APPENDIX

A

1.) All Courts Denials

Fourth Circuit August 2 2024

Fourth Circuit Sept 23 2024

LEGAL MAIL

FILED: August 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6107
(6:23-cv-01170-DCN)

GENE TONY COOPER, JR.

Petitioner - Appellant

v.

WARDEN, TYGER RIVER CORRECTIONAL INSTITUTION

Respondent - Appellee

J U D G M E N T

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

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

/s/ NWAMAKA ANOWI, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6107

GENE TONY COOPER, JR.,

Petitioner - Appellant,

v.

WARDEN, TYGER RIVER CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. David C. Norton, District Judge. (6:23-cv-01170-DCN)

Submitted: July 30, 2024 Decided: August 2, 2024

Before NIEMEYER, AGEE, and HEYTENS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Gene Tony Cooper, Jr., Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gene Tony Cooper, Jr., seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Cooper'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*, 580 U.S. 100, 115-17 (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 Cooper 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

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* As to Cooper's newly asserted ineffective assistance of counsel claim, we do not "consider issues raised for the first time on appeal, absent exceptional circumstances." *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020) (cleaned up).

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Gene Tony Cooper, Jr., Petitioner, vs. Warden, Tyger River Correctional Institution, Respondent.	Civil Action No. 6:23-cv-1170-DCN-KFM **REPORT OF MAGISTRATE JUDGE**

The petitioner, a state prisoner proceeding *pro se*, seeks habeas corpus relief pursuant to 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.

I. BACKGROUND

The petitioner is currently incarcerated at Tyger River Correctional Institution serving a term of life in prison for murder, twenty-five years for armed robbery, and five years for conspiracy (doc. 1 at 1; app. 1521-22, 1535).

A. Underlying Case Facts

According to the State, on October 6, 1989, Kimberly Ann Quinn's ("Ms. Quinn") six-year-old daughter Amanda awoke to find her mother missing from their home in West Columbia, South Carolina. Ms. Quinn's purse was found in the front yard, and it was determined that her money, her South Carolina identification card, and her welfare check were missing. The welfare check was forged and cashed the next morning at a drive-through window of a local bank. Ms. Quinn's remains were discovered the following day. She had been shot in the head, neck, and back. Her hands and feet had been severed with an ax and her body set on fire. The severed appendages and an ax owned

by the petitioner were found in a nearby creek (app. 405, 423-24, 427-29, 447-51, 456, 564-70, 575-80, 639-42).

The petitioner and Robert "Bo" Southerland ("Mr. Southerland") were later arrested for Ms. Quinn's murder, and Mr. Southerland admitted his involvement and testified against the petitioner. In addition to Mr. Southerland's testimony, the State's evidence included testimony from Philip "Red" Farmer ("Mr. Farmer"), a state inmate who was friends with fellow inmate Eugene Carter, Ms. Quinn's boyfriend. Mr. Farmer was also friends with the petitioner and his niece, Brenda McLauren ("Ms. McLauren"), both of whom were acquainted with Ms. Quinn. Mr. Farmer received information that Ms. Quinn was to receive a $2,800.00 check from an insurance settlement, and Mr. Farmer told the petitioner over the phone from prison that this would be a good opportunity for the petitioner to rob her. Mr. Farmer testified that the petitioner told him that he "didn't see any problem with it" and that he "didn't have any respect for the bitch" (app. 681, 942-43, 949-51, 957, 1200-05).

Mr. Southerland testified that on the morning of October 5, 1989, the petitioner requested his help in robbing and killing Ms. Quinn. Mr. Southerland agreed, and, after watching Ms. Quinn's house from the parking lot of a nearby apartment complex in the petitioner's truck early that day, the men contacted Ms. McLauren and asked her to visit Ms. Quinn to find out if she had received the insurance proceeds. Ms. McLauren did so and advised that Ms. Quinn had not yet received the check and that it was only going to be $240.00. Mr. Southerland testified that the petitioner stated, "[D]amn the money, I'm going to kill the bitch." After again watching the house and then visiting a bar, the petitioner and Mr. Southerland went to Ms. Quinn's house that evening and offered to sell her marijuana. Mr. Southerland testified that Ms. Quinn allowed the men into the house and that he and Ms. Quinn smoked marijuana. Ms. Quinn then left with the petitioner to get something to eat, leaving Mr. Southerland at the house to babysit Ms. Quinn's sleeping daughter. The

petitioner later returned alone and picked up Mr. Southerland, and they drove to a nearby pond where the petitioner had left Ms. Quinn in an abandoned house tied up, handcuffed, and gagged. The men entered the house, and the petitioner untied Ms. Quinn and took the gag out of her mouth, asking her for the names of co-workers who might have drugs or money. The petitioner, wielding a shotgun, then dragged Ms. Quinn outside and shot her dead as she begged for her life. Fearing the handcuffs would be recognized as stolen, the petitioner retrieved an ax from the gun rack of his truck and chopped off both of Ms. Quinn's hands. The petitioner then directed Mr. Southerland to chop off Ms. Quinn's feet. The petitioner got a gas can from his truck and doused Ms. Quinn's body with gasoline and set it on fire. The men gathered Ms. Quinn's hands and feet in a shopping bag; collected the handcuffs, ax, and gas can; and drove to a bridge over Congaree Creek. There, they threw the hands, feet, and ax in the water. The men then went to the petitioner's trailer, where Mr. Southerland showered and slept on the couch (app. 681-82, 686-706).

The next morning, the men went to a bank and cashed Ms. Quinn's welfare check using her identification card at the drive-thru. The petitioner subsequently washed and vacuumed his truck and then painted parts of the cab, a tool box, and the rear window black (app. 705-08).

Mr. Farmer testified that after the murder, he spoke with the petitioner again over the prison phone. The petitioner told him in coded language that his "intelligence was wrong; that she did not have the $2,800.00; that he had completed the construction job he was working on; . . . that he had burned the excess material; and [that the petitioner] was real pleased with the job and didn't see any complication." Mr. Farmer explained that this meant "that the robbery had been completed, . . . that [the petitioner] had killed Kim Quinn, . . . [and] that he had burned the body" (app. 958-63).

B. First Trial

In January 1990, the Lexington County Grand Jury indicted the petitioner for murder, kidnapping, armed robbery, forgery, and conspiracy to commit those crimes (app. 1561-65). The petitioner proceeded to trial in February 1991. The jury found him guilty of all charges, and he was sentenced to death for murder.

C. First Trial Direct Appeal

On direct appeal, the Supreme Court of South Carolina reversed the petitioner's murder conviction and vacated his death sentence, holding that the trial court's failure to obtain an on-the-record waiver from the petitioner of his right to personally address the guilt phase jury for his murder charge was reversible error, but the court affirmed his remaining convictions and sentences. *State v. Cooper*, 439 S.E.2d 276, 276 (S.C. 1994) ("*Cooper I*"), *overruled on other grounds by Franklin v. Catoe*, 552 S.E.2d 718 (S.C. 2001).

D. First Trial PCR

The petitioner then sought, and was granted, post-conviction relief ("PCR") on his remaining non-capital charges, arguing that he likewise had the right to address the guilt phase jury on those charges as well and that he did not knowingly and intelligently waive this right on the record (*see* doc. 13-12). The Supreme Court of South Carolina affirmed the PCR court's order on August 12, 2002 (*id.*).

E. Second Trial

With all of his convictions and sentences vacated, the petitioner's case was remanded to the circuit court for retrial.[1] The petitioner was represented by David A. Bruck ("Mr. Bruck"), John E. Duncan ("Mr. Duncan"), and Stuart M. Andrews, Jr. ("Mr. Andrews") (app. 345).

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[1] The State and the petitioner's counsel agreed the retrial should not start until final resolution of the petitioner's PCR proceedings (*see* app. 6).

On July 15, 2003, Mr. Bruck filed a demand for a speedy trial (app. 7). At a subsequent hearing regarding this demand before the Honorable Marc H. Westbrook, the chief administrative judge at the time, Mr. Bruck requested a November trial date (app. 13). Eleventh Circuit Solicitor Donnie Myers ("Mr. Myers") stated that he had a backlog of about eight or nine cases and also made an oral motion to disqualify Mr. Bruck based on an alleged ethical violation[2] (app. 14-15). Mr. Myers argued that his motion should be considered prior to setting a trial date (app. 15). Judge Westbrook noted that the entire Lexington County court staff would be moving into a new courthouse in November, making scheduling anything for that month particularly difficult (app. 18). Judge Westbrook took the matter under advisement, stating he would hold another hearing when he had a better idea of the court's schedule (app. 20). Shortly thereafter, during an unrecorded in-chambers conference, the State agreed to call the case for trial in spring 2004 (*see* app. 23, 35; doc. 13-15 at 2). Mr. Bruck subsequently took a job as a professor at an out-of-state law school, adding constraints to his availability (*see* app. 24).

