

UNPUBLISHED

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

No. 17-7056

SUPREME RAHEEM ACKBAR. a/k/a Ronald Gary. #275886,

Petitioner - Appellant,

v.

WARDEN MCFADDEN,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at
Florence. Richard Mark Gergel, District Judge. (4:17-cv-00334-RMG)

Submitted: December 19, 2017

Decided: January 8, 2018

Before TRAXLER, SHEDD, and AGEE, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Supreme Raheem Ackbar, Appellant Pro Se. Alphonso Simon, Jr., Assistant Attorney
General, Donald John Zelenka, Deputy 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Unpublished opinions are not binding precedent in this circuit.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:

Supreme Raheem Ackbar seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (2012) petition. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) (2012). The magistrate judge recommended that relief be denied and advised Ackbar that failure to file timely, specific objections to this recommendation could waive appellate review of a district court order based upon the recommendation. Although Ackbar filed timely objections to the magistrate judge's recommendation, the district court determined that the objections were nonspecific, and thus did not conduct a de novo review of any portion of the recommendation.

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. *Wright v. Collins*, 766 F.2d 841, 845-46 (4th Cir. 1985); *see also Thomas v. Arn*, 474 U.S. 140 (1985). To qualify as specific, a party's objections to a magistrate judge's recommendations must "reasonably . . . alert the district court of the true ground for the objection." *United States v. Midgett*, 478 F.3d 616, 622 (4th Cir. 2007); *see also United States v. Benton*, 523 F.3d 424, 428 (4th Cir. 2008) (same). Ackbar has waived appellate review by failing to file specific objections after receiving proper notice. Accordingly, we deny a certificate of appealability and dismiss the appeal.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: January 8, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7056
(4:17-cv-00334-RMG)

SUPREME RAHEEM ACKBAR, a/k/a Ronald Gary, #275886

Petitioner - Appellant

v.

WARDEN MCFADDEN

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

FILED: January 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7056
(4:17-cv-00334-RMG)

SUPREME RAHEEM ACKBAR, a/k/a Ronald Gary, #275886

Petitioner - Appellant

v.

WARDEN MCFADDEN

Respondent - Appellee

STAY OF MANDATE UNDER
FED. R. APP. P. 41(d)(1)

Under Fed. R. App. P. 41(d)(1), the timely filing of a petition for rehearing or rehearing en banc or the timely filing of a motion to stay the mandate stays the mandate until the court has ruled on the petition for rehearing or rehearing en banc or motion to stay. In accordance with Rule 41(d)(1), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

FILED: February 26, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7056
(4:17-cv-00334-RMG)

SUPREME RAHEEM ACKBAR, a/k/a Ronald Gary, #275886

Petitioner - Appellant

v.

WARDEN MCFADDEN

Respondent - Appellee

O R D E R

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

For the Court

/s/ Patricia S. Connor, Clerk

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

Supreme Raheem Ackbar,	)	Case No 4:17-cv-334-RMG
	)	
Petitioner,	)	
	)	
v.	)	ORDER AND OPINION
	)	
Warden McFadden,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court on the Report and Recommendation (“R. & R.”) of the Magistrate Judge (Dkt. No. 63) recommending that the Court grant Respondent’s Motion for Summary Judgment (Dkt. No. 41). For the reasons below, this Court adopts the R. & R. as the order of the Court. Respondent’s Motion for Summary Judgment (Dkt. No. 41) is granted.

I. Background and Relevant Facts

The Magistrate has thoroughly summarized the facts of the case in the R. & R. (Dkt. No. 63 at 2-7), and Petitioner has not objected to those findings, so the Court need not repeat the facts in detail here. Petitioner was found guilty of one count of murder at the end of a jury trial held February 7-9, 2011. Later, proceeding *pro se*, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on February 3, 2017. (Dkt. No. 1.) The Petition includes the following allegations: (1) that the trial court lacked subject matter jurisdiction; (2) that the trial court failed to impeach the witnesses; (3) that trial counsel failed to object and move the court to quash the indictment before the jury was sworn; and (4) that trial counsel failed to move the court for a directed verdict.

