No. 18-7277

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON D. MCGEE, SR.,

Petitioner,

v.

JOSEPH MCFADDEN, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals err in finding that Petitioner failed to stet a claim of the denial of a Constitutional [sic] where the State failed to provide Brady material in the form of a letter from a jailhouse snitch until a post-trial motion for a new trial hearing?

2. Were the State and Federal courts' decisions contrary to Giglio, Bagley, Brady and Napune [sic] v. Illinois where the State failed to disclose material impeachment evidence in the form of a jailhouse snitch letter and testimony was that Petitioner confessed to him?

3. Did the State and Federal courts err in finding that trial counsel rendered effective assistance where he failed to interview Michael Jones and call him as a witness?

(Petition, i-ii).

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OPINION BELOW

Petitioner seeks to appeal the opinion of the Fourth Circuit Court of Appeals denying his certificate of appealability to review the denial of relief in his 28 U.S.C. § 2254 action. That opinion is provided in the Petition Appendix A, at pp. 40-41. The Order from the District Court of South Carolina is provided in Petition Appendix C, at pp. 44-53.[1]

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its *per curiam* opinion on August 2, 2018, and denied a timely petition for rehearing on September 2, 2018. (Petition Appendix A, at 40; Petition Appendix B, at 43). The

[1] The Court also requested the record from the Fourth Circuit Court of Appeals on February 11, 2019. The Court of Appeals provided the record on February 12-13, 2019 according to the publically available docket listing. The publically accessible documents are also available on PACER.

Court's docket shows the petition was filed November 20, 2018, which is within the ninety day limit provided by the rules. Supreme Court Rule 13 (3). Petitioner contends this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). (Petition, p. 2).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner submits his rights secured by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution are at issue. (Petition, p. 3).

STATEMENT OF THE CASE

1. General Procedural History:

A Georgtown County grand jury indicted Petitioner in June 2006 for criminal sexual conduct ("CSC") with a minor, second degree (2006-GS-22-580); lewd act upon a minor child (2006-GS-22-581); and, assault with the intent to commit CSC with a minor, second degree (2006-GS-22-582). (ECF #16-4 at 100–101, 103–104, 106–107). Stuart Axelrod, Esq., represented Petitioner. A jury trial was held September 18–20, 2006, before the Honorable Roger L. Couch. (ECF #16-1 at 3). The jury found Petitioner guilty as charged. (ECF #16-2 at 20). Judge Couch sentenced him to life without parole for second-degree CSC with a minor; twenty years for assault with intent to commit CSC with a minor; and fifteen years for lewd act upon a minor. (ECF #16-2 at 26-27).[2]

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[2] Petitioner was absent from sentencing following his attack on the prosecutor. The transcript reflects: "At this time the defendant jumps up, flips counsel table over, runs to the center of the courtroom toward the court reporter and the jury, stops, turns toward the assistant solicitor, Mr. Bryan, jumps onto Mr. Bryan, throws him to the floor and begins to choke him. The deputy sheriff comes from behind the rail, places the taser into the defendant's back while the defendant is still on top of Mr. Bryan chocking [sic] him. Two other sheriff's deputies run over to assist the first deputy

On September 21, 2006, Petitioner filed a motion for a new trial, which Judge Couch denied on November 9, 2006. (ECF #16-5; BIO Attachment C).

Petitioner appealed his conviction and sentence to the South Carolina Court of Appeals. (ECF #16-6). Appellate counsel Katherine H. Hudgins, Esq., of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a final brief on or about August 26, 2008, raising the following issue:

> Did the judge err in refusing to grant a new trial based on the assistant solicitor's failure to disclose a letter from a witness demonstrating a willingness to make a deal in exchange for testimony?

(ECF #16-2 at 59).

On November 19, 2009, the Court of Appeals filed an unpublished decision affirming Petitioner's convictions and sentences. (ECF #16-2 at 88–89). Petitioner also sought review from the Supreme Court of South Carolina, but his petition was denied by order dated January 20, 2011. (ECF #16-11).

