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STATE OF SOUTH CAROLINA

FEB 25 2015

IN THE SUPREME COURT

**S.C. SUPREME COURT**

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

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STEVEN C. BRISCOE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001910

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PRO SE PETITION FOR WRIT OF CERTIORARI

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PRO SE RESPONSE

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## ARGUMENT

### ISSUE A

Trial counsel was ineffective for failing to object to the highly prejudicial opinion testimony of a State's witness who had not been qualified as an expert by the Trial Court.

### ISSUE B

Trial counsel was ineffective for failing to object to the prosecution's prejudicial closing argument that unduly prejudiced Petitioner and denied him a fair trial.

To save the Court's time, I will present two issues together, since the facts of one encompass the other. Petitioner contends that the State's BLOOD evidence was presented by a NON EXPERT Witness and that this evidence was [inadmissible] due to its [unreliability]. That counsel failed to object to the solicitation of BLOOD testimony from a State's witness who had not been qualified by the Court to give Expert Witness testimony and further Counsel failed to challenge detective Asbell's qualifications as well.

The State used detective Earl Asbell's testimony to assert that because of where the specimens assumed to have been blood were found, the State's version of events were factual. (Tr. p. 921, lines 6-14) (Tr. p. 922, lines 23-25) (Tr. p. 942, lines 1-3) The State's alleged

eyewitnesses testified that the shooter was behind the victim and shot him from the rear, as to hit him in the back. (Tr. p. 779, 7-22) (Tr. p. 280, line 8) (Tr. p. 279, lines 12-13) (Tr. p. 778, lines 1-5) (Tr. p. 778, lines 10-13) (Tr. p. 786, lines 13-14) The State's witnesses were bound by this shot from behind version of events at trial because this is what they told investigators prior to trial. The State used detective Earl Asbell's testimony about blood and blood spatter to support the alleged eyewitness' version of events. However, the substance assumed to have been blood was never scientifically tested to determine if it was in fact blood. (App. p. 1037, lines 8-19) (Tr. p. 470, lines 9-15) The defense presented the fact that according to the only scientifically reliable evidence available, the testimony of Dr. Joel Sexton, the forensic pathologist, the victim had not been shot in the back or from behind. However, he had in fact been shot in his right hand side and the shooter had been standing to the victim's right at the time the shots were fired, to shoot him in the right hand side. (Tr. p. 447, line 4 - p. 448, line 16) (Tr. p. 429, lines 3-9) (Tr. p. 429, line 18) (Tr. p. 432, lines 22-24) (Tr. p. 434, lines 17-20) So the shooter could not have been positioned behind the victim as the State's alleged eyewitnesses said he had been. Nevertheless, the State used detective Earl Asbell's testimony to paint a picture to the jury that this substance assumed to have been blood, supported the State's theory provided by the State's alleged eyewitnesses, that the shooter was behind the victim, followed the victim to the door and shot him in the back, from the rear. (Tr. p. 923, lines 17-19) The followed the victim to the door statement used by Solicitor Harrison

Bell during his closing argument, made him an actual witness himself because no witnesses for the State or otherwise ever made mention of the shooter following the victim to the door which is proven by the mere absence of any such testimony anywhere within the record of the proceedings.

Petitioner contends that the testimony solicited by the prosecution was deliberately placed before the jury in a manner calculated to evoke personal prejudice against Petitioner. Furthermore, personal opinion or belief of a Non-Qualified Expert Witness jeopardized the integrity of the entire trial process. Petitioner contends that this was a baseless maneuver used in order to gain an advantage for the State and it was inconsistent with the standards required of the State. In South Carolina, opinion testimony by a lay witness is governed by the South Carolina Rules of Evidence (701) which states ("if the witness is not testifying as an Expert, the witness's testimony in the form of opinion or inference is [limited] to those opinions or inferences which:

- (A) Are rationally based on the perception of the witness;
- (B) Are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue;
- (C) Do not require special knowledge, skill, experience, or training.

Petitioner contends that Counsel should have objected on the grounds that the testimony given by detective Earl Asbell [violated] Section (c) of the S.C.R.E. (701) for South Carolina specifically

drafted Section (c) "to emphasize that a lay person may not give expert opinions".

