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

Richard Avon Green, #291708, Petitioner, vs. Warden, Palmer Pre-Release Center, Respondent.	C/A No. 5:16-cv-3191-JFA **ORDER**

I. INTRODUCTION

Richard Avon Green ("Petitioner"), proceeding pro se, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 against the Warden of the Palmer Pre-Release Center ("Respondent").

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is a South Carolina Department of Corrections ("SCDC") inmate incarcerated at the Palmer Pre-Release Center. ECF No. 1-1 at 1. On or about September 19, 2016,[1] Petitioner's petition for writ of habeas corpus was filed. ECF No. 1. On December 22, 2016, Respondent made a motion for summary judgment and filed a return with a memorandum of law in support. ECF Nos. 16–17. Because Petitioner is proceeding pro se, the Magistrate Judge entered an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising him of the importance of the motion and the need for him to file an adequate response. ECF No. 18. As of February 2, 2017, Petitioner had not responded to the motion. Consequently, the Magistrate Judge entered an order directing Petitioner to advise the court whether he wished to continue

[1] Petitioner is incarcerated and, thus, the Court will apply the prisoner mailbox rule to his filings. See Houston v. Lack, 487 U.S. 266 (1988).

with the case. ECF No. 21. In addition, the Magistrate Judge ordered that Petitioner file his response by March 2, 2017, if he wished to proceed. Id. On or about February 10, 2017, Petitioner filed a response, as well as requested a continuance to adequately respond and conduct further investigation. ECF No. 24. The Magistrate Judge denied Petitioner's request to conduct discovery or investigation, but granted Petitioner's request for a continuance and extended the deadline to March 14, 2017. ECF No. 25. Petitioner timely filed a supplemental response. ECF No. 29.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c), D.S.C., the case was referred to the Magistrate Judge for pretrial handling.[2] On March 24, 2017, the Magistrate Judge issued a Report and Recommendation ("Report") wherein she recommends this Court should grant Respondent's motion for summary judgment and deny the petition. ECF No. 30 at 24. The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. See 28 U.S.C. § 636(b). In the absence of specific objections to the Report of the Magistrate Judge, this Court is not required to give an explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983). The Report sets forth in detail the relevant facts and standards of law on this matter, and this Court incorporates those facts[3] and standards[4] without a recitation.[5]

[2] The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. Mathews v. Weber, 423 U.S. 261 (1976).

[3] The Court modifies the Report to reflect that Petitioner filed his post-conviction relief application on March 3, 2014, not April 3, 2014. ECF No. 16-11 at 17.

In addition, Petitioner filed an amended application with additional grounds, such grounds were discussed during the hearing and do not affect the analysis contained in the Report. ECF No. 16-11 at 41–48.

The parties were advised of their right to object to the Report, which was entered on the docket on March 24, 2017. ECF No. 30. The Magistrate Judge gave the parties until April 7, 2017, to file objections. Id. On or about April 6, 2017, Respondent filed objections to the Report. ECF No. 33-1. Thus, this matter is ripe for this Court's review.

III. DISCUSSION

Petitioner raises four grounds on which he claims that he is being held in violation of the Constitution, laws, or treaties of the United States. ECF No. 1. The Magistrate Judge recommended that all grounds—except a portion of Ground Three—were not procedurally barred,[6] but all grounds warranted dismissal. ECF No. 30. Petitioner made three objections to the Report with regard to the first three grounds.[7] ECF No. 33. Each recommendation and objection will be discussed in accordance with the ground it was made upon.

Finally, the Report is modified on the seventeenth page to reflect the trial transcript reveals that the solicitor misspoke when he requested a lesser included charge of "attempted armed robbery" and it was clarified as a request for "attempted burglary." ECF No. 16-10 at 153–57.

[4] Inasmuch as the Report cites to Cruz v. Beto, 405 U.S. 319 (1972), to support a pro se litigant's complaint is to be liberally construed, it is replaced with Erickson v. Pardus, 551 U.S. 89 (2007). The former case relies solely upon the "no set of facts" standard provided in Conley v. Gibson, 355 U.S. 41 (1957), which was overruled in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560–63 (2007). See Francis v. Giacomelli, 588 F.3d 186, 192 n.1 (4th Cir. 2009); see also Erickson, 551 U.S. at 93–94 (reiterating the liberal construction of a pro se complaint after the decision in Twombly).

