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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Dorchester County

Edgar W. Dickson, Circuit Court Judge

STEVEN C. BRISCOE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001910

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	6
PETITION TO BE RELIEVED AS COUNSEL.....	7

ISSUE PRESENTED

Whether trial counsel was ineffective in failing to object to those portions of the assistant solicitor's closing argument vouching for the credibility of the State's witnesses?

STATEMENT

Petitioner was convicted of murder after a jury trial held before the Honorable Deadra L. Jefferson on October 31 – November 5, 2005, in Dorchester County. A thirty (30) year sentence was imposed. Kevin Kearse, Esquire, was trial counsel. Harrison Bell, Esquire, was the assistant solicitor. (App. p. 1 – p. 1007).

Petitioner appealed his conviction and it was affirmed by the Court of Appeals on May 14, 2008. State v. Briscoe, 2008-UP-259. (App. p. 1017). Petitioner filed an application for post-conviction relief on February 18, 2009. Respondent filed a return dated February 4, 2010. (App. p. 1008 – p. 1021). An evidentiary hearing was held on May 22, 2013, before the Honorable Edgar W. Dickson. Petitioner was present and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Walt Whitmire, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p. 1022 – p. 1114). On August 19, 2014, the Honorable Edgar Dickson issued an order denying and dismissing the application for post-conviction relief. (App. p. 1122 – p. 1135).

This petition follows.

ARGUMENT

Trial counsel was ineffective in failing to object to those portions of the assistant solicitor's closing argument vouching for the credibility of the State's witnesses.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E. 2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, hearsay, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006). Failing to properly investigate may lead to a claim of ineffective assistance of counsel. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009). And counsel may be alleged ineffective for failing to fully cross-examine a witness. State v. Nance, 393 S.C. 289, 712 S.E. 2d 446(2011); Kirkpatrick v. State, 306 S.C. 359, 412 S.E. 2d 389 (1991).

Petitioner raised the issue of trial counsel being ineffective for failing to object to portions of the assistant solicitor's closing argument vouching for the credibility of the State's witnesses at the evidentiary hearing. (App. p. 1048, line 10 – p. 1052, line 12). The assistant solicitor told the jury that the witnesses for the State were slightly different in their testimony because they were human with different perceptions. But this meant they told the truth. He guaranteed it. (App. p. 938, line 8 – p. 939, line 20). He again said they are telling the truth. (App. p. 940, lines 3 – 7).

In Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002), the Court wrote:

The solicitor's statement is improper. A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. Id. It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. Id.

The solicitor's summation led the jury to believe the government corroborated the witness' testimony before trial and found it credible. The solicitor did not support this vouching with anything within the record, such as corroboration by other witnesses or physical evidence. The solicitor improperly vouched for the witness.

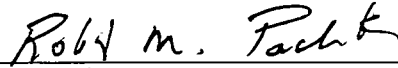
Counsel's failure to object was incorrect and prejudicial.

The vouching in this case was prejudicial because even the trial court noted that the case was about the credibility of the witness. (App. p. 833, lines 6 – 7; app. p. 985, lines 23 – 25; app. p. 986, line 17).

CONCLUSION

Petitioner's writ should be granted and his conviction should be reversed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

STEVEN C. BRISCOE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001910


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven C. Briscoe states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 22, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Steven C. Briscoe.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of November, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Edgar W. Dickson, Circuit Court Judge

STEVEN C. BRISCOE,

PETITIONER,

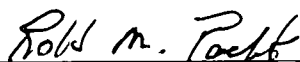
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

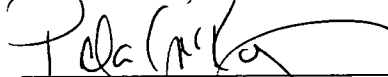
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Steven C. Briscoe, #312254, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 24th day of November, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of November, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.