

2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**  
OCT 14 2013  
S.C. Supreme Court

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Certiorari to Georgetown County  
Steven H. John, Circuit Court Judge  
\_\_\_\_\_

HEYWARD DAVIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213604  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

CARMEN V. GANJEHSANI  
Appellate Defender

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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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### **ISSUE PRESENTED**

Trial counsel provided ineffective assistance of counsel by failing to object to the solicitor's closing argument when the solicitor's comments improperly vouched for the credibility of the State's witnesses and so infected the trial with unfairness as to make the resulting convictions a denial a of due process.

## STATEMENT

### **Indictments**

On June 14, 2006, Petitioner Heyward Davis, Jr. was indicted by the Georgetown County Grand Jury for (1) assault and battery with intent to kill; (2) assault with intent to kill; (3) first degree burglary; and (4) possession of a weapon during the commission of a violent crime. App. 398-414.

### **Trial and Sentence**

On May 1, 2007, Petitioner was tried before the Honorable Paul M. Burch and a jury. App. 1. Petitioner was represented by Charles David Barr, and the State was represented by Assistant Solicitors Dorie C. Biagianti and Matthew Modica. App. 1. The jury found Petitioner guilty on all counts. App. 293, ll. 4-18. Judge Burch sentenced Petitioner to twenty-five (25) years for first degree burglary; twenty (20) years concurrent for assault and battery with intent to kill; ten (10) years concurrent for assault with intent to kill; and five (5) years concurrent for possession of a weapon during the commission of a violent crime. App. 301, l. 17 – 302, l. 4.

### **Direct Appeal**

Petitioner filed a direct appeal to the South Carolina Court of Appeals which affirmed his convictions on April 27, 2009. App. 304.

### **First PCR Application and Hearing (2009-CP-22-1540)**

On September 23, 2009, Petitioner filed his first application requesting post-conviction relief (“PCR”). App. 305-317. Petitioner specifically alleged that his trial counsel was ineffective for failing to object to improper closing argument by the solicitor

which bolstered the credibility of the prosecution's witnesses. App. 314-316. The State filed its Return on October 22, 2009. App. 318-322.

On August 26, 2010, an evidentiary hearing was held before the Honorable Larry B. Hyman, Jr. App. 323-334. Petitioner was represented by Paul Archer, and the State was represented by Assistant Attorney General Christina J. Catoe. App. 323. Only Petitioner testified at the hearing. App. 326-333.

**Order of Dismissal (2009-CP-22-1540)**

On October 12, 2010, Judge Hyman issued his Order of Dismissal denying Petitioner's PCR application. App. 336-340. Judge Hyman found that Petitioner's allegations in his PCR application regarding the improper closing argument by the solicitor raised a question of law. Judge Hyman further found that Petitioner's trial counsel was not ineffective for failing to object to certain remarks made by the solicitor in her closing argument because arguments regarding the credibility of the victims and their lack of motive to lie were permissible arguments. App. 338-339.

Petitioner's PCR counsel sent Petitioner a letter dated October 18, 2010 enclosing the Order of Dismissal and which also advised Petitioner that he could file a direct appeal to the South Carolina Supreme Court if he wished. App. 341. The letter, however, went on to say that the State had no more money to pay Petitioner's PCR counsel for his representation of Petitioner and therefore, if Petitioner wanted PCR counsel to file an appeal, he would have to pay PCR counsel \$500.00. Id.

On October 26, 2010, Petitioner then filed a *pro se* Motion to Alter or Amend Judgment Pursuant to Rule 59(e). App. 342-346. The PCR court filed an Order Dismissing the *Pro Se* Motion to Alter or Amend on December 20, 2010, finding that

pursuant to Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), Petitioner's *pro se* motion was improper and a nullity because Petitioner was represented by counsel. App. 347-349.

There was no Notice of Appeal filed on behalf of Petitioner.

### **Second PCR Application and Hearing (2011-CP-22-1620)**

On December 29, 2011, Petitioner filed a second PCR application requesting relief. App. 350-359. In this application, Petitioner asserted that he did not freely or voluntarily waive his right to appeal the Order of Dismissal of his first PCR application. App. 355. In support of his application, Petitioner attached his PCR counsel's October 18, 2010 letter to him advising Petitioner that he would have to pay \$500.00 to appeal. App. 357. Petitioner also asserted that he sent a letter to the South Carolina Supreme Court about the matter because he had a right to appeal the order dismissing his first PCR application and that the Supreme Court forwarded the letter to his PCR counsel. App. 355, 358. The State filed its Return and Motion to Dismiss on March 1, 2012. App. 360-366.

On November 16, 2012, an evidentiary hearing on the second PCR application was held before the Honorable Steven H. John. App. 367-393. Petitioner was represented by Brett Mehalic, and the State was represented by Assistant Attorney General Tyson Andrew Johnson, Sr. App. 367. Both Petitioner and his first PCR counsel, Paul Archer, testified at the hearing. App. 371-388.

