

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COREY JAWAN ROBINSON _____ PETITIONER

VS.

JOSEPH MCFADDEN _____ RESPONDENTS

APPENDIX

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PRO SE PETITIONER

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FILED: February 1, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7050
(5:14-cv-04718-JMC)

COREY JAWAN ROBINSON

Petitioner - Appellant

v.

JOSEPH MCFADDEN, Warden

Respondent - Appellee

J U D G M E N T

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

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

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-7050

COREY JAWAN ROBINSON,

Petitioner - Appellant,

v.

JOSEPH MCFADDEN, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Orangeburg. J. Michelle Childs, District Judge. (5:14-cv-04718-JMC)

Submitted: January 30, 2018

Decided: February 1, 2018

Before MOTZ and KEENAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Corey Jawan Robinson, Appellant Pro Se. Donald John Zelenka, Deputy Attorney General, William Edgar Salter, III, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

UNPUBLISHED**UNITED STATES COURT OF APPEALS
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COREY JAWAN ROBINSON,

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Before MOTZ and KEENAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Corey Jawan Robinson, Appellant Pro Se. Donald John Zelenka, Deputy Attorney General, William Edgar Salter, III, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Corey Jawan Robinson seeks to appeal the district court's orders accepting in part the first recommendation of the magistrate judge and accepting the second recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2012) petition. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). 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) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). 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. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Robinson has not made the requisite showing. Accordingly, we deny as moot Robinson's motion to stay the appeal pending resolution of his Fed. R. Civ. P. 59(e) motion, deny his motion for a certificate of appealability, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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

Corey Jawan Robinson,	)	
	)	
Petitioner,	)	Civil Action No.: 5:14-cv-04718-JMC
	)	
v.	)	ORDER AND OPINION
	)	
Joseph McFadden, Warden,	)	
	)	
Respondent.	)	
	)	

Petitioner Corey Jawan Robinson ("Petitioner"), a state prisoner, filed this *pro se* Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 alleging thirteen numbered Grounds for relief. (ECF No. 1.) In Grounds Nine, Ten, and Eleven, respectively, Petitioner alleges that the trial court erred by not granting his motion to suppress evidence, by not granting his motion for directed verdict on the ground that the prosecution had failed to prove his actual or constructive possession of the drugs at issue in his case, and by allowing him to appear *pro se* at trial when he had not waived his right to counsel. (*Id.* at 19-21.) In Ground Seven, Petitioner alleges that his trial counsel rendered ineffective assistance of counsel ("IAC") by failing to properly argue a motion to suppress and to request a *Franks*¹ hearing. (*Id.* at 17.) In Grounds One, Two, Three, and Four, respectively, Petitioner alleges that his counsel in his direct appeal rendered IAC by failing to file a merits brief on the issues of whether drugs used as evidence in Petitioner's trial should have been suppressed, whether a directed verdict was warranted because Petitioner was entitled to flee from an arresting officer who lacked reasonable suspicion to detain him, whether a directed verdict was warranted because of the prosecution's failure to prove actual or constructive possession of the

¹ *Franks v. Delaware*, 438 U.S. 154 (1978).

drugs as an essential element of the crime, and whether the trial court abused its discretion in admitting physical evidence over Petitioner's objection. (*Id.* at 6-14.) In Grounds Five, Six, Eight, Twelve, and Thirteen, respectively, Petitioner alleges that his counsel during post-conviction relief ("PCR") proceedings rendered IAC by failing to subpoena a video recording from a police car's camera, request a *Franks* hearing, and move for a continuance; failing to preserve prosecutorial misconduct and newly-discovered-evidence claims by filing a S.C. App. Ct. R. 59(e) motion; failing to conduct a substantial investigation of the record and amend the PCR application to include claims that the trial court erred in not granting Plaintiff's motion for a new trial and that appellate counsel rendered IAC by not raising this issue in a merits brief; failing to conduct a substantial investigation of the record after new evidence demonstrated prosecutorial misconduct and a *Brady*² violation; and failing to conduct a substantial investigation of the record after new evidence demonstrated prosecutorial misconduct under American Bar Association standards. (*Id.* at 15-16, 18, 22-23.)

