FILED: January 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6606
(8:21-cv-03591-TMC)

SHANNON MILES LANCASTER

Petitioner - Appellant

v.

WARDEN PERRY CORRECTIONAL INSTITUTION

Respondent - Appellee

O R D E R

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

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6606

SHANNON MILES LANCASTER,

Petitioner - Appellant,

v.

WARDEN PERRY CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Timothy M. Cain, District Judge. (8:21-cv-03591-TMC)

Submitted: November 22, 2022 Decided: November 29, 2022

Before HARRIS and RICHARDSON, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Shannon Miles Lancaster, Appellant Pro Se.

PER CURIAM:

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

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Shannon M. Lancaster, Petitioner, v. Warden, Perry Correctional Institution, Respondent.	C/A No. 8:21-cv-03591-TMC-JDA **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This matter is before the Court on Respondent's motion for summary judgment. [Doc. 24.] Petitioner is a state prisoner who seeks relief under 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

Petitioner filed this Petition for writ of habeas corpus on October 27, 2021,[1] and he subsequently amended his petition on January 14, 2022. [Docs. 1; 1-3; 17; 18.] On February 28, 2022, Respondent filed a return and memorandum to the petition and motion for summary judgment. [Docs. 23; 24.] On March 1, 2022, the Court issued an Order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion. [Doc. 25.] Petitioner filed a response in opposition to the motion

[1]A prisoner's pleading is considered filed at the moment it is delivered to prison authorities for forwarding to the court. *See Houston v. Lack*, 487 U.S. 266, 270 (1988). Accordingly, this action was filed on October 27, 2021. [Doc. 1-2 at 1 (envelope stamped received by prison mailroom on October 27, 2021).]

for summary judgment on March 16, 2022. [Doc. 27.] Respondent filed a reply on March 23, 2022. [Doc. 28.]

Having carefully considered the parties' submissions and the record in this case, the Court recommends that Respondent's motion for summary judgment be granted.

BACKGROUND

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. [Doc. 1 at 1.] In October 2016, Petitioner was indicted for trafficking in methamphetamine. [App. 166–67.[2]] On March 14, 2017, represented by Ricky Keith Harris, Petitioner pled guilty to trafficking in methamphetamine, and some other charges were dismissed pursuant to a plea agreement. [App. 1–18.] He received a 15-year sentence. [App. 16.] Petitioner filed a motion for reconsideration, which was denied. [App. 19–25.]

Direct Appeal

Petitioner appealed. Robert M. Pachak of the South Carolina Commission on Indigent Defense filed an *Anders*[3] brief on Petitioner's behalf, asserting that "the court erred in denying appellant's post-trial motion when his guilty plea was coercive[.]" [Doc. 23-4 at 4.] At the same time he filed the *Anders* brief, Pachak submitted a Petition to be relieved as counsel. [*Id.* at 9.] The appeal was summarily dismissed. [Doc. 23-5.] The remittitur was issued on August 10, 2018. [Doc. 23-6.]

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[2]The Appendix can be found at Docket Entry Numbers 23-1, 23-2, and 23-3.

[3]A brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), effectively concedes the appeal lacks a meritorious claim.

PCR Proceedings

First PCR Application

Petitioner filed a pro se application for post-conviction relief ("PCR") on September 4, 2018. [App. 26–42.] The PCR application alleged Petitioner had entered an involuntary guilty plea and had received ineffective assistance of counsel—in particular, that plea counsel had failed to properly investigate his case, had failed "to have a proper defense for p[h]ysical evidence," had coerced Petitioner into a guilty plea, had failed to move to suppress evidence, and had failed to challenge jurisdiction. [App. 33–39.] Petitioner later filed an amendment to his application to add an additional claim of ineffective assistance of counsel. [App. 56–60.] The State filed a return dated April 18, 2019. [App. 43–55.]

A hearing was held on February 20, 2020, before the Honorable R. Lawton McIntosh, and Petitioner was represented at the hearing by Susannah C. Ross. [App. 61–119.] At the conclusion of the hearing, the PCR judge took the matter under advisement. [App. 118.] In an order filed May 15, 2020, the PCR court denied and dismissed with prejudice Petitioner's PCR application. [App. 145–65.]

Petitioner appealed. Joanna K. Delany with the South Carolina Commission on Indigent Defense filed on Petitioner's behalf a *Johnson*[4] petition for writ of certiorari in the Supreme Court of South Carolina, dated December 22, 2020. [Doc. 23-7.] The petition asserted the following:

> Whether the PCR court erred where it found counsel provided effective representation where counsel failed to

[4] A *Johnson* petition is the PCR appeal analogue to an *Anders* brief which effectively concedes the appeal lacks a meritorious claim. *See Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (S.C. 1988).

> recognize and advise Petitioner that evidence in the case against him might be suppressed pursuant to the South Carolina Homeland Security Act, since counsel's failure to advise Petitioner of this important potential defense resulted in Petitioner's entry of a plea that was not voluntarily, knowingly, and intelligently made?