Archer acknowledged that he did not file a Notice of Appeal on Petitioner's behalf. Archer remembered that Petitioner asked him to file a motion for reconsideration, but Archer thought that there was nothing for the PCR judge to reconsider. App. 372, ll. 5-10. Archer testified that he did not see anything in his records indicating that Petitioner asked

him to appeal, but he again conceded that he at least knew that Petitioner wanted him to file a motion to reconsider. App. 372, ll. 11-25.

With respect to the letter he sent Petitioner advising him that the State had no more money to pay Archer to represent Petitioner and that he would need \$500.00 from Petitioner to file an appeal on his behalf, Archer admitted he was wrong to send that letter. App. 374, l. 20 – 375, l. 13; 376, ll. 10-22. Archer said because he never received any money from Petitioner, he never filed a notice of appeal or motion to reconsider. App. 375, ll. 18-22.

On cross-examination by the Assistant Attorney General, Archer then admitted that he really did not remember if Petitioner asked him to file an appeal and that perhaps Petitioner did:

Q: And Mr. Davis never asked you to file [a notice of appeal], did he?

A: You know, in all fairness, I don't know. My letter would indicate that he did, I mean, I clearly stated that you have a direct appeal, so maybe he did and maybe I didn't mark it on my file. My file is not marked.

App. 378, ll. 5-10.

Petitioner testified that after the first evidentiary hearing, he did in fact ask Archer to file an appeal and he thought Archer was going to file it. App. 382, l. 22 – 383, l. 4; 388, ll. 12-14. Petitioner thereafter received the Order of Dismissal from Archer, along with the letter requesting \$500.00 for Archer to file an appeal on behalf of Petitioner. App. 383, ll. 5-17. Petitioner, already having been declared indigent, did not have the \$500.00 for Archer to file an appeal, so Petitioner then filed his *pro se* motion to reconsider. App. 383, ll. 16-25; 385, ll. 21-22. Petitioner testified that he did not know that he could file an appeal by himself without Archer after his *pro se* motion to reconsider was denied by Judge Hyman as being a nullity since Petitioner's attorney did not file such motion. App. 384, ll. 1-8.

Petitioner also testified that he did not know that if he had asked Archer to file an appeal on his behalf, Archer would have had to do it regardless of whether Petitioner paid Archer the \$500.00. App. 384, ll. 9-11.

Judge John ruled at the conclusion of the hearing that Petitioner was entitled to a belated appeal of the order dismissing his first PCR application:

Based upon the facts and circumstances presented in this matter, counsel for the State and the Applicant are correct in that the standard here is did the Applicant knowingly waive his right to appeal, knowingly and intelligently waive his right to appeal. In this particular case – in some cases, I’m called to decide credibility and believability, you know, the attorney over the applicant or the applicant over the attorney. In this case, I don’t think I really need to call into question anybody’s credibility or believability. Both sides have testified, in the Court’s mind, as to a confusion over whether the Applicant asked for an appeal, whether the appeal was to go forward or not. Mr. Archer indicates that he believes there was some confusion. The Applicant in this testimony certainly indicates that I can’t find the testimony or evidence presented that the Applicant knowingly and intelligently waived his right to an appeal considering either party’s testimony. I can’t see that the evidence rises to that standard. Therefore, I do find that the belated appeal is proper under these circumstances. The facts and the evidence do not indicate that the Applicant knowingly and intelligently waived his right to appeal and therefore such a belated appeal is granted.

App. 392, l. 15 – 393, l. 11.

**Order Granting Belated Appeal Pursuant to Austin v. State (2011-CP-22-1620)**

On November 20, 2012, Judge John filed his order granting Petitioner a belated appeal of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 395-397.

This petition for writ of certiorari follows.

## ARGUMENT

**Trial counsel provided ineffective assistance of counsel by failing to object to the solicitor's closing argument when the solicitor's comments improperly vouched for the credibility of the State's witnesses and so infected the trial with unfairness as to make the resulting convictions a denial a of due process.**

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984) “First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 692.

### **Facts of Case**

Petitioner and Lesley Parrish worked together and had been involved in a romantic relationship for approximately two years. App. 131, l. 23 –132, l. 20; 157, ll. 7 – 24. Petitioner spent at least two nights a week at Lesley’s mobile home according to Lesley

although he maintained his own home. App. 158, l. 20 –160, l. 12. Petitioner told Investigator Lee when he was arrested and the Court at sentencing that he stayed there. App. 104, ll. 1 – 3; 299, l. 15, ll. 23 – 25. About two weeks before the incident, they had a misunderstanding and terminated the relationship according to Lesley. App. 160, l. 19 – 161, l. 6.