In the R. & R., the Magistrate recommended that this Court grant summary judgment for Respondent on Ground One because jurisdiction is a non-cognizable state law issue. (Dkt. No.

63 at 11). The Magistrate also recommended that this Court grant Summary Judgment for Respondent on Petitioner's ineffective assistance of counsel claims (Grounds Two, Three, and Four) for several reasons. As to Ground Two, the Post-Conviction Relief ("PCR") court's finding that counsel's trial strategy for cross-examination was valid is entitled to the presumption of correctness, and Petitioner did not proffer any questions he thought his counsel failed to ask. (Dkt. No. 63 at 15-16.) As to Ground Three, Petitioner's claim that his trial counsel failed to object and move to quash the indictment before the jury was sworn, the Magistrate has explained that the PCR court found that there was no legal basis to object to the failure of the arresting officer to serve Petitioner with a warrant when Petitioner had already been properly arrested for a prior armed robbery, and that the indictment gave Petitioner sufficient notice of the charges against him. (*Id.* at 18-19) Finally, as to Petitioner's fourth allegation that his counsel was ineffective for failing to move for a directed verdict, the Magistrate explained that, in light of the evidence of Petitioner's guilt, the PCR court reasonably found that trial counsel's failure to move for a directed verdict did not impact the outcome of the trial. (*Id.* at 20-21.)

II. Legal Standard - Magistrate's Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). This Court is charged with making a *de novo* determination of those portions of the R. & R. to which specific objection is made. Fed. R. Civ. P. 72(b)(2). Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where the plaintiff fails to file any specific objections, "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.” *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation omitted).

III. Discussion

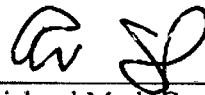
Petitioner has filed timely objections to the Magistrate’s R. & R. (Dkt. No. 65.) These objections are almost unintelligible and do not specifically refer to any finding in the R. & R. For example, Petitioner states that the R. & R. “embodies fraud,” “is an instrument of oppression,” and “highlights the arbitrary exercise of power by government officials who redundantly subvert the integrity of the Court.” (Dkt. No. 65 at 1.)

As Petitioner has not made a specific objection to any portion of the R. & R., the Court need only satisfy itself that the Magistrate has made no clear error on the face of the record. Finding no clear error in the Magistrate’s determination that there is no basis for default judgment on this habeas petition, the Court adopts the R. & R. as the order of the Court.

IV. Conclusion

For the reasons above, this Court adopts the R. & R. as the order of the Court. Respondent’s Motion for Summary Judgment (Dkt. No. 41) is granted.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

August 8, 2017
Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SUPREME RAHEEM ACKBAR,	)	C/A No. 4:17-0334-RMG-TER
	)	
Petitioner,	)	
	)	
vs.	)	
	)	REPORT AND RECOMMENDATION
WARDEN MCFADDEN,	)	
	)	
Respondent.	)	
_____	)	

Petitioner, appearing *pro se*, filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254¹ on February 3, 2017. Respondent filed a motion for summary judgment on June 2, 2017, along with a return and memorandum. (Docs. #40 and #41). The undersigned issued an order filed June 5, 2017, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately. (Doc. #42). Petitioner filed a response in opposition on June 28, 2017.

¹ This habeas corpus case was automatically referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c), DSC. Because this is a dispositive motion, this report and recommendation is entered for review by the district judge.

PROCEDURAL HISTORY

In his response to the motion for summary judgment, Petitioner did not contest the procedural history set forth in the State's return. Therefore, the undersigned will set out the undisputed procedural history, in part, as set forth by the Respondent.

Petitioner is currently incarcerated in the Lieber Correctional Institution pursuant to orders of commitment from the Clerk of Court for Spartanburg County. Petitioner was indicted on November 30, 2009, by the Spartanburg County Grand Jury for one count of murder. Petitioner was represented by Roger Poole, Esquire. Petitioner's jury trial was held on February 7-9, 2011, whereby Petitioner was found guilty as charged. The Honorable J. Derham Cole sentenced Petitioner to life imprisonment for the conviction.