In 1993, the United States Supreme Court held that,

"The trial judge must ensure that any and all scientific testimony or evidence admitted in, be not only relevant, "but reliable". See Daubert v. Merrell Dow Pharmaceuticals 113 S.Ct. 2786; also see Taylor v. State 889 P.2d 319, where the Court said, "Reliability refers to trust worthiness of the evidence. In a case involving scientific evidence, evidentiary reliability will be based on scientific validity."

This standard applies both to "novel scientific techniques" and "well established propositions." Daubert (supra) 113 S.Ct at 2796.

In short, Daubert (supra) requires that any Expert testimony pertaining to "scientific knowledge", requires special knowledge, skill, and training which clearly the witness Asbell did not have.

Here Counsel let the witness testify to the validity of the blood taken from the scene, that had not even been tested to determine it it was in fact blood at all.

This unchallenged testimony, so infected the trial with unfairness as to make the resulting conviction a denial of due process, which is protected by the Fourteenth Amendment. Donnelly v. DeChristforo 94 S.Ct. 1868.

The introduction of the [assumed] blood evidence test constituted a pivotal point in the trial of Petitioner, in that it had the potential to reasonably establish in the jurors' minds that the State's version of events was supported by such unreliable testimony.

While a Court reviewing Counsel's conduct in ineffective assistance of counsel claims is not to judge the actions in hindsight. Strickland 104 S.Ct. 2065, it is plainly clear that at the same this evidence was being introduced it would have been highly prejudicial to Petitioner's case.

Trial Counsel, however, failed to make any contemporaneous objections to the qualifications either of the witness or the reliability of the testimony by a Non-Expert Witness. The State's entire case against Petitioner was merely circumstantial evidence; in light of the fact that Petitioner's defense was simply that he was never at the scene. And while a timely object may not have prevented or excluded the testimony, the lack of any objection clearly prejudiced Petitioner, since this testimony was given to prove the truth of the matter asserted and was solicited from a lay witness in violation of S.C.R.E. (701)(c) and the lack of any objection deserves emphasis.

Additionally, the failure of Counsel to object later foreclosed Petitioner from being in a position to challenge the issue of this testimony by a Non-Expert Witness on Direct Appeal.

For the foregoing reasons, Petitioner submits that he was denied the effective assistance of Trial Counsel when Counsel failed to object to the highly prejudicial opinion testimony of a Non-Expert Witness whose testimony surely misled the jury in reaching their verdict.

Counsel's failure to object was incorrect and prejudicial. Counsel not objecting was prejudicial because the alleged blood

specimens were never scientifically tested to determine if they were in fact blood at all and because the State's witnesses themselves had tampered with the crime scene, admittedly. (Tr. p. 229, lines 3-17) (Tr. p. 247, lines 19-23) (Tr. p. 303, line 24 - p. 304, line 15) (Tr. p. 356, line 20) The Solicitor used detective Asbell's testimony to make the State's witness' version of events seem plausible.

#### **CONCLUSION**

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

## ARGUMENT

### ISSUE D

Trial counsel was ineffective for failing to object to the highly prejudicial closing argument by the State that impermissibly vouched for the State's witnesses and bolstered the credibility of the State's case.

Petitioner raised the issue of trial counsel being ineffective for failing to object to the highly prejudicial closing argument by the State that impermissibly vouched for the State's witnesses and bolstered the credibility of the State's case at the evidentiary hearing. (App. p. 1048, line 10 - p. 1060, line 10) Solicitor Harrison Bell told the jury that the State's witnesses "came in and tried to tell the truth as best as they remembered it." (Tr. P. 939, lines 17-18). He suggested to the jury that the witness "would have either gotten their stories straight or told the truth." (Tr. p. 940, line 3-5). Solicitor Bell would again give his personal assurance as to the truth and veracity of the testimonies given by the State's witnesses by further stating, "I'll tell you, ladies and gentlemen, they're just telling the truth as best they can." (Tr. p. 940, lines 5-7). In the middle of this verification, Solicitor Bell would use the words "because I guarantee you". (Tr. p. 939, line 20). Even though Solicitor Bell did not finish his statement, the fact remains that he was assuring the jury that the State's witnesses were telling the

