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

Anthony L. Marlar, #242361	)	C. A. No. 2:08-1874-RBH-RSC
	)	
Petitioner,	)	
	)	
-versus-	)	**REPORT AND RECOMMENDATION**
	)	
Warden, Tyger River Correctional Institution,	)	
	)	
Respondent.	)	

This habeas corpus petition under 28 U.S.C. § 2254 brought by a state prisoner proceeding *pro se* and *in forma pauperis* is before the undersigned United States Magistrate Judge for a report and recommendation on the respondent's motion for summary judgment filed on August 20, 2008. 28 U.S.C. § 636(b).

PROCEDURAL HISTORY

The petitioner, Anthony L. Marlaw, is presently confined to the Tyger River Correctional Institution of the South Carolina Department of Corrections pursuant to Orders of Commitment from the Clerk of Court from Anderson County. At the August 1996 term, the Anderson County Grand Jury indicted Petitioner for criminal sexual conduct in the first degree ("CSC 1st") (96-GS-04-2026) and burglary in the first degree (96-GS-04-2027). (PCR App. 353-54; 356-57).

Petitioner was represented at the trial level by Bruce Byrholdt, Esquire. On July 7 and 8, 1997, Petitioner went to trial before the Honorable H. Dean Hall and a jury. The jury

convicted Petitioner as charged, and Judge Hall sentenced Petitioner to thirty (30) years for burglary and a consecutive twelve (12) years for CSC 1st. (PCR App. 348-49; 355; 361).

A notice of appeal was filed and served with the South Carolina Court of Appeals on July 18, 1997. Robert M. Pachak, of the South Carolina Office of Appellate Defense, was appointed to represent Petitioner in his direct appeal. On October 20, 1998, Pachak filed a "no merit" Anders Petition for Writ of Certiorari in which he raised the following issue:

> The trial court erred in allowing the victim to repeat what a co-defendant said because it was hearsay.

Petitioner filed a *pro se* brief by letter form on November 20, 1998, in which he raised a number of issues in narrative form. On May 18, 1999, the state court of appeals issued an opinion in which it dismissed the appeal after Anders review. State v. Marlar, 99-UP-309 (S.C. Ct. App. 1999).

However, on May 28, 1999, Petitioner filed a *pro se* Petition for Rehearing in which he raised the following claims:

> 1. Was the testimony and evidencee sumitted (sic) to the trial court concerning DNA analysis flawed and contradictory?
>
> 2. Did the prosecution fail to provide hand written notes from the investigation as required by Brady v. Maryland?
>
> 3. Were contracdictory (sic) and inconsistent statements by Jerry Fields submitted to the jury as true and accurate?

4. Was the appellant's attorney sufficiently recovered from a recent heart attack to provide representation which did not prejudice the appellant's case?

On June 21, 1999, the state court of appeals issued an order in which it granted the petition for rehearing and ordered briefing on the following claims:

1. Was it error for the trial court to deny Marlar's motion for a directed verdict when the DNA evidence excluded Marlar as contributor of the semen?

2. Was it error for the trial court to deny Marlar's motion for a directed verdict when the SLED report showed the hair samples found in the victim's bed were inconsistent with Marlar's hair, but this information was not made known to the jury because the SLED expert testified merely that no DNA tests had been performed on the hair samples and did not mention that the hairs had been microscopically compared to and were inconsistent with Marlar's hair?

Accordingly, on July 21, 1999, Pachak filed a Brief of Petitioner, in which he addressed the two issues requested. The State filed a Brief of Respondent on September 20, 1999. On May 15, 2000, the South Carolina Court of Appeals filed an opinion in which it affirmed the convictions and sentences. State v. Marlar, 2000-UP-1361 (S.C. Ct. App. 2000). (PCR App. 472). The Remittitur was sent down on June 1, 2000.

Petitioner next filed a *pro se* Application for Post-Conviction Relief ("APCR') on August 18, 2000, (00-CP-04-2026), in which he asserted the following issues:

1. Applicant was denied Due Process of Law and

deprived of a fair trial, in as much as the state failed to disclose an oral statement alligedly (sic) given by applicant pursuant to applicants (sic) Brady Motion.

2. Applicant was denied effective assistance of counsel, inasmuch as counsel failed to question the co-defendent (sic) (Jerry Fields) concerning his redacted plea agreement and past biasis (sic) which would have been reason to falsely implicate the applicant in the crime.

