APPENDIX

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APPENDIX – A: ORDERS BELOW

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6944

JOHN DWAYNE GARVIN,

Petitioner - Appellant,

v.

LEVERN COHEN, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:22-cv-00994-DCN)

Submitted: January 31, 2024 Decided: February 29, 2024

Before WILKINSON, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

John Dwayne Garvin, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

John Dwayne Garvin seeks to appeal the district court's orders accepting the recommendation of the magistrate judge and denying relief on Garvin's 28 U.S.C. § 2254 petition and denying his Fed. R. Civ. P. 59(e) and 60(b) motions. The orders are 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 Garvin has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal.* Garvin's motion to remand and emergency motion are denied. We dispense with

* The district court denied the motions for reconsideration based on its mistaken belief that Garvin's appeal divested it of jurisdiction to consider the motions. However, Garvin failed to state grounds for Rule 59(e) relief, *see Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010), and his Rule 60(b) motion sought to reargue the claims he asserted in his § 2254 petition and therefore was an unauthorized, successive § 2254 petition over which the district court lacked jurisdiction; *see* 28 U.S.C. § 2244(b)(3);

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

United States v. Winestock, 340 F.3d 200, 206 (4th Cir. 2003). Therefore, the denial of the motions for reconsideration is not debatable.

FILED: April 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6944
(2:22-cv-00994-DCN)

JOHN DWAYNE GARVIN

Petitioner - Appellant

v.

LEVERN COHEN, Warden

Respondent - Appellee

ORDER

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

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

For the Court

/s/ Nwamaka Anowi, Clerk

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

JOHN GARVIN, Petitioner, vs. WARDEN LEVERN COHEN, Respondent.	No. 2:22-cv-00994-DCN-MGB **ORDER**

This matter is before the court on Magistrate Judge Mary Gordon Baker's report and recommendation ("R&R"), ECF No. 71, that the court grant respondent Warden LeVern Cohen's ("Cohen") motion for summary judgment, ECF No. 53, deny petitioner John Garvin's ("Garvin") motion for a declaratory judgment, ECF No. 63, and dismiss the petition with prejudice. For the reasons set forth below, the court adopts the R&R and dismisses the petition.

I. BACKGROUND

The R&R ably recites the facts and procedural history, and the parties do not object to the R&R's recitation thereof. Therefore, the court will only briefly summarize material facts as they appear in the R&R for the purpose of aiding an understanding of the court's legal analysis.

On July 17, 2012, the Spartanburg County Sheriff's Office arranged for Frederick Jerman ("Jerman"), an informant with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, to buy drugs from Garvin and an individual named Jonathan Perez. An investigator searched Jerman to ensure he had no narcotics of his own and then provided Jerman with money to buy the drugs and video equipment to record the transaction. ECF

No. 26-1 at 47–50. The investigator observed the drug deal from across the street. Id. Afterwards, Jerman turned over a package of drugs that he had purchased, which was later revealed to be 14.53 grams of heroin. Id. at 78. On May 23, 2013, a jury convicted Garvin of trafficking in heroin, and the Spartanburg County Court of General Sessions (the "trial court") sentenced him to twenty-five years of imprisonment with a $200,000 fine. The South Carolina Court of Appeals later affirmed his conviction on direct appeal. ECF No. 26-5; State v. Garvin, 2014 WL 6721427 (S.C. Ct. App. Nov. 26, 2014) (per curiam).

On September 12, 2015, Garvin filed a motion for a new trial based on after-discovered evidence. ECF No. 26-7. The trial court denied the motion. ECF No. 26-8. Garvin appealed, and the South Carolina Court of Appeals dismissed the motion for failure to serve timely notice of appeal upon the State. ECF No. 30 at 6. Garvin filed a petition for writ of certiorari, which the South Carolina Supreme Court denied on August 22, 2017. ECF No. 30-1 at 82.

On November 18, 2015, Garvin filed a motion for post-conviction relief ("PCR"). Garvin was provided with court-appointed PCR counsel, but he opted to proceed pro se at the evidentiary hearing after filing a motion to relieve counsel. ECF No. 26-13 at 2. The state court that heard Garvin's PCR motion (the "PCR court") denied the motion on July 10, 2020. Id. at 28. On appeal, Garvin was provided with counsel from the South Carolina Commission on Indigent Defense's Department of Appellate Defense, but Garvin filed a motion to relieve counsel and once again proceeded pro se. R&R at 3–4

(citing motion and South Carolina Supreme Court decision).[1] On November 12, 2021, the South Carolina Supreme Court dismissed Garvin's petition for failure to comply with the South Carolina Appellate Court Rules and order of the court. ECF No. 26-15. Garvin filed a motion to reinstate his appeal, which the South Carolina Supreme Court denied on March 15, 2021. Id. According to Garvin, he subsequently filed an appeal to the United States Supreme Court, though no record of such an appeal was provided.

On March 28, 2022, Garvin, appearing pro se, filed the instant habeas petition pursuant to 28 U.S.C. § 2254. ECF No. 1. Pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local Civil Rules 73.02(B)(2)(c) (D.S.C.), all pretrial proceedings in this case were referred to Magistrate Judge Baker. On September 15, 2022, Garvin filed an amended petition for writ of habeas corpus. ECF No. 51, Amend. Pet. On November 14, 2022, Cohen filed a motion for summary judgment. ECF No. 53.[2] Garvin responded in opposition on December 15, 2022, ECF No. 58, and Cohen replied on January 23, 2023, ECF No. 62. On January 27, 2023, Garvin filed a motion for a declaratory judgment. ECF No. 63. Cohen responded in opposition on February 2, 2023. ECF No. 64. At the magistrate judge's request, both parties filed supplemental briefs concerning an issue raised in the motion for summary judgment on March 1, 2023. ECF Nos. 68, 69. On March 7, 2023, Magistrate Judge Baker issued the R&R, recommending the court grant

[1] As the magistrate judge noted, Cohen did not file all the relevant documents related to the PCR appeal; however, the magistrate judge was able to view the documents from the state's online docket system. R&R at 3 n.1. The court similarly references the documents from the system. See South Carolina Appellate Case Management System, App. Case No. 2020-001418, https://ctrack.sccourts.org/public/caseView.do?csIID=72859 (last accessed Aug. 7, 2023).

[2] The memorandum in support of the motion for summary judgment is found at ECF No. 52.

Cohen's motion for summary judgment and deny Garvin's motion for a declaratory judgment. ECF No. 71 ("R&R"). In the same order, the magistrate judge denied Garvin's motion to strike, ECF No. 67, and motion to amend, ECF No. 70.[3] Id. On April 19, 2023, Garvin filed his objections to the R&R. ECF No. 87. Cohen responded[4] to the objections on May 3, 2023, ECF No. 89. As such, the motions are now ripe for review.[5]

II. STANDARD

A. Order on R&R

This court is charged with conducting a de novo review of any portion of the magistrate judge's R&R to which specific, written objections are made. 28 U.S.C. § 636(b)(1). A party's failure to object is accepted as agreement with the conclusions of the magistrate judge. See Thomas v. Arn, 474 U.S. 140, 149-50 (1985). The recommendation of the magistrate judge carries no presumptive weight, and the responsibility to make a final determination rests with this court. Mathews v. Weber, 423 U.S. 261, 270-71 (1976). However, de novo review is unnecessary when a party makes

[3] On June 28, 2023, Garvin filed a motion for preliminary injunction. ECF No. 92. On June 30, 2023, Garvin filed a motion styled as a motion for release. ECF No. 94. The court's decision to grant Cohen's motion for summary judgment moots both motions.

[4] Cohen's response to Garvin's objections merely relies on the R&R. See ECF No. 89 at 1 ("Petitioner's objections are without merit for the reasons set forth in the Report and Recommendation . . . ."). As such, the court considers there to functionally be no response from respondent.

[5] The court notes, as the magistrate judge did, that neither party filed a motion to exceed the page limit as provided under Local Civ. Rule 7.05(B) (D.S.C.). R&R at 9 n.3. The court further notes that Cohen's eighty-eight-page memorandum was far from the paragon of clarity. As just one example, the State Attorney General's office, as counsel for Cohen, reproduced the entirety of the PCR court's twenty-eight-page order in Cohen's brief instead of directing the court to certain portions as necessary. Compare ECF No. 52 at 11–39 (memorandum of law), with ECF No. 26-13 (PCR court order). The court cautions counsel against the practice in the future.

general and conclusory objections without directing a court's attention to a specific error in the magistrate judge's proposed findings. Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of a specific objection, the court reviews the R&R only for clear error. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (citation omitted).

B. Motion for Summary Judgment

Summary judgment shall be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Id. at 255.

C. Habeas Corpus

This court's review of a habeas petition is governed by 28 U.S.C. § 2254, which was amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1213. See Lindh v. Murphy, 521 U.S. 320 (1997). Section 2254(a) provides federal habeas jurisdiction for the limited purpose of establishing whether a person is "in custody in violation of the Constitution or laws or treaties of the United States." This power to grant relief is limited by § 2254(d), which provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (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). The "contrary to" and "unreasonable application" clauses contained in § 2254(d)(1) are to be given independent meaning—in other words, a petitioner may be entitled to habeas corpus relief if the state court adjudication was either contrary to or an unreasonable application of clearly established federal law.

A state court decision can be "contrary to" clearly established federal law in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." Williams v. Taylor, 529 U.S. 362, 405 (2000). Section 2254(d)(1) restricts the source of clearly established law to holdings of the

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Supreme Court as of the time of the relevant state court decision. See id. at 412; see also Frazer v. South Carolina, 430 F.3d 696, 703 (4th Cir. 2005).

For an "unreasonable" application of the law, a state court decision can also involve an "unreasonable application" of clearly established federal law in two ways: (1) "if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407.

However, "an unreasonable application of federal law is different from an incorrect application of federal law," and "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410–11 (emphasis in original). Indeed, "an 'unreasonable application of federal law is different from an incorrect application of federal law,' because an incorrect application of federal law is not, in all instances, objectively unreasonable." Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir. 2005) (quoting Williams, 529 U.S. at 410).

D. Pro Se Petitioners

Petitioner is proceeding pro se in this case. Pro se complaints and petitions should be construed liberally by this court and are held to a less stringent standard than those drafted by attorneys. See Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), cert. denied, 439 U.S. 970 (1978). A federal district court is charged with liberally

construing a complaint or petition filed by a pro se litigant to allow the development of a potentially meritorious case. See Hughes v. Rowe, 449 U.S. 5, 9 (1980). Liberal construction, however, does not mean that the court can ignore a clear failure in the pleading to allege facts that set forth a cognizable claim. See Weller v. Dep't of Soc. Servs., 901 F.2d 387, 390–91 (4th Cir. 1990).

III. DISCUSSION

In the amended petition, now the operative petition, Garvin raises six grounds for relief. In the motion for summary judgment, Cohen raised several independent reasons why each ground should be dismissed. First, Cohen argued that all six grounds were procedurally barred. ECF No. 52 at 45–54. Next, Cohen challenged the merits of each ground for relief. Id. at 54–87. As part of Cohen's arguments regarding the merits of the claims, Cohen argued that Grounds One, Five, and Six were not cognizable claims on federal habeas review because the claims solely involved interpretations of state law. The magistrate judge first considered that argument and agreed that Grounds One, Five, and Six were not properly before the court. R&R at 12–15. The magistrate judge then determined that the remaining claims—Grounds Two, Three, and Four—were procedurally defaulted. Garvin objects to the magistrate judge's recommendations on all six claims; therefore, a de novo review is necessary. Even though the court reviews the objections de novo, the court groups and analyzes the grounds for relief in the same manner as the magistrate judge.