Petitioner filed an application for post-conviction relief ("PCR") on February 14, 2011, (ECF #16-2 at 91–102), with amendments on March 7, 2011, and January 25, 2012, (ECF #16-2 at 103–52, 169–72). William L. Runyon, Jr., Esq., represented Petitioner. An evidentiary hearing was held before the Honorable Steven H. John on December 19, 2013, and on January 22, 2014, Judge John issued an order of dismissal. (ECF #16-24). Petitioner appealed.

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sheriff. The defendant is handcuffed and placed on his back. The taser is then placed on the defendant's chest and he is told not to move. The defendant is then dragged from the courtroom by the sheriff's deputies." (ECF #16-2 at 20-21). The trial judge found defendant "forfeited his right to be present at sentencing." (ECF #16-2 at 22).

Appellate Defender Carmen V. Ganjehsani, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a no-merit petition with the South Carolina Supreme Court on or about September 4, 2014. (ECF #16-14). On September 29, 2015, the South Carolina Supreme Court directed additional briefing on multiple issues. (ECF #16-18). Appellate Defender Laura R. Baer, Esq., substituted in and filed another petition consistent with the order. (ECF #16-19). The Supreme Court of South Carolina denied the petition by order dated September 21, 2016. (ECF No. 16-22).

Petitioner thereafter sought review in the District Court of South Carolina by filing a petition pursuant to 28 U.S.C. § 2254. The Honorable Patrick Michael Duffy, District Court Judge, denied relief and declined to order a certificate of appealability in his order filed February 9, 2018. (ECF #33). Again, Petitioner appealed.

By opinion filed August 2, 2018, the Fourth Circuit Court of Appeals found Petitioner failed to make the required showing to obtain a certificate of appealability. (Petition Appendix A, at 40). The Court of Appeals denied a timely petition for rehearing on September 2, 2018. (Petition Appendix B, at 43).

Petitioner filed his Petition for Writ of Certiorari with this Court on November 20, 2018. Respondent filed a waiver on January 17, 2019. On February 11, 2019, this Court requested a response. This Brief in Opposition follows.

2. Factual Basis for the Crimes:

The Magistrate summarized generally the fact of the crimes as developed in the September 2006 trial as follows:

At trial, the state presented evidence that Petitioner sexually abused his stepdaughter ("Victim"). [ECF Nos. 16-1 at 54–68]. The Victim was 15 years old when she testified at Petitioner's trial. *Id.* at 54. She testified that she had lived with Petitioner, her mother, and her siblings at the time of the abuse. *Id.* at 60, 62, 68. Victim testified that the first time Petitioner touched her inappropriately, he called her into his bedroom and told her to lie on top of him. *Id.* at 58. Victim was fully clothed and Petitioner had on pants and no shirt. *Id.* Victim stated two days later, Petitioner again called her into his bedroom and told her to sit beside him on the bed, where he touched her vagina and her behind through her pants. *Id.* at 59–60. Victim testified that, after her mother began her new work schedule from 5 a.m. to 1 p.m., Petitioner again asked her to his room and told Victim to lie on the bed. *Id.* at 61. Victim stated Petitioner got on top of her and touched her vagina through her clothes, and then reached inside her pants and started touching, but not penetrating, her. *Id.* at 61–62. Victim stated that a short time later, Petitioner again called her into his bedroom and Petitioner did not have any underwear on and he instructed Victim to masturbate him. *Id.* at 62. Victim testified that afterwards, Petitioner tried to have sex with her, but she pushed him off. *Id.* at 62–63, 65–66. Victim says these events happened during the summer. *Id.* at 63. Victim stated that once she started the eighth grade, Petitioner touched her inappropriately while she slept. *Id.* at 63–69. Victim testified that one time Petitioner reached into her pajamas and digitally penetrated her vagina while she was sleeping. *Id.* at 63–64. Victim testified that on another occasion, Petitioner whispered in her ear when she was half sleep that he wanted to have sex with her. *Id.* at 67. Victim testified that Petitioner put his mouth on her breasts, penetrated her with his finger, and tried to perform oral sex on her when she was sleep. *Id.* at 67–68. Victim stated she told Petitioner to leave her alone, and he stopped. *Id.* Victim said she told her seven-year old brother about Petitioner's abuse, but she never told her mother because she did not think her mother would believe her and she was scared of what would happen if she said anything. *Id.* at 68–69.