On February 10, 2005, the petitioner filed a renewed demand for a speedy trial (app. 18-20). The Honorable William P. Keesley, who was then the chief administrative judge, held a hearing on February 15, 2005 (app. 22). At the hearing, Mr. Bruck informed the court of his new employment and requested a trial date in June or July, when he would not be teaching (app. 24-25). Mr. Myers was not able to attend the hearing, and C. Dayton Riddle, III ("Mr. Riddle"), a Deputy Solicitor, stated that he could not agree to a trial date without Mr. Myers's input (app. 25-26). Mr. Riddle also noted that a judge needed to be appointed to the case prior to setting a trial date so that the judge's schedule could be taken into account (*id.*).

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[2] Mr. Bruck spoke with Mr. Southerland without Mr. Southerland's counsel present (app. 15).

On April 25, 2005, Judge Keesley issued an order stating, "The case is to be heard before the end of 2005, or the defendant may move for bail or for dismissal of the charges" (app. 35). The order also directed the Solicitor's Office to "speak with the Judge assigned to this case and to the Chief Judge for Administrative Purposes and select a firm date for the commencement of the trial, which shall begin in 2005" and to inform defense counsel of the trial date within thirty days of the order (*id.*). The following day, Mr. Bruck emailed Judge Keesley and opposing counsel, reminding them of his scheduling conflicts and renewing his request for the trial to begin before August (app. 277). On May 18, 2005, Mr. Myers filed a written motion to disqualify and remove Mr. Bruck from the case (app. 68). The same day, Mr. Myers wrote to Judge Westbrook, stating, "As you know, Judge Keesley issued an Order directing my Office to speak with you to set a date for the trial of the above case in 2005" (app. 274). In his letter, Mr. Myers requested a hearing and attached Judge Keesley's order, Mr. Bruck's email, and his motion to disqualify Mr. Bruck (app. 274-75).

On June 1, 2005, Mr. Bruck filed another speedy trial motion based on the State's failure to provide a trial date within thirty days of Judge Keesley's order (app. 30). On June 29, Mr. Myers wrote to both Judge Keesley and Judge Westbrook - because he was uncertain which judge was authorized to hear pending matters in the case or if another judge had been assigned - to disclose a conflict and provide notice he would be moving to disqualify the Eleventh Circuit Solicitor's Office at the next hearing (app. 269-70). Mr. Myers informed the judges that Rick Hubbard ("Mr. Hubbard"), one of the Deputy Solicitors, served as a judicial law clerk in the petitioner's first trial (*id.*). According to Mr. Myers, Mr. Hubbard "assisted [the judge] tremendously" during the petitioner's trial and "did a lot of work - - on ex parte communications" (app. 54).

The parties appeared before Judge Keesley on July 12, 2005, to argue all three motions - to disqualify Mr. Bruck, recuse the Eleventh Circuit Solicitor's Office, and dismiss the charges for lack of a speedy trial (app. 37-67). Mr. Bruck pointed out that it had

now been three years since the case was ready for retrial and two years since the first speedy trial motion (app. 43-44). Mr. Bruck also highlighted that the petitioner had been sitting on death row for sixteen years without a legally fair and valid trial (*id.*). Mr. Bruck stated that he had contacted court administration and discovered that the State had still not requested that they assign a judge to the case (app. 43). Mr. Bruck argued that Mr. Myers' motion to excuse his office this late in the game was dilatory, the length of delay unreasonable, and the reasons for the delay invalid (app. 44-46). Mr. Bruck elaborated that Mr. Myers had stated that the delay was due to other cases scheduled ahead of the petitioner's case but that, as far as he could tell, none of those cases had gone to trial either (*id.*). Mr. Bruck also argued that Mr. Myers had failed to comply with Judge Keesley's prior order and that the case should be dismissed for lack of prosecution or lack of a speedy trial or that the petitioner should be released on bond (app. 46-48). Mr. Myers countered that he had complied with Judge Keesley's order via his May 18th letter to Judge Westbrook, "who[m] [he had] assumed all along was assigned to this case" (app. 56). Mr. Myers thus argued that the motion to dismiss for lack of a speedy trial was premature because the State had until the end of 2005 to try the petitioner (app. 56, 58).

On July 13, 2005, Judge Keesley issued an order granting the State's motion to disqualify the Eleventh Circuit Solicitor's Office, denying the State's motion to remove Mr. Bruck, and denying the petitioner's motion to dismiss on speedy trial grounds (app. 76). Regarding the speedy trial motion, Judge Keesley noted that the petitioner had been incarcerated for "about 16 years" and had "repeatedly sought to have his case called for trial" since August 2002 (app. 77). However, Judge Keesley found "insufficient cause at this stage to dismiss the charges" (*id.*). Although he was "troubled" that removing the Eleventh Circuit Solicitor's Office would result in further delay, he did not believe the motion was dilatory or "part of an intentional pattern of delay" (app. 77-78). In dicta, Judge Keesley noted that the court would likely not be able to accommodate Mr. Bruck's schedule while

also setting the petitioner's trial at the earliest possible date (app. 78). Judge Keesley cited eight other pending death penalty cases, including one in which the defendant had been awaiting trial for ten years, and a general civil court backlog (*id.*). Judge Keesley concluded,

> [T]his court has frequently expressed its deep concern about the length of time that people accused of crimes are being required to sit in jail (in this case, on death row) awaiting trial. The court is aware that there are many reasons for this situation, including the explosive growth of this county. But, defense counsel is correct in his protestations that the constitution of the United States and South Carolina must mean something when they afford to everyone the right to a speedy trial.

(App. 78-79). Judge Keesley stated that he was giving notice that day "to the Chief Justice, Court Administration, and the Attorney General's office about [his] decision and the need for expedited steps to bring this matter to trial" (app. 79).

The case was then transferred to the First Circuit Solicitor's Office in September 2005,[3] and the Honorable Daniel F. Pieper was assigned exclusive jurisdiction over the matter on December 2, 2005 (app. 88, 330). On December 29, 2005, Mr. Bruck renewed his motion to dismiss for lack of a speedy trial (app. 81). Judge Pieper heard argument on the motion on February 8, 2006 (app. 101-264). At this hearing, Mr. Myers testified that generally when a death penalty case is pending, the Solicitor alerts the chief administrative judge, who then has court administration assign a judge to the case, or the Solicitor contacts court administration directly (app. 115-18). However, Mr. Myers testified that he did not make a request, either to Judge Westbrook or court administration, that a judge be assigned to the petitioner's case because he mistakenly believed that Judge Westbrook had already been assigned to it (app. 124-25).

Mr. Myers also testified that between August 2002, when the petitioner's case was sent back for retrial, and July 2003, when Mr. Bruck filed the first speedy trial motion,

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[3] The undersigned is also aware that Judge Westbrook tragically passed away in an automobile accident in September 2005.

he did not request that a judge be assigned or discuss setting a trial date (app. 119, 124-25). Mr. Myers explained that he "was fully convinced that [Judge Westbrook] had been assigned to this case as the presiding judge" (app. 120, 140-41, 157). When asked why the petitioner's case was not called for trial in the spring of 2004, as the State had agreed, Mr. Myers explained that his office "had other cases, . . . didn't get to this, and a judge did not set a date for a trial" (app. 136). Mr. Myers reiterated that "a judge didn't set it for a date certain until Judge Keesley set it to be tried in the latter part of 2005" (app. 157).

Mr. Myers also testified that, in 2003, the Eleventh Circuit Solicitor's Office was forced to move several times because of mold in the Lexington County courthouse (app. 159). Mr. Myers testified that his office had to move in and out of the old courthouse twice and then finally move into the new building (*id.*). To make matters worse, the mold problem meant that court was often canceled, and, when it was not canceled, they only had one operational courtroom (app. 159-60). Mr. Myers estimated that the whole situation cost them "seven or eight months of court" (app. 160). Mr. Myers testified that his office did not intentionally delay the petitioner's trial and that the trial was delayed primarily because of the backlog of cases and time lost while moving courthouses (app. 160-61). However, Mr. Myers also recognized that his office moved into the new courthouse in early 2004 and had not tried any death penalty cases in the two years since (app. 161-62).