A. Cognizable Claims

In the motion for summary judgment, Cohen argued that Grounds One, Five, and Six are not cognizable claims in a federal habeas petition because they solely involve

applications of state law. ECF No. 52 at 59, 84, 86. "A federal court may grant habeas relief 'only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States.'" Weeks v. Angelone, 176 F.3d 249, 262 (4th Cir. 1999), aff'd, 528 U.S. 225 (2000) (quoting 28 U.S.C. § 2254(a)) (alteration in original). "Therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review." Id. (citing Estelle v. McGuire, 502 U.S. 62, 67–68 (1991)). Applying that rule, the magistrate judge recommended that Grounds One, Five, and Six be dismissed. Garvin objects to that recommendation for each ground.

1. Ground One

Ground One in the amended petition is titled "Actual Innocence." Amend. Pet. at 6. Under this ground for relief, Garvin claims that certain material facts were "not previously presented and heard," and the PCR court failed to rule on the evidence. Id. In the R&R, the magistrate judge correctly noted that courts in the Fourth Circuit are unsettled about "[w]hether a freestanding claim of actual innocence is cognizable as a habeas action unaccompanied by an assertion of an independent constitutional violation." R&R at 13 (quoting United States v. Hawkins, 2015 WL 7308677, at *8 n.16 (W.D. Va. Nov. 19, 2015)). Despite this uncertainty, "the Supreme Court has strongly suggested that claims of actual innocence standing alone do not serve as an independent basis for relief." Buckner v. Polk, 453 F.3d 195, 199 (4th Cir. 2006) (citing Herrera v. Collins, 506 U.S. 390, 400 (1993)). Based on that finding, Garvin may deploy his claim about actual innocence to argue why he may overcome the procedural default of his other

claims, but the court agrees with the magistrate judge that when presented as a standalone argument, the claim is subject to dismissal.

Garvin's objections solely raise arguments emphasizing the merits of his actual-innocence claim. See generally ECF No. 87 at 3–8. At most, Garvin argues that a "fundamental miscarriage of justice" will occur "if his actual innocence claim is not considered," id. at 3, but Garvin fails to engage with the caselaw cited in the R&R. As the Fourth Circuit has explained, even "if free-standing actual innocence claims were cognizable on federal habeas review, 'the threshold showing for such an assumed right would necessarily be extraordinarily high.'" Buckner, 453 F.3d at 199 (quoting Herrera, 506 U.S. at 417). As the court discusses more thoroughly under the section on procedural default, Garvin has not met the standard for showing actual innocence in the context of procedural default; therefore, he certainly cannot bring a free-standing actual innocence claim. The court overrules Garvin's objection under Ground One and dismisses the claim.

2. Ground Five

Under Ground Five, Garvin asserts that the grand jury had no jurisdiction over him at the time of his indictment for several reasons, among them because (1) the assistant solicitor denied Garvin's request for a preliminary hearing pursuant to S.C. Code Ann. § 22-5-320, (2) the grand jury "was not selected, drawn, or summoned in accordance with S.C. Code Ann. §§ 14-7-1540 and 14-9-210," and (3) the indictment did not state facts sufficient to put Garvin on notice of the offenses with which he was being charged. Amend. Pet. at 18. In the R&R, the magistrate judge determined that this claim

solely raised deficiencies with the state court indictment and other errors of state law and therefore the claims were not properly raised in a federal habeas petition. R&R at 14.

Garvin raises two broad arguments in his objections, first arguing that the United States Constitution applies to the State and to municipalities. ECF No. 87 at 18. But Garvin fails to identify any constitutional violation that arose during the state grand jury process. Garvin generally states that that the indictment and grand jury process violated his Fifth, Sixth, and Fourteenth Amendment rights, but he does not develop those arguments any further. Even if the court were to favorably construe his argument, Garvin's claim cannot, by law, implicate the Fifth Amendment's guarantee of a presentment or indictment of a grand jury. See Hartman v. Lee, 283 F.3d 190, 195 n.4 (4th Cir. 2002) (explaining that "the Fifth Amendment requirement of indictment by grand jury does not apply to the states" and thus "federal cases involving indictments are of little value when evaluating the sufficiency . . . of a state accusatory pleading") (quoting Wilson v. Lindler, 995 F.2d 1256, 1264 (4th Cir. 1993) (Widener, J., dissenting)). Similarly, a defective indictment alone will not give rise to violations of the Sixth and Fourteenth Amendments. See id. at 195–96 (explaining that there is no law stating that "the only constitutionally sufficient means of providing the notice required by the Sixth and Fourteenth Amendments is through the charging document). The court thus overrules Garvin's objection that he properly raised a constitutional claim.

Second, Garvin argues that an error of state procedural law may provide a basis for federal habeas review where the error resulted in a "complete miscarriage of justice" or "where the need for the remedy afforded by the writ of habeas corpus is apparent." Id. at 19–20 (citing Hill v. United States, 368 U.S. 424, 428 (1962)); see also Wright v.

Angelone, 151 F.3d 151, 158 (4th Cir. 1998)). If anything, however, the cases cited by Garvin underscore that the standard for showing a "complete miscarriage of justice" is difficult to meet. In Hill and Wright, the Supreme Court and Fourth Circuit respectively determined that the petitioner had failed to raise any errors that resulted in a complete miscarriage of justice. See Hill, 368 U.S. at 428 (holding that the state trial court's failure to ask the petitioner whether he had anything to say before being sentenced was not a circumstance where habeas corpus could be used to correct the error); Wright, 151 F.3d at 158 (holding that the petitioner had failed to present any evidence suggesting a miscarriage of justice where he only raised defects based on state law); see also Short v. Garrison, 678 F.2d 364, 369 (4th Cir. 1982) (explaining that in the absence of a meritorious constitutional challenge, a petitioner "has a heavy burden" of demonstrating that habeas relief can be predicated on a non-constitutional ground).

Garvin's claims about deficiencies with the indictment and grand jury process fare no better. "Variances and other deficiencies in state court indictments are not ordinarily a basis of federal habeas corpus relief unless the deficiency makes the trial so egregiously unfair as to amount to a deprivation of the defendant's right to due process." Ashford v. Edwards, 780 F.2d 405, 407 (4th Cir. 1985). Here, Garvin has not shown a due process violation rising to that level. Id.; State v. Smalls, 613 S.E.2d 754, 756 (S.C. 2005) (explaining that under South Carolina's due process requirements, an indictment must simply "appraise [the defendant] of the elements of the offense and to allow him to decide whether to plead guilty or stand trial.") (internal quotation marks and citation omitted). Garvin argues that the State violated his due process by entering a conviction with a court that lacked jurisdiction. ECF No. 87 at 21. But Garvin's assertion is

unsupported by the law. See R&R at 15 ("Petitioner's claim that the trial court lacked subject matter jurisdiction fails because circuit courts have subject matter jurisdiction to try criminal cases regardless of whether there is a valid indictment in any particular case.") (quoting Epps v. Bazzle, 2008 WL 2563151, at *2 (D.S.C. June 23, 2008) (emphasis added)). In the absence of any evidence of a "complete miscarriage of justice," the court overrules Garvin's objections and dismisses Ground Five.

3. Ground Six

Under Ground Six, Garvin alleges that the trial judge erred in giving an instruction during the jury charge stating that "The Hand of One, is the Hand of All." Amend. Compl. at 19. According to Garvin, he was charged as a principal of the crime, but the erroneous instruction allowed him to be charged as an accomplice. Id. The magistrate judge determined that although Garvin cited the Sixth Amendment in support of his claim, he was effectively arguing that the trial judge gave an instruction that misstated South Carolina law. As such, the magistrate judge recommended the court find that Ground Six was not a cognizable claim.

Garvin argues that Ground Six is not procedurally barred. He appears to misconstrue the magistrate judge's finding. The magistrate judge determined that the claim required an interpretation of state law, not that the claim was procedurally defaulted. Even if the court construed Garvin's argument to be that the error resulted in a "miscarriage of justice," the court overrules the objection. Garvin has presented no evidence that the single phrase in the jury charge constitutes a "fundamental defect which inherently results in a complete miscarriage of justice." Short, 678 F.2d at 370. Therefore, the court overrules Garvin's objection and denies Ground Six.

B. Procedural Default

After recommending the dismissal of Grounds One, Five, and Six for failure to state a cognizable claim, the magistrate judge proceeded to evaluate whether the remaining claims were procedurally defaulted.

A petitioner seeking habeas relief under § 2254 may only do so once the petitioner has exhausted all remedies available in state court. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds, United States v. Barnette, 644 F.3d 192 (4th Cir. 2011). Under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez v. Ryan, 566 U.S. 1, 9 (2012); see also Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008) (explaining that generally, "[f]ederal habeas review of a state prisoner's claims that are procedurally defaulted under independent and adequate state procedural rules is barred.").

But "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions." Martinez, 566 U.S. at 10. One exception applies when a prisoner seeking federal review of a defaulted claim can show cause for the default and prejudice from a violation of federal law. Id. Second, a narrow exception applies when the habeas petitioner can demonstrate that the alleged constitutional error resulted in the conviction of one who is actually innocent. Dretke v. Haley, 541 U.S. 386, 388, 393–94 (2004). With that framework in mind, the court considers Grounds Two, Three, and Four in turn,

before finally considering whether Garvin's claim of actual innocence saves any of those grounds for relief.

1. Ground Two

Ground Two of Garvin's amended petition alleges ineffective assistance of trial counsel. Amend. Pet. at 17. Under this claim, Garvin alleges that his trial counsel was ineffective in no less than eleven ways.

Typically, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Martinez, 566 U.S. at 10. But this case is unique—Garvin did raise his claims about ineffective assistance of trial counsel in his PCR motion. See ECF No. 26-10 at 10 ¶ 11(b). The PCR court dismissed each of the claims. ECF No. 26-13 at 21–27. Garvin appealed the PCR court's dismissal, but his writ of certiorari was ultimately dismissed on procedural grounds. As such, Garvin is not arguing that he had cause to omit the ineffective assistance of counsel claims from his PCR motion; instead, he argues that the claims were never exhausted because they were "dismissed due to a procedural default [o]rder from the South Carolina Supreme Court on March 15, 2022." Amend. Pet. at 17.

By way of background, on December 9, 2021, the South Carolina Supreme Court denied Garvin's request to exceed the twenty-five-page limit set forth by the South Carolina Appellate Court Rules and warned Garvin that failure to comply would result in dismissal of the matter. ECF No. 26-15. After Garvin subsequently filed a twenty-eight-page amended petition for writ of certiorari, the Court dismissed the matter for failure to comply with both the rules and the court's previous order. Id. On March 15, 2022, the

Court denied Garvin's request to reinstate his appeal. Id. Garvin argues that he did not default on his ineffective assistance of counsel claims (and his other PCR claims) because the claims were presented to the State Supreme Court and were "deliberately by-passed" by the court on appeal. ECF No. 58 at 62.

Despite his claim to the contrary, Garvin's claims are procedurally defaulted. As the magistrate judge explained, Garvin exhausted his claims: since he did not properly raise them on appeal, he would be barred from re-raising them now, and there is no further relief available to Garvin in state court. R&R at 16 (citing Beard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998); Woodford v. Ngo, 548 U.S. 81, 92–93 (2006)). To circumvent that finding, Garvin argued that the procedural rule used to dismiss his claims was not consistently and regularly applied. ECF No. 58 at 66. The magistrate judge requested supplemental briefing on that issue, and the court first briefly summarizes the issue below.