3. Applicant was denied effective assistance of counsel in asmuch (sic) as counsel failed to call Detective Lindley to testify to the Statements give by Jerry Fields.

4. Applicant was denied effective assistance of counsel Inasmuch as counsel failed to object or move to suppress the testimony of Detective Sutton, where the testimony concerning a statement given by the applicant was never read or signed by the applicant and where the original notes were lost and were not similar to what the detective testified to at trial.

5. Applicant was denied effective assistance of counsel inasmuch as counsel failed to bring up the victims (sic) selective memory, where victim originally contended that both rapists ejaculated inside her and where DNA evidence excludes applicant from being one of the two rapists.

6. Applicant was denied effective assistance of counsel, inasmuch as counsel failed to subpoena DNA expert John Barron or object to the states (sic) failure to subpoena Mr. Barron in an attempt to gain an unfair tactical advantage where his testimony would have established that applicants (sic) DNA did not match any of the DNA samples collected from the crime scene which would have arguable (sic) exhonerated (sic) applicant as being the second rapist.

7. Applicant was denied effective assistance of counsel inasmuch as counsel failed to object to Solicitors (sic) mistatement (sic) of facts of in closeing (sic) arguments.

8. Applicant was denied effective assistance of counsel, inasmuch as counsel failed to discuss the case with applicant and in failing to prepare a defence (sic).

(PCR App. 362). The State filed a Return dated December 3, 2001. (PCR App. 383). Petitioner, through counsel Carey B. Murphy, Esquire, filed an "Amendment to Application for Post-Conviction Relief", dated September 23, 2002, in which he raised the following issues:

1. The Applicant was denied effective assistance of counsel because counsel failed to obtain and/or elicit appropriate information for and to make a motion to exclude or suppress statements allegedly made by the Applicant to the investigators based upon the failure of Michelle Brown to properly Mirandize the Applicant at the initial interview when he was a suspect in the case.

All information obtained thereafter from the Applicant was as a result of the information provided by him in the initial interview and would therefore be excludable (sic) pursuant to the "fruit of the poisonous tree" doctrine of the law.

2. The Applicant was denied effective assistance of counsel because counsel failed to subpoena and present the witnesses needed to counter testimony and other evidence presented by the State, specifically Anderson County Deputy Clark Brasier, the initial investitagor (sic) on the case who obtained statements from the victim, and SLED Agent John C. Barron, the trace evidence forensics expert who examined the pubic hairs found in the bed materials of the victim. Presentation of evidence through these witnesses would have shown that the victim did not know or have reason to know that the Applicant was one of her rapists as she later testified to, and that the pubic hairs found at the scene was (sic) physical evidence that conclusively excluded the Applicant and would therefore show that another person reasonably could be the second perpetrator and would

> constitute reasonale (sic) doubt as to the guilt of the Applicant.
>
> 3. The Applicant was denied effective assistance of counsel because counsel failed to contact and consult with SLED Agent John C. Barron concerning the results of the tests performed by him on the evidence submitted to him to determine how best to use and present that evidence to the jury. Further, counsel failed to take the necessary steps to have the microscopically inconsisnt (sic) pubic hairs tested for DNA evidence, either by the State or by an appropriate qualified agency, to obtain further evidence excluding the Applicant as one of the perpetrators in this case.

(PCR App. 387).

An evidentiary hearing in Petitioner's PCR was held before the Honorable J. C. Nicholson, Jr., on January 29, 2002. (PCR App. 389). Petitioner was present and represented by counsel Cary Murphy. Petitioner testified as well as SLED Agent John Barron and trial counsel. On September 30, 2003, Judge Nicholson issued an Order of Dismissal in which he rejected Petitioner's allegations. (PCR App. 468).

A notice of appeal was filed with the South Carolina Supreme Court from the denial of PCR relief. Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Petitioner in his PCR appeal. On June 6, 2004, Dudek filed a Petition for Writ of Certiorari, in which he raised the following issues:

> 1. Should petitioner's case be remanded for specific findings of fact where the order of dismissal did not specifically address any allegation of ineffective assistance of counsel, including the failure to call

SLED agent Barron about a crime scene hair not matching petitioner, and the failure to impeach codefendant Fields about petitioner having taken an arrest warrant out on him, since this order even referred to petitioner's trial as "involuntary plea" and these findings of fact were mandated by statute?

