

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Allendale County

Honorable Roger L. Couch, Circuit Court Judge

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MARQUIS BREELAND,

v.

STATE OF SOUTH CAROLINA,

RECEIVED  
JUN 19 2017  
PETITIONER  
S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO. 2016-002430

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PETITION FOR WRIT OF CERTIORARI

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Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor’s closing argument that improperly vouched for the credibility of the state’s crucial witness and where Petitioner was prejudiced because believing this witness, whose credibility was clearly questionable, was the only way the jury could convict Petitioner. ....8

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**ISSUE PRESENTED**

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor's closing argument that improperly vouched for the credibility of the state's crucial witness and where Petitioner was prejudiced because believing this witness, whose credibility was clearly questionable, was the only way the jury could convict Petitioner?

## STATEMENT OF THE CASE

The state alleged at trial that Petitioner shot and killed Laurice Jerome Garvin on July 22, 2007 in Kennedy Park, a community in Allendale, South Carolina. Garvin's body was found in the roadway on Robin Street about one hundred and forty feet from his car, which was in a ditch still in the drive position. App. 84, ll. 4-6; App. 93, l. 21 – 94, l. 21. The forensic evidence showed Garvin was shot once in the chest through the driver's side window and then twice in the head after he fled his vehicle. App. 95, l. 19 – 96, l. 13. He died before law enforcement or emergency medical services arrived.

An Allendale County Grand Jury indicted Petitioner on March 3, 2010 for murder and possession of a weapon during the commission of a violent crime. App. 381-384. His case was called to trial on August 8, 2011 before the Honorable H. William Seals, and a jury. App. 1. Assistant Solicitors Tameaka Legette and Robert Ferguson represented the state, and Stephen Plexico represented Petitioner. App. 1.

There was very little evidence against Petitioner. There were no eyewitnesses to the murder and no forensic evidence that could be used to identify the perpetrator. The murder weapon was never found. There was no evidence of any relationship or connection between Petitioner and Garvin. There was also no evidence that Petitioner ever possessed a firearm. The state's case rested solely on a purported confession Petitioner allegedly made to Marcus Witherspoon, who was facing a mandatory life sentence for a federal drug charge and hoped to receive a lesser sentence in exchange for his cooperation with the state.

Kennedy Park was a popular neighborhood in Allendale where many locals gathered. Patricia Ann Bradley claimed she saw Petitioner, Anthony Sanders, and Ricky Brandt, along with a fourth unidentified man, on a street corner in Kennedy Park at some point on the night of

July 22, 2007. She did not specify a time. App. 109, l. 12 – 110, l. 4. She also admitted there could have been others standing on this street corner as well. Bradley explained that lots of people “hang out” on this corner “on a regular basis” and that there was “nothing unusual about hanging out on the corner.” App. 111, l. 21 – 113, l. 5.

Richard Priester testified that he observed three men running away from Kennedy Park after he heard a gunshot on the night of July 22, 2007. Two of the men were tall and one was short. However, Priester did not recognize them. App. 114, l. 14 – 121, l. 6.

Latrincy Carter and Dwann Devoe, who were driving toward Kennedy Park because they heard somebody had been killed and wanted to see what happened, testified that they saw Petitioner and Anthony Sanders running towards them. Petitioner and Sanders flagged them down and asked for a ride to a man named Morrell’s house. Carter and Devoe dropped the men off “a few streets down” near Morrell’s house and then drove towards the location of the shooting. App. 129, l. 7 – 131, l. 25; App. 140, l. 25 – 143, l. 16. This was approximately ten or fifteen minutes after Carter and Devoe heard somebody had been killed. App. 145, l. 13 – 146, l. 7.

Willie James Elmore testified that sometime in July 2007, he heard Petitioner say “he was going to kill that dude.” Elmore said he gave a statement to law enforcement in 2007 where he claimed he heard Petitioner say he was going to kill the decedent, Laurice Garvin. However, Elmore did not think Petitioner “was serious.” After the shooting, Petitioner told Elmore that he did not kill Garvin and he did not know who did. App. 122, l. 8 – 127, l. 9.