Under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." Martinez, 566 U.S. at 9. Stated another way, where a petitioner fails to comply with a state procedural rule, and that failure provides an adequate and independent ground for the state's denial of relief, federal review will also be barred if the state court has expressly relied on the procedural default. Harris v. Reed, 489 U.S. 255 (1989); Coleman v. Thompson, 501 U.S. 722, 735 (1991). "A state procedural rule is adequate if it is consistently or regularly applied" by state courts, Reid v. True, 349 F.3d 788, 804 (4th Cir. 2003), and a rule is independent "if

it does not depend on a federal constitutional ruling," Fisher v. Angelone, 163 F.3d 835, 844 (4th Cir. 1998) (alterations and internal quotation marks omitted).

Here, the South Carolina Supreme Court dismissed Garvin's petition based on Rule 243(e)(e) of the South Carolina Appellate Court Rules ("SCACR"), which provides that "[t]he total length of a petition shall not exceed twenty-five pages." SCACR 243(e)(3). The magistrate judge first noted there was no disagreement that Rule 243(e)(e) was "independent." The dispute was instead over whether the rule was "adequate"; i.e., whether it was consistently or regularly applied by South Carolina courts. R&R at 18.

To decide whether the rule was adequate, the magistrate judge surveyed South Carolina appellate cases where petitioners had moved to exceed Rule 243(e)'s twenty-five-page limit. Id. Of the twenty-five motions to exceed the page limit filed by non-death-penalty petitioners, twenty of them were granted. Id. (citing ECF No. 68-1 at 1). Despite the seemingly high grant rate, the magistrate judge noted that the number of "exceptions" where motions to exceed the page limit were granted did not suggest that Rule 243(e)(3) is not consistently or regularly applied. Id. (citing Yeatts v. Angelone, 166 F.3d 255, 263–64 (4th Cir. 1999)). To the contrary, the occurrences together indicated "that the South Carolina Supreme Court required PCR petitioners to comply with the page limit rule or demonstrate why an exception was warranted." Id. at 19. Moreover, the magistrate judge found no cases—besides Garvin's—where a petitioner was instructed not to exceed the page limit by court order but did so regardless. Without a truly analogous case, Garvin could not point to a scenario where the South Carolina

Supreme Court elected not to enforce the rule. Id. at 20 (citing McNeill v. Polk, 476 F.3d 206, 212–13 (4th Cir. 2007)).

In his objections, Garvin reiterates his belief that there is a "double standard" that applies to motions when filed by pro se litigants as opposed to petitioners with attorneys. ECF No. 87 at 28. In support, Garvin attempts to add context to the statistics cited by the magistrate judge. Per Garvin, of the four cases[6] where motions to exceed the page limit were denied, all four petitioners were proceeding pro se. And in all cases except for one, the South Carolina Supreme Court allegedly denied the motion "without stating a [] reason." Id. at 29. But Garvin fails to connect the dots as to why this means Rule 243(e) has not been consistently or regularly applied. Indeed, as the magistrate judge noted, the fact that the South Carolina Supreme Court has required litigants move to extend the page limit is consistent with a regular application of the rule. To make a colorable showing that the rule is not consistently and regularly applied, Garvin "would need to cite a non-negligible number of cases" in which the Court permitted a litigant—pro se or otherwise—to file a brief exceeding twenty-five pages without first moving to do so or after his motion to do so was denied. See McCarver v. Lee, 221 F.3d 583, 589 (4th Cir. 2000). Garvin asks the court to delve into the purportedly irregular application of the rule between represented and unrepresented petitioners, but since the rule was regularly and consistently applied on its face, the court cannot read more into the State Supreme Court's rulings than what has been shown.

[6] As noted, the magistrate judge's review found five motions to exceed the page limit that were filed and denied. Two of those motions were filed by Garvin, leaving three other petitioners who had their motions denied.

If nothing else, Garvin failed to follow a court order warning him that failure to submit a motion within the page limit would result in dismissal of the matter. ECF No. 26-15. SCACR 240(g) provides that the failure to comply with an act required by the rules "may be deemed an abandonment of the . . . petition." Garvin cites no case where a petitioner was allowed to proceed after failing to comply with a court order and does not respond to the magistrate judge's comment on this matter in his objections. Since the state court's proffered reason for dismissing the PCR petitioner was entirely procedural, the court finds that Garvin's ineffective assistance of counsel claim is procedurally defaulted.

2. Ground Three

Ground Three alleges prosecutorial misconduct. Amend. Compl. at 9. Specifically, Garvin alleges that the state prosecutor committed "extrinsic fraud upon the court" by (1) presenting a false confession, (2) failing to correct a State witness who testified as to the trustworthiness of the false statement, and (3) "vouching" for the credibility of the State witness during closing arguments. Id. Like Garvin's claims of ineffective assistance of trial counsel, the claims about prosecutorial misconduct were raised in Garvin's PCR motion, ECF No. 26-10 at 10–11; denied by the PCR court, ECF No. 26-13 at 17–18; and dismissed when Garvin failed to adhere to the state's procedural rules for filing petitions to review PCR decisions, ECF No. 26-15. For the same reasons as discussed above, the court finds that federal habeas review is barred based on Garvin's failure to follow an adequate and independent state procedural rule.

3. Ground Four

Ground Four alleges police misconduct. Amend. Compl. at 11. Garvin alleges that certain evidence presented at his trial was derived from an unlawful arrest and would not have come to light but for the misconduct of the certain law enforcement officers. Id. This claim was similarly raised in Garvin's PCR motion, ECF No. 26-10 at 11 ¶ 11(g)–(h), and then dismissed on appeal based on Garvin's failure to adhere to an adequate and independent state procedural rule. The claim is therefore procedurally defaulted.

Notably, Garvin previously argued that his procedural default should alternatively be excused for cause and prejudice based on his "low level of competence," ECF No. 52 at 242, but he appears to have since abandoned that argument. Without cause or prejudice for the default, the court turns to Garvin's objection to the magistrate judge's finding that he has not established actual innocence.

4. Actual Innocence[7]

A procedurally defaulted claim may be heard by a federal court where the petitioner can demonstrate "actual innocence." Schlup v. Delo, 513 U.S. 298, 321 (1995). Actual innocence may be shown only in the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 495 (1986); see also Schlup, 513 U.S. at 327 (clarifying that the actual-innocence gateway requires a stronger showing than that needed to establish cause and prejudice). A "petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no

[7] As discussed earlier, Garvin raised a freestanding claim of actual innocence under Ground One. Although the court dismissed Ground One, the court applies Garvin's objections under that claim to the issue presented here.

juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Schlup, 513 U.S. at 329.

The magistrate judge addressed Garvin's claims of actual innocence by reviewing the evidence presented at his trial, at the PCR evidentiary hearing, and from his federal habeas filings. R&R at 21–28. Upon his arrest on July 17, 2012, Garvin was issued a Miranda warning and provided a signed voluntary statement. The signed statement shown at trial read:

> This guy known as "Fred" kept calling my roommate I know as Perez. Perez and "Fred" kept talking about delivering 15 bundles of heroin to Spartanburg. I took Perez yesterday to pick up 15 bundles from a guy that Perez knows. I put in $200.00 for this 15 bundles. We bought 4 grams of heroin and we worked it up to 15 grams with powdered sugar. We were coming to sell it for $280.00 per "brick." All of this was done in Henderson, North Carolina.

ECF No. 26-1 at 187. The statement was prepared by B.A. Asbill ("Asbill"), an agent with the South Carolina Law Enforcement Division, and signed by Garvin. ECF No. 26-1 at 95. Asbill also prepared an interview report documenting the interview and statement. As relevant here, Garvin produced two copies of the interview report prepared by Asbill at his PCR evidentiary hearing. The reports were substantially identical, except one indicated it was a report of an interview with "Jonathan Garvin," while the other indicated it was a report of an interview with "Jonathan Perez." Compare ECF No. at 58-2 at 1108, with ECF No. 58-2 at 1109. Jonathan Perez had testified at trial that he never gave a statement to law enforcement. ECF No. 26-1 at 136–37 (Tr. 239:23–240:8). Garvin had testified that he signed a statement written by Asbill but claimed it was not the statement that was presented at trial. Id. at 112. He testified that Asbill "had a bunch of papers in his hand, and then he like flipped the papers up," suggesting Asbill somehow tricked Garvin into signing a different statement than the one Garvin reviewed.

Garvin fails to object to the primary basis for the magistrate judge's recommendation against applying the actual-innocence exception. The magistrate judge correctly noted that "[t]he key to an actual-innocence claim is the submission of 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" R&R at 25–26 (quoting Hayes v. Carver, 922 F.3d 212, 216 (4th Cir. 2019)); see also Teleguz v. Pearson, 689 F.3d 322, 328 (4th Cir. 2012) (explaining that although a district court must consider all evidence, old and new, to determine actual innocence, the court only reaches an actual-innocence claim if the petitioner makes a threshold showing of new reliable evidence). The two interview reports created by Asbill were presented at Garvin's PCR hearing, and the PCR court determined that they did not prove that law enforcement fabricated the signed statement. ECF No. 26-13 at 17–18. Asbill's reports therefore do not constitute new evidence, and any actual-innocence arguments premised on the reports cannot excuse procedural default. See Sharpe v. Bell, 593 F.3d 372, 374–75 (4th Cir. 2010) (holding that the district court erred in finding that the petitioner had come forward with new evidence of actual innocence because the district court ignored state post-conviction proceedings where the state court determined the petitioner's evidence was not credible). Garvin fails to object to the magistrate judge's application of the rule and still has not presented any new reliable evidence to support his claims. The court therefore overrules Garvin's objection on this basis alone.

Instead of objecting to the R&R's conclusion about the lack of new evidence, Garvin objects to the R&R for purportedly finding that the discrepancy between the two reports was due to a scrivener's error. ECF No. 87 at 4. Garvin misconstrues the R&R.

The magistrate judge did not conclude as a matter of law that the discrepancy was due to a scrivener's error. Similarly, the magistrate did not find as a matter of law that Asbill's testimony was more credible than Garvin's. See id. at 5 (claiming that the magistrate judge found Asbill's testimony about the scrivener's error to be credible). Rather, the magistrate judge summarized those conclusions from the PCR court to underscore that the PCR court had already considered the issue—meaning again, Garvin had not presented new evidence in support of his actual-innocence argument. R&R at 26–27. To the extent the magistrate judge otherwise explored why Garvin's actual innocence claim failed notwithstanding his failure to present new evidence, the magistrate judge explained that even setting the voluntary statement aside, "there was also video evidence of the drug deal and testimony by a confidential informant and law enforcement officers who witnessed the drug deal." Id. at 28. Garvin fails to offer a compelling reason how that evidence does not defeat his actual innocence claim. Even if Garvin's copies of Asbill's reports somehow constituted "new" evidence, the court adopts the magistrate judge's recommendation. Garvin has not proven that he is actually innocent such that the court should review his procedurally defaulted claims.

C. Declaratory Judgment

Garvin also objects to the portion of the R&R relating to his motion for declaratory judgment, claiming he did not consent to a magistrate judge resolving his motion for declaratory judgment. ECF No. 87 at 34. 28 U.S.C. § 636(b)(1) allows a magistrate judge to submit a report and recommendation for the disposition of a motion for judgment on the pleadings and applications for posttrial relief. The magistrate judge properly issued a recommendation on the motion declaratory judgment, which the court

now adopts. See R&R at 9 ("The undersigned would similarly recommend the motion for declaratory judgment be denied.").