[*Id.* at 3.] At the same time she filed the *Johnson* petition, Delany submitted a petition to be relieved as counsel. [*Id.* at 16.] On February 3, 2021, Petitioner filed a pro se brief. [Doc. 23-9.] The appeal was transferred to the South Carolina Court of Appeals, which denied the petition and granted Delany's request to withdraw on September 3, 2021. [Docs. 23-10; 23-11.] Remittitur was issued on September 22, 2021. [Doc. 23-12.]

Second PCR Application

While his first PCR application was pending, Petitioner filed a second PCR application, alleging claims related to whether the Great Seal of South Carolina was affixed to a particular law. [Doc. 23-13.] His second PCR application was dismissed as untimely and successive. [Doc. 23-14.] Petitioner attempted to appeal the dismissal, but he was unable to demonstrate "an arguable basis for asserting that the determination by the lower court was improper." [Docs. 23-15; 23-16.] The remittitur for Petitioner's second PCR application was issued on July 15, 2021. [Doc. 23-17.]

Petition for Writ of Habeas Corpus

Petitioner filed this Petition for writ of habeas corpus on October 27, 2021. [Doc. 1.] Petitioner raises the following grounds and supporting facts, quoted substantially verbatim:

> **GROUND ONE:** The state PCR court unreasonably applied clearly established law in finding counsel rendered effective assistance; thus resulting in denial of Sixth Amendment effective assistance.

Supporting facts: During the PCR hearing counsel admitted that he advised Petitioner to plead guilty because Petitioner had no real defense at trial. However, Petitioner did have a defense, a defense of suppression. Officer Ruane's recording of details of the alleged drug buy as a protected oral communication for which law enforcement needed a court order to intercept. Counsel's failure to advise Petitioner that he could challenge the admissibility of the recording was ineffective assistance rendering the plea involuntary and unknowing. Petitioner testified that had he known he could have moved to suppress the recording he would not have pled guilty and would have insisted on going to trial.

GROUND TWO: The state court decision was contrary to or an unreasonable application of clearly established federal law of Strickland v. Washington. Counsel failed to investigate and file a suppression motion, pursuant to the Spartanburg County Sheriff's Office Investigator James Ruane illegally acting in his official capacity outside his jurisdiction and enters into Cherokee County to participate in a drug buy without a multi-jurisdictional agreement. The Investigator Ruane was required by law to obtain a multi-jurisdiction agreement to lawfully act outside his jurisdiction and investigate illegal drug activity inside Cherokee County. Petitioner testified if he had known that Investigator Ruane had illegally acted outside his jurisdiction then Petitioner would not have pleaded guilty but would have exercised his right to trial and had counsel moved for a suppression motion or motion to dismiss on this ground.

[Docs. 1 at 5; 1-3 at 1.] The case is now ripe for review.

APPLICABLE LAW

Liberal Construction of Pro Se Petition

Petitioner brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978);

Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. Even under this less stringent standard, however, the pro se petition is still subject to summary dismissal. *Id.* at 520–21. The mandated liberal construction means only that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the petitioner's legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Further, Rule 56 provides in pertinent part:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> >
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, he must produce existence of a factual dispute on every element essential to his action that he bears the burden of adducing at a trial on the merits.

Habeas Corpus

Generally

Because Petitioner filed the Petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett,* 134 F.3d 615 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision," and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011). Moreover, state court

factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Procedural Bar

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

Exhaustion

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

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (I) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254. The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. *Id.* § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011). Thus, a federal court may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds for relief be stated in the direct appeal or PCR application. S.C. App. Ct. R. 203; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C. 1976). Further, strict time deadlines govern direct appeal and the filing of a PCR application in the South Carolina courts. For direct appeal, a notice of appeal must be filed and served on all respondents within ten days after the sentence is imposed or after receiving written notice of entry of the order or judgment. S.C. App. Ct.

R. 203(b)(2), (d)(1)(B). A PCR application must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

If any avenue of state relief is still available, the petitioner must proceed through the state courts before requesting a writ of habeas corpus in the federal courts. *Richardson v. Turner*, 716 F.2d 1059, 1062 (4th Cir. 1983); *Patterson v. Leeke*, 556 F.2d 1168 (4th Cir. 1977). Therefore, in a federal petition for habeas relief, a petitioner may present only those issues that were presented to the Supreme Court of South Carolina through direct appeal or through an appeal from the denial of a PCR application, regardless of whether the Supreme Court actually reached the merits of the claim.

Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner seeks habeas corpus relief based on an issue he failed to raise at the appropriate time in state court, removing any further means of bringing that issue before the state courts. In such a situation, the petitioner has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). The United States Supreme Court has stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See id.* Bypass can occur at any level of the state proceedings if a state has procedural rules that bar its courts from considering claims not raised in a timely fashion. *Id.*

The Supreme Court of South Carolina will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. *See* S.C. Code Ann. § 17-27-90; *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Further, if a prisoner has failed to file a direct appeal or a PCR application and the deadlines for filing have passed, he is barred from proceeding in state court. S.C. App. Ct. R. 203(d)(3), 243. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. *See Reed v. Ross*, 468 U.S. 1, 11 (1984); *see also Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995). As the United States Supreme Court explained:

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

Reed, 468 U.S. at 10–11.