This matter is before the court on Respondent Joseph McFadden's ("Respondent") Motion for Summary Judgment (ECF No. 47.)³ In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02 D.S.C., the matter was referred to United States Magistrate Judge Kaymani D. West, for pre-trial handling. On March 2, 2016, the Magistrate Judge issued a Report and Recommendation recommending the court grant Respondent's Motion for Summary Judgment and deny the Petition. (ECF No. 58.) This review considers Petitioner's Objections to the Report and Recommendation

² *Brady v. Maryland*, 373 U.S. 83 (1963).

³ Respondent filed an initial Return and Motion for Summary Judgment on March 30, 2015. (ECF Nos. 23, 24.) The Magistrate Judge instructed Respondent to withdraw the initial filings and re-file them so that certain omitted pages would be contained in the re-filed Return. (ECF No. 42.) Respondent re-filed the Return and Motion for Summary Judgment on November 25, 2015. (ECF Nos. 46, 47.)

("Objections") (ECF No. 64), Respondent's response thereto (ECF No. 66), and Petitioner's reply (ECF No. 68). For the reasons set forth herein, the court **ACCEPTS IN PART** and **REJECTS IN PART** the Magistrate Judge's Report and Recommendation (ECF No. 58), **GRANTS IN PART** and **DENIES IN PART** Respondent's Motion for Summary Judgment (ECF No. 46), **DENIES** Grounds One through Nine and Eleven through Thirteen of the Petition (ECF No. 1), and **REMANDS** the matter to the Magistrate Judge.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The court concludes upon its own careful review of the record that the factual and procedural summation in the Report and Recommendation is accurate, except in one respect discussed below, and, aside from this exception, the court adopts the summary. The court will only recite herein facts pertinent to the analysis of Petitioner's Objections.

The Magistrate Judge determined that Petitioner's claims under Grounds Two, Three, Four, Five, Six, Seven, Eight, Ten, Twelve, and Thirteen are procedurally barred because Petitioner has failed to exhaust the claims in state court, and the claims could no longer be raised there. (ECF No. 58 at 24.); *see generally Woodford v. Ngo*, 548 U.S. 81 (2006); *Hedrick v. True*, 443 F.3d 342 (4th Cir. 2006). With respect to Grounds Two, Three, Four, Seven, and Ten, the Magistrate Judge determined that, although Petitioner asserted that his failure to raise the claims should be excused under *Martinez*,⁴ that case was of no aid to Petitioner because he failed to assert that the cause for his failure to raise the claims was his PCR counsel's error. (ECF No. 58 at 25.) With respect to Grounds Five, Six, Eight, Twelve, and Thirteen, she determined that *Martinez* did not apply because none of the underlying defaulted claims involved trial counsel's IAC. (*Id.* at 26-28.) The Magistrate Judge further found with respect to all of these Grounds that Petitioner had otherwise

⁴ *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012).

failed to demonstrate that cause and prejudice or a miscarriage of justice excused his procedural default. (*Id.* at 25-26.)

The Magistrate Judge determined that the Ground One claim should be denied on the merits because the PCR court's decision to deny Petitioner's claim that his appellate counsel rendered IAC by not filing a merits brief on the issue of whether the drugs at issue in his case should have been suppressed was not an unreasonable application of clearly established federal law. (*Id.* at 29 (citing *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986); *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985); *Southerland v. State*, 524 S.E.2d 833, 836 (1999)).) Regarding Petitioner's Ground Nine claim, the Magistrate Judge noted that a state trial court's decision not to suppress evidence over Petitioner's objection based on the Fourth Amendment is not reviewable in a § 2254 proceedings so long as the state provided a mechanism for the Fourth Amendment argument to be heard and Petitioner's opportunity to fully and fairly present the argument through the mechanism was not impaired. (*Id.* at 31 (citing *Stone v. Powell*, 428 U.S. 465, 489-95 (1976); *Doleman v. Murphy*, 579 F.2d 1258, 1265 (4th Cir. 1978)).) The Magistrate Judge determined that, because the state provided a mechanism to address the argument and because Petitioner was afforded an opportunity to fully and fairly present it, the claim was not cognizable. (*Id.*) The Magistrate Judge determined that Petitioner procedurally defaulted his Ground Eleven claim because he failed to raise at trial any argument regarding his waiver of his right to counsel. (*Id.* at 32-33 (citing *Weeks v. Angelone*, 176 F.3d 249, 269 (4th Cir. 1999); *Howard v. Moore*, 131 F.3d 399, 420 (4th Cir. 1997); *McKenzie v. Cartledge*, No. 8:13-CV-02488-RBH, 2014 WL 3919711, at *2 (D.S.C. Aug. 11, 2014)).)