In the R&R, the magistrate judge determined that Garvin's motion for declaratory judgment essentially restated Ground Five from his amended petition. Since the magistrate judge recommended dismissing Ground Five, the magistrate judge likewise recommended denying Garvin's motion. Garvin objects by reasserting that Ground Five is a cognizable claim. ECF No. 87 at 35. Garvin does not actually dispute that his motion for declaratory judgment, like Ground Five, is premised on arguing that the grand jury lacked subject matter jurisdiction based on alleged errors in the state court process. See also ECF No. 63-3 ("Petitioner contends that his declaratory judgment motion is based solely on the fact that his two true-billed indictments are not sufficient to satisfy South Carolina's statutory required mode of procedure laws . . . ."). Since the court similarly finds that Ground Five is not a cognizable claim in this habeas proceeding, the court adopts the magistrate judge's recommendation and denies Garvin's motion.

D. Certificate of Appealability

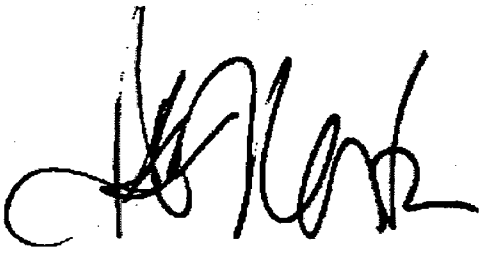
Rule 11(a) of the Rules Governing Section 2254 proceedings provides that the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). An applicant satisfies this standard by establishing that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El, 537 U.S. at 336–38.

For the reasons discussed in this order, the court finds that the legal standard for the issuance of a certificate of appealability has not been met. Accordingly, the court will deny a certificate of appealability.

IV. CONCLUSION

For the reasons set forth above, the court **GRANTS** Cohen's motion for summary judgment, **DENIES** Garvin's motion for declaratory judgment, and **DENIES** a certificate of appealability. Additionally, the court finds as **MOOT** Garvin's motion for preliminary injunction, ECF No. 92, and motion for release, ECF No. 94.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

August 14, 2023
Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

John Garvin, Petitioner, v. Warden LeVern Cohen, Respondent.	)	Case No. 2:22-cv-994-DCN-MGB **REPORT & RECOMMENDATION AND ORDER**

John Garvin, a state prisoner, seeks habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 1, 49, 51.) This matter is before the Court on the Warden's Motion for Summary Judgment. (Dkt. No. 53.) Also pending before the Court are Garvin's Motion for a Declaratory Judgment (Dkt. No. 63), Motion to Strike (Dkt. No. 67), and Motion for Leave to File an Amended Petition (Dkt. No. 70). Under 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), the undersigned is authorized to rule on any pretrial motions and to make recommendations to the District Judge on the summary judgment motion.

For the reasons set forth below, the undersigned recommends the Warden's motion for summary judgment be granted, and the petition be dismissed with prejudice. Garvin's request for an evidentiary hearing and motions to strike and to amend are denied.

BACKGROUND

In December 2012, a Spartanburg County Grand Jury indicted Garvin for trafficking in heroin. (Dkt. No. 26-1 at 188–89.) On May 21–23, 2013, Garvin, who was represented by Scott Robinson, Esq. ("trial counsel"), was tried before the Honorable R. Lawton McIntosh and a jury.

(Dkt. No. 26-1 at 4–186.) The jury found Garvin guilty as charged. (*Id.* at 184.) Judge McIntosh sentenced Garvin to twenty-five years' imprisonment and a fine of $200,000. (*Id.* at 186.)

Garvin appealed. In his direct appeal, Garvin was represented by LaNelle Cantey DuRant, an Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense ("appellate counsel"), who filed a brief raising the following issues:

> 1. Did the trial court err in admitting the statement of Appellant Garvin when the state did not prove by a preponderance of the evidence that Garvin's statement was freely and voluntarily and knowingly given?
>
> 2. Did the trial court err in not granting a directed verdict to Appellant Garvin when the only evidence against him was his statement which he recanted because he testified that he did not make the confession statement but was tricked into signing it?

(Dkt. No. 26-3 at 4.) The State filed a brief, as well. (Dkt. No. 26-4.) In an unpublished opinion filed November 26, 2014, the South Carolina Court of Appeals affirmed Garvin's conviction and sentence. (Dkt. No. 26-5.) The matter was remitted to the lower court on December 12, 2014. (Dkt. No. 26-6.)

On September 12, 2015, Garvin filed a motion for a new trial based on after-discovered evidence, and he attached his own affidavit in support of the motion. (Dkt. No. 26-7.) In an order filed November 30, 2015, Judge McIntosh denied the motion without a hearing. (Dkt. No. 26-8.) The order stated, "Defendant's Affidavit fails to recite facts sufficient to constitute newly discovered evidence. Further, the grounds recited in the Motion are manifestly without merit." (*Id.)* Garvin filed a notice of appeal. (Dkt. No. 30 at 1–5.) In a letter dated December 23, 2015, the South Carolina Court of Appeals advised Garvin that his proof of service was deficient in that he had not copied every party involved in the appeal, and he had ten days to correct the deficiency. (*Id.* at 99.) Garvin submitted a new notice of appeal on January 5, 2016. (*Id.* at 95–

98.) In an order filed May 4, 2016, the court of appeals dismissed the matter because Garvin had failed to timely serve the notice of appeal upon the State. (*Id.* at 6.) Garvin filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court. (Dkt. No. 30-1 at 8–21, 82–83.)

On November 18, 2015, Garvin filed an application for post-conviction relief ("PCR") in state court, alleging ineffective assistance of trial and appellate counsel, prosecutorial misconduct, an insufficient grand jury process, errors by the trial court, an involuntary confession, a falsified arrest warrant, and actual innocence. (Dkt. No. 26-10 at 10–11.) Garvin elected to proceed *pro se* in his PCR action. (Dkt. No. 26-12.) The Honorable J. Derham Cole held a hearing on the application on July 19 and 31, 2019. (*Id.)* The following witnesses testified during the PCR evidentiary hearing: Garvin, trial counsel, appellate counsel, the assistant solicitor who prosecuted Garvin, and three investigators who were involved in Garvin's case. (*Id.* at 59–299.*)* In an order filed July 10, 2020, the PCR court rejected Garvin's claims and denied his PCR application. (Dkt. No. 26-13.)

Garvin filed a notice of appeal.[1] Garvin was initially represented by the South Carolina Commission on Indigent Defense, Department of Appellate Defense; however, he filed a motion to relieve counsel and proceed *pro se* with the additional request that he be appointed a guardian ad litem. *See* Motion – Relieve Counsel, App. Case No. 2020-001418 (Jan. 1, 2021). The South Carolina Supreme Court granted Garvin's motion to proceed *pro se* and relieve appointed

[1] The Warden has not filed all of the documents associated with Garvin's PCR appeal, and it appears the Warden has filed different documents than those identified in his brief, in some instances. (*See* Dkt. No. 26-14 (where the Warden filed a petition for writ of certiorari from 2016, rather the petition for writ of certiorari following Garvin's PCR action).) Nevertheless, the undersigned has been able to view the documents from Garvin's state PCR appeal through the state C-TRACK system. *See* South Carolina Appellate Case Management System, App. Case No. 2020-001418, https://ctrack.sccourts.org/public/caseView.do?csIID=72859 (last accessed

counsel but denied the motion to appoint a guardian ad litem. *See* Non-Dispositional Decision – Order Granting Motion to be relieved, Appellate Defense associated for copies, App. Case No. 2020-001418 (Mar. 9, 2021). After being granted five extensions to file his petition for writ of certiorari, Garvin filed a motion to exceed the page limit set by South Carolina Appellate Court Rules, indicating that his petition was 202 pages. *See* Motion – Exceed Page Limit, App. Case No. 2020-001418 (Oct. 13, 2021). That motion was denied by the supreme court on October 15, 2021. *See* Non-Dispositional Decision – Order, App. Case No. 2020-001418 (Oct. 15, 2021). Thereafter, on November 5, 2021, the South Carolina Attorney General's Office filed a motion to dismiss Garvin's appeal, alleging that Garvin had served on it a petition that was over two hundred pages long. *See* Motion – Dismiss, App. Case No. 2020-001418 (Nov. 5, 2021). On November 12, 2021, the supreme court issued an order granting the motion to dismiss based on Garvin's failure to serve an amended petition in compliance with the South Carolina Appellate Court Rules and the court's previous order. (Dkt. No. 26-17.) On November 15, 2021, Garvin filed a motion to exceed the twenty-five page limit set by appellate court rules, and he submitted a fifty-six page petition. (Dkt. No. 26-16.) The supreme court then filed the following order:

> Petitioner filed a 202-page petition for a writ of certiorari, which was dismissed for failure to comply with the page limit of Rule 243(e)(3), SCACR. He has now filed a motion for leave to file "an enlarged brief," which we construe as a motion to reinstate and a motion to exceed the page limit of Rule 243(e)(3). We grant the motion to reinstate this matter. However, Petitioner's motion to exceed page the [sic] limit is denied. Within fifteen days of this order, Petitioner shall serve and file an amended petition for a writ of certiorari that complies with the twenty-five page limit set forth in Rule 243(e)(3). Petitioner's failure to do so will result in the dismissal of this matter.

Non-Dispositional Decision – Order, App. Case No. 2020-001418 (Dec. 9, 2021). On December 23, 2021, Garvin filed another motion to exceed the page limit along with a twenty-eight page

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March 6, 2023).

amended petition. *See* Motion – Exceed Page Limit, Petition for Writ of Certiorari and Responses – Petition (Amended), App. Case No. 2020-001418 (Dec. 23, 2021). The court then dismissed Garvin's PCR appeal. (*See* Dkt. No. 26-15.) Garvin subsequently filed a motion to reinstate his appeal, which the court denied on March 15, 2022, because Garvin had not shown good cause for his failure to comply with the page limit. *Id.* The court sent the remittitur that same day, and it was filed with the lower court on March 21, 2022. (Dkt. No. 26-18.) Garvin filed a motion to recall the remittitur, which was denied. (Dkt. Nos. 26-19, 26-20). Garvin advised the court he had filed an appeal with the United States Supreme Court. (Dkt. No. 26-21.)

PROCEDURAL HISTORY

Garvin filed his *pro se* habeas petition in March 2022. (Dkt. No. 1.) He subsequently filed an amended petition.[2] (Dkt. No. 51.) In his amended petition, Garvin raises the following grounds for relief (supporting facts excerpted verbatim from the amended habeas petition and attachment):

Ground One:	Actual Innocence
Supporting Facts:	(1) There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction in the interest of justice, that the PCR court failed to rule on pursuant to S.C. Code Ann. § 17-27-20(A)(4); and (2) The constitutional errors in Petitioner's trial has deprived the jury of critical exculpatory evidence that would have established insufficient evidence of guilt and would have proved my innocence's.
Ground Two:	Ineffective Assistance of Counsel
Supporting Facts:	The trial courts denial of Petitioner's Motion to Relieve Counsel and his objections to appointed counsel's representation of him during his trial, did place an actual conflict of interest upon Petitioner after a complaint was

[2] Garvin has filed another motion to amend his petition, seeking to change his presentation of Ground One. As discussed later, that motion is denied.