However, if a federal habeas petitioner can show both (1) "'cause' for noncompliance with the state rule" and (2) "'actual prejudice resulting from the alleged constitutional violation[,]'" the federal court may consider the claim. *Smith*, 477 U.S. at 533 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Further, if the petitioner does not raise cause and prejudice, the court need not consider the defaulted claim. *See Kornahrens*, 66 F.3d at 1363.

If a federal habeas petitioner has failed to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state courts and in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). Absent a showing of cause and actual prejudice, a federal court is barred from considering the claim. *Wainwright*, 433 U.S. at 87. In such an instance, the exhaustion requirement is technically met, and the rules of procedural bar apply. *Teague v. Lane*, 489 U.S. 288, 297–98 (1989); *Matthews*, 105 F.3d at 915 (citing *Coleman*, 501 U.S. at 735 n.1; *Teague*, 489 U.S. at 297–98; *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990)).

Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this Court may consider claims that have not been presented to the Supreme Court of South Carolina in limited circumstances—where a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or where a "fundamental miscarriage of justice" has occurred, *Carrier*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim, where the novelty of the constitutional claim is such that its legal basis is not reasonably available to the petitioner's counsel. *Id.* at 487–89; *Reed*, 468 U.S. at 16. Absent a showing of "cause," the court is not required to consider "actual prejudice." *Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995). However,

if a petitioner demonstrates sufficient cause, he must also show actual prejudice to excuse a default. *Carrier*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error. *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982).

As an alternative to demonstrating cause for failing to raise the claim, the petitioner may show a miscarriage of justice. To demonstrate a miscarriage of justice, the petitioner must show he is actually innocent. *See Carrier*, 477 U.S. at 496 (holding a fundamental miscarriage of justice occurs only in extraordinary cases, "where a constitutional violation has probably resulted in the conviction of someone who is actually innocent"). Actual innocence is defined as factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To demonstrate this actual innocence standard, the petitioner's case must be truly extraordinary. *Carrier*, 477 U.S. at 496.

DISCUSSION

Under the AEDPA, a federal court may not grant habeas relief unless the underlying state court decision was contrary to or an unreasonable application of federal law, as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1), or based on an unreasonable determination of the facts before the court, *id.* § 2254(d)(2). The Supreme Court has held the "contrary to" and "unreasonable application of" clauses present two different avenues for relief. *Williams*, 529 U.S. at 405. The Court stated there are two instances when a state court decision will be contrary to Supreme Court precedent:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this

> Court and nevertheless arrives at a result different from our precedent.

Id. at 405–06. Additionally, a state court decision is an unreasonable application of Supreme Court precedent when the decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08; *see also Richter*, 562 U.S. at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable."). Finally, a decision cannot be contrary to or an unreasonable application of Supreme Court precedent unless applicable Supreme Court precedent exists; without applicable Supreme Court precedent, there is no habeas relief for petitioners. *Virsnieks v. Smith*, 521 F.3d 707, 716 (7th Cir. 2008); *see Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008).

Both of Petitioner's grounds for relief depend on his allegation that he received ineffective assistance of counsel. When evaluating a habeas petition based on a claim of ineffective assistance of counsel, assuming the state court applied the correct legal standard—the Supreme Court's holdings in *Strickland*—"[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard."[5]

[5]In *Strickland v. Washington*, the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation and (2) he was prejudiced

Richter, 562 U.S. at 101. "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.*; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (stating judicial review of counsel's performance is "doubly deferential when it is conducted through the lens of federal habeas"). Consequently, a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of

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as a result. 466 U.S. 668, 687 (1984). To satisfy the first prong, a prisoner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To satisfy the second prong, a prisoner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Supreme Court has cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential," and "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

In the specific context of a guilty plea, to satisfy the prejudice prong of *Strickland*, a prisoner must show that "there is a reasonable probability that, but for counsel's errors, [the prisoner] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The Supreme Court further explained,

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. . . . As we explained in *Strickland v. Washington*, *supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker."

Hill, 474 U.S. at 59–60.

the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, the habeas court must determine whether it is possible for fairminded jurists to disagree that the arguments or theories supporting the state court's decision are inconsistent with Supreme Court precedent. *Id.*

Ground One

In Ground One, Petitioner argues that plea counsel was ineffective for failing to advise Petitioner that certain evidence—specifically, a recording made by an undercover police officer—could have been suppressed because it was made without a court order. [Doc. 1 at 5.] Petitioner further argues the PCR court unreasonably applied clearly established law in finding plea counsel provided effective assistance. [*Id.*] Respondent asserts the PCR court's findings of fact and law were not unreasonable, and, in any event, Petitioner is not entitled to relief because "the statute does not apply, the complained of evidence does not exist, and Investigator Ruane's testimony would be available regardless of recorded evidence." [Doc. 23 at 19.]