2. Was defense counsel ineffective for failing to call SLED Agent Barron to testify a pubic hair found on the alleged victim's bed was inconsistent with petitioner's hair, and the co-defendant's hair, since the state did not have any forensic evidence against petitioner, and this inconsistent evidence further strengthened the issue of a reasonable doubt?

(PCR App. 485). The State filed a Return to the Petition for Writ of Certiorari on July 15, 2004. (PCR App. 497). The case was subsequently transferred to the South Carolina Court of Appeals, and on September 19, 2005, that court issued an order in which it granted the petition for writ of certiorari. (PCR App. 506).

Accordingly, on January 23, 2006, Dudek filed a Brief of Petitioner, in which he raised the following claims:

1. Should petitioner's case be remanded for specific findings of fact where the order of dismissal did not specifically address any allegation of ineffective assistance of counsel, including the failure to call SLED agent Barron about a crime scene hair not matching petitioner, and the failure to impeach codefendant Fields about petitioner having taken an arrest warrant out on him, since this order even referred to petitioner's trial as a "involuntary plea," and these findings of fact were mandated by statute?

2. Was defense counsel ineffective for failing to call SLED Agent Barron to testify a pubic hair found on the alleged victim's bed was inconsistent with petitioner's hair, and the co-defendant's hair, since the state did not have any forensic

> evidence against petitioner, and this inconsistent evidence further strengthened the issue of a reasonable doubt?

(PCR App. 507). The State filed a Brief of Respondent on March 29, 2006. (PCR App. 518). Following oral argument on September 14, 2006, the South Carolina Court of Appeals on March 26, 2007, issued an opinion in which it vacated the denial of PCR relief and remanded for new proceedings in the PCR court. Marlar v. State, Op.No. 4225, 644 S.E.2d 769 (S.C. Ct. App. 2007) (PCR App. 528). The State then filed a petition for rehearing on April 6, 2007, (PCR App. 534), which the court of appeals denied by order dated May 17, 2007. (PCR App. 542).

The State then filed with the South Carolina Supreme Court a Petition for Writ of Certiorari dated June 15, 2007, in which it raised the following issues:

> 1. The Court of Appeals erred in finding that the PCR court's order did not sufficiently include findings of fact and conlusions (sic) of law.
>
> 2. The Court of Appeals erred in finding that the issue of the sufficiency of the PCR court's order was preserved for appellate review.
>
> 3. The PCR court properly ruled that trial counsel was not ineffective for failing to call SLED Agent John Barron to testify about pubic hairs found on the victim.
>
> 4. The PCR court properly ruled that trial counsel was not ineffective for failing to cross-examine Respondent's co-defendant Jerry Fields about his bias against Respondent because of a warrant Respondent had sworn against him.

Petitioner, through Appellate Defender Dudek, filed Return to the

Petition for Writ of Certiorari dated September 21, 2007, in which he raised the following issues:

> 1. The Court of Appeals correctly found that the PCR court's order did not sufficiently include the requisite findings of fact and conclusions of law.
>
> 2. The Court of Appeals correctly held the sufficiency of the PCR court's order was preserved for appellate review.
>
> 3. The Court of Appeals properly did not rule on the issue of whether trial counsel was ineffective for failing to call SLED Agent John Barron to testify about pubic hairs found on the victim, since there were not findings of fact and conclusions of law made by the PCR court on the issue.
>
> 4. The Court of Appeals properly did not rule on the issue of whether trial counsel was ineffective for failing to cross-examine respondent's co-defendant Jerry Fields about his bias against respondent because of a warrant respondent had sworn against him since there were no findings of fact and conclusions of law on this issue.

The South Carolina Supreme Court then issued on November 5, 2007, an opinion in which it granted the petition for writ of certiorari, dispensed with further briefing, and reversed the decision of the court of appeals thus reinstating the original denial of relief by the PCR judge. State v. Marlar, Op. No. 26391, 653 S.E.2d 266 (S.C. 2007). The Remittitur was issued on November 21, 2007.

On December 21, 2007, Appellate Defender Dudek wrote a letter to the state supreme court in which he noted that while he had closed his file, he had received attached copies of *pro se*

motions for relief from the state supreme court's opinion pursuant to SCRCP 60(b). On January 2, 2008, the Clerk of the South Carolina Supreme Court replied to Dudek that no action would be taken on the *pro se* motions as they were not filed by counsel and in any event were not submitted until after issuance of the Remittitur. Petitioner subsequently followed on January 17, 2008, with a *pro se* "Notice of Petition in Opposition to Remittitur and Judgment". On February 8, 2008, the state supreme court issued an order in which it denied the latter motion.