truth both before and after the statement was made. In light of this fact, it is both logical and reasonable to assert that it cannot be said with certainty that the jurors did not think that Solicitor Bell was guaranteeing them that the State's witnesses were telling the truth. As if he were aware of some type of proof or information supporting his statement that was outside of the evidence that had been presented to the jury. Solicitor Bell chose to vouch for the truth and veracity of the State's witnesses knowing full well that the State's alleged eyewitness Travis North had failed a polygraph examination specifically on the questions "Did you shoot Mark?" and "Do you know for sure who shot Mark?" to which he answered "no" to both questions. (App. p. 1116). However, Solicitor Bell also knew that the jury would never know of the lie detector test or of its results. Here is an experienced State's Attorney who deliberately introduced his own personal opinion of the prosecutions witnesses' credibility, ignoring his special obligation to avoid improper suggestions and insinuations. He is the sovereign's representative, and it is not his duty to tell the jury his individual impressions of the evidence, especially considering the fact that the Trial Court itself would admit that as it related to the testimonies of the State's witnesses "I think their culpability is a lot greater than has been reflected by their testimony." (Tr. p. 1004, lines 7-9) as well as Trial Court stating that "What is completely unfortunate about this entire case is that we'll never know the level of culpability of the other folk who were there. I don't think we'll ever know exactly who did what." (Tr.

p. 1004, lines 1-5) Nevertheless, Solicitor Bell chose to tell the jury that the State's witnesses were telling the truth.

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 impressions 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).

In Gilchrist v. State, 565 S.E. 2d 281 (SC 2002); prejudice was found because the witness at issue was the State's key witness and his credibility was crucial to the State's case.

**CONCLUSION**

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

## ARGUMENT

### ISSUE G

Trial counsel was ineffective for failing to object when the State impeached a defense witness's testimony with an illegally recorded taped conversation.

Petitioner raised the issue of Trial Counsel being ineffective for failing to object when the State impeached a defense witness's testimony with an illegally recorded taped conversation. (App. p 40, line 16 - p. 62, line 18). Prior to trial, detective lieutenant Terry Van Doran interviewed Helen Coles at her residence in Virginia. (Tr. p. 873, line 3 - p. 874, line 11) During the interview, Lt. Van Doran secretly taped her using a digital voice activated mini-recorder hidden in his front shirt pocket. (Tr. p. 879, line 14 - p. 880, line 17) During trial, Helen Coles testified for the defense. Following her testimony, the State moved to play the illegal tape that was surreptitiously recorded during the prior interview. For the jury as rebuttal testimony, to impeach the defense witness's testimony, without objection from defense counsel. (p. 874, lines 12-25) Solicitor Harrison Bell stated that during cross-examination, the defense witness was inquired about talking to Lt. Van Doran about a gun that he had asked her about, and she stated that she was talking about another gun and there were two different guns. (Tr. p. 826, lines 20-24) He went on to say that they had the recording that he

sought to put in through Lt. Van Doran, where she talks about this one gun that she purchased at Carters Gun Shop and that's all she talks about. Solicitor Bell states that he would do that to rebut her statement, to impeach her statement from what she testified to during cross-examination, which he thinks is proper impeachment. (Tr. p. 827, lines 5-11) Trial Court would state that you could not secretly tape somebody without his or her knowledge that is a violation of the Federal Wire Tap Act. Solicitor Bell responds, but that is on a phone, this was in person. (Tr. p. 837, lines 1-12) Trial Court would further state, the police could not secretly tape somebody without letting them know they are being taped. That is jus a fundamental. (Tr. p. 837, lines 14-20) After confirming that the witness did not know she was being taped (Tr. P. 839, lines 6-12), Trial Court ruled that even if it were a telephone conversation and she was not aware that she was being taped, it could still be offered for impeachment. (Tr. p. 838, lines 7-9) During his closing argument, Solicitor Bell used the recording to mislead the jury by implying that after the tape was revealed, the defense witness was caught. (Tr. p. 947, lines 19-23) saying she gave two different stories about that. That is not what she told Lt. Van Doran what happened to the gun in Virginia. (Tr. p. 948, lines 1-2 and lines 9-10) The defense witness never consented to recording or disclosure. (Tr. p. 879, line 14 - p. 880, line 17) During cross-examination, the defense witness never testified that she mistakenly disclosed information on a different handgun. The witness testified only that she was talking about two different guns. (Tr. p. 713, lines 5-25) (Tr. p. 717, line 3 - p. 718, line 1) Lt. Van Doran