In considering this claim, the PCR court addressed plea counsel's performance under the standards set forth in *Strickland* and *Hill*. [App. 153–56.] After setting forth the applicable standards, the PCR court found "[t]he evidence presented at the evidentiary hearing reveals that Counsel properly investigated and prepared Applicant's case for trial." [App. 157.] As to Petitioner's assertion that plea counsel should have moved to have the recording suppressed because it was improperly obtained, the PCR court considered both the state and federal laws that prohibit the interception of oral communication in certain circumstances. [App. 158–59.] The PCR court found that the recording was not prohibited under either state or federal law. [App. 159.] Further, the PCR court found that

> because the recording of Applicant does not fall under these definitions or the prohibited acts, Counsel was not deficient in failing to investigate into an application by the investigator, to make sure a judge entered an order, to advise [the] Court of allegedly illegal actions or to investigate a search and seizure issue, because the conduct did not fall under the statute requiring these actions on Counsel's part.

[App. 159.] Because the PCR court applied the correct legal standard, and because the record fails to demonstrate the court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from Supreme Court precedent, the Court concludes the state court's decision was not contrary to applicable Supreme Court precedent. Thus, this Court must analyze "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101.

Contrary to Petitioner's assertion, this Court cannot find that the PCR court's application of *Strickland* was unreasonable. The PCR court's determination that plea counsel was not deficient depended largely on the court's interpretation of state law concerning the legality of recording oral communication. Under South Carolina law, "[i]t is lawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication . . . ." S.C. Code Ann. § 17-30-30(B).[6] That same rule applies to someone not acting under color of state law. S.C. Code Ann. § 17-30-30(C). In any event, the state court's interpretation of state law is entitled to deference here. *See Estelle v.McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-

[6] Petitioner appears to argue that the consent of all parties was required for the recording to be lawful, but that is not consistent with the law.

law questions."). The PCR court also concluded that federal law did not prohibit the recording, and Petitioner has not shown the PCR court's conclusion was unreasonable. [Doc. 23-2 at 102–03 (discussing 18 U.S.C. §§ 2510, 2511, 2519).[7]] The PCR court concluded that plea counsel was not deficient where neither state nor federal law supported suppression of the recording, and Petitioner has not demonstrated that the PCR court unreasonably applied *Strickland* in coming to that conclusion. *See United States v. Wilkes*, 20 F.3d 651, 654 (5th Cir. 1994) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."). This Court cannot find the PCR Court's decision was unreasonable application of *Strickland*, and Petitioner has not alleged or shown that the PCR court's conclusion was the result of unreasonable factual findings. Accordingly, the undersigned recommends that Respondent's motion for summary judgment be granted with respect to Ground One.

Ground Two

In Ground Two, Petitioner asserts that plea counsel was ineffective for failing to file a motion to suppress evidence obtained by Investigator Ruane, who Petitioner alleges was acting outside of his jurisdiction without a multi-jurisdictional agreement. [Doc. 1-3 at 1.] Specifically, Petitioner contends that Investigator Ruane was required to obtain a multi-jurisdictional agreement to "investigate illegal drug activity inside Cherokee County" because Investigator Ruane was with the Spartanburg County Sheriff's Office. [*Id.*]

[7] Of note, 18 U.S.C. § 2511(2)(c) provides, "[i]t shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." And 18 U.S.C. § 2511(2)(d) is essentially the same but for those who are not acting under color of law.

Respondent argues that "Investigator Ruane's simple act of picking Petitioner up in Cherokee County would be permissible." [Doc. 23 at 20.] Therefore, Respondent contends "[t]here is no basis for ineffective assistance on the part of [plea counsel] in not investigating and raising such a defense" because "[s]uch a defense was simply not available." [*Id.* at 20–21.]

The PCR court considered and rejected Petitioner's claim that plea counsel was ineffective for failing to have evidence suppressed due to the lack of a multi-jurisdictional agreement in Petitioner's case. [App. 163–64.] In particular, the PCR court noted that state law generally forbids law enforcement officers from acting outside of their jurisdiction; however, the general rule did not prevent what Investigator Ruane had done in Petitioner's case. [*Id.*] The PCR court offered the following reasoning:

> All the charges against Applicant resulted from conduct occurring in Spartanburg County. Additionally, there was nothing illegal or improper for the investigator to pick up applicant in Cherokee County and bring him to Spartanburg County for an undercover drug operation. The officers were acting like private citizens while acting outside of their assigned jurisdiction, rendering any extra-jurisdictional activities lawful, as per *State v. Harris*[, 382 S.E.2d 925, 926 (S.C. 1989).] Much like in *Harris*, giving someone a ride to a house in another county is something private citizens can engage in and, as such, officers did not act unlawfully when doing so while representing themselves as private citizens. Further, all the charges against Applicant resulted from conduct occurring in Spartanburg County.

[App. 164.] The PCR court ultimately concluded that plea counsel was not ineffective for failing to file a motion to suppress the evidence where no unlawful activity occurred. [*Id.*] As with Ground One, the PCR court's decision relies squarely on the interpretation of state law—here, what conduct requires a multi-jurisdictional agreement. This court does not

have the authority to re-examine the PCR court's determination as to that state-law issue. *See Estelle*, 502 U.S. at 67–68. Petitioner's arguments are founded on his belief that such an agreement was required,[8] but he otherwise fails to identify how the PCR court's decision is either the result of unreasonable factual findings or an unreasonable application of federal law.