The following documents have been made part of the file here:

1. Appendix including: Index; Trial Transcript; Application for Post-Conviction Relief; State's Return; Amended Application for Post-Conviction; PCR Transcript; Order of Dismissal; Clerk Records; SCDC Inmate Records; Petition for Writ of Certiorari; Return to Petition for Writ of Certiorari; Order Granting Certiorari; Brief of Petitioner; Brief of Respondent; Opinion Vacating and Remanding Order; Petition for Rehearing; Order Denying Petition for Rehearing;

2. July 18, 1997 Amended Notice of Appeal;

3. October 20, 1998 Final *Anders* Brief of Appellant;

4. November 23, 1998 *Anders* Response Brief;

5. May 18, 1999 South Carolina Court of Appeals Opinion;

6. May 28, 1999 Petition for Rehearing;

7. June 21, 1999 South Carolina Court of Appeals Order;

8. July 21, 1999 Brief of Appellant;

9. September 20, 1999 Brief of Respondent;

10. May 15, 2000 South Carolina Court of Appeals Opinion;

11. June 1, 2000 Remittitur;

12. June 15, 2007 Petition for Writ of Certiorari;

13. September 21, 2007 Return to Petition for Writ of Certiorari;

14. November 5, 2007 South Carolina Supreme Court Opinion;

15. November 21, 2007 Remittitur;

16. December 20, 2007 Listing of Exhibits including *Pro Se* Motion for Rule 59(e);

17. December 21, 2007 Letter to the Supreme Court from SCCID;

18. January 2, 2008 Letter to Robert Dudek from South Carolina Supreme Court;

19. January 17, 2008 *Pro Se* Notice of Petition in Opposition to Remittitur and Judgment;

20. February 7, 2008 South Carolina Supreme Court Order.

HABEAS ALLEGATIONS

Petitioner presented the following grounds for relief in the instant petition for a writ of habeas corpus 28 U.S.C. § 2254:

A. Ground One: DENIAL OF EFFECTIVE ASSISTANT OF COUNSEL.

Defense Counsel was Ineffective for failing to call available SLED Agent John Barron to testify that two public (sic) Hairs Found on the Victim's Bed "DID NOT" match Petitioner. Similarly, counsel was ineffective for failing to cross-examine co-defendant Fields about his bias since

petitioner had sworn out a warrant for his arrest for damaging his property, and Petitiner (sic) testified at PCR this was Field's Motivation for place him at the crime scene.

B. Ground Two: CONVICTION OBTAINED BY UNCONSTITUTIONAL DNA PROCEDURES AND COURT OF APPEALS FAILED TO MAKE A PROPER RULING...

The Court of Appeals Properly Did NOT rule on the Issue of WHETHER TRIAL COUNSEL WAS Ineffective for Failing to call SLED Agent John Barron to testify about Pubic Hairs found on the Victim, since there were NO findings of fact and Conclusions of Law made by the PCR court on this Issue....

C. Ground Three: THE SUPREME COURT PROPERLY FOUND THAT THE PCR JUDGE IN THIS MATTER FAILS TO SPECIFICALLY ADDRESS ANY Of The Allegations Raised By Respondent....

"PCR JUDGE FAILED TO UPHOLD THE INTEGRITY OF THE JUDICIARY"

An Independent Judiciary is Indispensable to Justice in Our Society. A Judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the Integrity and Independence of the Judiciary will be preserved. The Judge shall Respect and Comply with the Law and shall act at all times in the manner that promotes public confidence in the Integrity and Impartiality of the Judiciary. THE PCR JUDGE FAILED TO DO SO, THEREFORE, CAUSING A MISCARRIAGE OF JUSTICE IN THIS CASE.

D. Ground Four: TRIAL COURT EXHIBITED CALOUS AND DELIBERATE DISREGARD FOR THE PETITIONERS FUNDAMENTAL AND FAIRNESS, DUE PROCESS RIGHTS OF PETITIONER...

Trial Court Violated the Confrontation Clause by preventing defense Cousel (sic) from cross-Examining... Trial Court violated 6th Amendment by curtailing defense cross-examination of state's Expert and by Impeding defense from presenting expert of its own. Trial Court failed to use

> proper DNA techniques and failed to investigate psychological evidence of the victims story, whereas claims of sexual abuse by the Petitioner was fabricated, or whether the perpetrator was someone other than the petitioner.