Direct Appeal

A timely Notice of Appeal was served on behalf of Petitioner, and an appeal was perfected with the filing of a Final Anders Brief of Appellant. (Attachment #3).

On appeal, Petitioner was represented by Katherine Hudgins, Appellant Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. In his Final Brief, Petitioner argued error by the trial judge by refusing to declare a mistrial when, during the murder trial, a juror realized he knew the victim

and shared that information with at least one fellow juror.

Petitioner filed a *pro se* brief arguing the trial judge, defense attorney, and the prosecuting attorney committed prejudicial misconduct throughout the trial against Petitioner which resulted in his wrongful conviction.

In an unpublished opinion filed September 12, 2012, the South Carolina Court of Appeals dismissed Petitioner's appeal after an Anders review and granted counsel's motion to be relieved as counsel.

Petitioner filed a petition for rehearing pursuant to Rule 221 arguing trial court error when the judge failed to give a ruling on evidence that was not in the indictment. Petitioner asserted that the trial judge erred when he failed to give a ruling on evidence that was not in the indictment. Second, Petitioner alleged the trial judge erred in denying defense counsel a sufficient opportunity to refute the prosecution from improperly identifying Petitioner in a truck.

On October 17, 2012, the South Carolina Court of Appeals denied the petitioner for rehearing. (Attachment #81). The remittitur was issued on November 29, 2012.

PCR

Petitioner filed his application for post-conviction relief (PCR) on December 4, 2012. (App. 295-319). In the PCR application, Petitioner argued that he was being

held in custody unlawfully due to ineffective assistance of counsel for the following reasons:

1. Engaging in intrinsic fraud with the State
2. Failing to object to Petitioner not being served properly for the murder charge
3. Failing to fully disclose Brady material
4. Objecting and not moving to quash the indictment.
5. Failing to object to perjury
6. Failing to object to the trial judge being impartial with findings and conclusions of law.
7. Failing to object to the jury charge and failing to move the court for a directed verdict.
8. Failing to file a motion to suppress evidence for illegal search and seizure.
9. Failing to raise a meritorious Fourth Amendment claim that Petitioner was improperly detained where the only illogical irrelevant evidence of Petitioner's guilt was discovered as a result of the unlawful detention.

(Tr. 295-319).

On December 17, 2012, Petitioner filed a Memorandum in Support of Amended Application for Post Conviction Relief. (App. 338-47). Petitioner presented several new claims. First, he asserted trial counsel was ineffective in failing to file a pretrial motion requesting a Jackson v. Denno hearing. (App. 339-43); trial counsel failed to raise the claim of selective prosecution before trial; trial counsel failed to prepare a defense; trial counsel failed to object to the sentence, which he asserts was disproportionate; and, that appellate counsel was ineffective in failing to raise a meritorious issue on appeal. (App. 338-346).

On February 6, 2013, Petitioner filed another Memorandum in Support of Amend Application for Post Conviction Relief. (App. 353-60). In this memorandum, Petitioner asserted trial counsel was ineffective in failing to assert his right to equal protection of the law by failing to prepare a defense of extraordinary meritoriousness. (App. 354-58).

On September 11, 2014, Petitioner filed a Motion to Amend Application for Post-Conviction Relief. (App. 444-45). In this motion, Petitioner added three claims. First, he contended trial counsel was ineffective for failing to meaningfully cross examine the state's witnesses. Second, he alleged trial counsel was ineffective for failing to object to a constitutionally invalid warrant. Third, he argued trial counsel was ineffective for failing to object to the admission of unconstitutionally obtained evidence.

The State served its Return on March 19, 2014. An evidentiary hearing was held before the Honorable Roger L. Couch, Circuit Court Judge, on September 15, 2014. (App. 457-512). Petitioner was represented by J. Brandt Rucker. The State was represented by Assistant Attorney General Suzanne White. The PCR Court filed its Order of Dismissal on March 27, 2015. (App. 513-23).

