APPENDIX "A"

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6211

SHANNON D. MCGEE, SR.,

Petitioner - Appellant,

v.

WARDEN JOSEPH MCFADDEN,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Aiken. Patrick Michael Duffy, Senior District Judge. (1:16-cv-03866-PMD)

Submitted: July 31, 2018 Decided: August 2, 2018

Before TRAXLER, DUNCAN, and AGEE, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Shannon Derowe McGee, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Shannon Derowe McGee, Sr., seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that McGee has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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FILED: August 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6211
(1:16-cv-03866-PMD)

SHANNON D. MCGEE, SR.

Petitioner - Appellant

v.

WARDEN JOSEPH MCFADDEN

Respondent - Appellee

J U D G M E N T

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

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

/s/ PATRICIA S. CONNOR, CLERK

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APPENDIX "B"

FILED: September 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6211
(1:16-cv-03866-PMD)

SHANNON D. MCGEE, SR.

Petitioner - Appellant

v.

WARDEN JOSEPH MCFADDEN

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Duncan, Judge Agee, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

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

Shannon D. McGee, Sr., #147120,	)	
	)	
Petitioner,	)	C.A. No.: 1:16-cv-3866-PMD-SVH
	)	
v.	)	**ORDER**
	)	
Warden Joseph McFadden,	)	
	)	
Respondent.	)	

This matter is before the court on Petitioner's objections to United States Magistrate Judge Shiva V. Hodges' report and recommendation ("R & R") (ECF Nos. 31 & 25). The Magistrate Judge recommends granting Respondent's summary judgment motion (ECF No. 17) and denying Petitioner's petition for relief under 28 U.S.C. § 2254.

Magistrate Judge Hodges issued her R & R on October 3, 2017. After receiving an extension, Petitioner filed his objections to the R & R on November 6. Accordingly, this matter is now ripe for review.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this Court. The R & R has no presumptive weight, and the responsibility for making a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). Parties may make written objections to the R & R within fourteen days after being served with a copy of it. 28 U.S.C. § 636(b)(1). This Court must conduct a de novo review of any portion of the R & R to which a specific objection is made, and it may accept, reject, or modify the Magistrate Judge's findings and recommendations in whole or in part. *Id.* Additionally, the Court may receive more evidence or recommit the matter to the Magistrate Judge with instructions. *Id.* A party's failure to object is taken as the party's

agreement with the Magistrate Judge's conclusions. *See Thomas v. Arn*, 474 U.S. 140 (1985). Absent a timely, specific objection—or as to those portions of the R & R to which no specific objection is made—this Court "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 & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Pro se filings are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), and federal district courts must construe such pleadings liberally to allow the development of potentially meritorious claims, *see Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (per curiam). The liberal construction requirement, however, does not mean courts can ignore a clear failure to allege facts that set forth claims cognizable in federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

DISCUSSION

The Magistrate Judge recommends granting Respondent summary judgment on all of Petitioner's grounds for relief. Petitioner objects to that recommendation and has noted eight objections to the R & R. The Court will address Petitioner's objections *seriatim*.

Petitioner first objects to the Magistrate Judge's purported omission of facts in her R & R, and he provides his own lengthy facts section. Although many of the facts Petitioner claims were omitted are ultimately included in the R & R, the Court need not address this objection in detail because the supposedly omitted facts have no bearing on the resolution of Petitioner's grounds for relief.

Second, Petitioner objects to the Magistrate Judge's recommendation that the Court grant Respondent's motion for summary judgment on ground one of his habeas petition. In that ground, Petitioner alleges that the State's calling of his case for trial violated the South Carolina

Constitution and the South Carolina Supreme Court's decision in *State v. Langford*, 735 S.E.2d 471 (2012). In his motion for summary judgment, Respondent argued that because ground one does not allege a violation of federal law, it is not cognizable in habeas review. The Magistrate Judge agreed, citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The Magistrate Judge further noted that any Sixth or Fourteenth Amendment arguments on this ground are defaulted because they were not raised in state court. The Court agrees. As stated by the Magistrate Judge, Petitioner's initial argument that the calling of his case violated the South Carolina Constitution and *State v. Langford* is entirely a state-law matter and is not cognizable on habeas review. *Estelle*, 502 U.S. at 72 ("[A] federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Moreover, Petitioner's attempt to shoehorn the above state-law argument into an ineffective assistance claim is also not cognizable because it was never presented that way in state court and cannot be presented there now. *Stewart v. Warden of Lieber Correctional Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010). Accordingly, Petitioner's objection is overruled.

Third, 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.[1]

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.

Fourth, Petitioner objects to the Magistrate Judge's recommendation that the Court grant Respondent's motion for summary judgment on ground three of his habeas petition. Petitioner claims that his trial counsel was ineffective for failing to object to the solicitor's use of a "golden rule argument" in his opening argument.[2] "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Here, the Court concludes that Petitioner has failed to show that the solicitor's comments denied him due process. The trial judge's opening charge extensively laid out that opening and closing statements by attorneys are not evidence. While Petitioner's trial counsel did not object to the solicitor's golden rule argument during opening statements, trial counsel did object to a similar argument during closing statements. At that time, the trial judge agreed with Petitioner's trial counsel and struck that argument from the record. As a result, the Court concludes that the entirety of the trial was not affected by a brief golden rule argument when taken in context with the trial judge's charge and his later ruling during closing arguments. Moreover, Petitioner's claim also fails under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), because he has failed to show that there is a reasonable probability that the outcome of the trial would have been different if his trial counsel had objected to the golden rule argument during opening statements. Accordingly, Petitioner's objection is overruled.

Fifth, Petitioner objects to the Magistrate Judge's recommendation that the Court grant summary judgment to Respondent on grounds six and seven. Petitioner's brief states that he

2. During his opening statement, the solicitor stated as follows: "Well, ask yourself what you would have done if you were twelve year old Minor Child living with your mother and your step-dad, who you may have some fear of if you are twelve year old Minor Child[.] So try to ask yourself, is it reasonable for her to do what she did, given who she is. It's called empathy." (Return Mem. Pet. Writ Habeas Corpus, State Ct. Docs. Attach. Number 1, ECF No. 16-1, at 50.)

objects to the Magistrate Judge's analysis in the R & R "based on his arguments on PCR." This is not a proper objection. *See, e.g.*, *Anderson v. Dobson*, 627 F. Supp. 2d 619, 623 (W.D.N.C. 2007) ("An 'objection' that . . . simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." (citation and quotation marks omitted)). Accordingly, Petitioner's objection is overruled.