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filed with the Office of Disciplinary counsel and a complaint was filed in the federal district court against both his court-appointed [counsel] and also against the prosecuting Assistant Solicitor prior to trial, did Constitutionally prejudice his right to effective assistance of counsel and to a fair trial as guaranteed to him under the Sixth and Fourteenth Amendment to the United States Constitution [in the following ways: (1) Counsel failed to prepare law and evidence for trial; (2) Counsel failed to inform Petitioner of and to present exculpatory evidence; (3) Counsel failed to be present for Petitioner's preliminary hearing; (4) Counsel failed to file a motion to quash indictments; (5) Counsel failed to investigate; (6) Counsel's failure to advise the court's of an existing conflict of interest; (7) Counsel failed to object to the Judge's erroneous jury instruction; (8) Counsel failed to object to the solicitor's vouching for the State's witnesses; (9) Effective assistance of counsel was abandoned entirely during the critical stages of Petitioner's State proceedings and was misrepresented during trial; (10) Counsel failed to impeach the State's witnesses; (11) Counsel failed to request a Frank's hearing. The above mentioned failures has caused Petitioner's court-appointed counsel to deliberately fail to subject the State's prosecution to meaningful adversarial testing, in violation of United States v. Chronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984)].

Ground Three: Prosecutorial Misconduct

Supporting Facts: The prosecutorial misconduct emanating from Petitioner's State proceedings denied him the right to a fair trial, by committing extrinsic fraud upon the court when presenting a falsified inculpatory confession statement as evidence and failing to correct the false testimony given by the State witnesses about the trustworthiness of the alleged confession statement, then vouching for the creditability of the State witnesses in his closing argument was in violation of Petitioner's Fourteenth Amendment right to due process.

Ground Four: Police Misconduct

Supporting Facts: The evidence that was provided at Petitioner's trial, derived from an illegal arrest and the misrepresentation of facts that was provided by Spartanburg County Sheriff

Officer, Lt. Ken Hancock; ATF Special Agent, David Pait; and SLED Agent, Ashley Asbill; it is police misconduct, that would not have come to light if not for the illegal actions of producing falsified arrest warrants and a fabricated inculpatory confession statement from the above-mentioned law enforcement officers, whereas, the evidence that was presented at Petitioner's trial was obtained by the exploitation of that illegality.

Ground Five: Grand Jury Lacks Subject Matter Jurisdiction

Supporting Facts: 1. The Indictment Lacks Jurisdiction of the Petitioner's Case at the Time of the Indictment.

a. Asst. Solicitor, James E. Hunter, denied and deprived Petitioner of a requested preliminary hearing pursuant to S.C. Code Ann. § 22-5-320, and knowingly employed the use of unlawful procedures for the return and publication of Petitioner, John Garvin's true-billed indictments without probable cause.
b. The Spartanburg County's Grand Jury had before it no substantial or rationally persuasive evidence on which to base a finding of probable cause for the indictment to be true-billed. (See Tr. P. 11, Ln. 22–24).
c. The indictment was returned solely as a result of the misleading and improper manner in which no such evidence was ever presented to the grand jury to establish probable cause.
d. The Spartanburg County Grand Jury was not selected, drawn, or summoned in accordance with S.C. Code Ann. §§ 14-7-1540 and 14-9-210.
e. The Spartanburg County General Sessions Court was without jurisdiction, until Petitioner's requested demand for a preliminary hearing had been held.
f. Asst. Solicitor, James E. Hunter, has abused the process of the Spartanburg County's Grand Jury process in the selection and/or non-selection of grand jurors.
g. Petitioner contends that the State knowingly employed the use of unlawful procedures for the return and publication of its true-billed indictments. That Asst. Solicitor, James E. Hunter, did unlawfully impaneled a grand jury outside the jurisdiction of the Spartanburg County Court of

General Sessions, and then willfully cause false and misleading information to be printed in the indictments.

h. Asst. Solicitor, James E. Hunter, and Spartanburg County Court of General Sessions failed to comply with statutory law jurisdictional in nature, specifying the manner and means for lawful return of true-billed indictments.

2. The indictment Does Not State Facts to Constitute an Offense to Put Petitioner on Notice of What He is Being Charged.

a. The indictments does not contain the necessary elements of the offense to fully inform Petitioner of the nature of the accusation against him.

b. The indictment's material variance between the charged offense and the proof of evidence presented at trial, deprived the court of subject matter jurisdiction and failed to put Petitioner on proper notice.

3. The Indictment Fails to Put the Petitioner on Notice of the True Nature and the True Actual Cause of Accusation to Legally Support the Conviction.

a. The phrasing of the indictment in the disjunctive does not provide Petitioner with the proper notice of the nature and the cause of the accusation, because such phrasing leaves the Petitioner uncertain as to which of the charged acts is being relied upon as the basis for the allegation against him.

4. The Spartanburg County Court of General Sessions Had No Jurisdiction to Try Petitioner Until He Had His Requested Preliminary Hearing.

a. On July 18, 2012, Petitioner had requested for a preliminary hearing pursuant to S.C. Code Ann. §§ 17-23-160, 22-5-320 and Rule – 2, SCRCrimP, to determine whether sufficient evidence exists to warrant Petitioner's detention and trial.

b. On October 25, 2012, Asst. Solicitor, James E. Hunter would waive Petitioner's preliminary hearing and bring forth an indictment on December 6, 2012, and base the indictment on the arrest warrant to establish probable cause to indict Petitioner of drug-trafficking.

c. The Spartanburg County Court of General Sessions had no jurisdiction to indict Petitioner until after he had his requested preliminary hearing.

Ground Six: The Judge's Erroneous Jury Charge of "The Hand of One, is The Hand of All."

Supporting Facts: The trial court abused it's discretion, and created a manifested constitutional error, in giving the Judge's erroneous jury charge, "The Hand of One is The Hand of All," to Petitioner, who was charged as a principal for drug trafficking in heroin, and did not receive adequate Sixth Amendment notice that he may be convicted guilty as an accomplice, had an identifiably negative impact on the trial to such a degree that the Constitutional rights of Petitioner were compromised, pursuant to Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993).

(Dkt. No. 51 at 6, 8, 9, 11, 17, 18–19.) On November 14, 2022, the Warden filed a return and motion for summary judgment. (Dkt. Nos. 52, 53.) Garvin filed a response in opposition to the motion for summary judgment on December 15, 2022. (Dkt. No. 58.) On January 23, 2023, the Warden filed a reply. (Dkt. No. 62.)

Since then, Garvin has filed a motion for a declaratory judgment (Dkt. No. 63), and the Warden has filed a response thereto (Dkt. No. 64). In his response, the Warden moved to hold all other motions in abeyance pending this Court's ruling on the motion for summary judgment. (Dkt. No. 64 at 2.) Garvin has now filed a motion to strike the motion to hold in abeyance. (Dkt. No. 67.) Garvin has also filed a motion for leave to file a second amended petition. (Dkt. No. 70.)

These motions are ripe for review.[3]

LEGAL STANDARD

[3] The parties are reminded that under the Local Civil Rules, "[u]nless an exception is granted by the court, no memorandum shall exceed . . . [t]hirty-five (35) double-spaced pages in the case of an initial brief . . . [and] [f]ifteen (15) doubled-spaced pages, in the case of any reply . . . ." Local Civ. Rule 7.05(B) (D.S.C.). Both parties well-exceeded these page limits without any motions to the Court to do so.

Habeas corpus in federal court exists to "guard against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citation and internal quotation marks omitted). Federal habeas is neither an alternative to state-court relief nor an additional chance to appeal erroneous state-court rulings. *See id.* That preference for, and deference to, state courts is borne out in the various constraints placed on federal courts. *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (stating § 2254 "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases"); *see also Woods v. Donald*, 575 U.S. 312, 316 (2015) (stating § 2254 "reflect[s] a presumption that state courts know and follow the law" (citation and internal quotation marks omitted)).

For instance, state prisoners who challenge matters "adjudicated on the merits in State court" cannot get relief in federal court unless they show that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" announced by the Supreme Court or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). That means a state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Federal courts must also defer to state courts' factual determinations, which are presumed correct until the prisoner rebuts that presumption with clear and convincing evidence. § 2254(e)(1).

In addition, before state prisoners may try to clear those high hurdles, two rules steer them to first pursue all relief available in the state courts. *See* § 2254(b)(1). The first, known as exhaustion of remedies, requires a prisoner to present his claims to the highest state court with

jurisdiction to decide them. *Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010). A federal court cannot grant a prisoner's habeas corpus petition until he exhausts his state-court remedies. § 2254(b)(1), (c). The second rule, called procedural default, comes into play when a prisoner failed to present a claim to the state courts at the appropriate time and has no means of doing so now. *Stewart*, 701 F. Supp. 2d at 790. Federal courts may not consider a procedurally defaulted claim unless the prisoner shows either that he has cause for defaulting and that the alleged violation of federal law prejudiced him or that not addressing the claim would be a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The ultimate issue in this case is, of course, whether Garvin should receive habeas relief under these standards. However, the Warden's summary judgment motion and briefing presents narrower questions. Summary judgment is appropriate only if the moving party shows that "there is no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Rule 12, Rules Governing § 2254 Cases (stating courts may apply in habeas cases any of the Federal Rules of Civil Procedure to the extent they are not inconsistent with statutes or the § 2254 rules). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Viewing the habeas rules through the lens of Rule 56, the Court has three questions to answer at this juncture:

(1) Are there genuine issues of fact as to whether Garvin's claims are properly before the Court?

(2) Are there genuine issues of fact as to the merits of Garvin's claims?

(3) If the answer to either (or both) of the first two questions is "no," is the Warden entitled to judgment as a matter of law?

In answering those questions, the undersigned must carefully consider the record before the Court.

DISCUSSION

The Warden contends that Garvin's habeas petition must be dismissed as he failed to properly exhaust his state court remedies, and, as a result, his grounds for relief are procedurally barred here. (Dkt. No. 52 at 45–50.) In the alternative, the Warden asserts Garvin is not entitled to habeas relief because his grounds are either not cognizable, procedurally defaulted, or without merit. (*Id.* at 45–87.) Garvin disagrees that his claims are procedurally barred and further asserts that any procedural bar should be excused as he is actually innocent. (Dkt. No. 58 at 62–86, 239–55.) Garvin also offers argument as to the merits of each of his grounds for relief. (*Id.* at 66–239.) The undersigned addresses the relevant arguments below.

I. Grounds That Are Not Cognizable

The undersigned first considers the Warden's allegations that Grounds One, Five, and Six are not cognizable in this habeas corpus action. Section 2254 states that this court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[W]hen a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review." *Weeks v. Angelone*, 176 F.3d 249, 262 (4th Cir. 1999), *aff'd* 528 U.S. 225 (2000) (citing

Estelle v. McGuire, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.")). With that foundation, the undersigned considers each ground in turn.

As to Ground One, Garvin asserts he is actually innocent of the crime of trafficking heroin. (Dkt. No.) "Whether a freestanding claim of actual innocence is cognizable in a habeas action unaccompanied by an assertion of an independent constitutional violation remains unsettled in the Fourth Circuit." *United States v. Hawkins*, No. 2:10-CR-0004-1, 2015 WL 7308677, at *8 n.16 (W.D. Va. Nov. 19, 2015) (citing *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999)). "However, . . . the Supreme Court has strongly suggested that claims of actual innocence standing alone do not serve as an independent basis for relief . . . ." *Buckner v. Polk*, 453 F.3d 195, 199 (4th Cir. 2006) (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). And the Fourth Circuit has recognized that even "if free-standing actual innocence claims were cognizable on federal habeas review, 'the threshold showing for such an assumed right would necessarily be extraordinarily high.'" *Id.* (quoting *Herrera*, 506 U.S. at 417). As laid out in greater detail below, Garvin has not met that "extraordinarily high" standard in this case. Consequently, the undersigned concludes this free-standing actual-innocence claim is not cognizable and recommends the Court grant the Warden's motion for summary judgment as to Ground One.