PCR Appeal

Petitioner timely served and filed a notice of appeal on April 30, 2015, and May 14, 2015, respectfully. (Attachment #10). On appeal, Petitioner was represented by David Alexander, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Petitioner's appeal was perfected with the filing of a Johnson Petition for Writ of Certiorari. In the Johnson petition, counsel argued the PCR court erred in ruling that trial counsel was not ineffective in failing to move to suppress the fruits of a search of a truck which belonged to Petitioner's wife because Petitioner had no standing to object to the search.

Petitioner filed a *pro se* Response for Writ of Certiorari on December 30, 2015. (Attachment No. 13). In the *pro se* response, Petitioner asserted the PCR Court erred in finding a lack of merit in regards to Petitioner's claims of counsel's failure to object to Respondent's failure to properly serve Petitioner for the charge of murder and make motion to quash indictment. Petitioner filed a second *pro se* Response for Writ of Certiorari on June 20, 2016. (Attachment #14). In this *pro se* Response, Petitioner asserted the PCR Court erred in finding that counsel adequately conferred with Petitioner, conducted a proper investigation, was thoroughly competent in his representation and that counsel's conduct does not fall below the objective standard of reasonableness.

By Order filed October 20, 2016, the South Carolina Supreme Court denied the Johnson Petition for Writ of Certiorari. (Attachment #15). The Remittitur was issued on November 7, 2016. (Attachment #16).

HABEAS ALLEGATIONS

Petitioner raised the following allegations in his petition:

GROUND ONE: The trial court lacked subject matter jurisdiction.

Supporting facts: Arrest Warrant #089645, Indictment # 2007-GS-42-5943, Tr. p. 5,1-6, Tr. P. 7, 10-12, Tr. 61, 17-19, Tr. P. 65, 12-16, Tr. 165, 6-24, Tr. P. 203, 9-14, Tr. P. 268, 12-21, Tr. P. 430 –P. 433.

GROUND TWO: Trial Court failed to impeach the witnesses.

Supporting Facts: Arrest warrant #089645, Indictment # 2007-GS-42-5943, Tr. p. 65, 12-16, Tr. P. 203, 9-14, Tr. P. 268, 12-21, Tr. P. 500, 23 –Tr. P. 501, 2, 20-25.

GROUND THREE: Trial counsel failed to object and move the court to quash the indictment before the Jury was sworn.

Supporting Facts: Arrest warrant #089645, Indictment # 2007-GS-42-5943, Tr. P. 5, 1-6, Tr. 7, 10-12, Tr. P. 61, 17-19, Tr. P. 65, 12-16, Tr. 165, 6-24, Tr. P. 203, 9-14, Tr. P. 268, 12-21.

GROUND FOUR: Trial counsel failed to move the court for a direct verdict.

Supporting facts: Tr. P. 5, 1-6, Tr. P. 7, 10-12, Tr. 61, 17-19, Tr. P. 65, 12-16, Tr. P. 165, 6-24, Tr. P. 203, 9-14, Tr. P. 268, 12-21

(Petition).

STANDARD FOR SUMMARY JUDGMENT

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Dep't of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists. If none can be shown, the motion should be granted. Fed. R. Civ. P. 56(c).

The moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action

upon which the non-moving party has the burden of proof. Celotex, 477 U.S. 317. Once the moving party has brought into question whether there is a genuine dispute for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine dispute for trial. Fed.R.Civ.P. 56(e); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Barber v. Hosp. Corp. of Am., 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

To show that a genuine dispute of material fact exists, a party may not rest upon the mere allegations or denials of his pleadings. See Celotex, 477 U.S. at 324 (Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves).

Rather, the party must present evidence supporting his or her position through “depositions, answers to interrogatories, and admissions on file, together with . . . affidavits, if any.” Id. at 322; see also Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390 (4th Cir. 1994); Orsi v. Kickwood, 999 F.2d 86 (4th Cir. 1993); Local Rules 7.04, 7.05, D.S.C.

