18-7277

No. 18-6211

ORIGINAL

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

SHANNON D. MCGEE, SR. — PETITIONER
(Your Name)

vs.

RANDALL WILLIAMS, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Shannon D. McGee, Sr. #147120
(Your Name)
Lieber Corr. Inst. Stone B-22
P.O. Box 205
(Address)

Ridgeville, SC 29472-0205
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR IN FINDING THAT PETITIONER FAILED TO STATE A CLAIM OF THE DENIAL OF A CONSTITUTIONAL 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 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?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Shannon D. McGee, Sr., Petitioner
Randall Williams, Warden, substituted for
Joseph McFadden, former warden.

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 2, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 18, 2018, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads in pertinent part:

"No person shall be... deprived of life, liberty, or property without due process of law...."
U.S. Const. V amend.

The Sixth Amendment to the United States Constitution reads in pertient part:

"In all criminal prosecutions, the accused enjoy the right ... to have the assistance of counsel for his defence."

U.S. Const. VI amend.

The Fourteenth Amendment to the United States Constitution reads in pertinent part:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

U.S. Const. XIV amend. §1.

Article I, § 3 of the South Carolina Constitution reads in pertient part:

"The privileges and immunities of the citizens of this State and of the United States under

this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property, without due process of law...."

S.C. Const. Art. I, §3.

Article I, §14 of the South Carolina Constitution reads in pertinent part:

"The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right... to be fully heard in his by himself, or by his counsel or by both."

S.C. Const. Art. I, §14

28 U.S.C. §2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceeding unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal

law, as determined by the United States Supreme Court; 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

STATEMENT OF THE CASE

Shannon D. McGee, Sr., Petitioner was indicted by the Georgetown County grand jury, on June 14, 2006 for (1) second degree criminal sexual conduct with a minor; (2) a lewd act on a minor child; and (3) assault with intent to commit second degree criminal sexual conduct with a minor. The State served a Notice of Intent to Seek Life Without Parole regarding the second degree criminal sexual conduct with a minor.

On September 18, 2006, Petitioner was tried before the Honorable Roger L. Couch and a jury. Petitioner was represented by Mr. Stuart Axelrod, Esquire, and the State was represented by Assistant Solicitor Robert Bryan, Jr., of the Fifteenth Judicial Circuit. On September 20, 2006, the jury found Petitioner guilty on all three charges. Judge Couch sentenced Petitioner to LWOP for the the criminal sexual conduct with a minor in the second degree; fifteen years confinement for the lewd act on a minor;

and twenty years confinement for assault with intent to commit second degree sexual conduct with a minor. All sentences to be served concurrently.

Prior to trial, Petitioner was offered a fifteen year sentence suspended upon service of seven years or a plea of a straight-up ten years and admit guilt. Petitioner rejected the plea offers because he was innocent of the charges.

Defense counsel also made a motion for a continuance on the basis that Petitioner would not get a fair trial on the basis that counsel was not prepared to go to trial on Petitioner's case; Based on the State having given defense counsel notice on the Friday at noon prior to the Monday trial date, which was the first or second trial. Defense counsel also informed the trial court that he believed it was "trial by ambush." That he had been advised that "Solicitor Smith told him

for the past eight weeks that he [Solicitor Smith] had gotten him protection from the court that week, for two days, Tuesday and Wednesday. That he had issued subpoenas on three trials in a different county. And, had trials lined up all the way to December. Defense counsel further stated that "he had seven hundred criminal clients in three counties", that "he could not be prepared with each case as if it's going to trial any given week, that he just can't do that!" Judge Couch denied the motion.

On September 22, 2006, Petitioner moved for a new trial or, in the alternative, a mistrial based on newly discovered evidence of a guilty plea of State's witness, Mr. Aaron Kinloch, the day after Petitioner's trial and discovery of a letter written by Mr. Kinloch to Assistant Solicitor Robert Bryan, dated August 4th, 2006 and stamped "Received Aug. 07, 2006 but no Clerk of Court's date-stamp on the document filed in the

Record on Appeal or the Court's Exhibit 9. Mr. Kinloch stated in that letter that:

> "... he had spoken with another inmate, Michael Jones, about Jones' conversation with the solicitor regarding Petitioner's [McGee] case. He also stated that he knew the whole story about what happened between Petitioner and his stepdaughter. Mr. Kinloch also wrote that 'he was willing to help and testify at Petitioner's trial because he needed the solicitor's help.' Mr. Kinloch further stated that he had information concerning Mr. Michael Jones' case as well as Mr. Jones' co-defendant, Ms. Jesse Walker."