Additionally, Mr. Riddle testified at the hearing that he did not recall whether the petitioner's case was ever formally assigned to him and he did not have any involvement until summer 2003, when Mr. Bruck started raising speedy trial issues (app. 165-67). Moreover, Mr. Riddle testified that, to his knowledge, no one in the Solicitor's Office was getting the case ready for trial prior to the first speedy trial motion (app. 167-69). Mr. Riddle also did not recall ever having a conversation with Mr. Myers about getting the petitioner's case set for trial (app. 175). Additionally, Mr. Riddle had no personal knowledge of why it had never been set for trial (app. 172).

In April 2006, Judge Pieper issued an order denying the petitioner's motion to dismiss based on the lack of a speedy trial, which is discussed more fully in the Ground One section below (app. 328-43). In short, Judge Pieper found that the reasons for the delay and the lack of prejudice to the petitioner warranted a denial of the petitioner's motion (app. 330-41). The petitioner was retried before Judge Pieper and a jury beginning on May 22, 2006 (app. 345). After several days of testimony and evidence, the jury found the petitioner guilty of all charges, and Judge Pieper sentenced him to a term of life in prison for murder, twenty-five years for armed robbery, and five years for conspiracy (app. 1521–22, 1535).[4]

F. Second Trial Direct Appeal

The petitioner filed a timely notice of appeal and, on March 23, 2009, filed his final brief, asserting three issues:

> 1. Appellant was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where the forty-four month delay was caused by the solicitor's admission he "did nothing" to prepare for appellant's retrial since August 2002, the state then failed to keep its promise to try the case in the Spring of 2004, and then failed to comply with the court's order to try the case by the end of 2005, since the state's lackadaisical approach to this case caused totally unnecessary and prejudicial delay to the incarcerated appellant who always maintained his innocence.
>
> 2. Appellant's Sixth Amendment right to confront Red Farmer was violated where the state did not make reasonable efforts to secure his presence from the Texas Correctional institution since allowing Farmer to be treated as "unavailable" under these circumstances, and that his prior stale testimony being read into the record was prejudicial to appellant's defense. Further, Farmer's subsequent actions and admissions since the first trial showed he was not worthy of belief, and the jury observing his demeanor in this case was critical.
>
> 3. The court erred by ruling appellant could be impeached with his 1977 convictions for house breaking and grand

[4] The State did not seek the death penalty in the petitioner's second trial.

> larceny since these convictions were too remote under Rule 609, SCRE, and they were highly prejudicial to appellant.

(Doc. 13-3 at 2-3). The Court of Appeals of South Carolina affirmed the petitioner's convictions and sentences on November 19, 2009 (doc. 13-15). *State v. Cooper*, 687 S.E.2d 62 (S.C. Ct. App. 2009) ("*Cooper II*"). The petitioner then petitioned for rehearing (doc. 13-16), which the Court of Appeals denied on January 21, 2010 (doc. 13-19). The petitioner also sought a writ of certiorari from both the Supreme Court of South Carolina regarding all three issues raised to the Court of Appeals (doc. 13-20) and the Supreme Court of the United States regarding the speedy trial issue (doc. 13-27). Both petitions were ultimately denied (docs. 13-25, 13-31).

G. Second Trial PCR

In June 2013, the petitioner filed a *pro se* PCR application (app. 1595-1603). Through appointed counsel, the petitioner amended his application twice (app. 1611-12, 1614-18). The petitioner's final application presented the following issues:

> a. Counsel was ineffective in failing to request a continuance to ensure the attendance of witness Red Farmer as an in-person trial witness.
>
> b. Counsel was ineffective by unreasonably admitting impeachment evidence against Red Farmer which was more harmful to the Applicant's case than helpful.
>
> c. Counsel was ineffective in conceding to allowance of the Applicant's prior housebreaking and grand larceny convictions and failing to object based upon the fact that they were overly prejudicial in that they are similar to the facts underlying the charges at issue in trial. Further, counsel was ineffective in that he unreasonably introduced information regarding the Applicant's sentence on those prior convictions including the fact that he had spent time in prison, all of which was unnecessarily prejudicial.
>
> d. Counsel was ineffective in failing to obtain an instruction from the Court that witness Robert Southerland should not be allowed [to] provide testimony introducing evidence regarding the Applicant's prior Armed Robbery convictions which were inadmissible and prejudicial.

e. Counsel was ineffective by failing to properly and effectively challenge the testimony regarding the photo identification by Dana Harley.

f. Counsel was ineffective in failing to object to the speculative testimony by Rick McDermott that the log was "too heavy for one person to lift alone," which the state was then allowed to address in closing argument over objection. Tr. 1103 and 1146.

g. Ineffective assistance for failure to assist in having the Applicant submit his DNA for comparison to the available DNA evidence in this matter.

h. Counsel was ineffective in failing to object when the State argued facts not in evidence. Tr. 1204, lines 4-6.

I. Counsel was ineffective in failing to call the Applicant as a rebuttal witness to provide context and substance regarding his interview with investigator Edward Hite as suggested by the Court. Tr. 1043.

j. Ineffective assistance for failure to effectively prepare for the direct examination of the Applicant and the cross-examination of investigator Hite.

k. Ineffective assistance of counsel for failure to recuse himself from representation of the Defendant as he was a necessary witness in the trial.

l. The cumulative effect of trial counsel's errors constitute ineffective assistance of counsel.

(App. 1615-16). The Honorable J. Cordell Maddox, Jr., held an evidentiary hearing on December 11, 2017, and heard testimony from Mr. Bruck (app. 1620-1709). The petitioner was represented at the hearing by Kristy G. Goldberg (app. 1620). Judge Maddox denied and dismissed the petitioner's application on May 18, 2018 (app. 1710-82).

The petitioner filed a timely appeal and, through appellate defender Lara M. Caudy, presented the following issues to the Supreme Court of South Carolina:

1. The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he introduced so called impeachment evidence against Phillip "Red" Farmer which merely reaffirmed Farmer's claim that Petitioner called him the morning after the murder and confessed to killing the decedent and burning her body since Petitioner was obviously prejudiced where the only other direct evidence against Petitioner was the

testimony of Robert "Bo" Southerland who had little to no credibility.

2. The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he told the jury during his opening statement about Petitioner's prior record and the fact that he went to prison with Robert "Bo" Southerland, and when he later failed to object to the introduction of Petitioner's prior convictions for housebreaking and grand larceny as unfairly prejudicial since they are similar to the underlying crime for which Petitioner was being tried, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense.

3. The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to request and obtain an instruction from the trial court that star witness Robert "Bo" Southerland could not testify concerning Petitioner's prior armed robbery convictions, since such evidence was inadmissible and unfairly prejudicial, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to his defense.

(Doc. 13-32 at 3). The Supreme Court transferred the matter to the Court of Appeals (doc. 13-34), which granted certiorari and ordered briefing on the third issue (doc. 13-35). On February 1, 2023, after briefing by both parties, the Court of Appeals dismissed the writ as improvidently granted (doc. 13-38).

H. Federal Habeas Petition

The petitioner raises the following grounds for relief in his instant *pro se* federal habeas petition:

GROUND ONE: U.S. Const. Amend. VI; S.C. Const. Art. 1, § 14 - Violation of a Constitutional Right to a Speedy Trial

SUPPORTING FACTS: Pet. argues the delay of (44) months exceeded any delay in any reported S.C. cases, and the State's reason for the delay was both arbitrary and unreasonable. Pet. argues his motion should have been weighed heavily in favor of granting his motion to dismiss, and Pet. further asserts that the witnesses' memories were clearly affected by the delay at trial.

GROUND TWO: Sixth Amend Violation - Confrontation Clause

SUPPORTING FACTS: Pet. argues the trial court erred in finding "Phillip Farmer" was unreliable witness and allowing "Farmer's" prior testimony to be read into the record b/c it denied "Cooper" his const. right to confrontation. Pet. also asserts the state knew it would be unable to obtain "Farmer's" presence at trial eleven days prior to the trial, and the state did not make a motion for continuance, or even bring the problem to the court's attention.