II. LEGAL STANDARD AND ANALYSIS

A. Standard of review

The Magistrate Judge's Report and Recommendation is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See Matthews v. Weber*, 423 U.S. 261, 270-71 (1976). This court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objections are made, and the court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation, or recommit the matter with instructions. *See* 28 U.S.C. § 636(b)(1).

B. The exhaustion requirement

"Before seeking federal habeas review of a claim, a [state prisoner] ordinarily must raise that claim in the state court, complying with state procedural rules and exhausting available state remedies." *Gray v. Zook*, 806 F.3d 783, 797-98 (4th Cir. 2015) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). "It is the general rule that after issues have been properly presented on direct appeal from a conviction to the highest state court to which resort may be had, a federal habeas petitioner will be deemed to have fully complied with the exhaustion requirement, since further resort to state courts may fairly be considered futile after the state's highest court has passed on the issues presented." *Thomson v. Peyton*, 406 F.2d 473, 474 (4th Cir. 1968) (per curiam); accord *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); cf. *Lyons v. Weisner*, 247 F. App'x 440, 446 n.4 (4th Cir. 2007) (explaining petitioner "exhausted his claim by raising it on direct appeal [even though he did not raise it in state post-conviction proceeding], which is sufficient in North Carolina to exhaust a claim for federal habeas purposes").

The South Carolina Supreme Court has held that the presentation of claims to the South Carolina Court of Appeals, alone, is sufficient to exhaust state remedies for federal habeas corpus review. *State v. McKennedy*, 559 S.E.2d 850 (S.C. 2002); *see also In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E.2d 454 (S.C. 1990). In *McKennedy*, the South Carolina Supreme Court specifically held that *In re Exhaustion* had placed discretionary review by the South Carolina Supreme Court “outside of South Carolina’s ordinary appellate review procedure pursuant to *O’Sullivan*.” 559 S.E.2d at 854. Accordingly, a claim would not be procedurally barred from review in this court for failure to pursue review in the South Carolina Supreme Court after an adverse decision in the South Carolina Court of Appeals, either after a direct appeal or after pursuing relief in a PCR application.

In order to exhaust state remedies, a § 2254 petitioner must provide the state “the ‘opportunity to pass upon and correct alleged violation of . . . federal rights.’” *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam)). “To provide the State with the necessary ‘opportunity,’ the [petitioner] must ‘fairly present’ his claim in each appropriate state court . . . , thereby alerting that court to the federal nature of the claim.” *Id.* “[O]rdinarily a state prisoner does not ‘fairly present’ a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim.” *Id.* at 32.

C. The court’s evaluation

Although Petitioner’s objections are rambling and lack clarity, because he is a *pro se* litigant, the court is required to liberally construe his arguments. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Even liberally construed, however, the court concludes, with one exception, that Petitioner’s objections are either conclusory, irrelevant, or merely rehash the arguments that

were already before the Magistrate Judge based on the state court records and the parties' contentions contained in their memoranda, responses, and replies. Because the court perceives no clear error in the Magistrate Judge's determinations against which Petitioner lodges only conclusory objections, those objections must be overruled.⁵ Furthermore, as the remainder of Plaintiff's objections merely repeat the evidence and arguments presented to the Magistrate Judge, which the Magistrate Judge thoroughly considered and correctly assessed,⁶ the court overrules Plaintiff's objections and accepts the Magistrate Judge's Report and Recommendation without elaboration except for the objection discussed below. *See In re Brady-Zell*, 756 F.3d 69, 71 (1st Cir. 2014) ("[W]hen lower [tribunal]s have supportably found the facts, applied the appropriate legal standards, articulated their reasoning clearly, and reached a correct result, a reviewing court ought not to write at length merely to hear its own words resonate."); *accord Moses v. Mele*, 711 F.3d 213, 215-16 (1st Cir. 2013); *In re Curry*, 509 F.3d 735, 735 (6th Cir. 2007); *Nichols v. Reno*, 124 F.3d 1376, 1378 (10th Cir. 1997).