Victim testified she told Petitioner's trial counsel she lied about the sexual abuse out of revenge and spite and that Petitioner did not touch her. *Id.* at 70, 72. Victim also told Petitioner's counsel that her family wanted her to say false and bad things about Petitioner because her family did not like Petitioner being with her mother. *Id.* at 75–77. Victim testified that her mother drove her to Petitioner's counsel's office. *Id.* at 70. Victim stated her mother told her if she did not tell Petitioner's counsel that Petitioner had not molested her, that her

> mother would go to jail and her sisters would go to foster care. *Id.* at 71. Victim testified that she told her grandmother and father about the visit to Petitioner's counsel's office, and her grandmother told her to call Petitioner's counsel and tell him why she really made her statement. *Id.* at 81. Petitioner stated she later called Petitioner's counsel and left a message stating that her mother forced her to give her statement. *Id.* at 81–82. Victim stated that her grandmother was in the room when she called. *Id.* at 83–84.
>
> Inmate Aaron Kinloch ("Kinloch") testified that he was in the county jail with Petitioner. *Id.* at 104. Kinloch stated that he did not know Petitioner before he was incarcerated, but Petitioner knew him. *Id.* at 106. Kinloch testified that one day Petitioner went to his cell and started to talk to Kinloch about his case. *Id.* at 108. Kinloch stated Petitioner told him he did not use his penis sexually toward his stepdaughter, but he used his finger, and that is why the DNA test came back inconclusive. *Id.* at 111–12. Kinloch testified that he wrote a letter to Petitioner's solicitor about his conversation with Petitioner because "if whatever he did took place, that's nasty to me, me myself. I've got kids of my own." *Id.* at 113. A medical exam was performed on Victim in September 2005 and the tests indicated Victim had a penetrating injury, but the medical expert could not say what caused the injury. *Id.* at 130, 133.

(Petition Appendix D, at 55-57; ECF #25 at 2-4)

REASONS WHY CERTIORARI SHOULD BE DENIED

There are two. First, Petitioner does not argue that the Court of Appeals applied the incorrect standard in denying his certificate of appealability. His argument goes to disagreement with the merits as decided by the District Court. Petitioner's Issue One presents no cause for this Court to exercise jurisdiction and consider the denial of the certificate based on the underlying merits of the remaining issues. Second, the remaining issues – a *Brady* claim and an ineffective assistance on allegation of failure to adequately investigate – involve ordinary application of well-established federal law. Moreover, that ordinary application was

based upon fact-intensive scrutiny of the well-developed record to determine the Brady error did not undermine confidence in the trial, and a lack of prejudice regarding the ineffective assistance claim. The reachable issues are factbound and unique to this matter. Petitioner has failed to show certiorari review is warranted.

I.

Petitioner has not alleged a cognizable argument for review of the Fourth Circuit opinion.

Petitioner argues that the Fourth Circuit incorrectly found Petitioner failed to show the denial of a Constitutional claim. (Petition, p. i, Issue 1). However, the Fourth Circuit did not consider the full merits of any of Petitioner's claims. Rather, the Fourth Circuit properly applied the standard for issuance of a certificate of appealability.

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Id.*, 137 S. Ct. at 773 (citing *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003)). Neither the District Court nor the Fourth Circuit granted a certificate. (Petition Appendix A, at 40-41; Petition Appendix C, at 53 n. 3; see also ECF #33 at 10 n. 3). Moreover, it would be error for the Court of Appeals to consider the full merits in denying the certificate. "A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'" *Id.*, at 774 (quoting *Miller–El*, 537 U.S., at 327).

Because Petitioner has not challenged the standard applied in consideration of the certificate, there is no issue which should be reviewed in regard to the Fourth Circuit Opinion. At any rate, it appears Petitioner actually wants to challenge the District Court's determination that the state court did not unreasonably apply federal law or make unreasonable determination of facts in concluding his claims did not warrant relief. Respondent submits his challenges are not only factbound and unsuitable for certiorari review, the record demonstrates ample support for the District Court's rulings.

II.