Sixth, 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.

Seventh, Petitioner objects to the Magistrate Judge's recommendation that the Court grant Respondent summary judgment on ground eight. Petitioner argues that his trial counsel's failure to object to the jury charge stating that "the testimony of a victim in a [criminal sexual conduct] case need not be corroborated" was ineffective assistance of counsel. (Objs. R & R, ECF No. 31,

at 20.) At the time of Petitioner's trial, that statement was codified in South Carolina Code Section 16-3-657. As recognized in *State v. Rayfield*, "[a] trial judge is not required to charge § 16–3–657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law." 631 S.E.2d 244, 250 (S.C. 2006). Although that decision was later overturned in *State v. Stukes*, 787 S.E.2d 480 (S.C. 2016), trial counsel had no reason to object to well-settled law at the time of the trial. *See Stukes*, 787 S.E.2d at 483 n.5 ("Therefore, our ruling is effective in this case and those which are pending on direct review or are not yet final, **but not in post-conviction relief**.") (emphasis added). Petitioner makes no objection that the charge was unduly emphasized by the trial judge or that the charge as a whole did not comport with the law. Accordingly, Petitioner's objection is overruled.

Finally, Petitioner objects to the Magistrate Judge's recommendation that the Court grant Respondent summary judgment on ground four. In that ground, Petitioner alleges that his appellate counsel was ineffective in failing to raise additional issues on appeal, including the trial court's denial of Petitioner's motion for a continuance. However, in his objection to the Magistrate Judge's analysis of ground four, Petitioner merely states that he objects to the Magistrate Judge's findings without specifying what his objection to those findings is. Because Petitioner has failed to provide a specific objection, the Court has reviewed that portion of the R & R for clear error and finds none. *See Diamond*, 416 F.3d at 315. Accordingly, Petitioner's objection is overruled.

CONCLUSION

For the foregoing reasons, it is **ORDERED** that Petitioner's objections to the R & R are **OVERRULED** and that the R & R is **ADOPTED**. Further, it is **ORDERED** that Respondent's motion for summary judgment is **GRANTED**, and that Petitioner's § 2254 application is **DISMISSED** with prejudice.[3]

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

February 9, 2018
Charleston, South Carolina

3. The Court declines to issue a certificate of appealability. Petitioner has not made a substantial showing of a denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller–El v. Cockrell*, 537 U.S. 322, 336–38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); *Slack v. McDaniel*, 529 U.S. 474, 484 (2000) (holding that when relief is denied on procedural grounds, a petitioner must establish both that the correctness of the dispositive procedural ruling is debatable, and that the petition states a debatably valid claim of the denial of a constitutional right).

APPENDIX "D"

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

Shannon D. McGee, Sr., #147120, Petitioner, vs. Warden Joseph McFadden, Respondent.	)	C/A No.: 1:16-3866-PMD-SVH REPORT AND RECOMMENDATION

Shannon D. McGee, Sr. ("Petitioner"), is an inmate at the Lieber Correctional Institution of the South Carolina Department of Corrections who filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civ. Rule 73.02(B)(2)(c) (D.S.C.) for a Report and Recommendation on Respondent's return and motion for summary judgment. [ECF Nos. 16, 17]. Pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Respondent's motion. [ECF No. 18]. After obtaining an extension [ECF No. 21], Petitioner filed a response on April 13, 2017, and Respondent filed a reply on April 20, 2017. [ECF Nos. 23, 24].

Having carefully considered the parties' submissions and the record in this case, the undersigned recommends the court grant Respondent's motion for summary judgment [ECF No. 17].[1]

[1] A handwritten note on Petitioner's habeas petition requests an evidentiary hearing. [ECF No. 1 at 1]. The undersigned denies the request for an evidentiary hearing as unwarranted.

SG

I. Factual Background

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.

II. Procedural Background

Petitioner was indicted by the Georgetown County grand jury during the June 2006 term of court 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 No. 16-4 at 100–101, 103–104, 106–107]. Stuart Axelrod, Esq., represented Petitioner at a jury trial on September 18–20, 2006, before the Honorable Roger L. Couch, Circuit Court Judge. [ECF No. at 16-1 at 3 *et seq.*]. Prior to the start of the trial, Attorney Axelrod moved for a continuance, stating that due to the short notice he received form the solicitor about Petitioner's trial date, he did not believe his client would get a fair trial. *Id.* at 16–17. Attorney Axelrod stated he needed more time to prepare. *Id.* at 16–20. Judge Couch denied the motion, and the trial proceeded as scheduled. *Id.* at 22. The jury found Petitioner guilty as charged. [ECF No. 16-2 at 20]. Judge Couch sentenced Petitioner to life without parole for second-degree CSC with a minor, 20 years for assault with intent to commit CSC with a minor, and 15 years for lewd act upon a minor. *Id.* at 26–27. On September 21, 2006, Petitioner filed a motion for a new trial based on newly-discovered evidence. [ECF Nos.

16-2 at 29–55; 16-4 at 20–23]. On November 9, 2006, Judge Couch denied the motion. [ECF No. 16-5]

Petitioner appealed his conviction and sentence to the South Carolina Court of Appeals ("Court of Appeals"). [ECF No. 16-6]. Katherine H. Hudgins, Esq., of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. [ECF No. 16-2 at 56 –67]. Attorney Hudgins 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?

Id. at 59. On November 19, 2009, the Court of Appeals filed an unpublished decision affirming Petitioner's convictions and sentences. *Id.* at 88–89. Petitioner filed a petition for rehearing on or about December 4, 2009, [ECF No. 16-7], that the Court of Appeals denied on January 20, 2010. [ECF No. 16-8]. Attorney Hudgins filed a petition for writ of certiorari in the South Carolina Supreme Court on or about April 21, 2010, raising the following issue:

> Did the Court of Appeals err in finding that the judge correctly refused 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 No. 16-9 at 4]. By order dated January 20, 2011, the South Carolina Supreme Court denied the petition for writ of certiorari. [ECF No. 16-11]. The remittitur was issued on February 7, 2011. [ECF No. 16-2 at 90].