On this record, the Court cannot find that the PCR court's application of *Strickland* was unreasonable or that its decision was contrary to or an unreasonable application of Supreme Court precedent. Accordingly, Respondent's motion for summary judgment should be granted with respect to Ground Two.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that Respondent's motion for summary judgment [Doc. 24] be GRANTED and the Petition be DENIED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

April 14, 2022
Greenville, South Carolina

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[8]On the night Investigator Ruane purchased methamphetamine from Petitioner in an undercover operation, Investigator Ruane picked Petitioner up in Cherokee County and drove him to Spartanburg County for the drug purchase. [App. 75–76.] At the PCR evidentiary hearing, Petitioner stated that Investigator Ruane had no written agreement or authority to cross county lines during the operation. [App. 67.] Petitioner further testified that S.C. Code Ann. § 23-1-210 required a multiple law enforcement jurisdiction agreement and that Investigator Ruane's "actions and/or lack thereof constituted a trap or entrapment by law enforcement." [App. 74–75; *see also* App. 78–79.] Petitioner alleged that plea counsel should have alerted him that the evidence gathered by Investigator Ruane could have been suppressed because he failed to comply with the law in that respect. [App. 78–79.] According to Petitioner, he would have gone to trial if he realized the evidence could have been suppressed. [App. 79–80.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Shannon M. Lancaster, Petitioner, vs. Warden of Perry Correctional Institution, Respondent.	)	Civil Action No. 8:21-cv-03591-TMC **ORDER**

Petitioner Shannon M. Lancaster ("Petitioner"), a state prisoner proceeding *pro se*, filed this Petition for Writ of Habeas Corpus on November 1, 2021. (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 a magistrate judge for pretrial handling. On February 28, 2022, Respondent filed a Motion for Summary Judgment. (ECF No. 24). Petitioner filed a response in opposition to the motion, (ECF No. 27), to which Respondent replied, (ECF No. 28). On April 14, 2022, the magistrate judge issued a Report and Recommendation ("Report"), recommending the court grant Respondent's motion for summary judgment and deny Petitioner's petition. (ECF No. 30). Petitioner filed objections to the Report, (ECF No. 32), and this matter is now ripe for review.

STANDARD OF REVIEW

The recommendations set forth in the Report have no presumptive weight, and this court remains responsible for making a final determination in this matter. *Wimmer v. Cook*, 774 F.2d 68, 72 (4th Cir. 1985) (quoting *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 a specific objection is made, and the court may accept, reject, 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 only review for clear error "those portions which are not objected to—including those portions to which only 'general and conclusory' objections have been made[.]" *Dunlap v. TM Trucking of the Carolinas, LLC*, 288 F. Supp. 3d 654, 662 (D.S.C. 2017). "An objection is specific if it 'enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute.'" *Id.* at 662 n.6 (quoting *United States v. One Parcel of Real Prop., With Bldgs., Appurtenances, Improvements, & Contents, Known As: 2121 E. 30th St., Tulsa, Okla.*, 73 F.3d 1057, 1059 (10th Cir. 1996)). On the other hand, objections which merely restate arguments already presented to and ruled on by the magistrate judge or the court do not constitute specific objections. *See, e.g., Howard v. Saul*, 408 F. Supp. 3d 721, 726 (D.S.C. 2019) (noting "[c]ourts will not find specific objections where parties 'merely restate word for word or rehash the same arguments presented in their [earlier] filings'"); *Ashworth v. Cartledge*, Civ. A. No. 6:11-cv-01472-JMC, 2012 WL 931084, at *1 (D.S.C. March 19, 2012) (noting that objections which were "merely almost verbatim restatements of arguments made in his response in opposition to Respondent's Motion for Summary Judgment . . . d[id] not alert the court to matters which were erroneously considered by the Magistrate Judge"). Furthermore, in the absence of specific objections to the Report, the court is not required to give any explanation for adopting the magistrate judge's recommendation. *Greenspan v. Brothers Prop. Corp.*, 103 F. Supp. 3d 734, 737 (D.S.C. 2015) (citing *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983)).

Additionally, since Petitioner is proceeding *pro se*, this court is charged with construing his Petition and filings liberally in order to allow for the development of a potentially meritorious case. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017) (noting that "when confronted with the objection of a pro se litigant, [the court] must also

be mindful of [its] responsibility to construe pro se filings liberally"). This does not mean, however, that the court can ignore a *pro se* party's failure to allege or prove facts that establish a claim currently cognizable in a federal district court. *See Stratton v. Mecklenburg Cty. Dep't of Soc. Servs.*, 521 Fed. App'x 278, 290 (4th Cir. 2013) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277–78 (4th Cir. 1985)) (noting that "'district judges are not mind readers,' and the principle of liberal construction does not require them to 'conjure up questions never presented to them or to construct full-blown claims from sentence fragments'").

