause." United States v. Fisher, 711 F.3d 460, 468 (4th Cir.2013). A defendant bears a heavy burden to demonstrate the need for a *Franks* hearing. United States v. Jeffus, 22 F.3d 554, 558 (4th Cir.1994).

See Dinkins v. Eagleton, No. 13-1537, 2014 WL 4129583 at * 1 (D.S.C. Aug. 29, 2014). No such showing was made in this case.

The search warrant was presumptively valid; Franks, 438 U.S. at 171; a presumption which could have been rebutted only if the Petitioner had shown that the affiant gave statements that were: (1) made knowingly and intentionally or with a reckless disregard for the truth; and (2) the false statements were necessary to establish probable cause. Simmons v. Poe, 47 F.3d 1370, 1383 (4th Cir. 1995); Wilkes v. Young, 28 F.3d 1362, 1365 (4th Cir. 1994)[False or misleading statement in the affidavit of an arrest warrant does not constitute a violation of the Fourth Amendment unless the false or misleading statement is essential to the finding of probable cause]; United States v. Hill, No. 07-

407, 2012 WL 859556 at * 3 (E.D.Va. Mar. 13, 2012). Further, a "challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." Franks, 438 U.S. at 171-172. Here, the search warrant at issue was attested to by Investigator McRae, who listed the Suburban, which was registered to Petitioner's mother, as the premises to be searched. In the warrant, McRae attested to the following:

> On 6/30/07 at approximately 0410 hrs Dumuria Johnson was fatally shot at H&J 2820 Hardscrabble Road, Columbia, SC 29223.
>
> Witnesses did identify the above listed vehicle leaving the incident location and firing several shots from this vehicle.
>
> One of these rounds from this vehicle did mortally [sic] wound Dumuria Johnson.
>
> A witness identified the driver and passenger in the vehicle as subjects leaving the incident location and has provided law enforcement with a statement stating that the gunshot that struck the victim came from this vehicle at the incident location.
>
> The vehicle was spotted by investigators at the residence of one of the suspects identified by witnesses as the driver of the vehicle tha[t] fired the shots at the incident location.

See Court Docket No. 23-22, p 3.

Petitioner contends that trial counsel should have challenged the fact that the affidavit stated "Witnesses did identify", arguing that only one witness identified the vehicle. However, trial counsel did challenge the validity of the search warrant. At trial, counsel argued "the affidavit for the search warrant fails to set forth any information whatsoever to establish probable cause in this case", asserting that "it merely states conclusory statements on the part of the investigator as to what he's learned from this investigation. There is no one in the affidavit identified whatsoever. It refers to witnesses in the affidavit, but none of those witnesses are identified nor is any information given to the magistrate so that the magistrate can determine the reliability of those witnesses." (R.pp. 300-

301).

> [T]he bottom line is that the affidavit has no– does not set forth probable cause because it does not establish the reliability of the witness – first of all, it doesn't identify the witness. It doesn't establish the reliability of the witnesses or the underlying basis for how those witnesses knew the information. So therefore the magistrate could not make a determination as to whether or not the affidavit – or could not have made a determination that the affidavit contained sufficient information to establish probable cause. Therefore the search has to be suppressed, based on this information on cases in South Carolina, which is basically elementary law.

(R.p. 304).

Moreover, at the PCR hearing defense counsel testified that he tried to lock in the officer that everything provided to the magistrate was contained in the affidavit to prevent an argument that the affidavit was supplemented orally. (R.p. 2285). Counsel also testified that he argued there was a lack of probable cause and there was no information to establish the reliability of the witnesses relied upon by law enforcement. (R.pp. 2286-2287).

Although Petitioner now argues that counsel should have gone further and requested a Franks hearing, Counsel testified as to his strategy for making his arguments as presented. While Petitioner now disagrees with his trial counsel's strategy relating to how he challenged the search warrant affidavit 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.]; Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998)[tactical decision cannot be second-guessed by court reviewing collateral attack]; Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991)[tactical decision sustainable unless it is both incompetent and prejudicial].