Petitioner filed an application for post-conviction relief ("PCR") on February 14, 2011, in which he alleged claims of ineffective assistance of trial counsel, prosecutorial misconduct, violation of 5th, 6th, and 4th Amendments, and ineffective assistance of appellate counsel. *Id.* at 91–102. Petitioner filed amendments to his PCR application on March 7, 2011, and January 25, 2012, in which he alleged additional claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. *Id.* at 103–52, 169–72.

William L. Runyon, Jr., Esq., represented Petitioner at PCR. [ECF Nos. 16-2 at 173–97; 16-3 at 1–54]. A PCR evidentiary hearing was held before the Honorable Steven H. John, Circuit Court Judge, on December 19, 2013, at which Petitioner and his trial counsel testified. *Id.* On January 22, 2014, Judge John issued an order of dismissal. [ECF No. 16-24].

Petitioner appealed the denial of his PCR. [ECF No. 16-13]. Appellate Defender Carmen V. Ganjehsani, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented him on appeal. [ECF No. 16-14]. Attorney Ganjehsani filed a *Johnson* petition[2] for writ of certiorari in the South Carolina Supreme Court on or about September 4, 2014, raising the following issue:

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[2] *Johnson v. State*, 364 S.E.2d 201 (S.C. 1988) (applying the factors of *Anders v. California*, 386 U.S. 738 (1967), to post-conviction appeals). *Anders* requires that counsel who seeks to withdraw after finding the "case to be wholly frivolous" following a "conscientious examination" must submit a brief referencing anything in the record that arguably could support an appeal, furnish a copy of that brief to the defendant, and after providing the defendant with an opportunity to respond, the reviewing court must conduct a full examination of the proceedings to determine if further review is merited. *Anders*, 386 U.S. at 744.

> Whether the PCR court erred in finding that trial counsel rendered effective assistance where trial counsel failed to conduct a reasonable pre-trial investigation and had trial counsel conducted such investigation, he would have become aware of the testimony of a crucial witness who should have testified at trial to create reasonable doubt of Petitioner's guilt?

Id. at 3. Petitioner's counsel asserted that the petition was without merit and requested permission to withdraw from further representation. *Id.* at 15.

On September 25, 2014, Petitioner filed a pro se brief. [ECF No. 16-16]. Petitioner filed an amendment to his pro se brief on October 10, 2014. [ECF No. 16-17]. By order dated September 29, 2015, the South Carolina Supreme Court denied Attorney Ganjehsani's motion to be relieved and directed the parties to address the following questions:

1. Did the State's calling of petitioner's case for trial violate the South Carolina Constitution and this Court's decision in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), hindering trial counsel's ability to prepare for trial?

2. Did the solicitor commit prosecutorial misconduct by misrepresenting his relationship with witness Aaron Kinloch?

3. Was trial counsel ineffective in failing to interview witness Michael Jones prior to trial?

4. Was trial counsel ineffective in failing to object to the solicitor's use of improper vouching and bolstering during his closing arguments?

5. Was trial counsel ineffective in failing to object to the solicitor's use of a "Golden Rule" argument in closing argument?

6. Was trial counsel ineffective in failing to object when the solicitor misstated evidence presented by the State's expert witness?

7. Was trial counsel ineffective in failing to object to the trial judge's instruction that testimony of a victim in a criminal sexual conduct case need not be corroborated?

8. Was appellate counsel ineffective for failing to raise additional issues on appeal, namely the trial judge's denial of petitioner's motion for a continuance?

[ECF No. 16-18].

Appellate Defender Laura R. Baer, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a re-petition for writ of certiorari in the South Carolina Supreme Court on or about December 10, 2015, raising the above-numerated issues. [ECF No. 16-19]. By order dated September 21, 2016, based on the vote of the court, the South Carolina Supreme Court denied the petition. [ECF No. 16-22]. The remittitur was issued on October 18, 2016. [ECF No. 16-23]. Petitioner filed this federal petition for a writ of habeas corpus on December 2, 2016. [ECF No. 1-4 at 1].[3]

III. Discussion

A. Federal Habeas Issues

Petitioner asserts he is entitled to a writ of habeas corpus on the following grounds:

Ground One: 6th/14th Amendment – The State's calling of petitioner's case for trial violated the South Carolina Constitution.

Supporting Facts: See Re-Petition for Writ of Certiorari; See pgs 8–13 Filed by Laura R. Baer

Ground Two: 6th/14th Amendment The solicitor committed prosecutorial misconduct by misrepresenting his relationship with witness Aaron Kinloch.

[3] The petition was received and docketed by the court on December 7, 2016. [ECF No. 1]. However, because Petitioner is incarcerated, he benefits from the "prison mailbox rule." *Houston v. Lack*, 487 U.S. 266 (1988). The envelope containing the petition was deposited in the prison mailing system on December 2, 2016. [ECF No. 1-4 at 1].

Supporting Facts: See Re-Petition for Writ of Certiorari; Pgs 17–20 Filed by Laura R. Baer

Ground Three: 6th/14th Amendment Trial Counsel was ineffective in failing to object to the solicitor's use of a "Golden Rule" argument in [opening and] closing argument.

Supporting Facts: See Re-Petition for Writ of Certiorari; See pgs 23–25 Filed by Laura R. Baer

Ground Four: 6th/14th Amendment: Appellate counsel was ineffective for failing to raise additional issues on appeal, namely the trail judge's denial of petitioner's motion for continuance.

Supporting Facts: See Re-Petition for Writ of Certiorari – (See pgs 13–17)

Ground Five: Was trial counsel ineffective in failing to interview witness Michael Jones prior to trial?

Ground Six: Was trial counsel ineffective in failing to object to solicitor's use of improper vouching and bolstering during his closing and opening arguments?

Ground Seven: Was trial counsel ineffective in failing to object when the solicitor misstated evidence presented by the State's expert witness?

Ground Eight: Was trial counsel ineffective in failing to object to the judge's instruction that testimony of a victim in a criminal sexual conduct case need not be corroborated?

[ECF Nos. 1 at 5–11 (errors in original)].

B. Standard for Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit

under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* At the summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255. However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e).