In a written order dated November 9, 2006, Judge Couch denied the motion for a new trial.

Petition appealed his convictions and sentences to the South Carolina Court of Appeals ("Court of Appeals"). Ms. Katherine H. Hudgins, Esquire, of the South Carolina Commission on Indigent Defense, represented Petitioner on appeal. Ms. Hudgins filed the

final 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?

Petitioner's convictions and sentences were affirmed by the Court of Appeals in an unpublished decision filed November 19, 2009. Petitioner filed a petition for rehearing on or about December 4, 2009, that the Court of Appeals on January 20, 2010. Petitioner 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?

The South Caroling Supreme Court denied the petition for writ of certiorari by an order dated January 20, 2011. The remittitur issued on Februaary 7, 2011. (Appx. F).

On Februaary 14, 2011, Petitioner filed an application for post-conviction relief ("PCR") alleging claims of ineffective assistance of trial counsel, prosecutorial misconduct, violation of Fifth, Sixth and Fourteenth Amendment due process violations, and ineffective assistance of appellate counsel. In two amendments to his pro se PCR application, Petitioner raised additional claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct.

On December 19, 2013, a PCR evidentiary hearing was held before the Honorable Steven H. John, Circuit Court Judge. Mr. William L. Runyan, Jr., Esquire, represented Petitioner at the hearing. Petitioner, his trial counsel and Mr. Michael Jones testified at the hearing. On January 22, 2014, Judge John issued an order of dismissal. (Appx. E).

Petitioner appealed the denial of his PCR. Appellate Defender Carmen V. Ganjehsani, Esquire, South Carolina Commission On Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. Ms. Ganjehsani filed a Johnson petition for writ of certiorari in the South Carolina Supreme Court on or about September 4, 2014, raising the following issue:

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).

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?

Ms. Ganjehsani asserted that the petition was without merit and requested permission to withdraw from further representation.

On September 25, 2014, Petitioner filed a pro se response. On October 10, 2014, Petitioner filed an amendment to his pro se response. By order dated September 29, 2015, the South Carolina Supreme Court

denied Ms. Ganjehsani's motion to be relieved and directed the parties to addres nine questions: (Only two pertient here)

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

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

Appellate Defender Laura R. Baer, Esquive, South Carolina Commission on Indigent Defense, filed a re-petition for writ of certiorari in the South Carolina Supreme Court on or about December 10, 2015, raising the grounds as ordered by the supreme court including the two above numerated grounds. By order dated September 21, 2016, based on the vote of the court, the South Carolina Supreme

Court denied the Petition. The remittitur issued on October 18, 2016. (Appx. F).

On December 2, 2016, Petitioner filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner raised eight of the nine issues raised and argued in the state courts. Pertinent here are only two, the prosecutorial misconduct and failure to interview a witness.

On October the 3rd, 2017, United States Magistrate Judge Shiva V. Hodges, in her Report and Recommendation, recommended granting the Respondent State and Warden summary judgment. After receiving an extension, Petitioner filed his objections to the Report and Recommendation ("R&R") on November 6, 2017. (Appx. D).

The Honorable Patrick Michael Duffy, United States District Court Judge, on February 9, 2018, overruled Petitioner's objections and adopted the R&R, ordered that Respondent's motion for summary

judgment granted, and dismissed Petitioner's §2254 petition with prejudice. In a footnote, Judge Duffy denied certificate of appealability, finding that Petitioner had not made a substantial showing of a denial of a constitutional right. (Appx. C).

On February 16, 2018, Petitioner timely filed a notice of appeal with United States District Court, (mailbox rule), the notice of appeal was date stamped March 5, 2018.

On August 2, 2018, the United States Court of Appeals for the Fourth Circuit dismissed Petitioner's appeal by unpublished per curiam opinion. (Appx. A).

Petitioner timely filed a petition for rehearing, which the Court of Appeals denied on September 18, 2018. (Appx. B).