STANDARD OF REVIEW

In addition to the standard that the court must employ in considering motions for summary judgment, the court must also consider the petition under the requirements set forth in 28 U.S.C. § 2254. Under § 2254(d),

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 the 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 State court proceeding.

Thus, a writ may be granted if a state court “identifies the correct principle from [the Supreme] Court’s decisions but unreasonably applies that principle of law” to the facts of the case. Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir. 2005) (citing Williams

v. Taylor, 529 U.S. 362, 413 (2000)). However, “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.” *Id.* “Thus, to grant [a] habeas petition, [the court] must conclude that the state court’s adjudication of his claims was not only incorrect, but that it was objectively unreasonable.” McHone v. Polk, 392 F.3d 691, 719 (4th Cir. 2004). Further, factual findings “made by a State court shall be presumed to be correct,” and a Petitioner has “the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

ANALYSIS

Ground One

In Ground One, Petitioner alleges the trial court lacked subject matter jurisdiction. As this issue pertains to the state court’s jurisdiction, this issue should be dismissed because claims arising from state law are not cognizable. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Jurisdiction is a non-cognizable state law issue. See Wright v. Angelone, 151 F.3d 151, 156-158 (4th Cir.). Therefore, the undersigned recommends that Respondent’s motion for summary judgment be granted and Ground One be dismissed.

GROUND TWO, THREE, & FOUR

In Grounds Two, Three, and Four, Plaintiff asserts allegations of ineffective assistance of counsel.

When presented with an application for habeas relief, the first inquiry by the court is to determine whether the claim raised in the petition was “adjudicated on the merits” by the state court. 28 U.S.C. §2254(d). If the claim was properly presented to the state court and the state court adjudicated it, the deferential standard of review set forth in §2254(d) applies and federal habeas corpus relief may not be granted unless the relevant state-court adjudication “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” *Id.* § 2254(d)(1),(2); see Williams v. Taylor, 529 U.S. at 398.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel in a criminal prosecution. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). In the case of Strickland, *supra*, the United States Supreme Court set forth two factors that must be considered in evaluating claims for ineffective assistance of counsel. A petitioner must first show

that his counsel committed error. If an error can be shown, the court must consider whether the commission of an error resulted in prejudice to the defendant.

To meet the first requirement, “[t]he defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985) (quoting Strickland), reversed on other grounds, 476 U.S. 28 (1986). In meeting the second prong of the inquiry, a complaining defendant must show that he was prejudiced before being entitled to reversal. Strickland requires that:

[T]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

The court further held at page 695 that:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct . . . the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. (Emphasis added.)

Id.; Williams v. Taylor, 529 U.S. 362 (2000)(confirming the Strickland analysis).

Ground Two

In Ground Two, Petitioner alleges ineffective assistance of trial counsel for failing to impeach the witnesses. Respondent argues Petitioner cannot show the PCR court made an unreasonable determination of the facts or unreasonably applied federal law in denying relief upon this claim.

This issue was raised and ruled upon by the PCR court. At the PCR hearing, both trial counsel and Petitioner testified. The PCR court found trial counsel's testimony more credible than the testimony of Petitioner. (App. 515). The PCR court found as follows:

In regards to the Applicant's allegation that Counsel was deficient in his cross-examination of the State's witnesses, this Court finds that the Applicant has failed to meet his burden of proof. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriques, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

(App. 519-520).