C. Habeas Corpus Standard of Review

1. Generally

Because Petitioner filed his petition after the effective date of the AEDPA, review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication: (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. 28 U.S.C. § 2254(d)(1)(2); *see Williams v. Taylor*, 529 U.S. 362, 398 (2000). "[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 410. Moreover, state court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

2. Procedural Bar

Federal law establishes this court's jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person "is in custody in violation of the Constitution or laws or treaties of the United States[,]" and requires that a petitioner present his claim to the state's highest court with authority to decide the issue before the federal court will consider the claim. *Id.* The separate but related theories of exhaustion and procedural bypass operate in a similar manner to require a habeas petitioner to first submit his claims for relief to the state courts. A habeas corpus petition filed in this court before the petitioner has appropriately exhausted available state-court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

a. Exhaustion

Section 2254 contains the requirement of exhausting state-court remedies and provides as follows:

> (b) (1) 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254.

The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds be stated in the direct appeal or PCR application. Rule 203 SCACR; S.C. Code Ann. § 17-27-10, *et seq.*; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767 (S.C. 1976). If the PCR court fails to address a claim as is required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the judgment

pursuant to Rule 59(e), SCRCP. Failure to do so will result in the application of a procedural bar by the South Carolina Supreme Court. *Marlar v. State*, 653 S.E.2d 266 (S.C. 2007).[4] Furthermore, strict time deadlines govern direct appeal and the filing of a PCR in the South Carolina courts. A PCR must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

The United States Supreme Court has held that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"—which includes "petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This opportunity must be given by fairly presenting to the state court "both the operative facts and the controlling legal principles" associated with each claim. *Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000) (citing *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (internal quotation marks omitted)). That is to say, the ground must "be presented face-up and squarely." *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) (citation and internal quotation marks omitted).

The South Carolina Supreme Court has held that the presentation of claims to the state court of appeals without more is sufficient to exhaust state remedies for federal

[4] In *Bostick v. Stevenson*, 589 F.3d 160, 162–65 (4th Cir. 2009), the Fourth Circuit found that, prior to the Supreme Court of South Carolina's November 5, 2007, decision in *Marlar*, South Carolina courts had not been uniformly and strictly enforcing the failure to file a motion pursuant to Rule 59(e), SCRCP, as a procedural bar. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

habeas corpus review. *State v. McKennedy*, 559 S.E.2d 850 (S.C. 2002); *see also In re Exhaustion of State Remedies in Criminal and Post–Conviction Relief Cases*, 471 S.E.2d 454 (S.C. 1990). The *McKennedy* court held that *In re Exhaustion* had placed discretionary review by the South Carolina Supreme Court "outside of South Carolina's ordinary appellate review procedure pursuant to *O'Sullivan*." 559 S.E.2d at 854. As such, it is an "extraordinary" remedy under *O'Sullivan*, "technically available to the litigant but not required to be exhausted." *Adams v. Holland*, 330 F.3d 398, 403 (6th Cir. 2003).

Because the South Carolina Supreme Court has held that presentation of certain claims to the South Carolina Court of Appeals without more is sufficient to exhaust state remedies, a claim is not procedurally barred from review in this court for failure to pursue review in the South Carolina Supreme Court after an adverse decision in the South Carolina Court of Appeals.

b. Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner who seeks habeas corpus relief as to an issue failed to raise that issue at the appropriate time in state court and has no further means of bringing that issue before the state courts. In such a situation, the person has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. Procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings if the state has procedural rules that 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 that could have been raised at an earlier time. Further, 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. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. As the Supreme Court explains:

> . . . [state procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Reed v. Ross, 468 U.S. 1, 10–11 (1984).

However, if a federal habeas petitioner can show both (1) "'cause' for noncompliance with the state rule[,]" and (2) "'actual prejudice resulting from the alleged constitutional violation[,]'" the federal court may consider the claim. *Smith v. Murray*, 477 U.S. at 533 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986), *superseded by statute on other grounds* (AEDPA).

If a federal habeas petitioner has failed to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state courts and in federal court. A federal court is barred from considering the filed claim (absent a showing of cause and actual prejudice). In

such an instance, the exhaustion requirement is technically met and the rules of procedural bar apply. *See Matthews v. Evatt*, 105 F.3d at 915 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Teague v. Lane*, 489 U.S. 288, 297–98 (1989); *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990)).

3. Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this court may consider claims that have not been presented to the states courts in limited circumstances in which a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or that a "fundamental miscarriage of justice" has occurred. *Murray*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor which hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim. *Id.* Absent a showing of "cause," the court is not required to consider "actual prejudice." *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice in order to excuse a default. *Murray*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error.

4. Ineffective Assistance of Counsel Claims

To prevail on his ineffective assistance of counsel claims, Petitioner must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that 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, 694 (1984). The court must apply a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance," and the errors must be "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011). This is a high standard that requires a habeas petitioner to show that counsel's errors deprived him "of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That the outcome would "reasonably likely" have been different but for counsel's error is not dispositive of the prejudice inquiry. Rather, the court must determine whether the result of the proceeding was fundamentally unfair or unreliable. *Harrington*, 131 S. Ct. at 787–88; *Strickland*, 466 U.S. at 694.

The United States Supreme Court has cautioned that "'[s]urmounting Strickland's high bar is never an easy task[,]' . . . [e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." *Harrington*, 131 S. Ct. at 788 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). When evaluating an ineffective assistance of counsel claim, the petitioner must satisfy the highly deferential standards of 28 U.S.C. § 2254(d) and *Strickland* "in tandem," making the standard "doubly" more difficult. *Harrington*, 131 S. Ct. at 788. In such circumstances, the "question is not whether counsel's actions were reasonable," but whether "there is any reasonable argument that counsel satisfied Strickland's deferential standards." *Id.* The unreasonableness of the state court determination must be "beyond any possibility of fairminded disagreement." *Id.* at 787. "If this standard is difficult to meet, that is because it

was meant to be." *Id.* at 786. Section 2254(d) codifies the view that habeas corpus is a "'guard against extreme malfunctions in the state criminal justice system,' not a substitute for ordinary error correction through appeal." *Id.*, quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

D. Analysis

1. Merits Review

a) State Law Error

Respondent argues Petitioner's claim in Ground One is not cognizable in habeas or is procedurally defaulted. [ECF No. 16 at 34–36]. The undersigned agrees. In Ground One, the petitioner argues the State's calling of his case for trial violated the South Carolina Constitution. [ECF No. 1 at 5].[5] Because this claim fails to allege any violation of federal law, it is not cognizable in habeas review. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Petitioner has raised a claim based upon state law and, therefore, has failed to allege an error upon which relief may be granted. 28 U.S.C. § 2254 (d)(1) (application shall not be granted unless the claim was based on an improper application of federal law). The

[5] To the extent Petitioner now argues that the manner in which the State called his case violated the Sixth and Fourteenth amendments to the United States Constitution, these claims are defaulted because they were not raised in the state court. *See Coleman v. Thompson*, 501 U.S. 722 (1991) (holding issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); *Pruitt v. State*, 423 S.E.2d 127 (S.C. 1992) (holding issue must be raised to and ruled on by the PCR judge in order to be preserved for review).