Lastly, the Court adds to the Report's legal standard that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986); see Coleman v. Thompson, 501 U.S. 722, 750 (1991) holding modified by Martinez v. Ryan, 566 U.S. 1 (2012) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

[5] None of the modifications effect the analysis of the Report.

[6] Furthermore, the Court finds that there is not an absence of available state corrective process or an existence of circumstances that render such process ineffective to protect the rights of Petitioner. 28 U.S.C. § 2254(b)(1)(B).

[7] Petitioner did not object to the Report's recommendation that the fourth ground—regarding the circuit court's jurisdiction—was not a cognizable habeas ground and the trial court had jurisdiction. However, should any of Petitioner's objections be liberally construed to apply to this ground, the Court agrees with the analysis in the Report. Furthermore, if the Court had found Ground Four to be a cognizable habeas

A. Grounds One and Two[8]

Petitioner's first ground is "Insufficient Indictment (Enlarged)" and he claims "that [he was] never Indicted for attempted, and attempt never went before the grand jury." ECF No. 1 at 5. Petitioner's second ground is "Due Process Violation" and he claims that he was "never put on notice for attempted burglary no one even said anything about attempt, until after [he was] acquitted of 1st degree burglary through a direct verdict." Id. at 7.

The Magistrate Judge addressed Grounds One and Two together and recommended that they were not procedurally barred. ECF No. 30. However, as to Ground One, the Magistrate Judge recommended that this Court could not "conclude that the state trial court or the state appellate court's determination on the issue was contrary to, or an unreasonable applicable of, clearly established federal law" because each based their rulings, regarding burglary in the first degree or a lesser included offense of attempted burglary in the first degree,[9] on an interpretation of the South Carolina Code of Laws or common law. ECF No. 30 at 19. Regarding Ground Two, the Magistrate Judge recommended that this Court should find Petitioner's due process rights were not violated by the trial court's jury instruction because Petitioner was indicted for burglary, a more serious crime under South Carolina law. Id. at 20. Moreover, the Magistrate Judge found that the trial court's jury charge of attempted burglary was not unlawful or unconstitutional. Id.

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ground, the trial court had jurisdiction. The Court adds that an indictment was issued for burglary to be tried before the circuit court and Petitioner was simply convicted of a lesser included offense—attempted burglary. Furthermore, as discussed infra, the circuit court did not acquit Petitioner of burglary until after he ruled that he would instruct the jury as to attempted burglary. Thus, the circuit court did have jurisdiction allowing Petitioner to be convicted of attempted burglary. Therefore, Ground Four is dismissed.

[8] Due to the similarity of these grounds and the combined analysis of same in the Report, the Court will address these grounds simultaneously.

[9] All references to these charges hereinafter will be to burglary or attempted burglary.

Petitioner objects to the Magistrate Judge's recommendation that summary judgment should be granted on Grounds One and Two. ECF No. 33. For example, Petitioner argues that the "State[10] Constitution 5th Amendment state that no person shall be put in jeopardy twice for the same crime and its clear that once I were acquitted of the 1st degree burglary I were put in jeopardy again for the same charge." ECF No. 33 at 1. In addition, Petitioner argues that he was sentenced "for something that [was] not included in the indictment" and "never had a trial for." Id. at 1–2. These objections simply rehash Petitioner's arguments in his response in opposition. See ECF Nos. 24, 29. However, this Court will address them to alleviate any concern.

Petitioner's attempt to relay the facts surrounding the directed verdict are misleading. Specifically, the following events transpired regarding the motion for a directed verdict on the burglary charge:

> THE COURT: All right, Mr. Hastie, motions on behalf of Defendant?
>
> MR. HASTIE [Defense Counsel]: Yes, Your Honor. Your Honor, I certainly like to make a motion for a directed verdict. We know that one of the four elements of burglary is there must be an entry.
> . . .
> I think it fails on the elements itself because there never was an entry into [the victim's] home.
>
> THE COURT: All right. So your matter of fact they failed to prove an entry which is one of the requirements of burglary?
>
> MR. HASTIE: Yes, sir.
>
> THE COURT: All right. Mr. Meadors.
>
> MR. MEADORS [Solicitor]: [After arguing circumstantial evidence existed—due to the garage door being lifted two inches—that there was an entry,]
> . . .
> Judge, also if at the appropriate—depending on what Your Honor's ruling is now, I was going to ask Your Honor to consider the lesser included offense of attempted [first degree burglary].