The crux of the state’s case against Petitioner was the testimony of Marcus Witherspoon. Witherspoon was facing a mandatory life sentence after he was indicted for conspiracy to traffic cocaine by the federal government. In exchange for his cooperation with the State of South

Carolina, the government allowed Witherspoon to plead to a lesser offense to avoid a mandatory life sentence. At the time of trial, Witherspoon had pleaded guilty and was awaiting sentencing. Under the terms of his plea agreement, which required him to “provide substantial assistance in the prosecution of another person,” he was facing a mandatory minimum of ten years and a potential life sentence. App. 148, ll. 8-25; App. 152, l. 3 – 155, l. 11; App. 156, ll. 15-24; App. 158, l. 8 – 160, l. 3. Witherspoon also had an expensive prior record. App. 147, l. 23 – 148, l. 7; App. 156, ll. 1-14.

Witherspoon testified that he saw Petitioner on the night of July 22, 2007. App. 149, l. 22 – 150, l. 9. He claimed Petitioner came to his house and “basically just told me that he was the one that, you know, pulled the trigger. He was the one that killed him [Laurice Garvin].” App. 150, ll. 16-22. Witherspoon could not explain why Petitioner would say this to him other than he thought Petitioner wanted “recognition.” App. 151, ll. 7-13. He admitted there was no one else present who could verify what Petitioner allegedly told him. App. 158, ll. 5-7.

Other than this testimony, nothing tended to show Petitioner shot Garvin or was involved in the murder.

The assistant solicitor gave a very inflammatory and passionate closing argument. Aware that the state’s case against Petitioner was very weak and that believing Marcus Witherspoon was the only way the jury could convict Petitioner, the solicitor improperly vouched for Witherspoon’s credibility. She argued:

And, ladies and gentlemen, let us consider Marcus Witherspoon. Let us consider him. Marcus came in here, had a sense of shame with his head down, and told us he really didn’t want to be here. Information that he knew for a long time, he just kept to himself. Oh, yes. Kept to himself.

He said a friend basically came to him and told him what he did. He said Marquis Breeland [Petitioner] came to Mr. Witherspoon the night of this murder and confided in him, told him what he did. Said, I shot and killed Laurice Garvin.

I asked Marcus why did he tell you that. He said, oh, because he wanted recognition. He wanted me to recognize him. He thought highly of me. And Marcus didn't want to be here. I imagine he didn't want to tell on his friend. I imagine he felt like a snitch. Yep, said the life he used to live, he admitted to be a self-confessed criminal. And, yes, he's facing 10 to life in prison.

**But even being the criminal that he is and even facing all of that time, something he said struck me. Not just that Mr. Breeland [Petitioner] confided in him, but something he said that struck me in the craw. And it was, I ain't going to just lie to send somebody else to prison to keep me out of prison for life.**

**That says something to me, ladies and gentlemen. No, he ain't going to do that. And, yes, he can help himself, but lying to get out of life, that wasn't it.** He didn't come in here and say, yeah, I'm glad to be here. Yeah.

Imagine the cost to Marcus Witherspoon. Imagine that cost. He hung his head low when he walked in and he hung his head low when he walked out, even though what he faced. **He didn't just come here to perform. He came here to tell the truth.** He told you what Marquis [Petitioner] said. Marquis Breeland told him he killed Laurice Garvin.

And, ladies and gentlemen, **I surmise that the reason Marcus came in here, that the mark is wide and the mark of the universe is long but it bends toward justice. And what I mean by that is Marcus sat on it a long time but that justice finally caught up with him and justice brought him in here to tell what he knew. Simple as that.**

App. 221, l. 10 – 222, l. 24 (emphasis added).

Defense counsel failed to object to this improper argument.

The jury ultimately convicted Petitioner of murder and possession of a weapon during the commission of a violent crime. App. 260, ll. 8-25. He was sentenced to life without parole for murder and a consecutive five year sentence for the weapons offense. App. 267, ll. 4-9.