Only one objection lodged by Petitioner warrants discussion. In his Ground Ten claim, Petitioner alleges that the "Trial Judge erred in not granting [his] motion for direct verdict [based on the prosecution's] failure to prove actual or constructive possession [of the drugs at issue]." (ECF No. 1 at 20.) The Magistrate Judge determined that Petitioner failed to exhaust this claim by

⁵ The vast majority of these conclusory objections involve Petitioner's unsupported assertions that he demonstrated cause and prejudice sufficient to excuse his procedurally defaulting 11 of his 13 claims.

⁶ The vast majority of these objections involve arguments that the Magistrate Judge incorrectly determined that Petitioner procedurally defaulted 11 of his 13 claims by failing to raise them to the highest state court to adjudicate his direct appeal or his PCR proceeding. His remaining arguments regarding the two claims that the Magistrate Judge addressed on the merits either were correctly rejected by the Magistrate Judge or do not challenge her reasons for recommending denial.

not raising it in the appropriate state court. However, Petitioner objects to this determination, arguing that he raised the claim on direct appeal. (ECF No. 68 at 2 (citing ECF No. 46-2 at 8-20).) In his *pro se* brief to the South Carolina Court of Appeals—on which the Magistrate Judge relied in determining that Petitioner had exhausted claims under Grounds Nine and Eleven (ECF No. 58 at 24)—Plaintiff stated the issue on appeal:

The lower court erred in allowing arresting officer to make an illegal arrest without probable cause, which result from illegal detention, illegal search and illegal seizure of an unlawful arrest and denial of motion to suppress. *State failed to prove actual possession by defendant of crack cocaine and marijuana found in bag on ground near where defendant was apprehended, state failed to prove constructive possession by defendant of crack cocaine and marijuana, defendant was entitled to judgment of acquittal* Appellant raise the facts, errors and prejudice on the grounds of false testimonies of witnesses, grounds of violation of motion in limine, hearsay evidence and money as evidence. The lower court erred in not granting appellant motion to quash the warrants and the defective of the COR code in the indictments. Errors in appellant sentencing sheet for possession with intent to distribute cocaine base.

(ECF No. 46-2 at 8 (emphasis added).) In the argument section of the brief, Petitioner isolated the claim by setting forth the italicized language above as the header of a separate argument. (*Id.* at 12). The court concludes, based on this language, that Petitioner, in fact, raised the claim contained in Ground Ten in his *pro se* brief filed in his direct appeal.

The court further concludes that, by raising the Ground Ten claim on direct appeal, Petitioner satisfied the exhaustion requirement for the claim. First, he received an adverse ruling on the claim from the South Carolina Court of Appeals (ECF No. 46-2 at 23), such that he presented the claim to the highest state court necessary for purposes of exhaustion. *See McKennedy*, 559 S.E.2d at 854; *In re Exhaustion*, 471 S.E.2d 454. Petitioner fairly presented the claim by placing it squarely in the statement of the issue and separately addressing it in a subsection of his *pro se* appellate brief. *See Baldwin*, 541 U.S. at 29. Moreover, the claim Petitioner presented

was one for a violation of federal constitutional law. *See West v. Wright*, 931 F.2d 262, 266 (4th Cir. 1991) (“Any challenge to the sufficiency of the evidence to convict in a state prosecution is necessarily a due process challenge to the conviction.”), *rev’d on other grounds Wright v. West*, 505 U.S. 277 (1992). Accordingly, Petitioner satisfied the exhaustion requirement, and denial based on failure to exhaust is inappropriate.

The court notes that Respondent moved for summary judgment with respect to the Ground Ten claim on various grounds, some procedural and some merits-based (*see* ECF No. 46 at 22, 54.), and that the Report and Recommendation does not contain a description of the factual and procedural background from which resolution on these grounds easily could be had. The court also notes that both parties’ submissions with respect to the Ground Ten claim are rather terse compared to their discussion on other claims. The court believes it is in the interests of expeditious adjudication for Respondent’s summary judgment motion to be denied without prejudice as to Ground Ten so that it may refile the motion and the court may have more fully developed argument on the issue.