PROCEDURAL HISTORY

The magistrate judge thorough set forth the background and procedural history in her Report, to which Petitioner does not object and which the court, therefore, incorporates herein. *See* (ECF No. 30 at 2–5). Briefly, on October 3, 2016, Petitioner was indicted by the Spartanburg County Grand Jury for trafficking in methamphetamine. (ECF No. 23-3 at 4–5). On March 14, 2017, Petitioner, represented by attorney Ricky Keith Harris, pled guilty and was sentenced to fifteen years imprisonment. *See* (ECF No. 23-1 at 3–20). Subsequently, Petitioner filed two motions for reconsideration—one through counsel and one *pro se*—seeking to withdraw his guilty plea and for reconsideration of the fifteen-year sentence. *Id.* at 21, 23–24. Petitioner's motions for reconsideration were denied, *id.* at 26–27, and Petitioner then appealed asserting "the court erred in denying [his] post-trial motion when his guilty plea was coercive[,]" (ECF No. 23-4 at 4). His appeal was summarily dismissed, and the remittitur was entered on August 10, 2018. (ECF Nos. 23-5; 23-6).

Petitioner filed his first application for post-conviction relief ("PCR"), *pro se*, on September 4, 2018, alleging his guilty plea was involuntary and asserting ineffective assistance of counsel. (ECF No. 23-1 at 28–44). Specifically, Petitioner alleged that counsel was deficient in

failing to properly investigate the case; "fail[ing] to have a proper defense for p[h]ysical evidence[;]" "coercing the defendant into a guilty plea[;]" failing to move to suppress evidence, and failing to challenge jurisdiction. *Id.* at 29–30, 35–41. Petitioner later submitted an amended PCR application on September 18, 2018, raising an additional claim for ineffective assistance of counsel again based on his plea counsel's failure to file a motion to suppress. (ECF No. 23-2 at 1–2). An evidentiary hearing was held on Petitioner's application on February 20, 2020. *See id.* at 5–63. At the hearing, Petitioner was represented by counsel, and both Petitioner and his plea counsel testified. *See id.* Following the hearing, the PCR judge entered an order denying and dismissing Petitioner's PCR application with prejudice. *Id.* at 89–106; (ECF No. 23-3 at 1–3).

Petitioner then appealed the PCR court's order by filing, through counsel, a *Johnson*[1] Petition for a Writ of Certiorari to the South Carolina Supreme Court.[2] (ECF No. 23-7). PCR counsel simultaneously filed a petition to be relieved as counsel. *Id.* at 16–17. Petitioner only raised one issue on appeal:

> Whether the PCR court erred where it found counsel provided effective representation where counsel failed to recognize and advise Petitioner that evidence in the case against him might be suppressed pursuant to the South Carolina Homeland Security Act, since counsel's failure to advise Petitioner of this important potential defense resulted in Petitioner's entry of a plea that was not voluntary, knowingly, and intelligently made[.]

Id. at 3. Petitioner filed a *pro se* response to the *Johnson* petition on February 3, 2021. (ECF No. 23-9). The appeal was transferred to the South Carolina Court of Appeals, (ECF No. 23-10), and

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

[2] As the magistrate judge correctly noted in her Report, a *Johnson* petition is the South Carolina state court PCR appeal equivalent to an *Anders* brief, *see Anders v. California*, 386 U.S. 738 (1967), and effectively concedes that the appeal lacks merit and provides a mechanism through which counsel may withdraw.

on September 3, 2021, the Court of Appeals denied certiorari and granted PCR counsel's request to withdraw (ECF No. 23-11).

While his first PCR action was still pending, Petitioner filed a second application for PCR on the ground that "counsel and the Court [failed] to investigate the laws of South Carolina as to whether they were 'Affixed' with the impression of the Great Seal of South Carolina." (ECF No. 23-13 at 8). This second application was dismissed as untimely and successive. *See* (ECF No. 23-14). Petitioner again attempted to appeal the dismissal, *see* (ECF No. 23-15), but the South Carolina Supreme Court summarily dismissed his appeal because he had "failed to show that there is an arguable basis for asserting that the determination by the lower court was improper." (ECF No. 23-16).

Consequently, Petitioner initiated this action on November 1, 2021, alleging that his guilty plea was unconstitutional and claiming ineffective assistance of counsel. (ECF No. 1). In particular, Petitioner asserted that his plea counsel's "failure to advise Petitioner that he could challenge the admissibility of the recording [of the drug buy] was ineffective assistance rendering the plea involuntary and unknowingly [made]." *Id.* at 5. Petitioner subsequently filed an amendment to his petition adding a second claim, set forth below:

> Ground 2: The state [PCR] court decision was contrary to or an unreasonable application of clearly established federal law of *Strickland v. Washington*. Counsel failed to investigate and file a suppression motion, pursuant to the Spartanburg County Sheriff's Office Investigator James Ruane illegally acting in his official capacity outside his jurisdiction and enters into Cherokee County to participate in a drug buy without a multi-jurisdictional agreement. The Investigator Ruane was required by law to obtain a multi-jurisdictional agreement to lawfully act outside his jurisdiction and investigate illegal drug activity inside Cherokee County. Petitioner testified if he had known that Investigator Ruane had illegally acted outside his jurisdiction then Petitioner would not have pleaded guilty but would have exercised his right to trial and had counsel move for a suppression motion or motion to dismiss on this ground.