SUMMARY OF ARGUMENT

Under the Antiterrorism and Effective Death Penalty Act of 1996("AEPA"), § 2254(d) governs the Court's habeas

corpus review of state court decisions:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by this Court; 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).

This Court held that "a state court decision can be 'contrary to' and 'an unreasonable application of 'clearly established' Federal law,'" in Williams v. Taylor, 529 U.S. 362, 385 (2000). Petitioner's arguments implicate subsections (1) and (2) of §2254(d).

"'Clearly established Federal law' under §2254(d)(1) is the governing legal principle or principles set forth by this Court at the time the state court renders its decision!" Lockyer v. Andrade, 583 U.S. 63, 71-72 (2003).

1. POST TRIAL MOTION FOR NEW TRIAL

Petitioner's counsel, Mr. Axelrod, was advised the day after Petitioner's trial ended by trial counsel for jailhouse snitch, Mr. Kinloch, that Mr. Kinloch was pleading guilty to pending charges with favorable recom-

-mendation from the state, after having testified during proffer at Petitioner's trial that "he was serving his time for all the charges he had. When presented with Mr. Kinloch's "NCIC" criminal history was completely devoid of all mention of Mr. Kinloch's pending charges and Mr. Kinloch's burglary 1st arrest and subsequent nolle prosse. During the post trial motion for a new trial admitted that he received a letter written by Mr. Kinloch, a jailhouse snitch who testified against Petitioner at his trial. The letter was admitted as court's exhibit during the post trial motion. The letter from Mr. Kinloch to Assistant Solicitor Robert Bryan, dated August 4, 2006, stamped received by the Solicitor's office August 7, 2006, was never seem by trial counsel. Mr. Bryan advised the Court at the post trial motion hearing that the letter was filed with the Clerk of Court on August 9, 2006. But the state record and exhibits from

are devoid of Mr. Aaron Kinloch's letter having the Clerk of Court for Georgetown County's date/time stamp on it.

In Mr. Kinloch's letter he explains that he knew what happened between Petitioner and the victim and stated "[I]f you wish to speak to me, I'm willing to, if you are cause I do need your help. At Petitioner's trial, the assistant solicitor questioned Mr. Kinloch as to whether he, assistant solicitor had ever corresponded with Mr. Kinloch, written him a letter, and whether any representative of the [solicitor's office] or law enforcement ever talked to Mr. Kinloch about this issue prior to having Mr. Kinloch brought to court the day before.

Trial counsel had never seen Mr. Kinloch's letter and did not know the contents thereof, that Mr. Kinloch had made it perfectly clear that he was willing to testify, that he needed Mr. Bryan's help but did

specify what help was needed.

Mr. Kinloch was allowed to testify that he was only testifying because the Petitioner's charges were nasty, that he had four daughters of his own. When in fact, Mr. Kinloch's letter spoke of having information on Mr. Michael Jones and a Ms. Jesse Walker, a co-defendant of Mr. Jones.

Mr. Kinloch again testified that he had not been promised anything and nothing implied, no expectation of anything. That everybody there had kids and that it was nasty.

The above was testified to after Mr. Kinloch testified that Petitioner told him "that he used his finger not his penis, which Mr. Bryan stated that Mr. Kinloch's testimony was very important for the jury to understand that Petitioner said he did it.

Mr. Axelrod had failed to interview

Mr. Michael Jones after having been informed to talk with him concerning Mr. Bryan having pulled prisoners out to talk about Petitioner's case with them. Mr. Kinloch was told by Mr. Jones that the assistant solicitor was looking for people to testify against Petitioner and that Mr. Bryan had been willing to dismiss charges against Ms. Walker if he would testify against Petitioner. [Mr. Michael Jones testified at Petitioner's PCR evidentiary hearing.

Trial counsel failed to cross-examine Mr. Kinloch regarding the pending charge for receiving stolen goods. While the assistant solicitor did inform the judge that he had not offered Mr. Kinloch a deal, he did not inform the court or trial counsel that he had received a letter from Kinloch demonstrating a willingness to testify in exchange for a plea. The failure to disclose the constituted a violation

of Brady v. Maryland, 373 U.S. 83 (1963) and other cases, as well as a violation of Petitio- right to cross-examine a witness concern- ing bias under the Confrontation Clause, of the United States Constitution, VI amend.