admitted on the stand that he did not specifically inquire about the ten millimeter Glock in question. (Tr. p. 877, lines 14-22) He asked only about a handgun purchased from Carters Gun Store. (Tr. p. 881, lines 4-16) The sales receipts from Carters Gun Store show that the defense witness had indeed purchased more than one handgun from Carters, just as she had testified. (App. p. 1118 and p. 1120) During cross-examination, when the defense witness is asked about her handgun purchased from Carters, she states that she had one that was stolen out of a Mazda that was wrecked. (Tr. p. 713, lines 8-22) (Tr. p. 714, lines 13-14) which is also the gun that she referred to in the surreptitiously taped interview. (Tr. p. 713, lines 5-22) When questioned about her ten millimeter Glock specifically, she testifies that she did purchase it (Tr. p. 699, lines 19-21), that she bought it for her own protection (Tr. p. 700, line 24 - p. 701, line 1), and that she ended up giving it to a friend as collateral on a loan. (Tr. p. 703, lines 1-9) Solicitor Bell's misleading explanation of the tape and its contents made it look to the jury like the defense witness gave two different stories about what happened to the ten millimeter Glock. However, clearly the witness explains when confronted that she was talking about two different guns. (Tr. p. 713, lines 23-25) (Tr. p. 717, lines 3 - p. 718, line 1) Also, please see (App. p. 1074, line 7 - p. 1083, line 14)

#### DISCUSSION

Petitioner contends that he was denied his constitutionally guaranteed right to the effective assistance of Trial Counsel when

Counsel failed to object to State impeaching Petitioner's defense witness by playing an illegally recorded taped conversation to the jury in order to impeach Petitioner's defense witness.

It is elementary that illegally obtained evidence can be used to impeach the defendant [but not a defense witness]. Harris v. New York 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1, citing United States v. Langu 71 F3d 966 at 975.

Evidence obtained in violation of the Fourth Amendment may [NOT BE USED] to impeach testimony of "other defense witnesses", it may "[o]nly" be used to impeach the testimony of the defendant. State Ex Rel St. Farm Fire v. Madden 451 S.E.2d 721 Id at 729.

In James v. Illinois 493 U.S. 307, 110 S.Ct. 648 (1990), the United States Supreme Court held that the truth-seeking rationale supporting the use of illegally obtained evidence to impeach the testimony of a defendant does not apply with equal force to witnesses other than defendant because they are adequately deterred from lying by the threat of criminal prosecution for perjury. 493 U.S. 307, 314.

The Court reasoned that using illegally obtained evidence to impeach witnesses other than the defendant could interfere with the defendant's right to present a defense by dulling testimony of others who might make statements in sufficient tension with the tainted evidence. See 493 U.S. at 314-316.

Petitioner contends that the State's use of the tape to impeach his defense witness denied him his right to fair trial and Counsel was constitutionally ineffective for failing to object.

Counsel's failure to object was incorrect and prejudicial.

The tape was prejudicial because it was illegally recorded, admitted into evidence, and introduced to the jury in a manner that misled them to believe that a defense witness had given untrue or false testimony, when in fact they had not. In addition, because the solicitor stressed the improperly admitted evidence during his closing argument to make it look to the jury like the defense witness had lied to them, knowing that this was a credibility case and that it really came down to who the jury believed. (App. p. 833, lines 6-7; app. p. 985, lines 23-25; app. p. 986, line 17) As per State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) defendant prejudiced where solicitor stressed improperly admitted evidence in his closing argument. The tape was the fruit of a Fourth Amendment violation because the investigating detectives lacked a judge's order granting the authority to surreptitiously record what would become a witness for the defense, without the knowledge that they were being taped.

#### CONCLUSION

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