[10] Presumably, Petitioner intended to refer to the United States Constitution as the South Carolina Constitution only contains three amendments.

. . .

MR. MEADORS: . . . I think circumstantially, is theres to [sic] an entry there and if not I think it would be fewer it will be proven entry still have to bring everything else well consent and intent submit [sic] crime which to answer that I think cutting the phones using night before but something good that was going to be planned. Clearly I think there was attempt to be inferred from that. Judge, we respectfully ask Your Honor to charge lesser included offense of attempted burglary. We think it meets the defenses.

THE COURT: Okay. I'm going to think about it. Let me go back and see if I can find anything on it in a few minutes. . . .

. . .

*Now counsel, assuming and I haven't made this decision yet but assum*ing that that two go forward and this matter goes to the jury, tell me about your position Mr. Meadors with regard to report to arguments how many arguments [sic] whether how much time you need?

. . .

THE COURT: All right. We're back on the record . . . Counsel, I have done some research and tried to determine what I thought was appropriate and correct under the law of this case. I am convinced that there is no evidence in the record upon which the jury could convict the defendant of burglary in the first degree because the evidence is simply not there for a showing of entry which is one of the elements of crime of burglary in the first degree. . . . That does not end the inquiry because then we have to look and determine whether or not the crime of attempted burglary should go to the jury as a lesser included offense and I have done some research on that . . . there is a South Carolina case the language for which is first of all, that under the elements test crime will only be considered a lesser offense if the greater crime encompasses all of the elements of lesser. And in this case the greater crime being burglary in the first degree requiring entry whereas the lesser offense does not require an entry but requires all of other elements and furthermore, this particular case goes on to say that when an indictment for greater offense trial court has the requisite jurisdiction to charge and convict a defendant of any lesser included offense inconclusive of instruction is required only whether the evidence warrants such an instruction. To me the evidence in this case is exactly that, . . . so the long and short of it is that I am going to submit the case to the jury on the lesser included offense of attempted burglary in the first degree and not on burglary in the first degree . . . . All right, *that will be the Court's ruling*.

ECF No. 16-10 at 150–65. (emphasis added). Thus, Petitioner's defense counsel moved for a directed verdict and, before the trial judge ruled upon that motion, the prosecution requested a charge of the lesser included offense of attempted burglary. The trial judge simultaneously considered both issues and decided "to submit the case to the jury on the lesser included offense of attempted burglary in the first degree and not on burglary in the first degree." Id. at 165.

As stated by the Magistrate Judge, the rulings of the trial court and appellate court were based on state statutes and common law. Under South Carolina law, "A trial [court] is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Gilliland, 741 S.E.2d 521, 527 (S.C. Ct. App. 2012) (quoting State v. Drafts, 340 S.E.2d 784, 785 (S.C. 1986)). "The federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'" Hopper v. Evans, 456 U.S. 605, 612 (1982) (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)). Thus, the South Carolina rule clearly does not offend federal constitutional standards nor Petitioner's right to due process. Furthermore, evaluation of Petitioner's claims that his rights under the Fifth Amendment or to due process were violated are without merit.

The Double Jeopardy Clause under the Fifth Amendment to the United States Constitution states, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." United States v. DiFrancesco, 449 U.S. 117, 127 (1980) (internal citation and quotations omitted). As explained by the United States Supreme Court:

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. (quoting Green v. United States, 355 U.S. 184, 187–88 (1957)); see also Blueford v. Arkansas, 566 U.S. 599 (2012). Thus, the United States Supreme Court has summarized the "guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (internal citation and quotation omitted).