Garvin's motion to amend recognizes that this ground is not cognizable and, thus, he seeks to reconfigure Ground One to assert "Evidence of Extrinsic Fraud Upon the Court." (Dkt. No. 70 at 1.) However, the supporting facts and arguments Garvin proposes are the same—renaming the claim does not render it cognizable here when it remains, in substance, a claim of actual innocence. (Dkt. No. 70-3 at 6.) As explained by the Fourth Circuit, "'[L]eave to amend a

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pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the party of the moving party, or the amendment would have been futile.'" *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)). Here, Garvin's proposed amendment is futile as it is merely a renaming of his actual innocence claim, but also, even to the extent the claim could be interpreted as different, a claim of "extrinsic fraud upon the court" does not allege a violation of constitutional or federal law, so it is likewise not cognizable. The undersigned denies the motion to amend.

In Ground Five, Garvin outlines why he believes the grand jury lacked subject matter jurisdiction based on a variety of complaints about the indictment and the grand jury process. (Dkt. No. 51 at 18–19.) The Warden asserts he is entitled to summary judgment on this ground because "a claim of lack of subject matter jurisdiction is not cognizable on federal habeas review[,]" and "[f]urther, deficiencies in state court indictments are generally not a basis for habeas relief unless they made trial so egregiously unfair as to deny due process." (Dkt. No. 52 at 49.) The undersigned agrees. "'[F]ederal habeas corpus relief does not lie for errors of state law.'" *Estelle*, 502 U.S. at 67 (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). Garvin's Ground Five sets out a number of allegations that the state grand jury process violated state law; however, he does not identify any violations of the constitution or federal law. *See Wright v.* Angelone, 151 F.3d 151, 158 (4th Cir. 1998) (holding jurisdiction is a matter of state law); *see also Monahan v. Burtt*, No. CIVA 205-2201-RBH, 2006 WL 2796390, at *7 (D.S.C. Sept. 27, 2006) ("Reliance on state statute, and the state constitution, as a basis for relief simply fails to present a question of federal law. To the extent the petitioner relies solely on state law, he has failed to present a matter cognizable under 28 U.S.C. § 2254."). Garvin's complaints regarding

his indictment are similarly matters of state, not federal, law. *See Dilworth v. Markle*, 970 F. Supp. 2d 498, 507 (N.D.W. Va. 2013) ("[B]ecause there is no federal constitutional requirement that a state proceed on criminal charges by way of indictment, then there can be no constitutional challenge to the sufficiency of the indictment itself. What is required of a state indictment turns purely on an interpretation of state law . . . ."); *see also Epps v. Bazzle*, No. 9:07-cv-3113-RBH, 2008 WL 2563151, at *2 (D.S.C. June 23, 2008) ("Petitioner's claim that the trial court lacked subject matter jurisdiction fails because circuit courts have subject matter jurisdiction to try criminal cases *regardless of whether there is a valid indictment in any particular case.*" (emphasis added)). Because Garvin's Ground Five concerns matters of state law, which are not cognizable in federal habeas corpus, the undersigned recommends granting the Warden's motion as to Ground Five.

As to Ground Six, Garvin alleges,

> The trial court abused it's discretion, and created a manifested constitutional error, in giving the Judge's erroneous jury charge, "The Hand of One, is The Hand of All," to Petitioner, who was charged as a principal for drug trafficking in heroin, and did not receive adequate Sixth Amendment notice that he may be convicted guilty as an accomplice . . . .

(Dkt. No. 51 at 19.) Although Garvin references federal constitutional law in this ground, some of his argument is founded on state law. (*See* Dkt. No. 58 at 229–33.) For the same reasons already discussed above, to the extent Garvin is asserting a claim that the instruction violated state law, it is not cognizable in this action, and the undersigned would recommend summary judgment be granted.[4] *See Smith v. Moore*, 137 F.3d 808, 821–22 (4th Cir. 1998) (refusing to entertain the habeas petitioner's contention that a jury instruction misstated South Carolina law).

[4] To the extent Garvin is asserting a cognizable violation of federal law in Ground Six, the undersigned still recommends summary judgment because the claim is procedurally barred, as explained in greater detail below.

II. Remaining Grounds Are Procedurally Barred

The Warden argues that all of Garvin's grounds, to the extent they are cognizable, are procedurally barred. As outlined above, federal habeas petitioners must exhaust their state court remedies before a federal court can consider their grounds for relief. Exhaustion is an important prerequisite to federal habeas corpus relief. *See* § 2254(b)–(c); *see also Rose v. Lundy*, 455 U.S. 509, 515 (1982) ("The exhaustion doctrine existed long before its codification by Congress in 1948."). It exists to "protect the state courts' role in the enforcement of federal law" and to "prevent disruption of state judicial proceedings." *Lundy*, 455 U.S. at 518. Those purposes are integral to the preservation of federalism, and district courts must see that they are taken seriously. *Id.* at 510, 518, 520.

In the instant case, Garvin sought to exhaust his state court remedies by filing a PCR appeal. However, after being given multiple opportunities, Garvin did not comply with the South Carolina Supreme Court's rules for filing or the court's order directing him to do so, and his petition for writ of certiorari was dismissed. Because there is no further relief available to Garvin in state court, his claims are considered exhausted. *See Woodford v. Ngo*, 548 U.S. 81, 92–93 (2006) ("In habeas, state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability."). Nevertheless, because he did not properly raise his claims for relief and would be barred from doing so now, his PCR claims are procedurally defaulted. *See Beard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998) ("A procedural default . . . occurs when a habeas petitioner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" (quoting *Coleman v.*

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Thompson, 501 U.S. 722, 735 n.1 (1991))). Accordingly, this court cannot consider the merits of those claims.

Garvin challenges the procedural bar of his claims, asserting the page limit rule is not consistently and regularly applied. The Warden disagrees, and the undersigned directed the parties to submit additional briefing on that specific issue. The undersigned analyzes the application of the procedural bar in greater detail below and finds it applicable here.

A. Whether the Procedural Bar is Regularly and Consistently Applied

In this case, Garvin's PCR appeal was dismissed, in part, for his failure to comply with South Carolina Appellate Court Rule 243(e)(3), which states that petitions for writ of certiorari to review post-conviction relief actions "shall not exceed twenty-five pages." The Warden asserts this is an independent and adequate state procedural rule. (*See* Dkt. No. 62 at 4.) However, the Warden also highlights that the reason offered by the South Carolina Supreme Court for dismissing Garvin's petition was two-fold—it was because Garvin failed to comply with the court's order **and** because he failed to comply with Rule 243(e)(3). (Dkt. No. 68 at 1.) Initially in addressing the procedural default of his claims, Garvin claimed South Carolina Appellate Court Rule 243(e)(3) was not an independent and adequate ground for dismissal. (Dkt. No. 58 at 240.) In the supplemental briefing on this issue, Garvin argues that the page-limit rule was not an independent and adequate state procedural rule because it was not regularly and consistently applied. (Dkt. No. 69 at 2–9.)

"A state rule is adequate if it is 'firmly established,' . . . and regularly and consistently applied by the state court, . . . and is independent if it does not 'depend[] on a federal constitutional ruling . . . ." *Weeks v. Angelone*, 176 F.3d 249, 270 (4th Cir. 1999) (quoting *James v. Kentucky*, 466 U.S. 255, 262 (1984); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)). As to who

bears the burden of demonstrating a state rule is independent and adequate, the Supreme Court has not decided that question, and the circuits are split. See Brian R. Means, *Postconviction Remedies* § 24:22 (August 2022 Update). "The Fourth Circuit places the burden on the petitioner, requiring him to point to 'a non-negligible number of cases' in which the state courts have not followed the procedural rule." *Id.* (quoting *McNeill v. Polk*, 476 F.3d 206, 213 (4th Cir. 2007); citing *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000) (petitioner must make a "colorable showing" that state procedural rule is not consistently and regularly applied)).

There is no question in this case that Rule 243(e)(3) is independent. (*See* Dkt. No. 69 at 6.) However, the parties disagree about whether it was adequate, which requires the rule to be both firmly established and regularly and consistently applied.

"As a general matter, an unambiguous court rule such as [a state appellate court's page-limit rule] is necessarily 'firmly established.'" *Weeks*, 176 F.3d at 270 (citing *O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir. 1996)). Rule 243(e)(3) is firmly established based on that criteria.

In making the inquiry into whether a rule is consistently and regularly applied, the Fourth Circuit has directed courts to consider "not whether the procedural rule is applied in all cases, but 'whether the particular procedural bar is applied consistently to cases that are procedurally analogous.'" *Woodfolk v. Maynard*, 857 F.3d 531, 544 (4th Cir. 2017) (quoting *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000)). In this case, the Warden submitted a list of forty-six cases filed since 2011 where PCR petitioners had moved to exceed the twenty-five page limit set by 243(e)(3). Twenty-one of those cases are readily distinguishable from Garvin's as they were death penalty cases. Of the remaining twenty-five cases, the motion to exceed the page limit was granted in twenty of them. (*See* Dkt. No. 68-1 at 1.) Even so, many of those cases are also

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distinguishable from Garvin's in that the they were consent motions made by counsel where the records were very large and there were quite a few issues raised. (*See id.* (*Bonner v. State*, 2017-000758 (raising an unsettled question); (*Tolen v. State*, 2013-001199 (where the motion was a consent motion, the appendix was over 900 pages long, and there were six issues raised); *Cutro v. State*, 2012-212782 (where the motion was a consent motion, and the record was over 5,000 pages with "numerous meritorious issues" having been raised in PCR)).) In any event, the fact that the state supreme court made exceptions to that rule does not demonstrate it was not regularly and consistently applied. *See Yeatts v. Angelone*, 166 F.3d 255, 263–64 (4th Cir. 1999) ("Consistent or regular application of a state rule of procedural default does not require that the state court show an 'undeviating adherence to such rule admitting of no exception,' . . . when the state procedural rule has, as 'a general rule, . . . been applied in the vast majority of cases[.]'" (internal citations omitted)). On the contrary, what these cases, both capital and non-capital, show is that the South Carolina Supreme Court required PCR petitioners to comply with the page limit rule or demonstrate why an exception was warranted.

It is notable that the motion to exceed the page limit set by Rule 243(e)(3) was denied in three cases in addition to Garvin's. (*See* Dkt. No. 68-1 at 1.) However, none of these cases is exactly analogous to his. Except for Garvin, in all of the other cases where the South Carolina Supreme Court denied the motion to exceed the page limit, the petitioner complied with the court's decision.[5] Indeed, neither party has offered an example of a case, other than Garvin's own, where a petitioner exceeded the page limit after their motion to do so was denied. *See*

[5] In one particular case, a petitioner, Bobby Joe Barton, did not raise all of his PCR claims in his subsequent PCR appeal due to the 25-page limit for PCR appeal petitions. When the claims he failed to raise were deemed procedurally defaulted in his federal habeas action, Barton asserted his *pro se* status and the 25-page limit for briefs prevented him from raising all of his claims. *Barton v. Lewis*, Civil Action No.: 9:18-cv-748-RBH, 2019 WL 1416887, at *7–8 (D.S.C. Mar.