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undersigned recommends that Respondent be granted summary judgment on Petitioner's Ground One.

b) Prosecutorial Misconduct

In Ground Two, Petitioner alleges the solicitor committed prosecutorial misconduct by misrepresenting his relationship with Kinloch. [ECF No. 1 at 7].[6] The day after the jury found Petitioner guilty, Petitioner's counsel filed a motion for a new trial based on a *Brady*[7] violation and newly-discovered evidence, and a hearing was held on September 22, 2006. [ECF Nos. 16-2 at 29–55; 16-5]. During the hearing, trial counsel argued Kinloch testified at trial that he did not have any pending charges. However, counsel stated he learned that Kinloch pled guilty to having received stolen goods the day after Petitioner's trial. [ECF Nos. 16-2 at 31–33; 16-4 at 20–22]. Counsel claimed the solicitor was aware of Kinloch's pending charges and did not correct this misstatement. *Id.* Cousel also stated that the solicitor did not make him aware that Kinloch had an earlier burglary first charge that was dismissed. *Id.* Lastly, counsel argued the solicitor failed to produce a letter Kinloch wrote to him. [ECF No. 16-2 at 31–32]. Counsel argued the failure to disclose this letter was a violation of *Brady*. *Id.* at 32. The solicitor testified that he made Petitioner's counsel aware of Kinloch's record and pending charges prior to trial. *Id.* at 36–43. The solicitor also claimed he did not have to produce Kinloch's letter because it was not exculpatory. *Id.*

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[6] Although Respondent argues Petitioner's Ground Two is procedurally barred, the undersigned finds this ground was presented to and ruled on by the PCR court, and then properly raised in Petitioner's PCR appeal.

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

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Kinloch's letter was dated August 4, 2006. [ECF No. 16-4 at 25]. In his letter, Kinloch indicated that he had spoken with inmate Michael Jones ("Jones") about a conversation Jones had with the solicitor about Petitioner's case. *Id.* at 25. Kinloch claimed that he knew the "whole story of what happened between Shannon and his stepdaughter." *Id.* Kinloch stated he told Jones some of what happened that night, but not all of it. *Id.* at 26. Kinloch said he was willing to help and testify at trial because he needed the solicitor's help. *Id.*

The court denied Petitioner's motion for a new trial, finding counsel knew about Kinloch's pending charge for receiving stolen goods, and counsel could have discovered the evidence of the dismissed burglary first charge prior to trial, as the information was in the public record. [ECF No. 16-5 at 3, 5]. As to the failure to produce the letter, the court noted that the solicitor acted improperly, but found there was no evidence that the solicitor struck a deal with Kinloch, and, therefore, Petitioner failed to establish that he did not receive a fair trial. *Id.* at 4–5.

Petitioner filed a direct appeal and argued the trial court erred in refusing to grant him a new trial. [ECF No. 16-2 at 56–67]. In denying his appeal, the Court of Appeals found:

> PER CURIAM: Shannon D. McGee appeals his convictions and sentences for second-degree criminal sexual conduct, second-degree assault with the intent to commit criminal sexual conduct with a minor, and lewd act upon a minor child. On appeal, he argues the trial court erred in denying his motion for a new trial based on the State's Brady v. Maryland violation. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007) ("A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion."); Riddle v. Ozmint, 369 S.C.

> 39, 44, 631 S.E.2d 70, 73 (2006) ("An individual asserting a Brady violation must demonstrate that evidence [is]: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching.").

Id. at 88–89].

The issue of prosecutorial misconduct was also addressed during the PCR hearing. [ECF Nos. 16-2 at 182–84, 196; 16-3 at 33–34]. Petitioner testified the solicitor misrepresented facts to the court when he testified that he had never spoken to Kinloch until the day of the trial and that he was unaware of Kinloch's potential involvement in Petitioner's case. [ECF No. 16-2 at 33–34].

PCR counsel testified he was not aware that Kinloch was to be a witness prior to Petitioner's case being called for trial. *Id.* at 182. Counsel stated he was told Kinloch did not have any pending charges and he had not made any deals with the solicitor related to his testimony. *Id.* at 183. Counsel testified that he found out after Petitioner was sentenced that Kinloch had pending or other charges that he could have used to impeach Kinloch. *Id.* at 183–84. Counsel stated he believed Kinloch's testimony caused the jury to find Petitioner guilty. *Id.* at 184. Counsel testified he was not given any statements from Kinloch, and Kinloch's testimony was a surprise to him. *Id.* Counsel stated after Petitioner's trial, the solicitor disclosed a letter Kinloch wrote to the solicitor asking him for help. *Id.* at 196.

In denying this claim, the PCR court found the Court of Appeals had decided the issue of prosecutorial misconduct and the *Brady* violation in Petitioner's appeal, and,

therefore, Petitioner could not challenge this issue on collateral review. [ECF No. 16-24 at 13–15]. The PCR court further found:

> Regardless, Applicant has not shown any conduct by the solicitor prejudiced his right to a fair trial. Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006). Trial 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 Applicant of a fair trial. State v. Cheeseboro, 346 S.C. 526, 554, 552 S.E.2d 300, 314–15 (2001) ("Where there is an abundance of evidence detailing the witness's unabashed disrespect for the law, the nondisclosure of other impeaching evidence does not deprive the defendant of a fair trial.") (citing State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993))). Therefore, the solicitor's actions "do not rise to the level of bring[ing] the trustworthiness of the verdict into question[.]" (Order of Judge Couch at p. 5, Nov. 9, 2006).

Id. at 14–15.

In his response, Petitioner argues the PCR court's finding was erroneous. [ECF No. 23 at 20]. Petitioner also contends the Court of Appeals erred in finding the trial court correctly refused to grant a new trial based on the solicitor's failure to disclose Kinloch's letter. *Id.* Petitioner alleges the solicitor's failure to disclose that Kinloch was willing to testify in exchange for a plea was prejudicial because his counsel was not able to properly confront Kinloch or attack his credibility. *Id.* at 22.