Based upon the record, the PCR court's rejection of the ineffective assistance of counsel ground for relief was not "contrary to, or involved an unreasonable application of, clearly established Federal law; or did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2); Williams, supra. The PCR court found counsel's testimony credible while finding Petitioner's testimony not credible. The PCR court's factual determinations regarding credibility are entitled to deference in this action. Cagle v. Branker, 520 F.3d 320, 324 (4th Cir.2008), (citing 28 U.S.C. § 2254(e)(1) (for a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear)); see also Marshall v. Lonberger, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646, (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"). Additionally, a presumption of correctness attaches to state court factual findings. 28 U.S.C. §2244(e)(1). Evans v. Smith, supra; Wilson v. Moore, supra. The state PCR court's findings that counsel's trial strategy was valid is entitled to the presumption of correctness, 28 U.S.C. § 2254(e)(1). Courts are instructed not to second guess an attorney's trial strategy and tactics. Goodson v. United States, 564 F.2d 1071, 1072

(4th Cir.1977); Stamper v. Muncie, 944 F.2d 170 (4th Cir.1991). Additionally, during the PCR evidentiary hearing, Petitioner did not proffer any questions that he thought counsel failed to ask and did not present any testimony showing the answers at trial would have been different. Therefore, it is recommended that Respondent's motion for summary judgment be granted as to Ground Two.

Ground Three

In Ground Three, Petitioner alleges ineffective assistance of trial counsel for failing to object and move to quash the indictment before the jury was sworn. Respondent argues Petitioner cannot show the PCR court made an unreasonable determination of the facts or unreasonably applied federal law in denying relief upon this claim.

This issue was raised and ruled upon by the PCR court. The PCR court noted that Petitioner testified at the evidentiary hearing that he was never served with a warrant on the charge of murder which trial counsel should have objected to and moved to quash the indictment. Additionally, Petitioner testified that trial counsel should have moved to quash the indictment because the language of the indictment indicated that the victim was killed by "stabbing and/or cutting . . . with a large fixed blade hunting knife" which said knife was not introduced into evidence entitling him

to acquittal. In the order of dismissal, the PCR concluded the following with regard to this issue:

This Court finds that these allegations lack merit. Counsel would have had no legal basis on which to object to the failure of the arresting officer to properly serve the Applicant with the arrest warrant. Applicant had been properly arrested on a prior armed robbery. The South Carolina Supreme Court has held that an officer is authorized to make a warrantless arrest based upon his knowledge that a valid arrest warrant has been issued against a defendant. State v. Grate, 310 S.C. 240, 242, 423 S.E.2d 119, 120 (1992). Furthermore, there is no legal basis for Counsel to object to the indictment. An indictment for murder is sufficient “if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or conviction thereon may be pleaded as a bar to any subsequent prosecution.” Winns v. State, 363 S.C. 414, 418, 611 S.E.2d 901, 903 (2005) (citing Joseph v. State, 351 S.C. 551, 561, 571 S.E.2d 280, 285 (2002)).

(App. 518).

First, this claim is not cognizable on federal habeas review. It is not for this Court to determine this state law issue. Thompson v. Perry, No. 06-3429, 2007 WL 2579570, at *4 (D.S.C. Sept. 4, 2007)(“[I]t is up to South Carolina courts to resolve issues as to whether or not subject matter jurisdiction exists.”). 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.” Sampson v. Reynolds, 2015 WL 4487960 (D.S.C. July 22, 2015) (quoting Ashford v. Edwards, 780 F.2d 405, 407 (4th Cir.1985)). A state court’s decision on a question of state law is binding in federal court. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Thomas v. Davis, 192 F.3d 445, 449 n. 1 (4th Cir. 1999).

In any event, the PCR court found that Petitioner had been properly arrested on a prior armed robbery. Therefore, the PCR court held there was no legal basis to object to the failure of the arresting officer to properly serve Petitioner with the warrant as the South Carolina Supreme Court has held an officer is authorized to make a warrantless arrest based upon his knowledge that a valid arrest warrant has been issued against the defendant. (App. 518). Additionally, the PCR court found no legal basis for counsel to object to the indictment. Id. The South Carolina Supreme Court noted in Winns v. State, 611 S.E.2d 901 (S.C. 2005)² that indictments are notice documents. In this case, the record reveals that the indictment states the crime, the

² The South Carolina Supreme Court noted in Winns v. State that:

[O]ur decision in this case is consistent with the recently published opinion of State v. Gentry, [610 S.E.2d 494 (S.C. 2005)], which explains that indictments are notice documents, not documents required to confer subject matter jurisdiction. See S.C. Const. art. V, Section 11 (providing that circuit courts are “general trial court[s] with original jurisdiction in civil and criminal cases, except those in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law”).