With regard to the Fifth Amendment of the United States Constitution, the United States Supreme Court has held that a defendant's trial ends in an acquittal when a trial court rules that the State has failed to produce sufficient evidence of his guilt, and, thus, the Double Jeopardy Clause bars retrial for the offense. See Evans v. Michigan, 133 S. Ct. 1069, 1081 (2013). In Evans, the defendant moved for a directed verdict of acquittal in the state trial court, arguing that the prosecution had failed to prove a burned building was a dwelling—an alleged element of the charged offense—and the trial court granted the motion. Id. at 1073. However, the prosecution only contested whether the element was required and did not appear to request a charge of a lesser included offense. Id. at 1073 (citing People v. Evans, 810 N.W.2d 535, 539 (Mich. 2012)).

Here, the solicitor requested a charge for the lesser included offense of attempted burglary before the trial court ruled on the motion of Petitioner's defense counsel for a directed verdict. The trial court considered both issues together, relying upon South Carolina statutes and common law, and specifically ruled, "I am going to submit the case to the jury on the lesser

included offense of attempted burglary in the first degree and not on burglary in the first degree. . . . All right, that will be the Court's ruling." ECF No. 16-10 at 165. Thus, the trial court issued its final decision on each issue after giving them due consideration by first ruling that a charge of the lesser included offense would be given and, second, that Petitioner was entitled to a directed verdict on the greater offense. See Smith v. Massachusetts, 543 U.S. 462, 469 n.4 (2005) (referencing Swisher v. Brady, 438 U.S. 204 (1978) and recognizing "that the initial jeopardy does not end until there is a final decision"); see also S.C. R. Crim. P. 19 (implying a motion for directed verdict does not need to be immediately ruled upon). The United States Supreme Court has "held that the Double Jeopardy Clause is violated when a defendant, tried for a greater offense and convicted of a lesser included offense, is later retried for the greater offense," which is different than a defendant may not be convicted of a lesser included offense at the conclusion of a trial as Petitioner seems to contend. Blueford v. Arkansas, 132 S. Ct. 2044, 2052 (2012). Moreover, jeopardy may terminate on some counts even as it continues on others. Smith v. Massachusetts, 543 U.S. 462, 465–70 (2005).

Here, Petitioner was not subjected to a second trial or prosecution nor was additional evidence being surmounted against him to convict him of attempted burglary. The prosecution merely moved for the trial judge to instruct the jury on a lesser included offense, which was granted, before the trial judge granted the motion of Petitioner's defense counsel to acquit him of the greater offense.

As to Petitioner's due process argument, the United States Supreme Court has previously declined "to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause." Sattazahn v. Pennsylvania, 537 U.S. 101, 116 (2003). The South Carolina Supreme Court recently articulated, "Due process requires that a lesser included

offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence." Cook v. State, 784 S.E.2d 665, 669 (S.C. 2015) (internal citations and quotations omitted) (emphasis in original). As discussed above, Petitioner's right to due process was not violated by instruction of the lesser included charge, which appears to be a standard procedure in state and federal courts. See, e.g., United States v. Walkingeagle, 974 F.2d 551, 553 (4th Cir. 1992) (holding a district court retained jurisdiction over the lesser included offense after it granted judgment of acquittal on the statutory felony counts as the rule allowing a court to submit an uncharged lesser included offense to the jury was a matter of procedure that "was originally intended to aid prosecutors whose proof of the charged offense failed, [but] defendants more often invoke the procedure as a means of giving the jury a less serious alternative").

Thus, the charge of attempted burglary was deemed to be a lesser included offense of burglary and the issue was raised before the trial judge ruled on the motion for a directed verdict on the greater offense. Moreover, the lesser included charge was not required to be listed on the indictment or presented to a grand jury for this state charge. Petitioner's right under the Fifth Amendment was not violated as he was not acquitted of the greater offense until after the trial judge decided he would instruct the jury on the lesser included offense so double jeopardy had not attached. Finally, Petitioner's right to due process was not violated as he was on notice of the elements of the greater offense.

Therefore, the state courts' decisions did not result "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" nor were they "based on an unreasonable determination of

the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254. Furthermore, Petitioner's objections are overruled and Grounds One and Two are dismissed.