(ECF No. 1-3 at 1).

On February 28, 2022, Respondent filed his return and a Motion for Summary Judgment. (ECF Nos. 23; 24). Petitioner filed a response in opposition to Respondent's motion, (ECF No. 27), and Respondent replied (ECF No. 28). The magistrate judge entered her Report on April 14, 2022, recommending the undersigned grant Respondent's motion (ECF No. 24) and deny the Petition (ECF Nos. 1; 1-3). (ECF No. 30). As discussed above, Petitioner filed objections to the Report. (ECF No. 32).

MAGISTRATE JUDGE'S REPORT

In her Report, the magistrate judge recommends that the undersigned grant Respondent's Motion for Summary Judgment and deny the Petition. (ECF No. 30 at 21). The magistrate judge first set forth the standards for determining whether the PCR court's ruling was contrary to or an unreasonable application of federal law—in particular, *Strickland* and *Hill*.[3] *Id.* at 14–17. As the magistrate judge correctly noted, the Supreme Court has recognized two instances when a state court decision will be deemed contrary to Supreme Court precedent:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 14–15 (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). Similarly, "a state court decision is an unreasonable application of Supreme Court precedent when the decision 'correctly

[3] *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing the two-part test for ineffective assistance of counsel: (1) counsel was deficient in his or her representation and (2) the defendant was prejudiced by such deficiency); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (establishing that, in the specific context of a guilty plea, the prejudice prong of *Strickland* is satisfied by showing "there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial").

identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Id.* at 15 (quoting *Williams*, 529 U.S. at 407–08). The magistrate judge then recognized that "[b]oth of Petitioner's grounds for relief depend on his allegation that he received ineffective assistance of counsel" such that "'the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

As to Petitioner's first claim that counsel was ineffective in failing to advise him that certain evidence could have been suppressed because it was made without a court order, the magistrate judge found that the PCR court's decision was not an unreasonable application of *Strickland* nor was its conclusion the result of unreasonable findings of fact. *Id.* at 19. Specifically, the magistrate judge noted the PCR court set forth the applicable standards under *Strickland* and *Hill* as well as the pertinent state and federal laws concerning the interception of oral communications. *Id.* at 17; *see also* (ECF No. 23-2 at 97–100, 102–03). Applying these standards, the PCR court found the recording was not prohibited under either state or federal law and concluded that

> because the recording of [Petitioner] does not fall under these definitions or the prohibited acts, Counsel was not deficient in failing to investigate into an application by the investigator, to make sure a judge entered an order, to advise the Court of allegedly illegal actions or to investigate a search and seizure issue, because the conduct did not fall under the statute requiring these actions on Counsel's part.

(ECF No. 23-2 at 103); *see also* (ECF No. 30 at 17–18). Based on the PCR court's analysis and findings, the magistrate judge concluded that "the PCR court applied the correct legal standard and, because the record fails to demonstrate the court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived as a result

different from Supreme Court precedent, . . . the state court's decision was not contrary to applicable Supreme Court precedent." (ECF No. 30 at 18).

The magistrate judge further noted that she could not find the PCR court's application of *Strickland* on this claim to be unreasonable, particularly in light of the fact that "[t]he PCR court's determination that plea counsel was not deficient depended largely on the court's interpretation of state law concerning the legality of recording oral communication." *Id.* As the magistrate judge correctly indicated, a state court's interpretation of state law is entitled to deference. *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). Moreover, to the extent the PCR court's decision was based on its determination that the recording was not prohibited under federal law, the magistrate judge found that Petitioner has not shown the PCR court unreasonably applied *Strickland* to reach that conclusion. *Id.* at 19. Accordingly, the magistrate judge recommended summary judgment be granted to Respondent as to Petitioner's first claim. *Id.*

The magistrate judge then considered Petitioner's second argument that his counsel was ineffective in failing to move for suppression of evidence obtained by an investigator acting outside his jurisdiction and without a multi-jurisdictional agreement. *Id.* at 19–21. The magistrate judge found that the PCR court thoroughly considered and rejected Petitioner's claim because, while "state law generally forbids law enforcement officers from acting outside of their jurisdiction[,] . . . the general rule did not prevent what Investigator Ruane had done in Petitioner's case." *Id.* at 20 (citing ECF No. 23-3 at 2). As the PCR court explained,

> [T]here was nothing illegal or improper for the investigator to pick up [Petitioner] in Cherokee County and bring him to Spartanburg County for an undercover drug operation. The officers were acting like private citizens while acting outside of their assigned jurisdiction, rendering any extra-jurisdictional activities lawful, as per *State v. Harris*, 299 S.C. [157,] 159, 382 S.E.2d [925,] 926 [(1989)]. Much like in *Harris*, giving someone a ride to a house in another county is something private citizens can engage in and, as

> such, officers did not act unlawfully when doing so while representing themselves as private citizens. Further, all the charges against [Petitioner] resulted from conduct occurring in Spartanburg County.