GROUND THREE: Rule 609(b), SCRE, Violation

SUPPORTING FACTS: Pet. argues the trial court erred in ruling that Petitioner could be impeached with his (1977) convictions for housebreaking and grand larceny b/c the conviction were too remote and were highly prejudicial.

GROUND FOUR: Ineffective Assistance of Counsel

SUPPORTING FACTS: Pet. argued that the (PCR) judge erred by finding trial counsel was not ineffective when he failed to request and obtain an instruction from the trial court that the state witness could not testify concerning Pet. prior (armed robbery) conviction, since such evidence was inadmissible and unfairly prejudiced, and where Petitioner was prejudiced since he testified at trial and his credibility was crucial to the defense.

(Doc. 1 at 5, 7, 8, 10).

II. APPLICABLE LAW AND ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 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). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the 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. In 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 district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (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; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff'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 the granting of 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.*

B. Federal Habeas Review

Because the petitioner filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (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, 410 (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, 101-102 (2011) (citations omitted). 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).

C. Exhaustion and Timeliness

The respondent acknowledges that the petition is timely and that the petitioner exhausted his state court remedies by pursuing both a direct appeal and PCR appeal (doc. 13 at 33 n.11).

D. Ground One

In Ground One, the petitioner asserts that he was denied his Sixth Amendment right to a speedy trial because of the 44-month delay between when his case was remanded to the circuit court and his second trial (doc. 1 at 5).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. Amend. VI. The Fourteenth Amendment extends this right to state court trials. *Klopfer v. N.C.*, 386 U.S. 213, 222-23 (1967). When addressing a claim alleging a violation of the right to a speedy trial, the court must consider (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant timely asserted his right; and (4) whether delay prejudiced the case. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). While

none of these factors are determinative, they are "related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533. The right is "'necessarily relative,'" "amorphous," and "slippery," and thus cannot "be quantified into a specified number of days or months." *Id.* at 522-23 (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)). Accordingly, the first factor acts as a triggering mechanism, *i.e.*, if the delay is within normal limits, there is no need to consider the remaining factors. *Id.* at 530. Generally, a delay of over one year is presumptively prejudicial. *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992).

In its order ruling on this issue in the petitioner's direct appeal, the Court of Appeals of South Carolina summarized the factual and procedural background, the relevant law, the petitioner's arguments, and Judge Pieper's order (doc. 13-13 at 2-5). The Court of Appeals then summarily concluded that Judge Pieper's decision was "supported by the evidence" (*id.* at 5). Because the Court of Appeals summarily affirmed Judge Pieper's order, the undersigned will "look through" the Court of Appeals' decision to Judge Pieper's order. *See Woodfolk v. Maynard*, 857 F.3d 531, 544 (4th Cir. 2017) ("To determine the basis upon which a state court rejected a habeas claim, a federal habeas court must look though any intervening summary decisions to the last reasoned decision of a state court addressing the claim.") (citation and internal quotation marks omitted). The undersigned will "presume that the [Court of Appeals'] decision adopted the same reasoning." *Wilson*

v. Sellers, 138 S. Ct. 1188, 1192 (2018).[5] Judge Pieper set forth the applicable law and then addressed the *Barker* factors in detail, as discussed below.

1. Length of the Delay

Regarding the length of the delay, Judge Pieper found that "the total delay of at least forty four months [was] sufficient to trigger review of the other factors" (app. 332). The undersigned finds that Judge Pieper's decision here was not based on an unreasonable determination of the facts and did not involve an unreasonable application of clearly established federal law. The record reflects that the Supreme Court of South Carolina upheld the PCR court's grant of relief and remanded the case to the circuit court in August 12, 2002, and the petitioner's second trial began on May 22, 2006. Moreover, Judge Pieper acknowledged the Supreme Court's dicta indicating that a delay of over one year, such as in this case, was "presumptively prejudicial" (app. 333) (citing *Doggett v. U.S.*, 505 U.S. 647, 652 n.1 (1992)).

2. Petitioner's Assertion of His Right

Judge Pieper also found that "nothing in the procedural history of the case could support a finding that the [petitioner] failed to properly assert his right to speedy trial" (app. 338). The undersigned further finds that this decision was not based on an unreasonable determination of the facts and did not involve an unreasonable application of clearly established federal law, as the record reflects that the petitioner raised speedy

[5] Judge Pieper initially framed the issue before him as "whether the delay since the denial of the motion by Judge Keesley [in July 2005] is justified" (app. 330). However, he subsequently addressed the totality of the 44-month delay, the length of the delay that was before the Court of Appeals of South Carolina and is presently before this court. Because Judge Pieper addressed the entirety of the 44-month delay in his analysis and conclusions, his decision remains the last reasoned decision of a state court addressing the claim at issue here.

trial issues on numerous occasions. The bulk of Judge Pieper's analysis focused on the two remaining factors - the reasons for the delay and whether the petitioner suffered prejudice.

3. Reasons for the Delay

On this factor, the Supreme Court of the United States has explained that "different weights should be assigned to different reasons" for delay. *Barker*, 407 U.S. at 531.

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id.; *see also U.S. v. Hall*, 551 F.3d 257, 272 (4th Cir. 2009) ("The reasons for a trial delay should be characterized as either valid, improper, or neutral.").

Here, Judge Pieper found that "[t]he delay was not apparently part of an intentional scheme," but rather, the delay was partly "the result of prosecutorial and governmental negligence, and partly justifiable" (app. 333). Judge Pieper then concluded that "while none of [the state's] excuses alone [were] sufficient to justify such delay, in the aggregate, they sufficiently justif[ied] the majority of the delay" (*id.*).

First, Judge Pieper considered the explanation that the petitioner's case was old and complex and thus required a significant amount of time to prepare for trial (app. 334). Judge Pieper noted, however, that Mr. Myers had testified that nothing substantial had been done to prepare for trial and it was unclear whether Judge Keesley had weighed

this factor in the State's favor prior to the case being assigned to the First Circuit Solicitor's Office (*id.*). Judge Pieper then concluded that the delay since the First Circuit Solicitor's Office was assigned the case was justified because "the case was clearly complicated and required substantial time to investigate and prepare" (*id.*) (quoting *State v. Kennedy*, 528 S.E.2d 700, 704 (S.C. Ct. App. 2000)).

Second, Judge Pieper considered the Eleventh Circuit Solicitor's Office's move to the new courthouse due to mold contamination (app. 334). This, Judge Pieper found, could account for several months of the delay (*id.*). Additionally, Judge Pieper stated as follows regarding the court's records:

> [T]he last general sessions term in the old courthouse was November 13, 2003; during the term, the Northcutt case, a capital case, was tried. The first general sessions jury trial in the new courthouse was on April 4, 2004. However, starting January 8, 2004, general sessions pleas and civil trials were regularly being conducted. Despite the actual time there were no criminal jury trials being held, it would not be inappropriate to justify additional time for the solicitor's office to get settled into the new facility . . .

(*Id.*).

Moreover, citing state law finding that "a loaded docket was a correct yet insufficient excuse alone for the delay," Judge Pieper concluded that "even though the overcrowded docket argument was standing alone insufficient, it should still be considered" (app. 334–35) (citing *Kennedy*, 528 S.E.2d at 704).

Third, Judge Pieper addressed the State's apparent "confusion as to which judge if any had been assigned to the case prior" to his own appointment (app. 335). Judge Pieper noted that Mr. Myers believed that Judge Westbrook was the judge assigned to the

case when in fact no judge had been assigned (*id.*). Further, Judge Pieper found that "[t]he solicitor has the duty of alerting court administration so that a judge will be assigned, and the consequences (insofar as delay is concerned) resulting from the postponement of this procedure is a burden the state must bear" (*id.*). Moreover, "[d]ue to this delay, the undersigned was not given exclusive jurisdiction over this case until December 2, 2005, so that trying the case in 2005, as Judge Keesley's order directed, was virtually impossible due to the time necessary to summons a larger jury pool, mail out questionnaires, etc., that normally is associated with a capital trial" (app. 335-36).

Lastly, Judge Pieper considered the Eleventh Circuit's recusal of itself in July 2005 (app. 336). Judge Pieper found that "a reasonable delay attributable to recusal of the state is justified because the process of recusal is designed to protect the defendant's due process right to a fair and impartial trial" (*id.*).