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. 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." *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995). The question is not whether the defendant would more likely

than not have received a different verdict with the concealed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *United States v. Bagley,* 473 U.S. 667, 678 (1985).

Petitioner has failed to show the state court's rulings in denying his *Brady* claim were "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 undersigned cannot conclude that the Court of Appeals and PCR court's decisions "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). The state courts reviewed the standard by which materiality must be judged, as articulated by the United States Supreme Court in *Brady v. Maryland* and as interpreted by the South Carolina appellate courts, and correctly applied the standard. The undersigned also cannot find that the courts unreasonably determined the facts "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The PCR court conducted an evidentiary hearing, at which Petitioner and his trial counsel testified, and heard argument. The undersigned presumes the state court's determination of the factual issues is correct, 28 U.S.C. § 2254(e)(1), and Petitioner has not met his "burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*; *see also Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010) ("Where the state court conducted an evidentiary hearing and explained its reasoning with some care, it

should be particularly difficult to establish clear and convincing evidence of error on the state court's part."). The undersigned recommends Ground Two be dismissed.

c) Ineffective Assistance of Trial Counsel Claims

(1) Improper solicitor comments

In Ground Three, Petitioner argues his trial counsel was ineffective in failing to object to the solicitor's use of a "golden rule" argument in opening and closing argument. [ECF No. 1 at 8]. In Ground Six, Petitioner claims his trial counsel was ineffective in failing to object to the solicitor's use of improper vouching and bolstering during his closing and opening arguments *Id.* at 11.[8] In Ground Seven, Petitioner claims his trial counsel was ineffective in failing to object when the solicitor misstated evidence presented by the State's expert witness. *Id.*

The PCR court found these ineffective assistance of counsel allegations to be without merit, as follows:

> The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to object to various portions of the solicitor's opening and closing arguments. Applicant alleged the solicitor improperly vouched of the witnesses credibility when he stated they "were credible and believable[,] and they told the truth." (Trial Tr. 152:10–11). The court finds this statement does not rise to the level of improper vouching. A solicitor improperly vouches for a witness' credibility when he "places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity" or "by indicating information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A AmJur. Trial § 700 (1991)). Here, the solicitor did not make a personal assurance the witnesses were telling the truth nor did he

[8] Although Respondent argues Petitioner's Ground Six is procedurally barred, the undersigned has reviewed the record and liberally-construed, this issue was addressed in the PCR order and appeal and is therefore preserved for federal habeas review.

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indicate he had personal knowledge of the witnesses' truthfulness. *Id.* Rather, he indicated the manner in which the jurors testified lent credibility to their testimony. This argument is not improper because "[a] solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816 822 (1990) (citing State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976)), overruled on other grounds by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006). Therefore, trial counsel was not ineffective because the solicitor's statement was not objectionable.

Trial counsel was not ineffective for failing to object to the solicitor's statement urging the jury to "ask yourself, is it reasonable for her to do what she did, given who she is." (Trial Tr. 48:2–3). It is improper for a solicitor to ask jurors to abandon their impartiality and view the evidence from the victim's standpoint. State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 902 (2006), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, the solicitor's comments here do not ask the jurors to view the evidence from the victim's standpoint. Rather, the solicitor is asking the jurors to consider the victim's motives for testifying against Applicant. Again, this is permissible argument relating to the "credibility and common sense biases of the witness[.]" Caldwell, 300 S.C. at 505, 388 S.E.2d at 822. Because it is not objectionable argument, trial counsel was not required to object.

Applicant's allegation trial counsel should have objected to the solicitor commenting on facts not in evidence is likewise without merit. Applicant challenges the following statement by the solicitor in referring to the State's expert:

> "I thought what she also testified to, as an expert, was even maybe as interesting, or more informative for you, which is delayed reporting. I think, what, ninety nine percent of the time why it's—at least in Georgetown and Horry Counties—that's consistent with what happened here, recantation is part of the known cycle that goes on; it happens in a substantial number of cases."

(Trial Tr. 155:7–13). Applicant points out that the expert testified that recantation happens between twenty-five (25%) and seventy-five (75%) of the time. (Trial Tr. 125:6–9). However, a careful reading of the challenged argument indicates the solicitor is actually referring to delayed reporting by CSC victims. In fact, the expert did testify only two (2) of one hundred and eighty (180) CSC victims she interviewed the prior year did not exhibit

> delayed disclosure. (Trial Tr. 124:5–9).Therefore, the argument does not present facts not in evidence and was not objectionable.
>
> Regardless, Applicant cannot show he was prejudice by any of the solicitor's opening or closing arguments. The propriety of a closing argument must be reviewed "in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 914–15 (2009) (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). Here, Judge Couch's charged the jury that the solicitor's arguments were not to be considered in determining Applicant's guilt. (Trial Tr. 41:7–24). Judge Couch also charged the jury it was ultimately tasked with determining witness credibility (Trial Tr. 180:7–181:8) and weighing the expert's testimony (Trial Tr. 185:1–17). Furthermore, the arguments Applicant challenges are not repeatedly made and are "limited in duration." Id., 680 S.E.2d at 915. Therefore, the Court finds Applicant has not proven prejudice because the solicitor's comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Id. (citing Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002); State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)).

[ECF No. 16-24 at 7–10].

In his response, Petitioner alleges the PCR court unreasonably applied federal law in denying this claim and argues the decision was an unreasonable determination of the facts in light of the evidence presented. [ECF No. 23 at 33].

In examining claims pertaining to improper comments by a prosecutor, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). However, the *Darden* Court noted that "it is not enough that the remarks were undesirable or even universally condemned." *Id.* (internal quotation omitted). Having reviewed the record and considered the weight of the evidence and the extent of these comments, the court finds that the solicitor's comments did not

render Petitioner's trial fundamentally unfair. Petitioner has failed to establish that there is a reasonable probability that the result of the proceeding would have been different if trial counsel had objected. *Strickland,* 466 U.S. at 694. Therefore, Petitioner cannot establish that trial counsel was constitutionally ineffective in failing to object during opening and closing arguments. Moreover, Petitioner has not shown that the state court's analysis of this issue misapplied clearly established federal law or, even if there were an error, that it was unreasonable. *See Williams v. Taylor*, 529 U.S. at 410. Based on the foregoing, the undersigned recommends Respondent be granted summary judgment on Grounds Three, Six, and Seven.