Petitioner has also failed to show any prejudice he suffered as a result of counsel not requesting a Franks hearing. Petitioner has not shown that even if the alleged false statement that there were "witnesses" instead of just one witness was stricken from the affidavit, this would have led to a finding that the search warrant was insufficient to establish probable cause. See State v. Weston, 494 S.E.2d 801, 802-803 (S.C. 1997)[Discussing the totality of circumstances test where veracity and basis of knowledge were relevant to, but not inflexible requirements of, a determination of probable cause]. In addition to the reference to "witnesses" identifying fatal shots being fired from the Suburban, the affidavit also set forth that:

> *A witness* identified the driver and passenger in the vehicle as subjects leaving the incident location and has provided law enforcement with a statement stating that the gunshot that struck the victim came from this vehicle at the incident location.
>
> The vehicle was spotted by investigators at the residence of one of the suspects identified by witnesses as the driver of the vehicle tha[t] fired the shots at the incident location.

See Court Docket No. 23-22, p 3.

Furthermore, Petitioner has also failed to show that even if the evidence from the search had been suppressed, the outcome of his trial would have been different. Jacobs testified as an eyewitness that Petitioner and his co-defendant were in the Suburban from which the fatal shots were fired. (R.pp. 669-670). Jacobs also testified that he saw Watts with the gun in his hand and as

he was getting into the Suburban. (R.pp. 670-671, 815-816). Jacobs testified that Petitioner was driving the SUV, that the shots were then fired from the driver's side of the vehicle, and he also identified the type of weapon he saw in a gun lineup. (R.pp. 671, 815-817). Jacobs also identified the Suburban in a photo (R.pp. 699-700), and provided law enforcement with Petitioner's name and his co-defendant's name, and identified both in photo lineups. (R.pp. 684, 687-690, 697-698). Jacobs noted that he recognized both the Petitioner and Watts from seeing them prior to the night of the shooting, including that he had observed Petitioner driving the Suburban before. (R.pp. 669-670, 674). Furthermore, McRae testified that he located the tan Suburban fitting the initial description given by Jacobs at Petitioner's residence by 6:30 a.m. on the morning of the shooting (R.pp. 1663-1664), and Collins (the firearms expert) testified that the projectile recovered from the victim was consistent with being fired from an M-11 type firearm. (R.pp. 1586-1587, 1602). Shell casings recovered from the scene of the shooting were also consistent with being fired from an M-11 type firearm, which the firearms and toolmarks examiner referred to as being a MAC 10 styled weapon. (R.p. 1593). Other testimony established that lead particles consistent with a firearm being fired from the drivers's side of the vehicle were found, while additional witnesses established that Petitioner had a Mac 10 gun and about their involvement in the disposal of a gun. (R.pp. 1030-1032, 1117-1118, 1145, 1454-1456, 1462, 1502-1508).

Based on this record, Petitioner has not met his burden of showing that even if his counsel had requested a Franks, hearing, it would have resulted in a different outcome in his case. Rather, he only speculates that it may have done so. Accordingly, Petitioner has failed to meet his burden of showing that his 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]; and

has therefore failed to show a substantial issue with regard to Ground Fourteen.

(Ground Fifteen)

Petitioner also contends that his trial counsel was ineffective for failing to request a Franks hearing to challenge the affidavit to his arrest warrant. This affidavit stated as follows:

> That on 6/30/07 while at 2820 Hardscrabble Road in the Dentsville magisterial District of Richland County, one Tremaine Wray did commit the crime of Murder because he did willfully, unlawfully, feloniously, with malice aforethought while armed with a deadly weapon, a firearm, did shoot and mortally wound one Dumuria Johnson without just cause or provocation and the said Dumuria Johnson did die of such mortal wound on June 30, 2007. The def has been picked in a six photo line-up and has been implicated in sworn statements by a witness at the incident location. Affiant and others are witness to prove the same.

See Court Docket No. 23-21, p. 1. This issue was not raised or ruled on by the PCR court. Accordingly, it was not preserved for PCR appellate court review.

Initially, the undersigned again notes that to the extent that Petitioner asserts a violation of the South Carolina Constitution, Laws, and/or Statutes, those alleged violations are a matter of state law, and "[i]t is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions." Estelle, 502 U.S. at 67-68 ["federal habeas corpus relief does not lie for errors of state law."]. Petitioner has also failed to meet his burden of showing that his counsel was ineffective for failing to request a Franks hearing. Smith, 528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus].

First, as was the case with Petitioner's search warrant claim, his arrest warrant is presumptively valid; Franks, 438 U.S. at 171; and can only be rebutted if Petitioner can show that the affiant gave statements that were: (1) made knowingly and intentionally or with a reckless disregard for the truth; and (2) the false statements were necessary to establish probable cause. Simmons, 47 F.3d at 1383; Wilkes, 28 F.3d at 1365 [False or misleading statement in the affidavit

of an arrest warrant does not constitute a violation of the Fourth Amendment unless the false or misleading statement is essential to the finding of probable cause]; United States v. Hill, 2012 WL 859556, at * 3. To warrant a Franks hearing, Petitioner's claim must be "more than conclusory and must be supported by more than a mere desire to cross-examine." Franks, 438 U.S. at 171-172.