Judge Pieper then concluded as follows:

> This court finds that the reasons for the delay are unintentional and for the most part justifiable. Various reasons for a lag between indictment and trial are weighed differently. *U.S. v. Frith*, 181 F.3d 92, 1999 WL 387849 (C.A. 4 (Va.)). For example, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Barker* at 531, 2193. "More neutral reasons, such as governmental negligence or an overcrowded court docket, are still weighed against the government (because it bears the ultimate responsibility for bringing a defendant to trial), but less heavily." *Frith* at 3 (citing *Barker*). It should be noted that there is South Carolina case law that indicates that the burden is on the movant to prove that the "delay was due to the neglect and willfulness of the State's prosecution." *State v. Dukes*, 256 S.C. 218, 222, 182 S.E.2d 286, 288 (1971) (emphasis added) (citing 21 Am.Jur.(2d), Criminal Law,

> Sections 251-253, 286; *State v. Hollars*, 266 N.C. 45, 145 S.E.2d 309 (1971)). It is not clear to this court whether such precedence requiring neglect and willfulness is in line with the jurisprudence of the United States Supreme Court. Nonetheless, the court finds that the state's conduct in this instance was not apparently willful and was largely justifiable.

(App. 336-37).

While the 44-month delay in this case is deeply troubling, the undersigned cannot conclude that Judge Pieper's analysis of this factor was so lacking in justification that it constitutes an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *See Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (citation and internal quotation marks omitted).

As set out above, the reasons for a trial delay should be characterized as either valid, improper, or neutral. *Hall*, 551 F.3d at 272. The undersigned agrees with Judge Pieper that there exist both valid and neutral reasons for the delay here. Moreover, the record does not reflect any improper reasons, such as a deliberate attempt to delay the trial in order to impede the defense, which would be weighed heavily against the State.

Mr. Myers's failure to alert court administration so that a judge would be assigned to the petitioner's case for at least two years is very concerning, particularly when Mr. Myers admitted that he had not taken steps to have a judge assigned to the case or set a trial date during that time period. However, again, the record does not reflect an intentional attempt to delay. Rather, Mr. Myers explained his mistaken belief that Judge Westbrook had already been assigned to the case. Mr. Myers' claim about this confusion is substantiated by his letter to Judge Westbrook. Specifically, after Judge Keesley issued

an order on April 25, 2005, directing Mr. Myers to "speak with the Judge assigned to this case and to the Chief Judge for Administrative Purposes and select a firm date for the commencement of the trial . . . ," Mr. Myers wrote a letter to Judge Westbrook on the following day, stating, "As you know, Judge Keesley issued an Order directing my Office to speak with you to set a date for the trial of the above case in 2005." Accordingly, the undersigned agrees with Judge Pieper that Mr. Myers' failure to alert court administration so that a judge could be assigned to the case amounts to negligence, which is a neutral reason that should be weighed against the State (app. 335 ("neutral reasons, such as governmental negligence . . . are still weighed against the government," and this reason for the delay "is a burden the state must bear.")).

Although Judge Pieper relied on state law to conclude that the overcrowded docket reason was "standing alone insufficient [but] should still be considered," he did not explicitly state how he weighed this explanation. On this issue, federal law provides that an overcrowded docket is a neutral reason to be weighed against the State. *Barker*, 407 U.S. at 531.

There are also several valid reasons for the delay in the record. As set forth above, there was some delay due to the Eleventh Circuit Solicitor's Office recusing itself from the case in July 2005. As noted by Judge Pieper, this constitutes a valid reason for delay "because the process of recusal is designed to protect the defendant's due process right to a fair and impartial trial." Additionally, the First Circuit Solicitor's Office took over the case in September 2005, and, at that point, the petitioner's case was old and complex. As a result, the case undoubtedly required a significant amount of time for the First Circuit Solicitor's Office to investigate and prepare for trial. Moreover, throughout 2003, the

Eleventh Circuit Solicitor's Office was forced to move several times because of mold in the Lexington County courthouse. Specifically, this office had to move in and out of the old courthouse twice and then finally move into the new building. Mr. Myers testified that this mold problem also meant that court was often canceled, and, when it was not canceled, only one courtroom was operational. Judge Pieper further noted the delay in the court schedule based on this move.

Whether this factor weighs in favor of the petitioner or the State is a close call. As discussed herein, there exist both valid reasons, which weigh in favor of the State, and neutral reasons, which weigh against it. However, the role of a federal habeas court is not to grant relief simply because, in its independent judgment, it would have reached a different result. Instead, to grant habeas relief, the state court's judgment must be objectively unreasonable, and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 562 U.S. at 101-102 (citations omitted). As recently stated by the Supreme Court of the United States, "In order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia*, 582 U.S. at 94 (citation and internal quotation marks omitted). Stated differently, "a litigant must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*." *Id.* (emphasis added) (citation and internal quotation marks omitted). This standard is a high bar, and intentionally so. *Toghill v. Clarke*, 877 F.3d 547, 555 (4th Cir. 2017); *see Harrington*, 562 U.S. at 103 ("Federal habeas review of state

convictions disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."). Here, Judge Pieper set forth the governing law and applied it to a reasonable determination of the facts based on the record. He weighed the reasons for the delay and noted that some of these reasons were "justified." However, he also found that the delay was partly "the result of prosecutorial and governmental negligence," which was a "neutral reason[to be] weighed against the government." In balancing these valid and neutral reasons, Judge Pieper ultimately concluded that the valid reasons, in the aggregate, justified the delay. *See Barker*, 407 U.S. at 533 (recognizing that this is "a difficult and sensitive balancing test"). Based on the foregoing, the undersigned cannot conclude that Judge Pieper's analysis and conclusion on this factor are so erroneous beyond any possibility for fairminded disagreement. Therefore, the undersigned finds that Judge Pieper's order regarding the reasons for the delay did not involve an unreasonable application of clearly established federal law.[6]

4. Prejudice

Prejudice, the final *Barker* factor, "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect," including "(I) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S.

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[6] As set out above, Judge Pieper also noted that there is South Carolina case law indicating that the burden is on the movant to prove that the "delay was due to the neglect and willfulness of the State's prosecution" (app. 336). Judge Pieper further noted that it was "not clear to this court whether such precedence requiring neglect and willfulness is in line with the jurisprudence of the United States Supreme Court" (app. 336-37). However, although Judge Pieper noted this state law, he did not hinge his findings on it. Rather, Judge Pieper's order makes clear that he found that the reasons justified the delay.

at 532. This third interest, impairment to the defense, "is the most serious ... because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *United States v. Robinson*, 55 F.4th 390, 400 (4th Cir. 2022) (citation and internal quotation marks omitted).

In *Doggett*, the Supreme Court of the United States distinguished between "actual prejudice" and "presumptive prejudice" and recognized that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655. The Court noted that when addressing the impact of a delay, "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* The Court further stated that this "presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria," but it "is part of the mix of relevant facts, and its importance increases with the length of delay." *Id.* at 655-56 (citations omitted). The Court further stated that its toleration of government negligence "varies inversely with its protractedness." *Id.* at 657. Regarding the facts before it, the Court found that the eight-and-a-half-year delay that Doggett experienced between his indictment and his arrest, six years of which was the result of the government's negligence, violated Doggett's right to a speedy trial. *Id.* at 648-58. The Court recognized in a hypothetical that actual prejudice would still be required in some instances. *Id.* at 656. Specifically, the Court noted that had the government pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail "however great the delay, so long as Doggett could not show specific prejudice to his defense." *Id.* The Court stated that it "attach[es] great

weight" to justifiable reasons for the delay. *Id.* In conclusion, however, the Court found that "[w]hen the Government's negligence . . . causes delay six times as long as that generally sufficient to trigger judicial review . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." *Id.* at 658.