III. CONCLUSION

Upon careful consideration of the entire record, the court **ACCEPTS IN PART** and **REJECTS IN PART** the Magistrate Judge’s Report and Recommendation (ECF No. 58). Respondent’s Motion for Summary Judgment (ECF No. 47) is **GRANTED IN PART** with respect to Grounds One through Nine and Eleven through Thirteen and **DENIED IN PART WITHOUT PREJUDICE** with respect to Ground Ten. Grounds One through Nine and Eleven through Thirteen of Petitioner’s Petition for a Writ of Habeas Corpus (ECF No. 1) are **DENIED**. This matter is **REMANDED** to the Magistrate Judge for consideration of any further motions and briefings in accordance with this order.

Certificate of Appealability

The law governing certificates of appealability provides that:

(c)(2) A certificate of appealability may issue... only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability... shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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

IT IS SO ORDERED.



United States District Judge

September 30, 2016
Columbia, South Carolina

PER CURIAM:

Corey Jawan Robinson seeks to appeal the district court's orders accepting in part the first recommendation of the magistrate judge and accepting the second recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2012) petition. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). 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) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). 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. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Robinson has not made the requisite showing. Accordingly, we deny as moot Robinson's motion to stay the appeal pending resolution of his Fed. R. Civ. P. 59(e) motion, deny his motion for a certificate of appealability, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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

Corey Jawan Robinson,

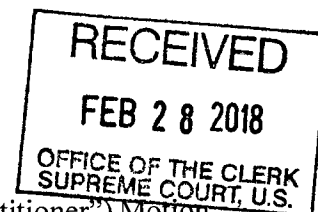
Petitioner,

v.

Joseph McFadden, Warden,

Respondent.

Civil Action No.: 5:14-cv-04718-JMC

ORDER AND OPINION

This matter is before the court on Petitioner Corey Jawan Robinson's ("Petitioner") Motion to Show Cause and Motion to Alter and/or Amend the District [Court's] [August 7, 2017] Final Order (ECF No. 95) accepting the Magistrate Judge's March 30, 2017 Report and Recommendation ("Second Report") (ECF No. 84). (ECF Nos. 105, 106.) For the reasons stated below, the court **GRANTS** Petitioner's Motion to Show Cause and Motion to Alter and/or Amend the court's Order, but still **ACCEPTS** the Magistrate Judge's Second Report **GRANTING** Respondent's Motion for Summary Judgment (ECF No. 78) as to Ground Ten and further **DENYING** Petitioner's Petition for Writ of Habeas Corpus ("Petition") (ECF No. 1) as to the same. Additionally, the court finds that Petitioner's Motion to Stay Pending Certificate of Probable Cause and Appealability (ECF No. 107) is **MOOT**.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2008, a Grand Jury indicted Petitioner for possession with intent to distribute cocaine base, possession of marijuana with intent to distribute, and assault while resisting arrest in Georgetown County, South Carolina ("the State"). (ECF No. 46-3 at 78, 84, 90.) On March 16, 2009, Petitioner's trial for these charges commenced, and Attorney C. Reuben Goude represented

him. (ECF No. 46-1 at 3.) Petitioner was tried before the Honorable Steven H. John. (*Id.*) After Judge John ruled on several motions raised at the beginning of trial, Petitioner made a Motion to Relieve his counsel and proceed *pro se*. (*Id.* at 41-50.) After questioning Petitioner about his Motion and informing him of his trial rights, Judge John granted Petitioner's Motion to represent himself, relieving Attorney Goude as Petitioner's counsel. (*Id.* at 49-50.)

At the conclusion of Petitioner's trial, a jury found Petitioner guilty of possession of crack cocaine with intent to distribute, possession with intent to distribute marijuana, and assault of an officer while resisting arrest. (*Id.* at 194-95.)¹ Petitioner was sentenced to concurrent sentences of fifteen years imprisonment for possession with intent to distribute cocaine base, ten years imprisonment for possession with intent to distribute marijuana, and ten years imprisonment for assault on a police officer while resisting arrest. (*Id.* at 201.)

On March 20, 2009, Petitioner filed an appeal in the South Carolina Court of Appeals. (ECF No. 46-4 at 1.) Deputy Chief Appellate Defender Wanda H. Carter represented Petitioner on direct appeal, filing an *Anders* Brief² and a Petition to be Relieved as Counsel on December 29, 2009. (ECF No. 46-1 at 205-213.) On January 12, 2010³, Petitioner filed a *Pro Se* Appellant

¹ The Grand Jury's indictment uses different wording than the jury's verdict and the trial judge's sentencing to describe the charges against Petitioner, specifically as to the distinctions between "cocaine base" and "crack cocaine," or "assault while resisting arrest" and "assault on a police officer while resisting arrest."