Petitioner contends that a Franks hearing was warranted because the arrest warrant did not include the fact that the source for the information used for the finding of probable cause had told a different officer there were two other suspects in a different vehicle. He further asserts that the arrest warrant affidavit fails to note that the bullets found in the front passenger seat of the second SUV (the Rodeo) were also consistent with the shell casings and projectiles recovered from the crime scene and the victim. However, Petitioner has not made a substantial preliminary showing that the stements made by the agent in his affidavit were false, or that the agent recklessly or deliberately passed on false information to the county magistrate. To the contrary, the facts contained in the arrest warrant were borne out by the statements given by Jacobs to law enforcement, and were supported by the testimony of both Jacobs and McRae at Petitioner's trial. See discussion, infra. Petitioner has also not shown the alleged omissions he cites were necessary to the finding of probable cause for Petitioner's arrest. Simmons, 47 F.3d at 1383 ["[M]ere[] negligen[ce] in . . . recording the facts relevant to a probable-cause determination" is not enough."] (quoting United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990)) [Petitioner required to make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant's affidavit"](quoting Franks, 438 U.S. at 155-156).

Accordingly, Petitioner has failed to show that his counsel performed deficiently by not challenging the arrest warrant or seeking a hearing under Franks v. Delaware, nor has he provided

any evidence that the alleged omissions were necessary to the finding of probable cause. See Davis v. Cartledge, No. 09-3218, 2011 WL 4501166 at *4 (D.S.C. Sept. 28, 2011)(citing Illinois v. Gates, 462 U.S. 213, 238 (1983)[adopting the "totality of the circumstances" test to determine if the warrant is supported by probable cause]). Furthermore, Petitioner has presented no evidence in this proceeding to show that even if his counsel had requested a Franks v. Delaware hearing, he would have succeeded in obtaining one. Therefore, Petitioner has not shown the necessary prejudice with regard to this claim. Evans, 220 F.3d at 312; Williams v. Taylor, supra; Strickland v. Washington, supra.; Dennis v. Jennings, No. 11-245, 2011 WL 6293279 at * 10 (W.D.Va. Dec. 13, 2011); Davis, No. 2011 WL 4501166, at * 4.

Finally, even if the arrest warrant had for some reason been invalidated, "[a]n illegal arrest, without more, has never been viewed as a bar to a subsequent prosecution, nor as a defense to a valid conviction." United States v. Crews, 445 U.S. 463, 474 (1980). Respondent correctly notes that Petitioner's belief that a Franks hearing was necessary was moot since he was subsequently indicted by the Richland County Grand Jury (R.p. 2051), and an "[i]llegal arrest or detention [even assuming one occurred] does not void a subsequent conviction." Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ["[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause."]. Accordingly, Petitioner has not shown a substantial issue with regard to Ground Fifteen.

(Ground Sixteen)

Petitioner contends that his trial counsel was ineffective for failing to object to the State using the fruits of the search to bolster their argument for finding probable cause and to show pre-existing probable cause. This claim was not raised or ruled upon by the PCR court. Therefore,

it was not preserved for PCR appellate court review.

As before, to the extent Petitioner asserts a violation of the South Carolina Constitution, Laws, and/or Statutes, those alleged violations are a matter of state law and "[i]t is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions." Estelle, 502 U.S. at 67-68 ["federal habeas corpus relief does not lie for errors of state law."]. As for his ineffective assistance claim, Petitioner asserts that trial counsel should have objected to the State advising the trial court of the fruits of the search warrant during the suppression motion, and specifically objects to the State's reference to the fact that law enforcement was seeking forensic evidence inside of Petitioner's vehicle with the search warrant and found evidence inside of the vehicle. (R.p. 333). However, Petitioner has not shown that it was improper for the State to mention the results of the search to the court, and based on a review of the arguments by both counsel and the Court's ruling on the suppression motion, there is also no indication that the reference to the results had any bearing on the trial court's finding of probable cause. Rather, the trial court specifically detailed the basis of its finding of probable cause, which did not include the results of the search. (R.pp. 352-353).