Petitioner Petition Pages 5-6.

On August 22, 2008, the petitioner was provided a copy of the respondents' summary judgment motion and was given an explanation of dismissal and summary judgment procedure as well as pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure similar to that required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). The petitioner filed an opposition to the motion on September 12, 2008. Hence it appears consideration of the motion is appropriate.

APPLICABLE LAW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), effective April 24, 1996, is applicable to this action filed in 2007. Title 28, United States Code, Section 2254(d) and (e) provides in pertinent part as follows:

> (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 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.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The Supreme Court expounded upon this language in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000). Writing for the majority with respect to this matter, Justice O'Connor stated that a state court's decision can be contrary to the Supreme Court's precedent in two ways: first, "if the state court arrives at a conclusion opposite to that reached by the Court on a question of law. Second, a state-court decision is also contrary to the Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that of the Supreme Court. Id. at 1519.

Justice O'Connor further stated that "[t]he text of § 2254(d)(1) ... suggests that the state court's decision must be substantially different from the relevant precedent of the Court." Id. She added that a "state-court decision will also be contrary to the Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless

arrives at a result different from the Court precedent." Id. at 1519-20. Even if "the federal court considering the prisoner's habeas application might reach a different result applying" relevant Supreme Court precedent, so long as the state court applied the correct legal rule from Supreme Court cases, such a "run-of-the-mill" state court decision could not be deemed "contrary to" Supreme Court precedent. Id. at 1520.

As for the "unreasonable application" prong of § 2254(d)(1), Justice O'Connor stated that a state court decision involves an unreasonable application of the Court's precedent if "the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of the Court's precedent if the state court either unreasonably extends a legal principle from our 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." Id. Justice O'Connor added that "[u]nder § 2254(d)(1)'s 'unreasonable application' clause, then, 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 1522. In making the "unreasonable

application" inquiry, "a federal habeas court ... should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 1521.

In another change brought by the AEDPA, 28 U.S.C. § 2254(e)(1) now states that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. ... The touchstone for a reasonable determination is 'whether the determination is at least minimally consistent with the facts and circumstances of the case.'" Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.), cert. denied, 522 U.S. 819 (1997).

THE HABEAS CORPUS EXHAUSTION REQUIREMENT

Relief under Section 2254 may be had only after a habeas petitioner has exhausted his state court remedies: "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas corpus. Claims not so raised are considered defaulted." Breard v. Green, 523 U.S. 371, 375, 118 S.Ct. 1352 (1998), citing Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); see also, 28 U.S.C. § 2254(b). The theory of exhaustion is based on 28 U.S.C. § 2254, which gives the federal court jurisdiction of habeas petitions. See generally, O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, (1999).

The court's exhaustion requirements under § 2254 are explained in Matthews v. Evatt, 105 F.3d 907, 910-911 (4th Cir.), cert. denied, 522 U.S. 833, 118 S.Ct. 102 (1997). In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing, a § 2254 petitioner is required to "exhaust" all state court remedies before a federal district court can entertain his claims. Thus, a federal habeas court may consider only those issues which have been properly presented to the highest state courts with jurisdiction to decide them. The burden of proving that a claim has been exhausted lies with the petitioner. The exhaustion requirement, though not jurisdictional, is strictly enforced. (Citations omitted).

Additionally, a claim has not been exhausted unless the substance of a petitioner's claim is "fairly presented" to the state courts. The Matthews court explained, "[t]he ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not suffice. In other words, fair presentation contemplates that both operative facts and the controlling legal principles must be presented to the state court." Matthews v. Evatt, 105 F.3d at 911.

In order to exhaust his collateral claims in state court, a South Carolina habeas corpus petitioner must pursue a direct

appeal and/or file an application for relief under the South Carolina Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 - 160. As the South Carolina Supreme Court has explained: "[W]hen the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies." In Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990).

Petitioner here had a direct appeal which was unsuccessful. Petitioner also had a full round of PCR proceedings. His PCR application was denied at the trial court level, and he had a timely petition for a writ of certiorari from the denial of PCR. The South Carolina Supreme Court denied the petition. Thus, he has exhausted his direct appeal and his PCR remedy. Petitioner here has no remaining state remedies which can be pursued.