The District Court applied the correct deference in its determination the state courts reasonably applied this Court's precedent in finding confidence in the result of the trial was not undermined from a Brady violation in context of the trial proceedings and facts of record such that habeas relief was not warranted.

This Court has repeatedly reminded the lower federal courts of the strictures of review in cases considered pursuant to 28 U.S.C. § 2254. "Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner is eligible for federal habeas relief if the underlying state court merits ruling was 'contrary to, or involved an unreasonable application of, clearly established Federal law' as determined by this Court." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1727 (2017). "The statute respects the authority and ability of state courts and their dedication to the protection of constitutional rights." *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019). "This means that a state court's ruling must be 'so lacking in justification that there was an error well understood and comprehended in existing

law beyond any possibility for fairminded disagreement'" to qualify for relief. *Id.* (quoting *Harrington v. Richter,* 562 U.S. 86, 103 (2011)).

Brady v. Maryland, 373 U.S. 83, 87 (1963) requires the prosecution disclose "evidence favorable to an accused" where "material either to guilt or punishment" lest it violate a defendant's due process rights. The disclosure requirement extends to witness impeachment evidence. *Giglio v. United States,* 405 U.S. 150, 153-154 (1972). Whether "'evidence is 'material' within the meaning of *Brady*'" depends upon finding "'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Smith v. Cain,* 565 U.S. 73, 75 (2012) (quoting *Cone v. Bell,* 556 U.S. 449, 469–470 (2009)). This Court has qualified as to prejudice that the proper test is not as to a likely "'different verdict,'" but whether "the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Id.,* (quoting *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) (with internal quotation marks omitted)).

At issue in this claim was a two page letter from a jailhouse informant, Aaron Kinloch, to the prosecutor in Petitioner's case. (BIO Appendix A; ECF #16-4 at 25-26).[3] In the letter, Kinloch writes he knows about McGee's crime and declares it "disgusting." Id. He also asserts on page two of the letter, "So if you wish to speak to me, I'm willing to help, if you are cause I do need your help." Id. The letter is dated August 4, 2006. Id. Kinloch referenced the letter in his testimony at trial on September 19, 2006, testifying that he contacted the prosecutor "[t]hrough a letter."

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[3] The copy is provided as filed in PACER and appears to cut off some portion of the edges of the text.

(BIO Appendix B, ECF #16-1 at 105). The prosecutor asked Kinloch "why" he sent the letter, to which Kinloch responded, "if whatever he did took place, that's nasty to me... I've got kids of my own," and that is what he put in the letter to the prosecutor. (BIO Appendix B, ECF #16-1 at 113). Kinloch testified that Petitioner told him he had digitally penetrated his stepdaughter victim and that was why the "D.N.A. test came back inconclusive...." (BIO Appendix B, ECF #16-1 at 112).

The record also shows prior to the testimony, the parties sought to settle Kinloch's record for impeachment purposes. Kinloch testified *in camera* that he had previously pleaded guilty to a receiving stolen property charge, though charged with burglary charge, prior to contacting the prosecutor. (Appendix B, ECF #16-1 at 105). A new trial motion based on the failure to provide the informant's letter, or advise of the burglary charge by report or other means, was denied. The trial judge found a Brady violation for failure to disclose the letter, but that Petitioner did not show confidence in the trial proceedings was undermined such as would warrant relief. (BIO Appendix C, ECF #16-5 at 4-5). In his alternative ruling, the PCR judge agreed there was a Brady violation but also agreed the violation did not "deprive the defendant of a fair trial." (BIO Attachment D, ECF #16-24 at 14-15).

The claim was raised in the District Court as Ground Two of the habeas petition. The issue was treated as properly exhausted and available for deferential review on the merits. The District Court concluded that it was reasonable to find a Brady violation, but no prejudice. The District found:

> ... Petitioner objects to the Magistrate Judge's recommendation that the Court grant Respondent summary judgment on ground two of his

habeas petition. In that ground, Petitioner alleges that the solicitor committed prosecutorial misconduct by misrepresenting his relationship with State's witness Aaron Kinloch, and by not disclosing Kinloch's full criminal history. Specifically, Petitioner alleges that the solicitor committed a *Brady* violation by failing to disclose a letter that Kinloch wrote to the solicitor offering to testify against Petitioner. [FN 1]

> [FN 1] As the Magistrate Judge thoroughly discussed in her R & R, Kinloch wrote a letter to the solicitor on August 4, 2006. He stated that he had spoken to another inmate, Michael Jones, about Jones' conversation with the solicitor regarding Petitioner's case. Kinloch also stated that he knew the whole story about what happened between Petitioner and his stepdaughter. Finally, Kinloch wrote that he was willing to help and testify at trial because he needed the solicitor's help.