In the written order denying a new trial the judge wrote:

> The Solicitor's actions of failing to disclose the contents of the letter in question were a clear disregard for his responsibility as a prosecut- or to seek justice in any case whi- ch he is prosecuting. A letter from a witness that demonstrates the willingness to make a deal for his his testimony should be given to the defendant regardless of the actual existence of a deal. Howe- ver, while this evidence could ha- ve been favorable to the defend- ant, it did not indicate that in fact a deal for the testimony had been reached. In light of all the evidence and testimony, and in particular, the lacks of any facts

indicating any deal struck between the witness and the solicitor, it is this court's finding that the defendant received "a fair trial resulting in a verdict worthy of confidence." Riddle [v. State, 631 S.E.2d 70 (2006)].

2. DIRECT APPEAL

Petitioner argued that the trial judge erred 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. In that, the judge erred in basing the denial of a new trial on the lack of any facts indicating any deal struck between the witness and the solicitor.

Petitioner argued that the withheld letter of Mr. Aaron Kinloch was a Brady.

Petitioner argued that as noted by the judge in his order, the evidence of the letter could have been favorable to him. The letter is favorable to Petitioner because it demonstrates Mr. Kinloch's bias to provide testimony favorable to the State in exchange or in hopes for a deal, whether or not an actual deal was ever reached. That Petitioner had a right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308 (1974); State v. Brown, 399 S.E.2d 593 (1991). The letter was known by the prosecution and suppressed, and evidence of the letter was both material and impeaching.

At trial, the step daughter admitted that she called defense counsel and told him that Petitioner never touched her and she simply wanted revenge because Petitioner was mean and yelled a lot. She also

admitted telling trial counsel that her family made her say things about McGee that wasn't true because the family did not like the fact that her mom had a relationship with Petitioner. At trial, however, the step-daughter testified that her mom forced her to recant her allegations against Petitioner. The State called three additional witnesses, the younger brother, a doctor and Kinloch. Kinloch's testimony was particularly damaging because he testified that Petitioner confessed to the allegations. Had the State disclosed the letter, Petitioner could have cross-examined Kinloch in order to reveal his bias and motive for testifying and show it was for assistance with his charges, not because he had daughters and was "dirty". Petitioner was prohibited from engaging in otherwise appropriate cross-examination to show bias on the part of Kinloch such that the jury could draw references to Kinloch's reliability as a witness. Delaware

v. Van Arsdall, 475 U.S. 673 (1986); State v. Mizzell, 563 S.E.2d 315 (2002). The State's suppression of Kinloch's letter prohibited Petitioner from engaging in an otherwise appropriate cross-examination to show bias and motive on behalf of Kinloch. Combined with the stepdaughter's recantation, there is a reasonable probability that the result of the proceeding would have been different if Petitioner had cross-examined Kinloch concerning the contents of his letter. Evidence of Kinloch's letter was was material and the suppression constituted a violation of the Confrontation Clause, as Kinloch's trial testimony was inconsistent with the contents of his letter, where he stated that he needed the solicitor's help and that he had information on two other people and was willing to testify against them also.

The letter could have been used to impeach Kinloch, in light of the fact, he

that he testified that he did not expect anything in exchange for his testimony. Kinloch's letter, clearly stated "if you wish to speak to me, I'm willing to help, if you are cause I do need your help," clearly contradicted his trial testimony.

The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. Petitioner timely filed a petition for rehearing, and was denied. He then filed a petition for certiorari to the South Carolina Supreme Court and was denied.

3. PCR, APPEAL, § 2254 PETITION FOR A WRIT OF HABEAS CORPUS AND CERTIFICATE OF APPEALIBILITY.

Petitioner has continuously argued a Brady violation and prosecutorial misconduct for the assistant solicitor's withholding the Kinloch letter and ineffective assistance of trial counsel for failing to interview Michael Jones and call him as a witness to reveal the lie lie Aaron Kinloch was testifying to.

REASONS FOR GRANTING THE PETITION

1. THE STATE VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND RIGHT TO A FAIR WHEN IT FAILED TO PROVIDE BRADY MATERIAL IN THE FORM OF A LETTER FROM A JAILHOUSE SNITCH UNTIL A POST-TRIAL MOTION FOR A NEW TRIAL.