² *Anders v. State of Cal.*, 386 U.S. 738, 744 (1967) ("[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.")

³ The Clerk's Office received this Brief on January 19, 2010. The date that a Prisoner mails a document serves as the filing date, not when it is received by the Clerk's Office. *See infra* note 5.

Brief. (ECF Nos. 46-2 at 2-22, 46-13.)⁴ The South Carolina Court of Appeals dismissed Petitioner's case on April 28, 2011. (ECF 46-2 at 23.) On May 5, 2011, Petitioner filed a Petition for Rehearing (ECF No. 46-5) and it was denied on June 1, 2011. (ECF No. 46-6.)

On December 12, 2014, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) On March 30, 2015, Joseph McFadden ("Respondent") filed a Return and Motion for Summary Judgment, but the Return was missing a portion of the Appendix. (ECF Nos. 23, 24.) Respondent filed a corrected Return and Motion for Summary Judgment on November 25, 2015. (ECF Nos. 46, 47.) On March 2, 2016, the Magistrate Judge issued a Report and Recommendation ("First Report") recommending that the court grant Respondent's Motion for Summary Judgment and deny Petitioner's Petition. (ECF No. 58.) On March 14, 2016, Petitioner filed an Objection to the Magistrate Judge's Report. (ECF No. 64.)

On September 30, 2016, the court accepted in part and rejected in part the First Report. (ECF No. 71.) The court denied Petitioner's Habeas Corpus Petition as to Grounds One through Nine and Eleven through Thirteen. (*Id.* at 3.) The court disagreed with the First Report as to the procedural bar on Ground Ten based on its discovery that Petitioner presented Ground Ten in his *pro se* Brief on direct appeal, thus satisfying the exhaustion requirement for his claim. (*Id.* at 8.) The court instructed Respondent to refile his summary judgment motion as to Ground Ten so that the "court may have a more fully developed argument on the issue" and remanded Petitioner's Petition to the Magistrate Judge for reconsideration. (*Id.* at 9.) The court did not grant a Certificate of Appealability. (*Id.* at 10.)

In response to the court's Order (ECF No. 71), Respondent filed an Amended Answer and Amended Motion for Summary Judgment on December 2, 2016. (ECF Nos. 77, 78.) Petitioner

⁴ ECF No. 46-2 at 2-22 may be hard for readers to understand, thus it was re-attached as ECF No. 46-13.

filed an Amended Response on December 12, 2016. (ECF No. 82.) The Magistrate Judge filed her Report and Recommendation as to Ground Ten on March 30, 2017. (ECF No. 84.) Ground Ten of Petitioner's Petition states that the "trial judge erred in not granting his Motion for Directed Verdict [and that the State failed] to prove that he had actual or constructive possession [of the crack and marijuana found at the scene]." (ECF No. 1 at 20.) The Magistrate Judge recommended that Respondent's Motion for Summary Judgment as to Ground Ten (ECF No. 78) be granted. On April 4, 2017, Petitioner filed an Objection to the Second Report (ECF No. 86), and on April 11, 2017, he filed a Supplement to his Objection. (ECF No. 89.) Respondent responded to Petitioner's Objections (ECF No. 90) and Petitioner replied (ECF No. 91). On August 7, 2017, the court accepted the Magistrate Judge's Second Report granting Respondent's Motion for Summary Judgment, and denying Petitioner's Petition. (ECF No. 95.) Petitioner appealed this Order to the United States Court of Appeals for the Fourth Circuit and it was remanded to this court for a Certificate of Appealability as to Ground Ten, which was subsequently denied. (ECF Nos. 98, 103, 108.)

On August 14, 2017, Petitioner filed a Motion to Show Cause as to the timeliness of his Objections to the Second Report, and also filed a Motion to Alter and/or Amend the court's Order (ECF No. 95). (ECF Nos. 105, 106.) Petitioner additionally filed a Motion to Stay Pending Certificate of Probable Cause and Appealability. (ECF No. 107.)