The Magistrate Judge based her recommendation on Petitioner's failure to show that the state courts' decisions on this issue "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 "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Specifically, the Magistrate Judge concluded that the state courts correctly applied the standard set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and that the state courts' rulings denying reversal based on Petitioner's *Brady* claim were not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The Court agrees.

While the PCR court concluded that Petitioner had met all of the elements of *Brady* with regard to Kinloch's letter, that court also determined that reversal was still not warranted. As set forth in *Kyles v. Whitley*, reversal for a *Brady* violation is required "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 514 U.S. 419, 433–34 (1995). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). When reviewing a habeas petition pursuant to § 2254, "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." 28 U.S.C. § 2254(e)(1). The trial judge, the South Carolina Court of Appeals, and the PCR court all examined the facts surrounding Petitioner's *Brady* claim and concluded that reversal was not warranted because Kinloch's letter was merely additional impeaching evidence, and that there was no evidence that Kinloch and the solicitor actually made a deal in exchange for Kinloch's testimony. Although the Court recognizes that it is conceivable that the impeachment value of Kinloch's letter might have changed the outcome of Petitioner's trial even in the absence of a deal between Kinloch and the solicitor, Petitioner has failed to satisfy his burden of proving that there is a **reasonable probability** that the outcome would have been different. Specifically, Petitioner's objections provide a strong argument as to the *Brady* issue, but fail to show that there is a reasonable probability that the outcome would have been different. Here, the trial judge stated that, based on his determination of the facts, the solicitor's actions "do not rise to the level of bring[ing] the trustworthiness of the verdict into question." (Return Mem. Pet. Writ Habeas Corpus, State Ct. Docs. Attach. Number 2, ECF No. 16-5, at 5.) The PCR court similarly stated that "[t]rial counsel extensively attacked Kinloch's credibility. The jury was aware of Kinloch's prior conviction and pending charges. Because trial counsel effectively called Kinloch's credibility into question with his prior crimes, the impeachment evidence of Kinloch's desire to assist the State did not deprive [Petitioner] of a fair trial." (Return Mem. Pet. Writ Habeas Corpus, State Ct. Docs. Attach. Number 21, ECF No. 16-24, at 14–15 (citing *State v. Cheeseboro*, 552 S.E.2d 300, 314–15 (S.C. 2001).) Petitioner has not made a sufficient showing that those determinations were wrong or that there was a reasonable probability of a different outcome had the letter been introduced at trial as additional impeachment evidence. The PCR court's ruling also completely undermines Petitioner's argument about Kinloch's pending charges and prior convictions that were not disclosed on his NCIC report. The PCR court concluded that the jury was aware of all of those charges and convictions. The Court sees no reason to overturn that finding as it does not unreasonably apply clearly established federal law and it is not an unreasonable determination of the facts. Accordingly, the Court overrules Petitioner's objection.

(Petition Appendix C, at pp. 46-48; ECF # 33 at 3-5) (emphasis in original).

The District Court's order reflects and supports it applied the correct standards to this case and its denial of relief is well-supported by the record. This Court should deny the petition.

III.

The District Court applied the correct deference in its determination the state court reasonably found Petitioner failed to show *Strickland* prejudice in trial counsel's failure to interview a specific witness, Michael Jones, to support an ineffective assistance of counsel claim.

As noted above, AEDPA sets out significant restrictions to review in federal habeas. In reviewing a claim of ineffective assistance, there is an additional restriction. To be entitled to relief on an ineffective assistance claim, Petitioner must show (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). The review of ineffective assistance of counsel claims in federal habeas, though, is not simply a new review of the merits; rather, habeas review is centered upon whether the state court decision was reasonable. 28 U.S.C. § 2254(d). Each step in the review process requires deference – deference to counsel and deference to the state court that previously reviewed counsel's actions. *Harrington v. Richter*, 562 U.S. at 105. Thus, the deference is greater in review of such claims.