B. Ground Three

Petitioner's third ground is "Ineffective Assistance of Counsel," and he claims his lawyer "allowed Improper admission of here say" and was "not prepare[d] for attempted burglary, or less[er] included offense." ECF No. 1 at 8. Regarding Ground Three, the Magistrate Judge recommended that the hearsay issue was procedurally barred because it was not raised to and ruled upon by the PCR court nor raised in the appeal from Petitioner's PCR dismissal. ECF No. 30 at 20. Thus, the Magistrate Judge recommended this portion of Ground Three be dismissed without review on the merits. Id. at 20–21. As to the lawyer's preparedness for attempted burglary being charged, the Magistrate Judge recommended that the PCR court did not unreasonably misapply clearly established federal law in rejecting Petitioner's ineffective-assistance-of-counsel claim nor did the PCR court make objectively unreasonable factual findings. Id. at 22–23.

Petitioner objects to the Report's recommendation and argues that his lawyer was not effective because the lawyer acknowledged that he was not fully prepared "to take on the task at hand." ECF No. 33 at 2.

1. Counsel's Effectiveness Regarding Hearsay Objection

To the extent that Petitioner's objection is construed as an objection to the entire recommendation for Ground Three, the Magistrate Judge correctly concluded that whether Petitioner's counsel allowed hearsay testimony was not preserved for review and is procedurally barred as this issue was not raised to the PCR court nor was it raised on appeal from its

dismissal. In addition, Petitioner has not argued that the procedural default is excused by cause and prejudice or actual innocence.

Moreover, should this portion of Ground Three not be barred, Petitioner has failed to show how counsel's performance was deficient and resulted in prejudice. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." S.C. R. Evid. 801(c); accord Fed. R. Evid. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). The victim's statements as to what she observed during the crime and her identification of him are not hearsay.[11]

Thus, the performance of Petitioner's counsel in failing to object to this evidence as hearsay could not have been deficient, and, if not procedurally barred, this portion of Ground Three would fail on the merits.

2. Counsel's Effectiveness Regarding Attempted Burglary Charge

With regard to the second portion of Ground Three—claiming his lawyer was not prepared to address attempted burglary—the Court agrees with the Magistrate Judge's recommendation that the PCR court did not unreasonably apply clearly established federal law in rejecting Petitioner's ineffective-assistance-of-counsel claim nor did the PCR court make objectively unreasonable factual findings. Id. at 22–23.

[11] In Ground Three—as to the hearsay issue—it is unclear how it arose as the victim testified as to what she saw and her conduct whereas hearsay is defined as a "statement that . . . the declarant does not make while testifying at the current trial . . . and . . . a party offers in evidence to prove the truth of the matter asserted in the statement." FRE 801.

Petitioner objects to the Report's recommendation and argues that his lawyer was not effective because the lawyer acknowledged that he was not fully prepared "to take on the task at hand." ECF No. 33 at 2.[12]

During the PCR hearing, Petitioner testified that his trial counsel met with him two to three times and discussed the evidence as well as possible defenses with him. ECF No. 16-11 at 46–47, 49. Trial counsel testified that he met with Petitioner four to five times prior to trial, moved for discovery as well as reviewed it with Petitioner, and conducted an investigation even though Petitioner did not provide him with any witnesses to interview on his behalf. ECF No. 16-11 at 52–54. Moreover, trial counsel explained that he moved for a directed verdict on the burglary charge, which the trial judge granted, and trial counsel objected to the jury considering attempted burglary. Id. at 53. Trial counsel testified that he felt prepared for trial, but, as to the "defense of no presence," the witness was "a hundred percent certain [Petitioner] was there" and Mr. Green, who claimed to be home alone, decided not to take the stand due to his extensive record. ECF No. 16-11 at 55. During his closing at trial, trial counsel did argue Petitioner was not present at the victim's house at the time of the attempted burglary. ECF No. 16-11 at 59; ECF No. 16-10 at 169–76.[13] Trial counsel also testified that he spoke "with the Solicitor and there was no discussion from the Solicitor's Office about charging him with the attempt so when they came with that, it was kind of a surprise to us"; however, trial counsel did object to the attempted burglary charge and was overruled. ECF No. 16-11 at 60–61. Finally, when asked if