(ECF No. 23-3 at 2); *see also* (ECF No. 30 at 20). Thus, because the PCR court found there was no unlawful activity, he found plea counsel was not ineffective for failing to file a motion to suppress the evidence. (ECF Nos. 23-3 at 2; 30 at 20).

The magistrate judge recognized that, as with Petitioner's first claim, the PCR court's determination that no unlawful conduct occurred "relie[d] squarely on the interpretation of state law—[specifically], what conduct requires a multi-jurisdictional agreement." (ECF No. 30 at 20). The magistrate judge noted, therefore, that "[t]his court does not have the authority to re-examine the PCR court's determination as to that state-law issue." *Id.* at 20–21. The magistrate judge further noted that, beyond his mere disagreement with the PCR court's conclusion, Petitioner "fails to identify how the PCR court's decision is either the result of unreasonable factual findings or an unreasonable application of federal law." *Id.* at 21. Therefore, the magistrate judge concluded that the PCR court's decision was neither contrary to nor an unreasonable application of *Strickland*. Accordingly, the magistrate judge recommended the court grant summary judgment for Respondent as to this claim too. *Id.*

DISCUSSION

Petitioner filed objections to the Report. *See* (ECF No. 32). However, Petitioner makes no specific challenges to any of the magistrate judge's findings or conclusions. *See id.* Rather, Petitioner merely repeats—almost verbatim—allegations and arguments raised in his response to the motion for summary judgment, *compare* (ECF No. 32), *with* (ECF No. 27), which the magistrate judge has already thoroughly considered, *see* (ECF No. 30). It is well-settled in this Circuit that "an objection that merely repeats the arguments made in the briefs before the

magistrate judge is a general objection and is treated as a failure to object." *Jesse S. v. Saul*, No. 7:17-cv-00211, 2019 WL 3824253, at *1 (W.D. Va. Aug. 14, 2019); *see also, e.g.*, *Howard*, 408 F. Supp. 3d at 726 (noting "[c]ourts will not find specific objections where parties 'merely restate word for word or rehash the same arguments presented in their [earlier] filings'"); *Nichols v. Colvin*, No. 2:14-cv-50, 2015 WL 1185894, at *8 (E.D. Va. Mar. 13, 2015) (finding that the rehashing of arguments raised to the magistrate judge does not comply with the requirement to file specific objections). Indeed, a district court "may reject perfunctory or rehashed objections to R&Rs that amount to a second opportunity to present the arguments already considered by the Magistrate Judge." *Heffner v. Berryhill*, No. 2:16-cv-820, 2017 WL 3887155, at *3 (D.S.C. Sept. 6, 2017) (internal quotation marks omitted).

Liberally construed, Petitioner asserts that the magistrate judge erred by failing to consider Petitioner's argument that the investigator unlawfully recorded oral communications while outside of his jurisdiction. *See* (ECF No. 32 at 6). As discussed above however, the magistrate judge thoroughly considered Petitioner's argument on this point as well as the PCR court's analysis and conclusions. *See* (ECF No. 30 at 19–21). Thus, Petitioner's argument that the magistrate judge "never considered" this argument is demonstrably false and this objection is overruled.

The remainder of Petitioner's objections amount to no more than disagreement with the magistrate judge's conclusions, without identifying any error of law or fact therein, that the PCR court's decision was not an unreasonable application of *Strickland* and that its interpretation of state law is entitled to deference. *See* (ECF No. 32 at 5). However, objections which "merely express disagreement with the magistrate judge's Report . . . in lieu of any actual argument or specific assertion of error in the magistrate judge's findings" do not constitute specific objections requiring *de novo* review by this court. *Lowdermilk v. LaManna*, Civ. A. No. 8:07-2944-GRA,

2009 WL 2601470, at *2 (D.S.C. Aug. 21, 2009); *see also Orpiano v. Johnson*, 687 F.2d 44, 47–48 (4th Cir. 1982) (noting that *de novo* review is not required where a party makes only general and conclusory objections that do not direct the court to a specific error in the Report). Accordingly, the court need only review this portion of the Report for clear error. *Dunlap v. TM Trucking of the Carolinas, LLC*, 288 F. Supp. 3d 654, 662 (D.S.C. 2017).

Having thoroughly reviewed the Report and the record under the appropriate standards and, finding no clear error, the court **ADOPTS** the Report in its entirety (ECF No. 30), and incorporates it herein. Accordingly, Respondent's Motion for Summary Judgment (ECF No. 24) is **GRANTED** and Petitioner's Petition for Writ of Habeas Corpus (ECF No. 1) is **DISMISSED with prejudice.**

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the instant matter, the court finds that the petitioner failed to make a "substantial showing of the denial of a constitutional right." Accordingly, the court declines to issue a certificate of appealability.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

Anderson, South Carolina
May 13, 2022

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