Lebedun v. Baskerville, No. Civ.A. 00-1427-AM, 2001 WL 34803138, at *5 (E.D. Va. July 10, 2001) ("Simply pointing to the absence of case law interpreting and applying the rule does not suffice to exhibit its inconsistent and irregular application."); *see also McNeill v. Polk*, 476 F.3d 206, 212–13 (4th Cir. 2007) (finding a "for [a petitoner's] argument [that a state rule of procedure is not adequate] to succeed, [the petitioner] must point to 'a non-negligible number of cases' in which the [state] courts have" not enforced the rule). Nevertheless, the cases presented by the Warden generally evidence that Rule 243(e)(3) has been regularly and consistently followed in South Carolina in cases since at least 2011, and Garvin has not identified any cases where the South Carolina Supreme Court allowed a petitioner to proceed with their PCR appeal despite non-compliance with Rule 243(e)(3). *Cf. Dowdy v. Warden*, 1:12cv1460(GBL/IDD), 2013 WL 12153559, at *2 (E.D. Va. 2013) ("The Fourth Circuit has held that the rules imposing page limits constitute adequate and independent state-law grounds for decision." (citing *Weeks*, 176 F.3d at 271)).

In addition, as pointed out by the Warden, the South Carolina Supreme Court expressly stated it was dismissing Garvin's case "for Petitioner's failure to comply with Rule 243(e)(3) and this Court's order dated December 9, 2021." 01/18/2022 Order. Notably, Garvin had been warned when he decided to proceed *pro se* in his appeal that his failure to comply with the court's rules would result in the dismissal of his petition. He was given the chance to correct the problems with his petition, but he again declined to follow the court's rules. As outlined above, he failed to comply with the independent and adequate rule setting page limits on his petition, but he also failed to comply with the state court's order, which adds another basis for procedural default. To the extent Garvin's remaining claims are barred, he attempts to overcome the

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29, 2019). This Court rejected those arguments. *Id.*

procedural bar by arguing that he is actually innocent and that there is cause and prejudice that should excuse his failure to exhaust.

B. Petitioner's Allegation of Actual Innocence

1. Evidence Presented at Garvin's Trial

Garvin was tried and convicted for trafficking heroin. At trial, the State presented evidence that, on July 17, 2012, law enforcement officers arranged for a confidential informant, Frederick Jerman, to buy drugs from Garvin and a man named Jonathan Perez. (Dkt. No. 26-1 at 45–55.) Investigator Ken Hancock with the Spartanburg County Sheriff's Office testified that he prepared Jerman by providing him with equipment to record the drug deal and $4,200 with which to buy the drugs. (*Id.* at 48–50.) Hancock testified that he watched the drug deal from across the street. (*Id.* at 53–55.) Hancock observed a car pull up beside Jerman's car at a gas station. (*Id.* at 53–54.) Garvin got out of the car and went inside the convenience store. (*Id.* at 54.) Perez then got out of the car and walked around to Jerman's car and placed something that appeared to be a paper bag in the back seat and also got in Jerman's car himself. (*Id.*) As Perez was beginning to get out of Jerman's car, Garvin returned, and he and Jerman spoke. (*Id.*) Garvin and Perez then got in their car and left the gas station. (*Id.*) Jerman also left and met up with law enforcement agents to return the recording equipment and the video of the drug deal to them and to turn over the drugs. (*Id.*)

Jerman testified at trial and confirmed that he met with Garvin and Perez on July 17, 2012 and purchased heroin from them. (*Id.* at 62–68.) Jerman testified that Garvin approached his car at some point "[j]ust making sure that he had got paid and things of that nature." (*Id.* at 65.) Jerman also testified that when they interacted, he told Garvin, "fuck with me a couple more times and you don't have to be this nervous[,]" to which Garvin responded, "all right . . . ." (*Id.*

at 66.) The videotape Jerman recorded of the drug deal was played during Jerman's testimony.[6] (*Id.* at 63–67.)

David Pait, a special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), testified that Jerman was an ATF informant. (*Id.* at 89–90.) Pait was with Hancock during the drug deal. (*Id.* at 90.) Pait also gave Garvin his *Miranda* warning after his arrest but before Garvin gave a statement. (*Id.* at 91–93.) Pait and a South Carolina Law Enforcement Division ("SLED") agent, Ashley Asbill, were both present for Garvin's statement. (*Id.* at 93–96.) Asbill wrote the statement down for Garvin, and Garvin signed it. (*Id.* at 95.) Asbill testified that Garvin made the following statement:

> This guy known as Fred, "Fred" kept calling my roommate I know as Perez. Perez and "Fred" kept talking about delivering 15 bundles of heroin to Spartanburg. I took Perez yesterday to pick up 15 bundles from a guy that Perez knows. I put in $200 for this, for this 15 bundles. We bought four grams of heroin, and we worked it up to 15 grams of, with powdered sugar. We were coming to sell it for $280 per brick. All of this was done in [Henderson], North Carolina.

(*Id.* at 104.)

Garvin and Perez testified in Garvin's defense. Garvin testified that Perez asked for a ride to South Carolina, and he followed Perez's directions the day of the drug deal. (*Id.* at 127–28.) When they arrived at a gas station, Garvin went into the convenience store and paid for gas, then went back out to the car and pumped gas. (*Id.* at 110.) Garvin testified that on the way back to the car, he told Perez "to come on cause [he] had to go." (*Id.* at 110–11.) Garvin testified that he told the law enforcement agents that he did not know anything that happened and "all I did was bring him from North Carolina to South Carolina." (*Id.* at 112.) Garvin also testified he gave the agents some information about some people he knew in New Jersey. (*Id.* at 114.) Garvin testified

[6] Later, the jury was shown another recording of the drug deal that was made by a law enforcement officer from across the street. (Dkt. No. 26-1 at 80–82.)

that after he gave his statement, Asbill "had a bunch of papers in his hand, and then he like flipped the papers up," and Asbill gave Garvin the opportunity to read his statement and sign it. (*Id.* at 112.) At least, Garvin thought he was signing the paper with his statement, but Garvin testified the statement with his signature that had been presented at trial (excerpted above) was not the statement he signed. (*Id.* at 113.) Garvin testified he did not know how Asbill had gotten him to sign a different statement than the one he reviewed, but he demonstrated how Asbill had been holding multiple papers when he offered to have Garvin sign one. (*Id.* at 115–17.) According to Garvin, "It was like signing a blank check." (*Id.* at 117.)

Perez testified that on July 17, 2012, he called Garvin and asked Garvin to drive him to meet a friend in exchange for some gas money. (*Id.* at 130.) Perez knew Jerman but Garvin did not. (*Id.* at 131.) According to Perez, Garvin went into the store while Perez met with Jerman in Jerman's car. (*Id.* at 132.) Garvin stopped by the car to get Perez, then pumped gas, and then the two left. (*Id.*) Perez testified he purchased the heroin in North Carolina and added sugar to it. (*Id.* at 135.) Perez testified he never gave a statement to law enforcement and never told them about mixing the drugs with sugar. (*Id.* at 136–38.)

2. Evidence Presented in the PCR Evidentiary Hearing

In his PCR action, Garvin maintained he had been tricked into signing the statement attributed to him at trial. (Dkt. No. 26-12 at 67.) He further testified at his PCR evidentiary hearing that, in reviewing the evidence from his case, he had found a statement with Perez's name on it that contained the information he had testified that he provided to law enforcement when giving his statement. (*Id.* at 67, 78–79, 88–89, 92–94.)

During the hearing, Garvin produced two interview reports created by Asbill. (*Id.* at 238–54; *see also* Dkt. No. 58-2 at 1108–09.[7]) The reports were substantially identical, except one indicated it was a report from an interview with "Jonathan Garvin" and the other indicated it was a report from an interview with "Jonathan Perez." (Dkt. No. 26-12 at 238–54.) Asbill testified that he made a scrivener's error with the last name in the document, which explained why there was one with the last name Perez and the other with the last name Garvin. (*Id.* at 241–42.) Asbill initially recalled that Perez refused to give a statement, but he offered information about a large-scale drug operation in Allentown, Pennsylvania. (*Id.* at 242–43.) When told about Perez's testimony that he never gave a statement to law enforcement, Asbill indicated the information must have come from Garvin. (*Id.* at 243–44.) Asbill indicated the interview report "was generated back at the office" based on Asbill's notes, and, therefore, it would not have been available for Garvin to read and sign at the time of his statement. (*Id.* at 244.) Later, Asbill confirmed that the information in the report reflected an interview with Garvin, and Asbill testified he did not recall speaking with Perez. (*Id.* at 248.) Asbill also testified that Garvin gave him a separate, voluntary statement, which Asbill handwrote, and Garvin signed. (*Id.* at 249–52.)

Trial counsel testified he did not recall a discussion where Garvin told him the information in a statement attributed to Perez was the information Garvin told agents. (*Id.* at 147.)

As part of Garvin's claim of prosecutorial misconduct, the PCR court considered the assertion "that Agent Ashley Asbill fabricated evidence and provided perjured testimony regarding the applicant having provided a voluntary statement which implicated him in the crime

[7] Copies of these statements, which were admitted during the PCR evidentiary hearing as Applicant's Exhibits, are not included in the state court record filed by the Warden. However, they are part of the documents provided by Garvin to this Court.

for which he stood trial and was convicted." (Dkt. No. 26-13 at 17.) The PCR court made the following findings regarding Garvin's claim:

> Aside from Applicant's own testimony, there has been presented no evidence tending to establish that the State's witnesses provided perjured or false testimony, fabricated evidence used against the applicant in his trial, or that the prosecutor fraudulently or improperly relied upon that testimony in the prosecution of the applicant's case.

(*Id.* at 18.)

3. Garvin's Allegation of Actual Innocence

Garvin asserts he is actually innocent of the crime of trafficking heroin. In particular, he asserts as follows:

> Petitioner Garvin's presentation of two Report of Interviews, (see Pet. Ex. – 1: Appx. Pp. 1097–1098), conducted by SLED Agent, Ashley Asbill, shows that extrinsic fraud was committed upon the court, thus, discrediting the State's most incriminating documented evidence against him, an alleged inculpatory confession statement, (see Pet. Ex. – 1: Appx. P. 1100), in an entirely circumstantial case, plus the record shows that, Asst. Solicitor, James E. Hunter and Petitioner's trial attorney, Scott D. Robinson, Esquire, did conspire to convict Petitioner, which should have led the PCR court to find that such a showing undermines the confidence in the outcome of his trial sufficiently so that no reasonable juror knowing of all of this evidence existed would persist in believing Petitioner Garvin is guilty beyond a reasonable doubt.

(Dkt. No. 58 at 250.) Thus, his claims of actual innocence appear to be based upon the same allegations he raised at trial—that he was tricked into signing a confession—and that he later built upon in his PCR action when he alleged that the two substantially identical interview reports demonstrated Asbill committed fraud and tricked him into signing a confession.

A habeas petitioner's actual innocence is a valid (though rarely established) basis for excusing the untimeliness of his filing. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The key to an actual-innocence claim is the submission of "'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—

that was not presented at trial.'" *Hayes v. Carver*, 922 F.3d 212, 216 (4th Cir. 2019) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). To get the actual-innocence exception, the petitioner must show that, "in light of all the evidence, old and new, it is more likely than not that no reasonable juror would have voted to find him guilty beyond a reasonable doubt." *Id.* at 217 (quoting *Finch v. McKoy*, 914 F.3d 292, 298–99 (4th Cir. 2019)); *see also McQuiggin*, 569 U.S. at 401 (stressing this standard "is demanding").

As an initial matter, this evidence—specifically, the two interview reports created by Asbill—is not new. Although those interview reports were not introduced at trial, they were apparently part of the discovery provided to trial counsel since they were part of his file that Garvin eventually reviewed in full for his PCR action. (*See* Dkt. No 26-12 at 67, 78–79, 254.)