On April 10, 2013, after his convictions and sentence were affirmed on direct appeal, Petitioner filed an application for post-conviction relief (PCR). App. 300-306. The state filed a return to this application dated September 22, 2014. App. 307-311. With the assistance of counsel, Evan K. Bromley, Petitioner filed an amended application and a memorandum of law in

October 2015 raising the claim argued in this petition. App. 312-333. An evidentiary hearing was convened on October 21, 2015 before the Honorable Roger L. Couch. App. 334. Assistant Attorney General J. Rutledge Johnson represented the state, and Bromley represented Petitioner. App. 335.

Stephen Plexico, who represented Petitioner at trial, acknowledged that Marcus Witherspoon's credibility was key to the state's case. App. 347, ll. 21-23. He described Witherspoon as "a drug dealer and a long-time crook." App. 345, l. 25. Plexico said the assistant solicitor "put on a performance" during her closing argument and "scream[ed]" and "dance[d] around." App. 356, ll. 6-8. He admitted he "should have absolutely objected to" the solicitor's argument that improperly vouched for Witherspoon's credibility, and, if he had, "the case wouldn't have gone against my client [Petitioner]." App. 348, l. 24 – 349, l. 13; App. 355, l. 25 – 356, l. 9; App. 356, l. 23 – 357, l. 1.

By order filed February 3, 2016, the PCR court denied Petitioner relief. App. 369-379. While the court found trial counsel's failure to object to the solicitor's closing argument was ineffective assistance of counsel, it concluded Petitioner did not suffer prejudice. App. 373. The court found "the solicitor's comments concerning Witherspoon's motivation for testifying improperly vouched for his credibility by presenting information that was not presented to the jury during the trial." App. 373. Because the solicitor's comments were improper vouching, the court concluded "trial counsel's failure to object constituted a failure to provide effective assistance under the prevailing professional norms." App. 373. However, the court maintained Petitioner did not suffer prejudice because, unlike the state's case in Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), the state's case against Petitioner "did not rely on the improperly bolstered testimony of a single witness." App. 373. The court found "additional testimony

presented at trial placed [Petitioner] at the scene where the crime took place, and the testimony of Willie James Elmore concerning [Petitioner's] statement that he planned to kill the victim provided a sufficient basis for the jury to convict [Petitioner]." App. 373. The court concluded, "Given the weight of the evidence against [Petitioner] excluding the improperly vouched testimony, the guilty verdict did not result from a denial of due process." App. 373. Consequently, the court denied Petitioner relief.

Because Petitioner's due process rights to a fair trial were violated when trial counsel failed to object to the solicitor's inflammatory closing argument, which improperly vouched for the credibility of the state's crucial witness, and prejudice clearly flowed from counsel's error, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor's closing argument that improperly vouched for the credibility of the state's crucial witness and where Petitioner was prejudiced because believing this witness, whose credibility was clearly questionable, was the only way the jury could convict Petitioner.

Aware that the state's case against Petitioner was very weak and that believing Marcus Witherspoon was the only way the jury could convict Petitioner, the solicitor personally assured the jury of Witherspoon's veracity and improperly vouched for his credibility during her closing argument. Trial counsel's failure to object to this improper argument violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Prejudice clearly flowed from counsel's error since Witherspoon's credibility was crucial to the prosecution.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The government may “elicit testimony regarding a plea agreement on direct examination only if the prosecutor’s questions do not imply the government has special knowledge of the witness’ veracity, the trial court gives a cautionary instruction, and *the prosecutor’s closing argument contains no improper use of the witness’ promise of truthful cooperation.*” State v. Shuler, 344 S.C. 604, 628, 545 S.E.2d 805, 816 (2001) (citing United States v. Romer, 148 F.3d 359, 369 (4th Cir. 1998)) (emphasis added). “A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness’ truthfulness.” Shuler, 344 S.C. at 630, 545 S.E.2d at 818 (citing Elmer v. Maryland, 353 Md. 1, 724 A.2d 625 (1999)). “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.” Id. (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001) and 75A AM.JUR. Trial § 700 (1991)).

“Because 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’ 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) (internal quotation marks omitted).