PROCEDURAL DEFAULT

When a federal habeas petitioner has failed to raise a claim at the appropriate time in state court and has no further means of bringing that issue before the state courts, the claim will be considered procedurally defaulted, and he will be procedurally barred from raising the issue in his federal habeas petition. The United States Supreme Court has clearly stated that the procedural default of a constitutional claim in earlier state

proceedings forecloses consideration by the federal courts. See, e.g., Smith v. Murray, 477 U.S. 527, 533, 106 S.Ct. 2661 (1986).

Procedural default can occur at any level of the state proceedings, if a state has procedural rules which bar its courts from considering claims not raised in a timely fashion. The South Carolina Supreme Court will refuse to consider claims raised in a second appeal which could have been raised at an earlier time. Furthermore, if a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court. A petitioner must also raise all grounds raised but denied at the PCR hearing level in his subsequent petition to the South Carolina Supreme Court for a writ of certiorari from the denial of PCR if he is to preserve them for consideration here.

THE RELATIONSHIP BETWEEN EXHAUSTION AND PROCEDURAL DEFAULT

If a petitioner in federal court has failed to raise a claim in state court at the appropriate juncture, and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed (or defaulted) his opportunity for relief in the state courts. Under these circumstances, the exhaustion requirement is "technically met" and the rules of procedural bar apply. Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997); cert. denied, 522 U.S. 833, 118 S.Ct. 102 (1997), citing Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546

(1991); Teague v. Lane, 489 U.S. 288, 297-98, 109 S.Ct. 1060 (1989); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996). In other words, where the state court has not had the opportunity to apply its own procedural bar, the federal court will nevertheless bar the claim where application of the bar is clear. Teague v. Lane, 489 U.S. at 297-98.

EXCUSING PROCEDURAL DEFAULT

Notwithstanding the foregoing, the requirement of exhaustion is not jurisdictional, and a federal court may consider claims which have not been presented to the highest South Carolina court with jurisdiction to hear the claim in very limited circumstances. Cranberry v. Greer, 481 U.S. 129, 131, 107 S.Ct. 1671 (1989). A federal court will review a procedurally defaulted claim if the petitioner can demonstrate cause for the default and actual prejudice therefrom, or his actual innocence of the crimes for which he is being held. Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546 (1991). In this context, "cause" is defined as "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." Strickler v. Greene, 527 U.S. 263, 283 n. 24, 119 S.Ct. 1936 (1999), quoting Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner must show reasonable diligence in pursuing his claim to establish cause. Hoke v. Netherland, 92 F.3d 1350, 1354 n. 1 (4th Cir. 1996). Moreover, the claim of

cause must itself be exhausted. Edwards v. Carpenter, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (failure of counsel to present issue on direct appeal must be exhausted in collateral proceeding as ineffective assistance to establish cause for default).

Next, with respect to establishing "actual prejudice," a petitioner generally must show some error. Tucker v. Catoe, 221 F.3d 600, 615 (4th Cir.), cert. denied, 531 U.S. 1054, 121 S.Ct. 661 (2000). In addition, a petitioner must show an actual and substantial disadvantage as a result of the error, not merely a possibility of harm, to show prejudice. Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir. 1997).

"Actual innocence" is not an independent claim, but only a method of excusing default. O'Dell v. Netherland, 95 F.3d 1214, 1246 (4th Cir. 1996), aff'd, 521 U.S. 151, 117 S.Ct. 1969 (1997). To prevail under this theory, a petitioner must produce new evidence that was not available at trial to establish his factual innocence. Royal v. Taylor, 188 F.3d 239 (4th Cir.1999). A petitioner may establish actual innocence as to his guilt, Id., or his sentence. Matthews v. Evatt, 105 F.3d 907, 916 (4th Cir. 1997). It is a habeas petitioner's burden to raise cause and prejudice or actual innocence; if these are not raised by petitioner, the court need not consider the defaulted claim.

Kornahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995), cert. denied, 517 U.S. 1171, 116 S.Ct. 1575 (1996).

DISCUSSION

A review of the record and relevant case law reveals that the instant petition should be denied. The petitioner's grounds for relief will be reviewed seriatim.

Petitioner's first ground for relief is that his trial lawyer was constitutionally ineffective for (1) failing to call a SLED agent to testify that two pubic hairs found on the victim did not match the petitioner, and (2) for failing to cross-examine the co-defendant on an alleged bias since Petitioner previously had sworn out a warrant against the co-defendant for damaging property. Petitioner's claims are not available for review in this court because they are procedurally barred.