A. During Petitioner's trial, the State called jailhouse snitch Aaron Kinloch as a witnes. Kinloch testified during direct-examination that Petitioner told him that he committed the offense but there was no DNA because Petitioner said he used his finger. Kinloch further testified that he was not promised anything, no type of help but he had daughters of his own, and the charge was nasty. Trial counsel could not effectively question Kinloch concerning any bias or motive he had for testifying against Petitioner. The assistant solicitor never questioned Kinloch about the contents of his letter.

1. During his closing argument assistant solicitor told the jury:

> "Kinloch was a really interesting witness for everybody because normally you will hear a defendant -- a defense lawyer get up here and scream about a deal, what he got out of it, or, you know, some kind of expectation of

reward for this lie, but again, the defendant is really going to have to search for a really sort of hidden agenda of this Aaron Kinloch, because the testimony is and the truth is, that I never met the till yesterday, and had no deal with him. He didn't get any deal; he didn't get any benefit; he didn't do a day less than he would have done. I don't know what motive he would have to come in here and fabricate this awful lie.

That Aaron Kinloch says he has got four daughters and that it was nasty. Kinloch wrote me but never met me. Ends up in court because it [the charge] offended him.

2. Kinloch's letter to the assistant solicitor memorialized his willingness to testify against Petitioner as well as two other persons for the solicitor's help. Kinloch had first and second degree burglary charges pending. Kinloch's letter stated in pertient part:

P.S

"I also know something about Michael Jones' case also, his co-defendant, Ms. Jesse Walker is married to my uncle Mr. Franklin Walker, he didn't know that until after he spoke with me about his charges and who was with him."

Kinloch's testimony is inconsistent and directly

in conflict with his letter revealing his willingness to testify against not only Petitioner but Michael Jones and his Aunt, Ms. Jesse Walker.

In this case, Kinloch's letter to the assistant solicitor fits the classic definition of impeachment evidence against Aaron Kinloch. The jury, as the sole trier of fact, should have been allowed to hear evidence in order to make a determination regarding the witness' credibility and in order to assist the jury to resolve conflicts in testimony.

3. During post-trial motion for a new trial, the assistant solicitor blatantly misrepresented to the court that Kinloch's letter was filed with the Georgetown County Clerk of Court, when in fact, Kinloch's letter was stamped by the Georgetown County Solicitor's Office. The assistant solicitor told the court that trial counsel could have checked the clerk of court's records and found the letter.

As such, the failure to timely disclose the Kinloch letter violated Petitioner's due process rights under the Fifth and Fourteenth Amendments to the U.S. Const.

3. DUE PROCESS REQUIRES THE STATE PRODUCE MATERIAL EVIDENCE IMPEACHING A STATE'S WITNESS.

In Strickler v. Green, this Court provided the following concise summary of the Brady doctrine:

> "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87. The Court has since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 682. See also Kyles v. Whitley, 514 U.S. 419 (1995); Monroe v. Angelone, 323 F.3d 286, 299-300 (4th Cir. 2003).

Strickler v. Greene, 527 U.S. 263, 280-81 (1999); Gibson v. State, 514 S.E.2d 320 (1999); Riddle v. Ozmint, 631 S.E. 2d 70 (2006).

This Court also distilled the "three components of a true Brady violation: The evidence at

issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Id. at 281-82.

The suppressed letter-contents thereof-was inconsistent with Kinloch's trial testimony. Trial counsel unable to cross-examine Kinloch about his purported "pure" motive for testifying.

The pending charges of first and second degree burglary that were reduced to receiving stolen goods was relevant to show pro-government bias on the part of the testifying witness[Kinloch], on the theory that the witness might tailor[his]testimony to please the prosecutor. Davis v. Alaska, 415U.S.308(1974).

Kinloch testified that "Petitioner told him he did it but used his finger."

"A colorable showing of bias can be important, unlike evidence of prior inconsistent statements - which might indicate that the witness is lying- evidence of bias suggests why the witness might be lying." Stephens v. Hall, 294 F.3d at 224(1st Cir. 2002).