(2) Failure to investigate

In Ground Five, Petitioner contends his trial counsel was ineffective in failing to interview Jones prior to trial. [ECF No. 1 at 11].

At the PCR hearing, Jones testified he was detained in Georgetown County Detention Center in 2006 with Petitioner and Kinloch. [ECF No. 16-3 at 17–19]. Jones stated that he spoke to Petitioner's solicitor three times and

> on the second occasion he asked me about other people in jail, so in other words, he was looking for a snitch, or somebody to tell about different people's cases. So the third time I talked with Mr. Bo Bryan he pulled me out the cell. All he wanted to talk about is Shannon McGee.

Id. at 19. Jones testified as a result of that conversation he was listed as a witness in Petitioner's case. *Id.* Jones stated he told Kinloch about his conversation with the solicitor and that the solicitor was looking for someone to testify against Petitioner. *Id.* at 19–20. Jones testified Kinloch

> already had a year, now they are offering you ten years, and once I told them Bo Bryan was looking for somebody to testify he wrote Bo Bryan a letter. That's why y'all cannot find the charges y'all talked about here this morning.

Id. at 23–24. Jones stated he never spoke to Petitioner's trial counsel. *Id.* at 24.

Petitioner testified Jones was listed as a witness in his trial, but did not testify. *Id.* at 37. Petitioner stated he asked trial counsel to call Jones as a witness

> . . . during the course of my trial—during the course of when the trial was going on, when he kept trying to explain to the Judge about the pending charges I got that because I knew about the pending charges from Kinlock from the conversation that I had with Mike Jones of him going to testify.

Id. at 39.

Trial counsel testified he met with Petitioner, reviewed the case with him, and investigated his case. [ECF No. 16-2 at 177, 189]. Counsel stated he was told on the Friday before Petitioner's trial that Petitioner's case would start on Monday. [ECF Nos. 16-2 at 181, 190]. However, counsel admitted he received a trial roster a couple of weeks before Petitioner's trial and Petitioner's case was on the roster. *Id.*, [ECF Nos. 16-3 at 2]. Counsel stated he filed the appropriate discovery motions, but he was not aware that Kinloch was going to be a witness or the substance of his testimony prior to the case being called. [ECF No. 16-2. at 182–83]. Counsel testified he was not sure if Kinloch was on a witness list. *Id.* at 183. Counsel testified that Kinloch's testimony that Petitioner confessed caused him to lose the case. *Id.* at 184. Counsel stated he moved for a continuance at the start of Petitioner's trial because he felt it was trial by ambush. *Id.* at 191. Counsel stated had he known Petitioner's trial was going to be on Monday, he would have seen Petitioner more than he did. *Id.* Counsel testified:

> Well, prior to a trial—I mean, honestly, I would have probably seen Shannon every day before—that week before the trial. I would have come down to Georgetown and gone over the case with him every day. The trial notebook had been prepared, but I would have gone over every part of that trial with him. And I don't know what else I would—might have found out. I might have found out—maybe I would have found out about Mr. Kinlock, I don't know. I just know that I was under the impression I would not be trying a case that week.

Id. a 191.

When asked if there were any witnesses he did not have an opportunity to interview, counsel stated:

> All—it's hard to ask that because if I had met with Shannon the week before he might have—maybe there was a witness that he would have told me to get, or go see. I can't answer it because I didn't do it because I wasn't—I was under the impression I would not be trying this case, and clearly I—I put that on the record the morning of the trial, so everyone was aware of what had happened, not so much to me but what had happened to my client, really.

Id. at 191–92.

Counsel testified he had prepared a trial notebook but

> ultimately I was told that I would not—I would be doing DUI trials, so that week prior that was what my focus was on, my Magistrate—and I believe I had a DUI trial that week. That's what I had been focused on. And that's why I made that motion for that continuance, is that I thought it was unfair to me, and ultimately it was unfair to my client that that happened, so I raised it, and I preserved that.

[ECF No. 16-3 at 1–2].

The PCR court denied this claim finding:

> The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective in failing to conduct a pre-trial investigation. Regarding this allegation, the Court finds trial counsel's testimony to be credible, and Applicant's to be not credible. Specifically, the Court finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and

> was thoroughly competent in his representation. Furthermore, failure to conduct an independent investigation is not per se ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. *See Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant failed to articulate any information that could have been uncovered with a further investigation. The testimony revealed trial counsel interviewed witnesses and investigated the case to the extent Applicant provided leads to investigate. Trial counsel's trial notebook, entered into evidence as Applicant's Exhibit Number 1, shows trial counsel was thoroughly prepared for trial. Therefore, Applicant has not presented evidence trial counsel did not investigate the case or that further investigation "would have led to a different result." *Id.*

[ECF No. 16-24 at 11–12].

In his response, Petitioner argues the PCR court's denial of this claim was contrary to *Strickland v. Washington* and an unreasonable determination of the facts in light of the evidence presentenced in the state court proceeding. [ECF No. 23 at 34–36].

The undersigned agrees that the record does not support the PCR court's finding that trial counsel conducted an adequate pre-trial investigation. Trial counsel's testimony revealed that he did not believe he was prepared for Petitioner's trial. In fact, trial counsel moved for a continuance at the start of the case arguing it was a "trial by ambush." Counsel stated that although he had prepared a trial notebook, he did not have an opportunity to review the notebook with Petitioner. Counsel further testified that if he had met with Petitioner before the trial he may have discovered witnesses he should have interviewed. The undersigned finds if trial counsel had conducted a reasonable pre-trial investigation, he would have become aware of Michael Jones who was on the state's witness list. As Jones's testimony was helpful in challenging Kinloch's testimony, Petitioner has established trial counsel was deficient in failing to interview Jones prior to trial.