Therefore, Petitioner has not shown that his trial counsel had a valid objection to make to this reference by the State. See e.g., Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000)["counsel cannot be ineffective for failing to raise a meritless claim."]; see also Almon, 302 F.Supp.2d at 586 ["There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable."]. Furthermore, even assuming arguendo that trial counsel should have made the objection, Petitioner has failed to make any showing of prejudice. Accordingly, Petitioner has failed to show any substantial issue with regard to Ground Sixteen.

(Ground Seventeen)

In this Ground, Petitioner contends that his trial counsel was ineffective for failing to request a Franks hearing with regard to both the search warrant and the arrest warrant. This claim was not raised or ruled upon by the PCR court. Therefore, it was not preserved for PCR appellate court review.

First, the undersigned again notes that to the extent that Petitioner asserts a violation of the South Carolina Constitution, Laws, and/or Statutes, those alleged violations are a matter of state law, and "[i]t is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions." Estelle, 502 U.S. at 67-68 ["federal habeas corpus relief does not lie for errors of state law."]. As for Petitioner's ineffective assistance claims, the Respondent correctly notes that to the extent Petitioner is asserting that trial counsel should have sought a Franks hearing on the arrest warrant, this same claim was raised in Ground Fifteen and found not to be a substantial issue.

With regard to Petitioner's allegation that trial counsel should have requested a Franks hearing for the search warrant because the affiant omitted facts with the intent to mislead the magistrate (a different claim than his Ground Fourteen "witness" claim), Petitioner has failed to show that the affiant knowingly or with reckless disregard made a false statement in the affidavit. The record shows that the facts contained in the search warrant were supported by the statements given to law enforcement by Jacobs, and were also supported by the testimony of Jacobs and McRae at trial. See Colkley, 899 F.2d at 300 [Petitioner required to make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant's affidavit"], quoting Franks, 438 U.S. at 155-156. Therefore,

Petitioner has not met his burden to show that the agent's affirmations were false, and as a result he has failed to show that his counsel performed deficiently by not challenging the warrant under Franks v. Delaware. See Davis v. Cartledge, No. 09-3218, 2011 WL 4501166 at *4 (D.S.C. Sept. 28, 2011)(citing Illinois v. Gates, 462 U.S. 213, 238 (1983)[adopting the "totality of the circumstances" test to determine if the warrant is supported by probable cause]).

Furthermore, Petitioner has presented no evidence in this proceeding to show that he would have succeeded in his challenge to the search warrant even if his counsel had requested a Franks v. Delaware hearing. Therefore, Petitioner has not shown the necessary prejudice with regard to this claim. Strickland v. Washington, supra.; Dennis v. Jennings, No. 11-245, 2011 WL 6293279 at * 10 (W.D.Va. Dec. 13, 2011); Davis, No. 2011 WL 4501166, at * 4. Accordingly, Petitioner has failed to show a substantial issue with regard to Ground Seventeen.

(Ground Eighteen)

Petitioner also contends that his trial counsel was ineffective for not objecting to the trial court's ruling that the search warrant was supported by probable cause. This claim was not presented to or ruled upon by the PCR court. Accordingly, it was not properly preserved for appellate court review.

As for the underlying ineffective assistance claim, the record shows that defense counsel *did* argue the search warrant was not supported by probable cause. (R.pp. 300-306, 313-316, 338-350). See also discussion on Ground Fourteen, supra. Accordingly, the issue was preserved at the trial court level, and Petitioner's appellate counsel then raised this underlying issue in Petitioner's direct appeal. The South Carolina Court of Appeals then considered it on the merits and denied Petitioner relief on this claim. Petitioner has not shown that his trial counsel was ineffective on this

claim, and has therefore failed to show a substantial issue with regard to Ground Eighteen.

(Ground Twenty-Two)

Petitioner contends that his trial counsel was ineffective for not objecting to the admission of the GSR based on Rules 702, SCRE, and Rule 403, SCRE. These claims were not ruled on by the PCR court and were not preserved for PCR appellate review.

With respect to the underlying ineffective assistance claim, Rule 702, SCRE, provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Before admitting the expert testimony, the trial judge must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 706 S.E.2d 40, 42 (S.C.Ct.App. 2011); see also State v. Jones, 541 S.E.2d 813, 819 (S.C. 2001)["Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable, applying the factors in State v. Jones, supra; and (4) the probative value of the evidence outweighs its prejudicial effect."]. In cases involving scientific expert testimony, the trial court should consider the following factors: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 515 S.E.2d 508, 517 (S.C. 1999). With regard to non-scientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See

State v. White, 676 S.Ed.2d 684, 688 (S.C. 2009)["The foundation reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."].