Here, Judge Pieper addressed the above three interests and found that the petitioner "ha[d] not shown how his defense had been or will be prejudiced by the delay through the use of demonstrative evidence" (app. 338-39). Judge Pieper found that "this lack of proof in regard to trial prejudice . . . weigh[s] against his claim to a violation of his right to a speedy trial" (app. 339). Judge Pieper noted that although a majority of South Carolina case law relies on a lack of demonstrable evidence of trial prejudice in the denial of speedy trial motions, demonstrable trial prejudice is not essential pursuant to *Doggett* (app. 339-40). Judge Pieper stated that the petitioner was relying on this presumption that his defense was prejudiced by the passage of time (app. 340). However, Judge Pieper distinguished *Doggett*, noting that the government in that case had not proven that the delay left the defendant's ability to defend himself unimpaired (app. 341). In contrast, Judge Pieper found that, here, the State had proven that the delay had not impaired the petitioner's ability to defend himself (*id.*). Judge Pieper further noted that the State had recently withdrawn the notice to seek the death penalty, which could be construed as a benefit to the defendant that materialized from the delay (*id.*). Judge Pieper stated that the main prejudice that the petitioner suffered was from pretrial incarceration (app. 340). Moreover, Judge Pieper expressed that he "had not lost sight of the importance of a

defendant's liberty, for it is that liberty which the speedy trial right was designed to protect" (app. 340). Judge Pieper concluded, "However, upon balance of the *Barker* factors, especially with this court heavily weighing the lack of demonstrable trial prejudice, the presumption of prejudice has been persuasively rebutted" (app. 340-41).

In his habeas petition, the petitioner does not specifically challenge any of the state court's findings but expresses his alternate view that the State's reasons for the delay were arbitrary and unreasonable and that witnesses' memories were clearly impacted by the delay at his retrial (*see* doc. 1 at 5). This type of vague assertion, without more, is not enough to overcome the "highly deferential standard" that this court must apply when evaluating state court rulings. However, because the petitioner is proceeding *pro se*, the undersigned has conducted a careful review of the record and relevant precedent.

The petitioner was undoubtedly incarcerated for a long period of time between the remand of his case to the circuit court and his second trial. Moreover, the petitioner was on death row awaiting his second trial, which would certainly lead to anxiety and concern. Regarding the third, most important interest, there is undoubtedly a possibility of impairment to the defense after a 44-month delay. Further, at least some of the delay was due to official negligence. As set out above, the Supreme Court has made clear that a showing of actual prejudice is not essential to every speedy trial claim. However, even though this delay was partly the result of official negligence, whether the Supreme Court would require the petitioner to demonstrate actual prejudice is unknown because, unlike *Doggett*, the delay was shorter than "six times as long as that generally sufficient to trigger

judicial review" and the prejudice has been rebutted by several valid reasons.[7] As a result, the undersigned cannot conclude that Judge Pieper's order, finding that the prejudice factor weighed against the petitioner because he failed to demonstrate any prejudice to his defense under the third, most serious interest, was an unreasonable application of clearly established federal law. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (explaining that "'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision") (citations omitted).

In addition, to the extent that the petitioner argues that he was prejudiced by the delay based on Mr. Farmer not being physically present or memories fading by the time of the second trial, these arguments are without merit under the unique circumstances of this case (*see* docs. 17; 20). As noted by the respondent, the petitioner's case was first tried in 1991, and the prior sworn testimonies of the witnesses from both sides were preserved through a transcript. Therefore, any witness at the second trial could have been impeached or had his or her memory refreshed by the testimony from the first trial.

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[7] It is also worth noting that the Court of Appeals for the Fourth Circuit has held that defendants who experience delays arising from government negligence that are significantly shorter than the eight-and-a-half-year delay in *Doggett* are still required to show "actual prejudice." *See United States v. Lloyd*, 645 F. App'x 273, 278 (4th Cir. 2016) (citations omitted). Moreover, courts within the Fourth Circuit and South Carolina frequently rely on a lack of demonstrable prejudice in denying speedy trial motions when the delay is shorter than that in *Doggett*. *See, e.g., United States v. Pair*, 84 F.4th 577, 590 (4th Cir. 2023) ("Pair's inability to show any prejudice to his defense from the delay is quite harmful to his claim."); *Robinson*, 55 F.4th at 400 (finding that a court did not err in denying Robinson's speedy trial motion and stating, "[T]he only prejudice Robinson identifies is 'loss of memory for both Robinson himself and witnesses.' Yet Robinson fails to provide a single example of something relevant to his case that he or another witness couldn't remember. Without such an example, Robinson merely alleges a generalized prejudice common to all cases and all delays.") (internal citations omitted); *State v. Langford*, 735 S.E.2d 471, 484 (S.C. 2012) (finding that a defendant's speedy trial right was not violated when he did not demonstrate how his defense was prejudiced by the delay).

In sum, balancing all of the *Barker* factors, the undersigned finds that Judge Pieper's order and the Court of Appeals of South Carolina's order affirming Judge Pieper's decision were not based on an unreasonable determination of the facts and did not involve and unreasonable application of clearly established federal law. For these reasons, the undersigned recommends that the district court grant the respondent's motion for summary judgment as to Ground One.

E. Ground Two

In Ground Two, the petitioner asserts that he was denied his constitutional right to confront Mr. Farmer, one of the State's witnesses (doc. 1 at 7). The respondent counters that the state court's rejection of this claim was not contrary to Supreme Court precedent or based on an unreasonable determination of the facts (doc. 13 at 49). The undersigned agrees with the respondent.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The "Confrontation Clause reflects a preference for face-to-face confrontation at trial and that 'a primary interest secured by [the provision] is the right of cross-examination.'" *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)). "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). "[T]raditionally," there has "been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was

subject to cross-examination by that defendant." *Barber v. Page*, 390 U.S. 719, 722 (1968). A witness cannot be considered "unavailable" for purposes of this exception "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 724–25. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Roberts*, 448 U.S. at 74.

1. Background

Here, Mr. Farmer testified at the petitioner's first trial and corroborated that Ms. Quinn's murder resulted from a premeditated plot to rob her of an insurance settlement check, adding that he was supposed to get $500.00 for arranging the robbery (app. 52–58). B. Harrison Bell ("Mr. Bell"), the lead prosecutor on the petitioner's case from the First Circuit Solicitor's Office, testified in an affidavit that at the time of the petitioner's second trial, Mr. Farmer was incarcerated in Texas (app. 1541). Mr. Bell began attempting to subpoena Mr. Farmer in March 2006 (*id.*). Mr. Farmer was willing to testify and indicated that his testimony at the retrial would echo that of the first trial (*id.*). However, because Texas was a signatory to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act and South Carolina was not, Texas would not release a prisoner to testify in criminal proceedings absent "an executive agreement between the Governor of South Carolina and the Governor of Texas . . . accompanied by documentation guaranteeing protection of the prisoner witness from civil lawsuits and/or criminal prosecution from circumstances arising in South Carolina prior to the rendition" (app. 1539).

Upon discovery of this issue, Mr. Bell began preparing the necessary paperwork and making arrangements to transport Mr. Farmer to South Carolina (app.

1541). Mr. Bell finalized the paperwork and submitted it for Judge Pieper's signature on April 20, 2006 (*id.*). It was then forwarded to the Lexington County Clerk of Court and the Governor's office (app. 853–54). On April 26th, the Governor's office alerted Mr. Bell to a scrivener's error, which he corrected immediately (app. 854). About one week later, the Governor's office informed Mr. Bell that the Secretary of State required a duplicate original copy (*id.*). Judge Pieper signed the duplicate on May 5th (app. 857), and Mr. Bell forwarded it back up the chain to the Secretary of State, who faxed a copy to Texas (app. 854–55).

The Texas Department of Criminal Justice received the rendition paperwork on May 10, 2006 (app. 1539). Before a prisoner witness can be released, he must appear before a district judge, who must issue a transport order (*id.*). There are only two judges in the state who hold these hearings, and, despite the Department of Criminal Justice's prompt attempts to contact them, those judges were not available until April (*id.*).

The State then moved to have Mr. Farmer declared an unavailable witness under South Carolina Rule of Evidence 804(a)(5), arguing that it had made a good faith effort to secure his presence and had acted in a timely fashion (app. 351–56). The prosecutors further explained that they had not moved for a continuance due to concerns over the speedy trial ruling (app. 366–76).

Mr. Bruck argued he would be denied the opportunity to impeach Mr. Farmer with various inconsistent statements that he made and crimes he committed after the 1991 trial and disagreed that the State's efforts had been timely and reasonable (app. 357–58, 361–66, 382–84, 392–97). Judge Pieper took the matter under advisement (app. 401).

The parties discussed the matter again during the State's case. The State explained the importance of Mr. Farmer's testimony to its case against the petitioner (app.

837–41). Mr. Farmer and the petitioner were the only participants in the phone conversation that initiated the conspiracy, so the jury had yet to hear any direct evidence of that phone call (*id.*). In addition, Mr. Farmer had testified previously that the petitioner called him after the crime and informed him it was done, giving details in a sort of code that Mr. Farmer understood to mean the petitioner had killed the victim and burned her body (app. 840-41). The State argued that this evidence was particularly important because the petitioner's co-defendant, the only other person with direct knowledge of the crime, had just been thoroughly impeached (app. 841).