Additionally, the creation of the interview reports and the implication of those reports were fully considered by the PCR court, and the PCR court found there to be "no evidence tending to establish that the State's witnesses provided perjured or false testimony, fabricated evidence used against the applicant in his trial . . . ." (Dkt. No. 26-13 at 18.) Thus, the PCR court did not accept Garvin's version of events that Asbill tricked him in signing the handwritten confession and that the two interview reports were further evidence of Asbill's fraud. The PCR judge specifically questioned Asbill about how there came to be two identical reports attributed to two different people:

THE COURT:	Let me just try to clear up something if I can for my own benefit. Let me ask the witness if you'll look at Applicant's Exhibits 1 and 2.
THE WITNESS:	Yes, sir.
THE COURT:	Each of those appear to be a report of an interview.
THE WITNESS:	Yes, sir.

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THE COURT: Page one of one. The contents appear to be identical—

THE WITNESS: That's correct.

THE COURT: —except for the name of the person who is the subject of the interview.

THE WITNESS: Yes, sir.

THE COURT: And one says Jonathan Perez; one says Jonathan Garvin.

THE WITNESS: Yes, sir.

THE COURT: Let me ask Mr. Garvin and Mr. James. Was Perez charged as a codefendant with Mr. Garvin?

THE APPLICANT: Yes, sir.

THE COURT: Okay. And Mr. Perez's name was Jonathan Perez? Is that true? I mean, can we agree on that?

THE APPLICANT: Yes.

MR. JAMES: That is my understanding, Your Honor.

THE COURT: Okay. All right. So understanding that Mr. Garvin is John D. Garvin and Mr. Perez is Jonathan Perez, this interview is an interview of what subject or what person or persons?

THE WITNESS: The—the report of interview marked as Applicant's Exhibit No. 2 is the one from John Garvin and that's—that is the one that I typed up based on the notes talking to him.

THE COURT: All right. And what is the other Applicant's Exhibit 1? What is that?

THE WITNESS: Okay. That is the—where I inadvertently wrote Perez, typed in Perez and not Garvin.

THE COURT: And so you redid it? Is that what I'm understanding?

THE WITNESS: That's correct. I corrected it, yes, sir. . . . And must not have got pulled out of the case file, is the only thing I can think of. And when it was submitted to the solicitor's office this was in there.

(Dkt. No. 26-12 at 252–54.) The PCR court apparently accepted that explanation based on its rejection of Garvin's claim that the State fabricated evidence. (*See* Dkt. No. 26-13 at 17–18.)

While Garvin asserts that the existence of these two documents points to some larger fraud, he has failed to establish a connection between the two interview reports, which were created by Asbill after Garvin confessed, and the statement Garvin alleges he was tricked into signing. At most, the notes lend credence to Garvin's testimony that he told the agents about out-of-state drug activity, but they do not establish that a bait-and-switch occurred where Asbill held a stack of papers in such a way that Garvin was tricked into signing a different statement than what he told police. Moreover, while Garvin's confession was strong evidence of his guilt, there was also video evidence of the drug deal and testimony by a confidential informant and law enforcement officers who witnessed the drug deal. *See Hayes*, 922 F.3d at 217 (where "none of [the] evidence contradicts, or even undermines, the essential testimony of the identifying witnesses or the State's other evidence," the petitioner does not meet the stringent standard for establishing actual innocence). The undersigned cannot say that in light of the "new" and old evidence, it is more likely than not that no reasonable juror would have found Garvin guilty beyond a reasonable doubt. Garvin has failed to meet the high standard for demonstrating actual innocence. He cannot overcome the procedural bar of his claims on that basis.

C. Other Allegations of Cause and Prejudice

Garvin further asserts that his "low level of competence constitutes 'cause' for his failure to adhere to the State procedural rule that see's issues not briefed on appeal to be waive." (Dkt. No. 58 at 242.) The record demonstrates Garvin completed eighth grade, but he subsequently received his GED, and he went to college for a year. (Dkt. No. 26-1 at 109.) He has also filed extensive briefing, which includes citations to legal authority and complex arguments, in this

Court and in the state courts. Garvin's claims of low competence are questionable. Moreover, Garvin elected to proceed *pro se* in his PCR appeal (and in his PCR action) despite being specifically warned by the state courts of the hazards of proceeding *pro se*.[8] Finally, this Court and many others have rejected the argument that a petitioner's *pro se* status and lack of sophistication constitutes cause:

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

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[8] Prior to granting Garvin's motion, the South Carolina Supreme Court specifically warned him as follows:

> [I]t is not apparent from Petitioner's motion that he is fully aware of the dangers and disadvantages of proceeding pro se. We therefore take this opportunity to warn Petitioner that if he chooses to proceed pro se, this Court will require full compliance with all applicable rules and procedures. Failure to comply with such rules and procedures could result in the dismissal of the matter and forfeiture of the right to discretionary review. Petitioner is certain to be unlearned in other aspects of the law as well. Representation by an attorney trained in the law would be highly beneficial, and we strongly encourage Petitioner to continue with representation by [counsel].

Non-Dispositional Decision – Order, App. Case No. 2020-001418 (Jan. 25, 2021). Garvin responded to the order with a letter affirming he did not believe counsel's representation "would be highly beneficial or in [his] best interested" and, further, that he was waiving counsel "knowingly and intelligently . . . fully aware of the dangers and disadvantage of proceeding pro-se." Correspondence – Incoming Response to(Order), App. Case No. 2020-001418 (Feb. 16, 2021).

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Barton v. Lewis, Civil Action No. 9:18-cv-748-RBH, 2019 WL 1416887, at *8 (D.S.C. Mar. 29, 2019). Garvin's arguments that his "low level of competence" should serve as cause to excuse his failure to exhaust are unavailing.

As detailed above, the State Supreme Court gave Garvin multiple opportunities to submit a brief that complied with the state appellate court rule that petitions for writ of certiorari from PCR cases be limited to twenty-five pages or less.[9] Garvin refused to comply, and his refusal resulted in his failure to exhaust his PCR claims. He has failed to demonstrate cause and prejudice for his failure to exhaust or that some fundamental miscarriage of justice will occur if his claims are not considered. *See Harper v. Ballard*, 2014 WL 4470636, at *7 (S.D.W. Va. Sept. 10, 2014) ("Harper's obstinate refusal to comply with the West Virginia Supreme court's forty-page limit simply does not constitute good cause for failing to perfect his appeal, particularly where the page limit 'is itself a reasonable and consistently applied state procedural rule.'" (quoting *Weeks v. Angelone*, 176 F.3d 249, 272 (4th Cir. 1999))). Accordingly, the procedural bar must stand.

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[9] Garvin further imputes error to the South Carolina Supreme Court for their denial of his motions to exceed the page limit. To the extent Garvin is asserting that the South Carolina Supreme Court did not comply with state rules, that is not a matter for this Court's consideration. "[T]here is no federal right to appeal a state conviction, and state appellate procedures and processes are matters left to the states' discretion." *Lyles v. Reynolds*, C/A No.: 4:14-cv-1063-TMC-TER, 2016 WL 1445091, at *23 (D.S.C. Jan. 28, 2016) (citing *Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *McKane v. Durston*, 153 U.S. 684, (1894) ("[W]hether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself.")), *adopted by* 2016 WL 1211693 (D.S.C. Mar. 29, 2016).

Garvin also asserts the South Carolina Supreme Court should have granted him leave to file excess pages, referencing another case where the South Carolina Supreme Court granted motions to exceed the general, twenty-five-page limit in a PCR appeal, but that case is readily distinguishable from Garvin's as it was a death penalty case where the court was considering a matter of first impression. *See Robertson v. State*, 795 S.E.2d 29 (S.C. 2016). In *Robertson*, the South Carolina Supreme Court was considering whether to "create a state remedy that [was] the

For all of the above reasons, the undersigned recommends the Warden's motion for summary judgment be granted. Because Petitioner has failed to exhaust his state court remedies, and the remaining grounds are procedurally barred, the Court cannot consider their merits. *See Trevino v. Thaler*, 569 U.S. 413, 421 (2013) ("[W]here a conviction rest upon [an independent and adequate state ground], a federal habeas court normally cannot consider the defendant's federal constitutional claim." (citing *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991))).

III. Request for an Evidentiary Hearing

Garvin has requested an evidentiary hearing to further develop his factual allegations. The undersigned finds an evidentiary hearing is not needed at this stage if the recommendations in this report are adopted. Garvin has failed to demonstrate that further factual development would lead to a different recommendation as to any of his grounds for relief. Moreover, he has failed to show that § 2254(e)(2) permits such a hearing in this case. Consequently, Garvin's request for an evidentiary hearing is denied.

IV. Motion for Declaratory Judgment

Garvin has filed a motion asking this Court for "a declaratory judgment to determine the legality and constitutionality of Spartanburg County Grand Jury process. . . ." (Dkt. No. 63 at 1.) The Warden has filed a response in opposition. (Dkt. No. 64.) The Warden further asks this Court to hold the motion for declaratory judgment and any other motions by Petitioner in abeyance until the Court rules on the Warden's motion for summary judgment. (Dkt. No. 64 at 2.)

Based on the undersigned's review, Garvin's motion for a declaratory judgment is essentially a restatement of his Ground Five, where he alleges the grand jury lacked subject

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equivalent of the federal remedy established by *Martinez*[*v. Ryan*, 566 U.S. 1 (2012)]."

matter jurisdiction based on a number of alleged errors in the state court process. As set forth above, that ground is not cognizable in federal habeas corpus, and the undersigned has recommended summary judgment on Ground Five for that reason. *See Hartman v. Lee*, 283 F.3d 190, 195 (4th Cir. 2002) ("[T]he Fifth Amendment requirement of indictment by grand jury does not apply to the states . . . ."); *Riggleman v. West Virginia*, Civil Action No. 2:04 CV 80, 2007 WL 984218, at *6 (N.D.W. Va. Mar. 29, 2007) (finding "claims that a grand jury proceeding [was] defective do not warrant § 2254 relief because there is no federal constitutional right to a grand jury indictment for a state offense" (citing *Hurtado v. California*, 110 U.S. 516 (1884); *Keely v. Peyton*, 420 F.2d 912 (4th Cir. 1969)). The undersigned would similarly recommend the motion for declaratory judgment be denied. As to the Warden's motion to hold future motions in abeyance pending the disposition of the Warden's motion for summary judgment, that is denied. The motion to strike that motion (Dkt. No. 67) is likewise denied.

V. Motion to Amend

As discussed above, Garvin's motion to amend is futile. *See supra* pp. 13–14. As such, it is denied.

Certificate of Appealability

If the Warden's summary judgment motion is granted, the District Judge will need to decide whether to issue a certificate of appealability. *See* Rule 11(a), Rules Governing § 2254 Cases. A certificate may be issued only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a petitioner's constitutional claims have been denied on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El v.*

Robertson, 795 S.E.2d at 37.

Cockrell, 537 U.S. 322, 338 (2003) (citation and quotation marks omitted). The undersigned sees no reason to grant a certificate of appealability and would, therefore, recommend denying the certificate of appealability.

CONCLUSION

Garvin's request for an evidentiary hearing and motions to strike and to amend (Dkt. Nos. 67, 70) are denied. The Warden's motion to hold all motions in abeyance until a decision on the motion for summary judgment is also denied.

For the above reasons, the undersigned recommends the Warden's motion for summary judgment be granted (Dkt. No. 53), Garvin's motion for a declaratory judgment be denied (Dkt. No. 63), and the petition be dismissed with prejudice. The undersigned further recommends the certificate of appealability be denied.

March 7, 2023
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

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

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

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

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

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