Lesley Parrish was also involved in a romantic relationship with Chris Gamble several years prior to this incident and they had a twelve year old daughter together who lived with Ms. Parrish. Gamble often came to visit this daughter. App. 37, ll. 3 – 15; 130, l. 25 –131, l. 13; 142, ll. 12 – 14. On the day of the incident, Gamble came to visit his daughter who was not there. However, Gamble ended up spending the night with Lesley and being intimate with her. App. 139, ll. 1 – 6; 142, l. 12 –143, l. 9.

During the trial, Gamble and Lesley testified that Petitioner entered the bedroom where they were sleeping early in the morning of May 13, 2006 and fired a shot at Gamble hitting him in the back shoulder. App. 41, l. 10 – 43, l. 25. Gamble testified that he heard a second shot. Lesley testified that Petitioner shot at her but the bullet went past her into the wall. App. 44, ll. 10 – 13; 144, l. 20 – 145, l. 10.

During closing argument, the solicitor made the following remarks in reference to the testimony of the alleged victims in this case to which Petitioner's trial counsel did not object:

Now, I don't know about you but listening to that 911 call, wow, that was bone chilling. Even if you don't believe a word out of the victim's mouth, either victim's mouth on that witness stand, either that lady [Lesley] deserves an academy award or I don't know what. If she were just making up her ex-boyfriend's name Heyward – you heard I on the 911 tape, who shot you? The 911 operator said, Who shot you, who did this? Heyward. Heyward Davis. Well, she's either a really great actress to be able to come up if – if someone came into the house and call his name or she's telling the

truth. And she's telling the truth. She told you on the stand what happened. The male victim told you on the stand what happened, Chris. His story has never lingered.

App. 244, ll. 2-15.

What possible motivation do they have to lie, come into court and call that man's name, just happen to call his name. None.

App. 245, ll. 3-6.

Going back to - - even if you didn't believe the victims, all of the evidence is corroborated.

App. 245, ll. 9-11.

The United States Supreme Court has long ago counseled prosecutors to "refrain from improper methods calculated to produce a wrongful conviction . . . ." See Berger v. United States, 295 U.S. 78, 88 (1935). During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Yet, the "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); See State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). As this Court explained,

Solicitors are bound to rules of fairness in their closing arguments ... While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted).

“The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding “[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.”); See State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”). Ultimately, “[t]he appropriateness of a solicitor's . . . argument is a matter left to the trial court's sound discretion.” Id. at 548, 586 S.E.2d at 156.

This Court has also defined when a solicitor vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds*, Kelly v. State, 534 U.S. 246, 122 S.Ct. 726 (2002):

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence is not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 368-69, 540 S.E.2d at 860 (quotation omitted). See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977, 122 S.Ct. 404 (2001) (“[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion

concerning a witness' truthfulness . . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]” (citations omitted). Accordingly, “[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness’s credibility.” Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861); see also Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004) (finding solicitor’s closing argument which vouched for credibility of police officer was improper); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

Here, it is clear that the solicitor’s comments to the jury served to bolster the credibility of the prosecution witnesses. In Matthews, this Court held that counsel rendered ineffective assistance of counsel by failing to object to the solicitor’s comments vouching for the credibility of the state’s witnesses. The solicitor in that case made the following remarks during closing argument:

No, you may not have liked Bimbo Hudson. I didn’t like Bimbo Hudson. I don’t have to like him. All I have to do is determine whether or not he is a credible witness. I don’t trust any of these people **until I corroborate their testimony**. And **once I corroborate their testimony**, yes, put them on the witness stand because they were the ones that were there, they were the ones that can tell it.

Id. at 767, 565 S.E.2d at 275.

Petitioner’s trial counsel in this case therefore was ineffective in failing to object to the solicitor’s improper comments vouching for the credibility of the alleged victims. These comments made by the solicitor constituted an error of law and were inherently

prejudicial to Petitioner's case. See id. at 768, 565 S.E.2d at 276.

Trial counsel's failure to object to the solicitor's improper remarks during closing argument was not harmless error. The case against Petitioner depended on the credibility of the alleged victims, especially as to whether Petitioner was actually residing at the home of Lesley Parrish and therefore could not be guilty of first degree burglary where he merely entered a place where he was living.

Accordingly, given the fact that Petitioner's convictions were inextricably linked to the alleged victims' credibility, trial counsel's failure to object to the State's improper vouching prejudiced Petitioner's case. This Court should therefore reverse the PCR court's order denying relief.

**CONCLUSION**

Based on the foregoing reasons, Petitioner Heyward Davis, Jr. respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issues presented.

Respectfully submitted,

Handwritten signature of Carmen V. Ganjehsani in black ink, consisting of the letters 'C', 'G', and a stylized flourish.

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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Georgetown County  
Steven H. John, Circuit Court Judge

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HEYWARD DAVIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Heyward Davis, # , at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of October, 2013.

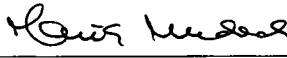


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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day  
of October, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.