At PCR, Petitioner present Michael Jones. (BIO Appendix E, ECF #16-3 at 17-25). As the Magistrate found, and the record supports, while the PCR testimony could give context or motive, Jones "did not challenge the veracity of Kinloch's

statement that Petitioner confessed to abusing his stepdaughter." (Petition Appendix D, at 84; ECF #25 at 31). In fact, the testimony shows confirms that Kinloch and Petitioner could have spoken, though Jones disagreed as to Petitioner's guilt. At any rate, the issue was raised as Ground Five in the habeas petition and considered properly exhausted for review on the merits under the deferential standards outlined above. The District Court agreed with the Magistrate in the following particulars:

> ... Petitioner objects to the Magistrate Judge's recommendation that the Court grant summary judgment to Respondent on ground five. Specifically, Petitioner objects to the Magistrate Judge's conclusion that Petitioner was not prejudiced by his trial counsel's failure to investigate Michael Jones prior to trial. Michael Jones was detained in the Georgetown County Detention Center at the same time as Petitioner and Aaron Kinloch. Jones testified at Petitioner's PCR hearing, stating that he spoke with the solicitor three times about Petitioner. Jones also said that he told Kinloch about his conversations with the solicitor about Petitioner and that he told Kinloch that the solicitor was looking for someone to testify against Petitioner. According to Jones, that conversation was the impetus for Kinloch to write the above-discussed letter to the solicitor asking for the solicitor's help in exchange for his testimony against Petitioner.
>
> The Magistrate Judge concluded that Petitioner's trial counsel's performance was deficient as a result of his failure to interview Jones before trial. The Magistrate Judge based that determination on trial counsel's request for a continuance and his own admission that he felt Petitioner's trial was a trial by ambush, as well as trial counsel's testimony that more meetings with Petitioner might have led to discovery of other witnesses he could have interviewed like Michael Jones. Petitioner's trial counsel testified that he was not able to review his trial notebook with Petitioner, and that he would have met with Petitioner several more times before trial had he known that the trial was going to take place. Finally, the Magistrate Judge concluded that Jones' testimony would have been helpful in challenging Kinloch's testimony because it provided the context in which Kinloch wrote the letter and Kinloch's motivation for writing it.

> Nonetheless, the Magistrate Judge also concluded that Petitioner was not prejudiced even though his trial counsel was deficient because Jones' testimony did not challenge the veracity of Kinloch's statement that Petitioner confessed to him about abusing his stepdaughter. The Magistrate Judge concluded that Petitioner's trial counsel had already extensively attacked Kinloch's credibility, so Jones' testimony would have been cumulative and would not have led to a different trial result. Accordingly, the Magistrate Judge recommends that the Court conclude that Petitioner was not prejudiced by his trial counsel's failure to interview Jones prior to trial.
>
> "While there are times that a failure to investigate impeachment evidence can satisfy the prejudice prong, that is less likely to be the case than a failure to investigate direct evidence." *U.S. v. Mason*, 552 F. App'x 235, 239 (4th Cir. 2014) (per curiam). Such is the case here. Trial counsel's failure to interview Michael Jones before trial and his corresponding failure to obtain Jones' additional impeachment evidence against Kinloch is insufficient to surmount the reasonable probability standard. As already set forth above in the discussion about Kinloch's letter, trial counsel extensively cross-examined Kinloch and used other impeachment evidence against him at trial. As a result, the Court cannot conclude that there is a reasonable probability that the additional impeachment value of Jones' testimony would have changed the trial's outcome. Accordingly, Petitioner's objection is overruled.

(Petition Appendix C, at pp. 50-52; ECF # 33 at 7-8).

Again, Petitioner can show no error either in the standard of review, the application of the review, or the factual support in the record. Not only is the review he requests fact-intensive and ill-suited for this Court, the record shows Petitioner has had ample review by multiple courts. The facts simply do not support relief. This Court should deny the petition.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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