And such impeachment "'increases in sensitivity in direct proportion to [the] witnesses importance' to [the] state's case." Jones v. Gibson, 206 F.3d 946, 955-57 (10th Cir. 2000)(discussing counsel's inability to question witness regarding pending charges against her).

There is an obvious distinction between general impeachment and particularized impeachment through "possible biases, prejudices, or ulterior motives" arising in connection with as-yet unimitiated or uncompleted criminal prosecution. Davis, 415 U.S. at 316-17.

2. THE STATE AND FEDERAL COURTS ERRED IN FINDING THAT PETITIONER HAD NOT SHOWN THAT THE STATE HAD MADE A DEAL WITH JAILHOUSE SNITCH AARON KINLOCH.

A. The day after Petitioner's trial, Petitioner's trial counsel was notified by Aaron Kinloch's plea counsel that Kinloch was entering a plea. Petitioner shown that some that of deal had been made, a deferred guilty plea where Kinloch was expecting leniency. In Boone v. Paderick, the State's witness was, an unindicted coconspirator testified that he had not

been promised leniency in exchange for his testimony. The Fourth Circuit Court of Appeals held that "a tentative promise of leniency might be interpreted by a witness as constingent upon the nature of his testimony. As the State record reveals, Kinloch's testimony was contrary to and in direct conflict with his letter revealing his true motive for testifying against Petitioner, "He needed help 'not that he found the charge nasty' and was offended by it.

3. THE STATE AND FEDERAL COURTS DETERMINATION THAT THE ASSISTANT SOLICITOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

A. The state and federal courts' findings are contrary to Giglio v. United States, 405 U.S. 150 (1972); Napune v. Illinois, 360 U.S. 264 (1958); Brady v. Maryland, 373 U.S. 83 (1963); and United States v. Bagley, 473 U.S. 667 (1985).

1. The assistant solicitor blatantly misrepresented the facts pertaining to the filing of Kinloch's letter with the Georgetown County Clerk of Court's Office. The letter has no Clerk of Court stamp on it. It

is stamped "RECEIVED" on "August 7, 2006", but not a Clerk of Court seal and time/date stamp on it. Kinloch's letter was impeachment evidence under United States v. Bagley.

Trial counsel argued that he never saw the Kinloch letter. Within this context, prosecutors have an affirmative duty to disclose such evidence. Kyles v. Whitley, 514 U.S. 419, 432, 437 (1995).

This Court held in Kyles v. Whitley, that Brady requires a prosecutor to "gauge the likely effect" of favorable evidence ex ante and to make a predictive judgment as to whether the failure to disclose the evidence would be prejudicial to the defense. Ibid. As this Court has stressed, however, "the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome." Id. at 439. Instead, this Court has admonished that "a prosecutor anxious about tacking to close to the wind" should "disclose a favorable piece of evidence", ibid., and "resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97 (1976).

4. THE STATE AND FEDERAL COURTS ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INTERVIEW AND CALL MICHAEL JONES AS A WITNESS.

A. The state and federal court's findings are "contrary to" and an "unreasonable application of the facts in light of the evidence presented at the post-trial motion for new trial hearing, and the PCR evidentiary hearing, under Strickland v. Washington, 466 U.S. 668 (1984).

The purpose of the Sixth Amendment guarantee of "the Assistance of Counsel," U.S. Const. Amend. VI, is to ensure that defendants have "effective" assistance of counsel, Strickland, 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), that is, "the assistance necessary to justify reliance on the outcome of the proceeding," Strickland, 466 U.S. at 691-92.

By trial counsel's motion for a continuance, and his admission that he had seven hundred clients in three counties was in itself, proof that counsel could not effectively represent Petitioner.

Trial counsel also admitted at PCR evidentiary hearing that had he interviewed Michael Jones it may have led to the discovery of other witnesses. That he did not have a chance to review his "notebook" with Petitioner.

Had trial counsel interviewed Michael Jones and subponeaed him to Petitioner's trial, Aaron Kinlochi's lie would have been revealed.

CONCLUSION

The petition for a writ of certiorari should be granted. And Petitioner's convictions and sentences should be vacated and remanded to the state court for a new trial.

Respectfully submitted,

M. Shannon D. McGee Sr.

Date: December 12, 2018