Mr. Bruck again raised the issue of the post-1991 impeachment evidence and the importance of face-to-face confrontation (app. 842). However, Mr. Bruck conceded that the petitioner had previously availed himself of a full and fair opportunity to cross-examine Mr. Farmer (app. 843). The only issue before Judge Pieper was whether the State could appropriately claim that Mr. Farmer was unavailable (app. 843-44, 846-47). The petitioner did not allege any bad faith or deliberate effort to keep Mr. Farmer from testifying but only that the State's efforts were not reasonable and timely (app. 846-47). The petitioner's primary allegation turned on the State's failure to alert the court or move for a continuance as soon as it knew there was an issue – twelve days before the trial (app. 850-51).

After considering the parties' arguments, Judge Pieper found as follows:

> Both sides have claimed at various times . . . that there was some uncertainty as to whether the Court had actually selected the May trial date or the June trial dates . . . . Each side has at some point claimed to one extent or another that that uncertainty, if any, was clarified at least by March.
>
> The paperwork for the witness at issue was initiated in April. It appears that delay in part was caused because . . . a duplicate copy had not been submitted to the Secretary of State.

> I did take the time to review pertinent procedures and statutory requirements. I would say, for the record, I don't ascertain any requirement to do that so I'm not so sure I should attribute that to the State that the Secretary of State held that paperwork.
>
> But having said that, both the Governor of South Carolina and the Governor of Texas signed that paperwork in early May and then it turned out that no hearing judge was available in Texas to hear the matter. And Texas law apparently requires that since South Carolina is not a reciprocal state or a signatory state or whatever the proper word is in that regard, that these hearings have to be held.
>
> And one of the things that have bothered me the most all along was whether or not the State should be held to some standard of accountability for the fact that Texas did not make any judges available. And it's difficult for me to say that the State acted unreasonably in that regard. Therefore, I do find that the witness is unavailable for these purposes.

(App. 864-65). Judge Pieper noted that the parties planned to stipulate to the introduction of certain post-1991 impeachment evidence and that neither party had requested a continuance (app. 865-66).[8]

As a result of Judge Pieper's ruling, the State read Mr. Farmer's previous testimony on direct examination to the jury (app. 941-63). Mr. Bruck then read portions of the cross-examination from the first trial and presented the agreed-upon impeachment evidence, which included: (1) a summary of drug-related charges from 1995; (2) Mr. Farmer's 2001 Texas convictions and sentences for manufacturing and possession of methamphetamine; (3) portions of Mr. Farmer's 2001 sentencing hearing; and (4) statements Mr. Farmer made during an interview in 2006 that contradicted his 1991 testimony (app. 963-69, 975-79, 992-1013, 1127-41).

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[8] Judge Pieper subsequently gave the petitioner until the following morning to request a continuance, and the petitioner chose not to do so (app. 866, 871-72, 875-76).

2. State Court Order

In reviewing this claim in the petitioner's direct appeal, the Court of Appeals of South Carolina stated the relevant legal principles, relying on *Barber* and its state law equivalents, along with South Carolina Rule of Evidence 804(a)(5) (doc. 13-15 at 5). The Court of Appeals accurately summarized the parties' positions as follows:

> Cooper argues the State's efforts to procure Farmer's presence from Texas were unreasonable. Cooper also asserts the State knew it would be unable to obtain Farmer's presence at trial eleven days prior to the trial; however, the State did not make a motion for continuance, or even bring the problem to the court's attention. He argues the State's failure to have Farmer available to testify in person denied him his constitutional right to confrontation because Farmer is a pathological liar and it was imperative for the trial jury to observe his demeanor in person.
>
> The State asserted the Solicitor was unable to secure Farmer's presence from a Texas penitentiary through a normal out-of-state subpoena because South Carolina is not a signatory state to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (the Act).

(*Id.* at 5-6). The Court of Appeals then examined the sequence of events leading to the failed rendition request as outlined in those affidavits and the State's testimony (*id.* at 6). Based on this background, the court concluded that "Judge Pieper's decision was supported by the evidence" (*id.* at 6).

3. Discussion

The petitioner does not challenge any specific factual finding or the Court of Appeals' application of the relevant legal precedent (*see* docs. 1 at 7-8, 17 at 3). Rather, the petitioner reasserts the general position that the trial court erred in finding that Mr. Farmer was unavailable and that the State should have moved for a continuance or alerted

the trial court to the issue sooner (doc. 1 at 7). The respondent argues that the petitioner does not meet his burden under § 2254(d)(1) or (2), the State made a good faith and objectively reasonable effort to obtain Mr. Farmer's presence at trial, and that any resulting error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (doc. 13 at 62-68).

The undersigned agrees that the petitioner fails to meet his burden under § 2254(d). "[T]he deferential standard set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken. Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed." *Hardy v. Cross*, 565 U.S. 65, 72 (2011).

Here, the petitioner has not identified any reason for this court to doubt the reasonableness of the state court's decision. Further, as the Court of Appeals found, the record supports Judge Pieper's ruling. Although ultimately unsuccessful, the State's actions constituted a reasonable effort to ensure the presence of a witness whom it considered critical to its own case. The petitioner previously had a full and fair opportunity to cross-examine that witness and was permitted to further impeach the testimony with subsequent convictions and inconsistent statements. Under these circumstances, the state courts reasonably found the Confrontation Clause satisfied. *See Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [a witness's forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness's testimony."). Accordingly, the

undersigned recommends that the district court grant the respondent's motion for summary judgment as to Ground Two.

F. Ground Three

In Ground Three, the petitioner asserts that the trial court violated South Carolina Rule of Evidence 609(b) by allowing the State to impeach him with evidence of prior convictions for housebreaking and grand larceny (doc. 1 at 8). The respondent contends that this ground presents a matter of state law that is not properly the subject of federal habeas review (doc. 13 at 68-69). The undersigned agrees with the respondent.

The petitioner did not present this claim to the state courts as a federal constitutional issue, nor has he alleged a federal constitutional violation in his current pleadings (*see* docs. 13-15 at 6–7 (state appellate court ruling evaluating legality under state law), 1 at 8 (alleging violation of state rule of evidence)). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) ("But it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts. The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. And we have repeatedly held that federal habeas corpus relief does not lie for errors of state law.") (emphasis in original) (internal citations and quotation marks omitted). Because the

petitioner has not alleged a federal constitutional violation in Ground Three, the undersigned recommends that the district court grant the respondent's motion for summary judgment as to this ground.

G. Ground Four

In Ground Four, the petitioner alleges that his trial counsel provided ineffective assistance in failing to "request and obtain an instruction from the trial court" preventing a witness from testifying about the petitioner's prior armed robbery convictions (doc. 1 at 10). Again, the respondent argues that the state court's determination on this issue was not contrary to clearly established precedent or based on an unreasonable interpretation of the facts (doc. 13 at 69-70). The undersigned agrees with the respondent.

To be entitled to relief on an ineffective assistance claim, a petitioner must show that (1) trial counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that but for counsel's error, the result of that proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–94 (1984). *Strickland* does not guarantee perfect representation, only a "'reasonably competent attorney.'" *Id.* at 687 (quoting *McMann v. Richardson*, 397 U. S. 759, 770 (1970)). There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. *Id.* at 690. The review of ineffective assistance of counsel claims in federal habeas is not simply a new review of the merits; rather, habeas review is centered upon whether the state court decision was reasonable. *See* 28 U.S.C. § 2254(d).

Additionally, each step in the review process requires deference – deference to counsel and deference to the state court that previously reviewed counsel's actions:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (internal citations omitted).

1. Background

In his PCR proceedings, the petitioner alleged that Mr. Bruck was constitutionally ineffective for failing to obtain an *in limine* instruction from Judge Pieper that his co-defendant, Mr. Southerland, could not reference the petitioner's prior armed robbery convictions during his testimony (app. 1753).

Mr. Bruck knew that Mr. Southerland's testimony was going to be an issue for their case and decided to address it right away in his opening statement (*see* app. 1674-75 (Mr. Bruck's PCR testimony explaining the strategy behind his opening statement)). Mr. Bruck explained to the jurors that he was not going to object to "the warrants and the things in Tony Cooper's background that are relevant to" the jurors' jobs because the jury "need[s] to know everything" (app. 415-16). Mr. Bruck then painted a picture of Mr. Southerland as

an older career criminal who took the petitioner, a teenager, under his wing and landed them both in prison (app. 416).