To exhaust state remedies, a habeas petitioner must present the substance of his claims to the state's highest court. See, e.g., Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997). Claims not presented to a state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now. George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996). However, a claim is procedurally barred from federal habeas corpus review if the state court to which the petitioner would be

required to present the claim would now find it procedurally defaulted. Williams v. Taylor, 163 F.3d 860, 872 (4th Cir. 1998) (quoting Coleman v. Thompson, 501 U.S. 722 (1991)).

Here, in its decision on the PCR appeal, the South Carolina Supreme Court held that appellate review was precluded as Petitioner did not file a SCRCP 59(e) motion, which rule provides an avenue for any party to move to alter or amend a judgment, seeking specific rulings from the PCR court on the issues he raised. State v. Marlar, Op. No. 26391, 653 S.E.2d 266 (S.C. 2007) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127). The South Carolina Supreme Court refused to remand Petitioner's case to the PCR court and noted that, while in a few cases it had remanded for specific findings, those cases were "unique" cases in which the court was attempting to remind the bench and bar of its procedural requirements. The Court pointed out that the Pruitt case specifically stated in a footnote that its action there did not affect the general rule that issues must be properly raised to and ruled upon by the PCR judge to be preserved for PCR appeal. See, also, Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised to and ruled upon by PCR judge to be preserved for appellate review).

These claims are technically exhausted because they are procedurally barred from being raised in state court. See, e.g., S.C. Code Ann. § 17-27-45 (Supp. 1998) (one-year period of

limitation on filing of APCR); Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997) (noting that South Carolina requires all grounds for relief to be raised in the first APCR). Since Petitioner did not present the instant effective assistance claims to the South Carolina Supreme Court for review on the merits in a procedurally viable manner, and since
the South Carolina state courts would find them procedurally defaulted if Petitioner attempted to raise them now, then the claims are procedurally barred in federal habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991). Nor has Petitioner demonstrated cause and prejudice or actual innocence to relieve him of the default. He is not entitled to relief.

Petitioner's second ground for relief is as follows: "Conviction obtained by unconstitutional DNA procedures and Court of Appeals failed to make a proper ruling." Although the allegation itself initially refers to "unconstitutional DNA procedures", Petitioner appears to be contending the state court of appeals properly remanded to the PCR court the issue of whether counsel was ineffective for failing to call a SLED agent, since the PCR court made no findings as to the issue. Inasmuch as Petitioner is contending the state court of appeals was correct as a procedural matter in remanding the case back to the PCR court for a new hearing based on the lack of specific findings, and the South Carolina Supreme Court was incorrect in

overruling that decision finding as a procedural matter the issues were not preserved, then he has raised a claim that is not cognizable in federal habeas corpus. Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998); Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988) (holding that errors and irregularities in connection with state post-conviction proceedings are not cognizable on federal habeas review). Petitioner is not entitled to relief on this ground.

Petitioner's third ground for relief is the same as his second ground for relief but stated in the alternative: "The Supreme Court properly found that the PCR judge in this matter fails to specifically address any of the allegations raised by respondent." Petitioner contends that the PCR judge erred by failing to rule upon all of the issues raised in his PCR, and thus Petitioner asserts the judge "failed to uphold the integrity of the judiciary."

Like his second issue, his third issue is not cognizable in habeas corpus. Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998); Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988) (holding that errors and irregularities in connection with state post-conviction proceedings are not cognizable on federal habeas review).

Petitioner's fourth ground for relief is as follows: "Trial court exhibited callous and deliberate disregard for the

petitioner's fundamental and fairness, due process rights of petitioner." Petitioner contends that the trial court violated his due process rights when the judge allegedly curtailed the defense cross-examination of the state's expert and prevented the defense from presenting its own expert. Petitioner also complained that the judge did not use "proper DNA techniques" and failed to investigate "psychological evidence of the victim's story" and third party guilt.

Again, Petitioner is attempting to raise procedurally barred issues. These claims are freestanding claims which were not raised on direct appeal, and the South Carolina state courts would find them procedurally defaulted if Petitioner attempted to raise them now. The court should not review these claims on the merits as they are procedurally barred in federal habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991).

CONCLUSION

Accordingly for the aforementioned reasons, it is recommended that the respondents' summary judgment motion be granted and this matter ended.

Respectfully Submitted,

Robert S. Carr

Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina

September 25, 2008

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 Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court judge 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).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
P.O. 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); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985).