II. JURISDICTION

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1331. Petitioner brings his Petition pursuant to 28 U.S.C. § 2254, which details remedies in federal courts for those persons in state custody.

III. LEGAL STANDARD

a. Motion To Alter and/or Amend a Judgment Pursuant to Fed. R. Civ. P. 59(e)

Under Federal Rule of Civil Procedure 59(e), a court may “alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice.” *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010) (citation omitted). It is the moving party’s burden to establish one of these three grounds in order to obtain relief under this rule. *Loren Data Corp. v. GXS, Inc.*, 501 Fed. App’x 275, 285 (4th Cir. 2012). The decision whether to reconsider an order pursuant to this rule is within the discretion of the district court. *See Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995).

b. Objections to the Magistrate Judge’s Report

The Magistrate Judge’s Report is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight; the responsibility to make a final determination remains with this court. *Matthews v. Weber*, 423 U.S. 261, 270-71 (1976). This court is charged with making a de novo determination of those portions of the report to which specific objections are made, and the court may accept, reject or modify, in whole or in part, the Magistrate Judge’s recommendation, or recommit the matter with instructions. *See* 28 U.S.C. § 636 (b)(1). Objections to the Report must, within fourteen (14) days, specifically identify portions of the Report objected to and the basis of those objections. Fed. R. Civ. P. 72(b)(2). “[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, 316 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

As Petitioner is a *pro se* litigant, the court is required to liberally construe his arguments. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*pro se* plaintiff's "inartful pleadings" may be sufficient enough to provide the opportunity to offer supporting evidence.) The court addresses those arguments that, under the mandated liberal construction, it has reasonably found to state a claim. *Boag v. MacDougall*, 454 U.S. 364, 365 (1982).

IV. ANALYSIS

Petitioner's Motion to Show Cause (ECF No. 105) and Motion to Alter and/or Amend (ECF No. 106) arise from his challenge to the court's finding that he did not file an Objection to the Second Report. (ECF Nos. 84, 95.)

The Second Report was filed on March 30, 2017 and a copy was mailed to Petitioner the same day. (ECF No. 84.) Petitioner had fourteen (14) days after service of the Second Report to object to it, plus an additional three (3) days if he was served by mail, which occurred here, thus he had to submit objections by April 16, 2017. (ECF No. 84-1.) Petitioner mailed his Objection on April 4, 2017 and a Supplement to his Objection on April 11, 2017, and they were received by the Clerk's Office on April 10 and April 19, 2017, respectively. (ECF Nos. 86, 89.) Therefore, Petitioner timely filed his Objection and his Supplement. *See United States v. McNeill*, 523 F. App'x 979, 982 (4th Cir. 2013) (court finding that the "prison mailbox rule"⁵ should apply to plaintiff mailing his petition before the end of the applicable limitations period.)

The court's August 7, 2017 Order incorrectly stated that Petitioner filed no objections to the Second Report. (ECF No. 95 at 4.) Petitioner's timely objections to the Second Report should

⁵ *See also Houston v. Lack*, 487 U.S. 266, 275 (1988) (a *pro se* prisoner's legal papers are deemed filed when they are received in the prison mailroom, not the Clerk's office).

have been considered in the court's Order, and not considering them was a clear error of law. (ECF No. 106 at 1.) The court now considers them and in doing so grants Petitioner's Motions to Show Cause and Alter and/or Amend the court's Order. (ECF Nos. 105, 106.)

Petitioner objects to the Analysis portion of the Second Report, specifically stating that "In the [Second] Report the Magistrate Judge overlooked these [sic] clear and convincing evidence that no rational trier of fact could prove Deputy Seale knew where drugs was found" and that "none of the evidence used by the Magistrate Judge on pages sixteen (16) and seventeen (17) of the [Second Report] can be used to show he had drugs." (ECF No. 86 at 4.) Petitioner further objects stating, "[t]he [Second] Report is not based on clear and convincing facts," because Agent Geno "cannot testify" to the fact of whether or not the drugs were Petitioner's because he testified that "[Petitioner] was taken into custody before [he got there]." (*Id.*) Lastly, Petitioner objects that the Magistrate Judge did not state "facts of where the money was found" as stated on page seventeen (17) of the Second Report. (*Id.* at 4-5.)