611 S.E.2d 901, 904 n.2 (S.C. 2005).

necessary elements of the crime, the date of the offense, and the name of the accused. (App. 526). Therefore, the indictment gave Petitioner sufficient notice of the charges against him.

As set forth above, this court's review is to determine whether the PCR court's decision involved an unreasonable application of federal law or an unreasonable determination of facts. Petitioner fails to meet either prong of the Strickland test. Therefore, it is recommended that Respondent's motion for summary judgment with respect to Ground Three be granted.

GROUND FOUR

In Ground Four, Petitioner alleges ineffective assistance of trial counsel for failing to move for a directed verdict. Respondent argues Petitioner cannot show the PCR court made an unreasonable determination of the facts or unreasonably applied federal law in denying relief upon this claim.

This issue was raised and denied by the PCR court as follows:

This Court finds that there was no evidence that Counsel was deficient in any way relating to a failure to make a motion for directed verdict. The Applicant did not demonstrate that a motion would have made an outcome (sic) in his trial, so that claim is denied and dismissed.

(App. 520).

Initially, a state court's decision on a question of state law is binding in federal court. See Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991); Goins v. Warden, Perry Correctional Institution, 576 Fed. Appx. 167 (4th Cir. 2014). However, to the extent Petitioner is raising this claim as a due process violation, claims of insufficiency of the evidence such that a directed verdict should have been granted are cognizable in habeas actions as claims of a denial of due process. Review in this area is " 'sharply limited.' " Wilson v. Greene, 155 F.3d 396, 405 (4th Cir.1998) (quoting Wright v. West, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)). The Wilson court determined that district courts are required to give significant deference to the state court's ruling on motions for directed verdict and similar challenges to the sufficiency of evidence to convict because "[f]ederal review of the sufficiency of the evidence to support a state conviction is not meant to consider anew the jury's guilt determination or to replace the state's system of direct appellate review." 155 F.3d at 405–06. This deference requires this court to consider that "a defendant is entitled to relief only if 'no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' " Id. (quoting Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560(1979)).

Petitioner cannot satisfy the Strickland test. In light of the evidence of Petitioner's guilt of Murder, the PCR court reasonably found that trial counsel's failure

to move for a directed verdict did not effect the outcome of the trial under Strickland. The evidence included the testimony of Petitioner's wife, Octavious Burnside, that Petitioner asked her during the week prior to the stabbing what was the victim's work schedule (App. 187-189); the testimony of S.K.³ that Petitioner told him that he was going to kill the victim (App. 86-87); and the testimony of Marcus Wright that he saw Petitioner punching the victim with latex gloves on, saw blood from the victim who had been screaming, and that Petitioner jumped in the car with Wright with the gloves on and a large knife telling Wright to drive until he dropped Petitioner off at the Dollar General. (App. 228-232).

Based on the record, there was an issue of credibility as to the witnesses' testimony to be determined by a jury. Petitioner fails to show "no rational trier of fact could have found guilt beyond a reasonable doubt." Wilson, supra. The state court's determination was neither 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; nor a decision that was based on an unreasonable determination⁴ of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(1), (2). Accordingly, it is recommended that Respondent's

³ Only the initials S.K. are used in the trial transcript because he was a minor. S.K. testified he was sixteen at the time of the trial. (App. 76).

⁴ A presumption of correctness attaches to state court factual findings. 28 U.S.C. §2244(e)(1).

motion for summary judgment be granted and Ground Four dismissed.

CONCLUSION

Based on the above reasoning, it is RECOMMENDED that Respondent's motion for summary judgment (doc. #41) be GRANTED and any outstanding motions be deemed moot.

Respectfully submitted,

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

July 25, 2017
Florence, South Carolina

The parties' attention is directed to the important notice on the next page.

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