[12] As to Petitioner's contention that his trial counsel was ineffective for failing to raise the defense of no presence at the alleged location (ECF No. 16-11 at 41), trial counsel provided an explanation as to why this defense was not strongly raised. During the PCR hearing, trial counsel explained that the victim knew Petitioner very well, was able to see him through the peephole as well as her window, and was able to positively identify him as the suspect. ECF No. 16-11 at 54–55. Moreover, Petitioner did not provide trial counsel with any witnesses to vouch for his location because he claimed that he was home alone sleeping in his bed, Petitioner chose not to testify at the trial, and Petitioner stated that he never discussed putting forth the defense with his attorney. ECF No. 16-11 at 42, 49–50, 52–53.

[13] A copy of the trial transcript was before the PCR court at the time of its ruling. ECF No. 16-11 at 72.

his defense strategy would have changed if he had known Petitioner would be facing attempted burglary, trial counsel answered, "Probably not because I felt that there was absolutely no evidence that he was there, that they could prove that and that they did prove that. So we probably – the strategy would not have changed." ECF No. 16-11 at 63.

During the PCR hearing, the PCR judge stated, "It's clear from the transcript that [trial counsel] did everything he could do to try to win this case for [Petitioner]. ECF No. 16-11 at 64. The PCR judge stated that trial counsel "did a great job" and "there [is] no basis for a PCR in this case." Id. at 68–69. Notably, the PCR court found trial counsel's testimony credible and Petitioner's testimony not credible. ECF No. 16-11 at 75.

To the extent that Petitioner objects because trial counsel was not fully prepared for trial, it appears to rest solely on trial counsel's surprise by the attempted burglary charge. However, as discussed above, trial counsel was prepared for trial and obtained a directed verdict on the charge upon which Petitioner was indicted. With regard to trial counsel's surprise as to the attempted burglary charge request, trial counsel stated that he had researched the issue and did not believe it was a lesser included offense of burglary or proper for the jury to consider it. ECF No. 16-10 at 157–58. Trial counsel objected to the attempted burglary charge, and the trial court overruled Petitioner's objection. ECF No. 16-10 at 164–66. In addition, trial counsel specifically stated that he would not have changed his strategy because he maintained that Petitioner did not enter the home and was not present during the attempted burglary.

The PCR court found that trial counsel's actions were reasonable, and even if they were not, Petitioner could not show prejudice "as there was clear overwhelming evidence of guilt" due to the positive identification. ECF No. 16-11 at 77. Thus, the Magistrate Judge correctly recommended that Petitioner failed to demonstrate the PCR court unreasonably applied the

Strickland/Hill test or clearly established federal law. ECF No. 30 at 23. Moreover, the Magistrate Judge was correct to recommend that the PCR court did not make objectively unreasonable factual findings. Id.

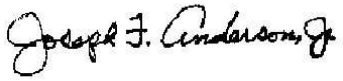
Therefore, a portion of Ground Three is procedurally barred and not excused due to the failure to show cause and prejudice or actual innocence nor would it be successful on the merits. Furthermore, Respondent is entitled to summary judgment on the remaining portion of Ground Three as it is unsuccessful on the merits and Petitioner's objections are overruled. Moreover, the state courts' decisions did not result "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" nor were they "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254.

IV. CONCLUSION

After a careful review of the record, the applicable law, the Report and the objections thereto, this Court finds that the Magistrate Judge's recommendation is proper. Accordingly, the Court **ADOPTS** and incorporates by reference the Report and Recommendation, as modified, of the Magistrate Judge. ECF No. 30. It is therefore **ORDERED** that Respondent's motion for summary judgment (ECF No. 17) is **GRANTED** and Petitioner's petition for writ of habeas corpus (ECF No. 1) is **DENIED**.

Further, because Petitioner has failed to make "a substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c)(2).[14]

IT IS SO ORDERED.



July 14, 2017
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

[14] 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). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. 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, 683–84 (4th Cir. 2001). In the instant matter, the Court finds that Petitioner has failed to make "a substantial showing of the denial of a constitutional right."