However, a finding that trial counsel was deficient does not automatically lead to the conclusion that counsel was ineffective. Petitioner must still make a substantial showing that "but for counsel's failure to interview . . . the witness[] in question, there is a reasonable probability that the result of his trial would have been different." *Kramer v. Kemna*, 21 F.3d 305, 309 (8th Cir. 1994). The undersigned finds that Petitioner has not offered sufficient evidence that his counsel's failure to interview Jones would have resulted in a different outcome at his trial. The undersigned finds Jones' testimony would have provided the jury with the context for Kinloch's testimony, i.e., that Kinloch contacted the solicitor because he learned the solicitor was looking for witnesses to testify against Petitioner. Jones' testimony would have also helped to establish a motive for Kinloch's testimony, i.e., that Kinloch was looking for a deal due to his pending charges. However, Jones' testimony did not challenge the veracity of Kinloch's statement that Petitioner confessed to abusing his stepdaughter. The undersigned finds Petitioner's trial counsel extensively attacked Kinloch's credibility during trial, and, therefore, Jones' testimony would have been cumulative and would not have led to a different trial result. The undersigned finds that Petitioner has failed to show he was prejudiced by counsel's failure to interview Jones prior to trial. This ground should be dismissed.

(3) Failure to Object to Jury Instructions

In Ground Eight, Petitioner argues his trial counsel was ineffective in failing to object to the trial court's instruction that the testimony of a victim in a criminal sexual conduct case need not be corroborated. [ECF No. 1 at 11].

In rejecting this claim, the PCR court found:

> Judge Couch's instruction that testimony of a CSC victim need not be corroborated was also not objectionable. See State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006); State v. Orozco, 392 S.C. 212, 222, 708 S.E.2d 227, 232 (Ct. App. 2011); State v. Hill, 382 S.C. 360, 370, 675 S.E.2d 764, 769 (S.C. Ct. App. 2009). The Court also finds Applicant cannot show he was prejudiced by this instruction because it was not unduly emphasized and Judge Couch's charge as a whole comports with the law. Rayfield, 369 S.C. at 118, 631 S.E.2d at 250. Therefore, trial counsel was not ineffective.

[ECF No. 16-24 at 10–11].

In his response, Petitioner argues the PCR court's denial was contrary to *Strickland* and was based on an unreasonable determination of the facts. [ECF No. 23 at 38].

As the PCR court determined, Petitioner's trial counsel did not have a basis to object to the trial court's jury instruction because the instruction given was current and valid based on South Carolina precedent at that time. Petitioner has not shown that the PCR court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See Williams v. Taylor*, 529 U.S. at 398. Nor can Petitioner show that the result of his trial would have been different if his trial counsel had objected to the challenged jury charge. Petitioner has failed to demonstrate that his counsel's performance was deficient. The undersigned recommends Ground Eight be dismissed.

d) Ineffective Assistance of Appellate Counsel

In Ground Four, Petitioner alleges his appellate counsel was ineffective in failing to raise additional issues on appeal, including the court's denial of Petitioner's motion for a continuance. [ECF No. 1 at 10].

The PCR court denied this claim, as follows:

The Court finds Applicant failed to meet his burden to show appellate counsel ineffective. Though Applicant argued appellate counsel should have briefed additional issues, he failed to present any testimony from appellate counsel on that issue. As such, the Court cannot speculate as to why certain issues were not briefed. Cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative").

Regardless, the Court finds the Applicant failed to demonstrate appellate counsel failed to exercise sound judgment in choosing which issues to present on appeal. See Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983) (holding appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on appeal). Applicant's allegation appellate counsel should have argued Judge Couch erred in denying the motion for a continuance is without merit. See Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) ("The denial of a motion for a continuance is within the sound discretion of the trial judge and his ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant." (citing State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989); State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977))). The allegation appellate counsel should have raised a directed verdict issue on appeal is likewise without merit because there was direct evidence of Applicant's guilt in the form of the victim's testimony. See State v. Frazier, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010) ("If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.") (citing State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006))).

Finally, Applicant's allegation appellate counsel should have argued Judge Couch erred in denying the motion for a mistrial is also without merit. Trial counsel's mistrial motion was based on several grounds. The first ground was there was insufficient evidence to support a conviction. As discussed above, evidence in the record supports Judge Couch's decision to submit the case to a jury. Frazier, 386 S.C. at 531, 689 S.E.2d at 613 (citing Weston, 367 S.C. at 292-93, 625 S.E.2d at 648). The second ground was Judge Couch erred in submitting the written charge to the jury. Submission of a written copy of the jury charge is left to the trial judge's discretion. State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007) (citing Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000)). Here, Judge Couch did not abuse his discretion in submitting a written charge.[3] The third ground for mistrial was

> Judge Couch erred in not allowing trial counsel to impeach Kinloch with convictions older than ten (10) years because the "probative value would not outweigh its prejudicial effect." (Trial Tr. 92:22-25). The Court finds no error in Judge Couch's ruling that would have been a viable appellate issue. See State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 889 (2012) (stating it is a heavy burden to demonstrate the prejudicial effect of a remote conviction is substantially outweighed by its probative value). Finally, trial counsel re-raised his objection to the case being called on short notice. Again, as discussed above, Judge Couch's decision on the continuance motion was not a viable appellate issue. Bozeman, 307 S.C. at 175, 414 S.E.2d at 146 (citing Babb, 299 S.C. at 451, 385 S.E.2d at 827; Pendergrass, 270 S.C. at 1, 239 S.E.2d at 750). Because Applicant's suggested appellate issues are not viable, he was not prejudiced by appellate counsel's decision to not brief them. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (no ineffective assistance of appellate counsel where applicant's alleged issues are not meritorious).
>
> [3] The Court notes trial counsel initially consented to submission of the written charge (Trial Tr. 200:12–16), so this issue was likely not preserved for appellate review. See State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot argue now on direct appeal that the trial court erred in acquiescing to his express and informed desire.").

[ECF No. 16-24 at 11–12].

Petitioner cannot satisfy the *Strickland* test. Petitioner cannot show appellate counsel's failure to raise claims concerning the trial court's refusal to grant Petitioner's motions for a continuance, directed verdict, or a mistrial was objectively unreasonable, or that there was a reasonable probability Petitioner would have prevailed if trial counsel had raised these motions. Petitioner has not shown that the state court's analysis of this issue misapplied clearly established federal law or, even if there was an error, that it was unreasonable. *See Williams*, 529 U.S. at 410. Based on the foregoing, Petitioner is not entitled to federal habeas relief on this ground, and the undersigned recommends Ground Four be dismissed.

IV. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends Respondent's motion for summary judgment [ECF No. 17] be granted.

IT IS SO RECOMMENDED.

Shiva V. Hodges

October 3, 2017
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

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 Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

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); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

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