In Gilchrist, during his or her opening statement the prosecutor personally assured the jury of a witness’ veracity and emphatically stated the witness was worthy of belief. 350 S.C. at 227-228, 565 S.E.2d at 285. This Court held Gilchrist’s counsel should have objected to this improper argument. Id. 350 S.C. at 228, 565 S.E.2d at 285. In remanding for a new trial, this Court held Gilchrist was clearly prejudiced by counsel’s error because the witness’ credibility was crucial to the state’s case. Id.

This Court should likewise hold trial counsel was ineffective for failing to object to the assistant solicitor's closing argument that personally assured the jurors of Witherspoon's veracity and improperly vouched for his credibility. Counsel's failure to object constituted deficient performance.

Prejudice clearly flowed from counsel's error. Witherspoon was the state's key witness, and therefore his credibility was crucial to the state's case. Because the remainder of the evidence against Petitioner was insubstantial circumstantial evidence, believing Witherspoon was the only way the jury could convict Petitioner. See Gilchrist, 350 S.C. at 228, 565 S.E.2d at 285. Because of Witherspoon's extensive prior convictions and his interest in providing favorable testimony for the state to obtain leniency from the federal government, Witherspoon's credibility was clearly questionable. Id.

Given Witherspoon's obvious credibility problems, and the fact that Petitioner's conviction was inextricably linked to Witherspoon's credibility, trial counsel's failure to object to the solicitor's improper vouching prejudiced Petitioner.

Enhancing the impropriety of the state's closing argument was the solicitor's repeated denigration of Petitioner's character and her efforts to arouse the passions and prejudices of the jury, often arguing facts not in evidence. See Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) ("A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences thereto."). For example, the solicitor argued:

And as I began to think more and more about evil and malice and wickedness, I began to see faces of movies I had seen in the past, and faces of those individuals, the evil face, an evil man.

What it takes to gun down a man and execute him in the middle of the street as he drives by. What kind of face is that? I saw the Mask. I saw the face

of Freddy Krueger, A Nightmare on Robin Street. That's what I saw in my mind. A senseless, evil, wanton, wicked killing. That's what I saw.

And as I began to think more deeply **I realized that evil has a new face. It's no longer the face of Jason the Mask. It's no longer the face of Freddy Krueger. It is the face of that man, Marquis Breeland [Petitioner], who sits before you today cloaked in a robe of righteousness.**

**A robe of righteousness, ladies and gentlemen. The Judge is going to tell you he has on a robe of righteousness. He sits there with his glasses on, he looks like a choir boy. But, ladies and gentlemen, I submit to you that underneath the façade of the choir boy and the glasses lurks the heart of any evil man. An evil man who would gun down a man as he drove down the street on a Sunday night in the Town of Allendale.**

App. 213, l. 13 – 214, l. 16 (emphasis added).

The solicitor later continued:

Laurice Garvin, I can see him. He's shot. He's going out of the car. **He's fighting for his life.** He's shot one more time.

Then I can see it, ladies and gentlemen, he's shot once in the car. He gets out. **Imagine, he was running for his life. He wanted to live.**

...

He gets out. ***Is he on his knees? Is he begging for life? He is begging, ladies and gentlemen.*** He's shot once. He's shot twice.

**And there he is, the new face of evil, standing over Laurice Garvin, killing him. Executing him in cold blood.**

Laurice Jerome Garvin. Good and dead.

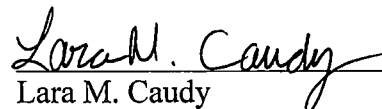
App. 215, l. 1-22 (emphasis added).

It is obvious that in addition to the improper vouching, the assistant solicitor, aware that the state's case against Petitioner was very weak, attempted to obtain a conviction by arousing the passions and prejudices of the jury. Respectfully, this Court should reverse Petitioner convictions and sentence and remand for a new trial.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of June, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Allendale County

Honorable Roger L. Couch, Circuit Court Judge  
—————

MARQUIS BREELAND,

PETITIONER

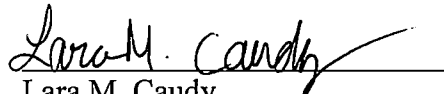
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


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CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Marquis Breeland, #298259, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 19th day of June, 2017.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 19th day of June, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.