Petitioner's objections focus on what evidence the Magistrate Judge used to make her Recommendation. At the end of the State's case against Petitioner, the trial court indicated that it would be appropriate to make certain motions, such as a Motion for Directed Verdict. (ECF No. 46-1 at 147.) Petitioner made this Motion and it was denied on the basis that the court looks at "the existence of evidence, not [] its weight" and that there was "sufficient evidence, which if . . . believed by the jury, [] would sustain the conviction of [Petitioner] regarding all [] matters charged beyond a reasonable doubt [.]" (*Id.*) After all of the trial evidence was submitted, Petitioner renewed his Motion for Directed Verdict, and it was denied again on the same grounds. (*Id.* at 165-66.) The Magistrate Judge reiterated the point regarding the existence of evidence over

the weight of evidence in the Second Report, and also found that there was “sufficient evidence of Petitioner’s guilt to go [to] the jury.” (ECF No. 84 at 17.) The court agrees with these findings.

Petitioner states that Deputy Seale could not know where the drugs were found because he did not find them, Agent Geno did, and that Deputy Seale’s story about where the drugs were found is “false.” (ECF No. 86 at 4.) Petitioner argues about conflicting testimony in that Deputy Seale testified that the drugs were found in “the briars and brush” while Agent Geno testified that they were found “on the ground.” (*Id.*) The record records that Deputy Seale testified that, after Petitioner was taken into custody, he showed “several other officers where [he and Petitioner] were struggling” and he asked Agent Geno to “look for any contraband that might have been dropped or came out while [he and Petitioner] were struggling [.]” (ECF No. 46-1 at 86-87.) Deputy Seale noted that the area where he and Petitioner were struggling had “dirt kicked up” and you could tell where the fight had been. (*Id.*) Deputy Seale further testified that he was within “25 yards of Agent Geno” and that “. . . [Agent Geno] located the crack cocaine and the marijuana in the immediate area where [he and Petitioner] were struggling, and he immediately came back and told me. [He then placed the drugs along with a shirt and a [do-] rag in an evidence bag].” (*Id.* at 87, 113-114.) Deputy Seale further acknowledged that he did not see Petitioner “drop anything” or “throw anything.” (*Id.* at 106.)

Money was also recovered from the scene, \$505.06 in total. (*Id.* at 112, 114.) Agent Geno testified that he believed the money came out of Petitioner’s pocket. (*Id.* at 111.) Petitioner finds issue with the alleged inconsistency of Agent Geno’s testimony, in that the money was recovered from the scene, but also from Petitioner’s pocket, specifically because he was in custody before Agent Geno got there. (ECF No. 86 at 4-5.)

After careful review of the Record and both Parties' submissions, the court finds that Deputy Seale's testimony detailing how the drugs were found, along with other testimony in the trial, present sufficient enough evidence for a jury to find that Petitioner could be found guilty of the crimes charged. Any inconsistency or alleged "falsity" of Deputy Seale's testimony goes to the weight of the evidence and not its existence. Petitioner's argument about the inconsistency in Agent Geno's testimony as to where the money was found also goes to the weight of the evidence and not its existence. Moreover, the money does not mitigate Petitioner's "actual or constructive" possession of the drugs. For these reasons, Petitioner's objections are overruled.

V. CONCLUSION

Based on the reasons stated above, the court **GRANTS** Petitioner's Motion for an Order to Show Cause (ECF No. 105) and Motion to Alter and/or Amend this court's August 7, 2017 Order (ECF No. 106). The court further **ACCEPTS** the Magistrate Judge's Second Report (ECF No. 84) **GRANTING** Respondent's Amended Motion for Summary Judgment (ECF No. 78) as to Ground Ten and further **DENYING** Petitioner's Petition for Writ of Habeas Corpus (ECF No. 1) as to the same. Petitioner's Motion to Stay Pending Certificate of Probable Cause and Appealability (ECF No. 107) is **MOOT**.

CERTIFICATE OF APPEALABILITY

The law governing certificates of appealability provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable judges would find this court's assessment of his constitutional claims is debatable or wrong and that any

dispositive procedural ruling by the district court is likewise debatable. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). As to Ground Ten of Petitioner's Petition, the legal standard for the issuance of a certificate of appealability has not been met.

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

October 12, 2017
Columbia, South Carolina