With regard to Petitioner's complaint that defense counsel did not challenge the GSR evidence under Rule 702, the record reflects that during the motion to suppress Moskal's testimony, counsel initially presented arguments that the testimony should not be admitted under Rule 702 (as well as under Rule 403). (R.pp. 1443-1444). However, counsel later noted that he did not intend to argue gunshot residue was unreliable under Rule 702 (R.p. 1447), and proceeded to instead make the argument against its admissibility under Rule 403, presenting a strong argument regarding its unduly prejudicial effect. (R.pp. 1443-1456). Counsel's position with respect to Rule 702 was clearly reasonable in light of the fact that gunshot residue evidence has consistently been found to be admissible in South Carolina Courts. To the extent Petitioner asserts that trial counsel was ineffective for not contending that the GSR evidence should not be allowed under Rule 403 because the probative value of the evidence did not outweigh the prejudicial effect of its admission, defense counsel did argue at trial that the GSR evidence should not be admitted for that reason. (R.pp. 1449, 1451-1453, 1456). However, after full argument on this issue, the trial court denied Petitioner's counsel's motion and admitted this evidence. (R.p. 1457). The Respondent also correctly notes that the PCR court found the GSR evidence was admissible under Rule 403, SCRE. (R.pp. 2431-2433). See also Estelle, 502 U.S. at 67-68 ["It is not the province of a federal habeas corpus court to re-examine state-court determinations on state-law questions."].

The undersigned finds no reversible error in the state courts' consideration of this issue. Therefore, Petitioner has failed to show a substantial issue with respect to this claim. He

simply now disagrees with his trial counsel's strategy relating to the GSR evidence and the arguments presented at the suppression hearing with the benefit of hindsight. As previously noted, such tactical and strategic choices made by counsel after due consideration do not constitute ineffective assistance of counsel. Strickland, 466 U.S. at 689; Horne v. Peyton, 356 F.2d at 633; see also Harris v. Dugger, 874 F.2d at 762 [An informed decision by trial counsel should not be second guessed by a reviewing court.]. Petitioner has not met his burden of showing that if his counsel had objected to the GSR evidence on the basis of Rule 702 in a different manner, it would have resulted in a different outcome in his case. Rather, he only speculates that it may have done so.

Accordingly, Petitioner has failed to show the necessary prejudice, and Ground Twenty-Two should be dismissed.

In sum, while ineffective assistance of PCR counsel can constitute the necessary cause for overcoming the procedural bar on these issues, under the first requirement of the Martinez exception 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 failed to show 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 ineffective assistance of counsel claims in Grounds Eleven through Eighteen, and Ground Twenty-two (as well as Ground Ten, to the extent that it could properly have been raised in his PCR proceedings) are substantial ones in order to be able to proceed under the Martinez exception on those claims. Gray, 526 Fed. Appx. at 333. Therefore, Petitioner has failed to show cause for his procedural default on these issues.

Rodriguez, 906 F.2d at 1159 ["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 all procedurally barred from consideration by this Court.

(Ground Twenty-Four)

Petitioner's final remaining Ground for relief, Ground Twenty-Four, presents a

separate issue. In this claim, Petitioner contends that his PCR counsel was ineffective for not raising certain issues and not filing a *proper* Rule 59(e) motion. However, this claim concerns alleged infirmities in Petitioner's state PCR proceeding, and as such are not a basis for federal habeas relief. See Bryant v. Maryland, 848 F.2d 492, 494 (4th Cir.1988) [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 1255, 1275 (5th Cir.1995), cert. denied, 518 U.S. 1–22(1996)["An attack on a state habeas proceeding does not entitle the petitioner to habeas relief...."]; 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."]; see also Murray, 492 U.S. 1-7, 13.

Therefore, Petitioner has failed to state a viable claim for relief based on any alleged errors in his PCR proceeding. Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir.1998) [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]; Wright v. Angelone, 151 F.3d 151, 159 (4th Cir.1998) [alleged defects in state post-conviction procedures are not cognizable in a federal habeas corpus action]; Nichols, 69 F.3d at 1275. This claim should be dismissed.

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.

January 10, 2019
Charleston, South Carolina

Bristow Marchant
United States Magistrate Judge

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.