The State did not elicit testimony from Mr. Southerland about the petitioner's prior convictions. However, on cross-examination, Mr. Bruck questioned Mr. Southerland about Mr. Southerland's prior record, and the following exchange took place:

> Q You were committed and convicted of three separate armed robberies in three separate counties?
>
> A Yes, sir. Your client, Tony Cooper was my codefendant.
>
> Q Excuse me, I'm asking about your record, if you don't mind.
>
> A Yes, sir. Well, I'm explaining to you who my codefendant was.

(App. 763). Mr. Bruck managed to return the jury's attention to Mr. Southerland's credibility, asking why he was so anxious to "[t]o do everything, to say everything you can to hurt Tony Cooper . . . today" (app. 764).

When the petitioner took the stand, Mr. Bruck asked him almost immediately if he pled guilty to the offenses of housebreaking and grand larceny in 1977 (app. 1186). The petitioner answered that he had pled guilty and had been sentenced to fifteen years for his crimes (*id.*).

During his charge to the jury, Judge Pieper stated:

> Also, there have been some references during the trial to prior proceedings in Mr. Cooper's case. Please understand that these prior proceedings have nothing to do with Mr. Cooper's guilt or innocence. He is presumed to be innocent, as I've told you, of all charges against him. And a cloak of innocence remains with him throughout these proceedings unless the State establishes guilt beyond a reasonable doubt. You may not speculate on any prior hearing or proceedings, but must

> base your verdicts entirely on the evidence or the lack of evidence in this case since this trial has begun.

(App. 1489). Judge Pieper further instructed the jury to only consider evidence of another crime or misconduct by a witness as it relates to the witness's credibility (app. 1508).

At the PCR hearing, Mr. Bruck testified that Judge Pieper had ruled the 1977 armed robbery conviction was not admissible for impeachment purposes because it was too remote and too similar to the current charges, but he did not exclude the petitioner's prior housebreaking and grand larceny convictions (app. 1640). Mr. Bruck stated that he simply did not think of asking Judge Pieper to instruct Mr. Southerland prior to his testimony that he was not allowed to discuss the petitioner's prior convictions but that, in hindsight, maybe he should have thought of it (app. 1640-41). Mr. Bruck believed there was no way to keep the jury from knowing that the petitioner had been in prison previously, but admitted it may have been possible to frame things in a way that excluded the prior charges and length of his sentence (app. 1643-44, 1674). However, Mr. Bruck stated, "If you think something's coming in anyway, you might as well be the first to tell the jury about it and – and put it in the proper context if you can, so I assume that's what I was trying to do" (app. 1675). Similarly, Mr. Bruck questioned the petitioner about his plea to housebreaking and grand larceny so the petitioner would appear open and honest (app. 1677). Mr. Bruck further testified that he did not move for a curative instruction or move *in limine* to preclude Mr. Southerland from testifying about the prior armed robbery convictions because he "didn't foresee that [Southerland] was going to volunteer that information unresponsively to a question" (app. 1677-78).

2. State Court Decision

The PCR court identified the correct legal standard and summarized the background information above (app. 1729-30, 1753-54). The PCR court found it "unnecessary . . . to address whether counsel's performance was deficient as to this allegation because it [was] clear that there was absolutely no resulting prejudice" (app. 1754-55). The PCR court cited Judge Pieper's jury instruction and Mr. Bruck's thorough cross-examination of Mr. Southerland

> concerning the details of the crimes to which he had testified on direct examination; his activities in the days immediately before and after the murder; his claim that he had only used the phone at the Cooper residence once; his claim that he had never spoken to Red Farmer; the various different statements he made about the murder; that his picture is in the photographic lineup introduced as State's Ex. 2; his claim that he had given a statement accepting full responsibility for the murder because Applicant had communicated a threat to him through three death row inmates, who had since been executed and could not be cross-examined; his claim that Applicant had told him what to say in that statement; . . . that he had given a similar statement to *The State* newspaper and repeated a similar story to "[a]nybody and everybody"; that he had given similar statements to death row inmate Norman Starnes and to two women who were church volunteers at the prison . . . ; that he had continued to claim full responsibility for the crimes until 2006; that he had spent over thirty years in prison; his remaining criminal history in addition to the armed robbery convictions; that the State had dropped the death penalty in exchange for his testimony against [the petitioner]; and, counsel even cross-examined him about his claim that he had cried after the murder, the fact no one witnessed this and that the only other time he acknowledged crying was when his mother died.

(App. 1755-56). The court noted that Mr. Bruck went on to use this impeaching information in his closing argument to "assail Southerland's credibility" (app. 1756). The PCR court concluded, "In light of the trial judge's limiting instructions, counsel's thorough impeachment

of Southerland's credibility and the overwhelming evidence of guilt, . . . there was no prejudice from counsel's failure to either request an *in limine* instruction before Southerland testified or a curative instruction after he made the unresponsive comment that Applicant was his co-defendant in the armed robberies" (app. 1756-57).

3. Discussion

The petitioner asserts that he was "unfairly prejudiced" by Mr. Bruck's failure to request and obtain an *in limine* or curative instruction because the petitioner "testified at trial and his credibility was crucial to the defense" (doc. 1 at 10). The undersigned does not dispute the importance of the petitioner's credibility. However, the petitioner fails to show how an *in limine* or curative instruction would have significantly impacted the jury's decision-making process, thus resulting in a different verdict. *See Harrington*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."). The PCR court reasonably found any possibility of prejudice from Mr. Southerland's testimony was mitigated by Mr. Bruck's thorough cross-examination and the trial court's jury instructions. The petitioner's mere disagreement with the state court's analysis is not enough to overcome the deference owed to that court's decision. Accordingly, the undersigned recommends that the district court grant the respondent's motion for summary judgment as to Ground Four.

III. CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the undersigned recommends that the respondent's motion for summary judgment (doc. 14) be granted.

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

December 7, 2023
Greenville, South Carolina

The attention of the parties is directed to the important notice on the following page.

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
250 East North Street, Suite 2300
Greenville, South Carolina 29601

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).

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

Gene Tony Cooper, Jr.,	)	C/A No. 6:23-cv-1170 DCN
	)	
Petitioner,	)	**ORDER**
	)	
vs.	)	
	)	
Warden Tyger River Correctional Institution,	)	
	)	
Respondent.	)	
	)	

The above referenced case is before this court upon the magistrate judge's recommendation that respondent's motion for summary judgment be granted.

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend for the district court to review the factual and legal conclusions of the magistrate judge. Thomas v Arn, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).[1] **Petitioner timely filed objections on December 21, 2023.**

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[1]In Wright v. Collins, 766 F.2d 841 (4th Cir. 1985), the court held "that a pro se litigant must receive fair notification of the consequences of failure to object to a magistrate judge's report before such a procedural default will result in waiver of the right to appeal. The notice must be 'sufficiently understandable to one in appellant's circumstances fairly to appraise him of what is required.'" Id. at 846. Plaintiff was advised in a clear manner that his objections had to be filed within ten (10) days, and he received notice of the consequences at the appellate level of his failure to object to the magistrate judge's report.

On January 4, 2024, respondent filed a reply to petitioner's objections, to which peitioner filed a sur-reply on January 16, 2024.

A de novo review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report and recommendation is **AFFIRMED** and incorporated into this Order. Respondent's motion for summary judgment is hereby **GRANTED.**

IT IS FURTHER ORDERED that a certificate of appealability is denied because petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(b)(2).

AND IT IS SO ORDERED.

David C. Norton
United States District Judge

January 19, 2024
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

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

FILED: August 13, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6107
(6:23-cv-01170-DCN)

GENE TONY COOPER, JR.

Petitioner - Appellant

v.

WARDEN, TYGER RIVER CORRECTIONAL INSTITUTION

Respondent - Appellee

TEMPORARY STAY OF MANDATE

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

/s/Nwamaka Anowi, Clerk

FILED: September 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6107
(6:23-cv-01170-DCN)

GENE TONY COOPER, JR.

Petitioner - Appellant

v.

WARDEN, TYGER RIVER CORRECTIONAL INSTITUTION

Respondent - Appellee

O R D E R

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 Niemeyer, Judge Agee, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk

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