

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

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S.C. Supreme Court

LAMAR A. GRAVES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to object to that part of the solicitor's closing argument that vouched for the State's witnesses?

STATEMENT

Petitioner was convicted of armed robbery after a jury trial held before the Honorable J. Derham Cole on January 4, 2006, in Spartanburg County. An eighteen (18) year sentence was imposed. Kathleen Hodges, Esquire was trial counsel.

Petitioner appealed his conviction and the appeal was dismissed by the Court of Appeals on October 10, 2008, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Graves, Op. No. 2008-UP-562.

Petitioner filed an application for post-conviction relief on June 18, 2009. An evidentiary hearing was held on May 26, 2010, before the Honorable J. Mark Hayes, II. Petitioner was present and was represented by Jonathan A. Neal, Esquire. Respondent was represented by Suzanne H. White, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing.

On July 28, 2010, Judge Hayes issued an order denying and dismissing the application for post-conviction relief.

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to object to that part of the solicitor's closing argument that vouched for the State's witnesses.

During closing argument the solicitor said this about the State's witnesses in reference to their identification of petitioner:

What about Lamar Graves? Every witness could not identify him. No witness said it wasn't him. The witnesses that could not identify Lamar Graves never said Lamar Graves wasn't there.

What they said was he had a hoodie on or I didn't get a good look at his face. I either had my face down, I was hiding, I was protecting my baby, I was running out of the apartment to try to get help, I was jumping out of second-story windows to go get help.

They never said it wasn't him, but they were honest with you. They came forward and they said, look, I can't tell you who it was. I can tell you what they did. That's why I called them to the stand, to tell you what happened to them, what they had to do and what they had to say.

(App. p. 383, line 15 – p. 384, line 4)

Later, the solicitor argued this about the State's key witness Troy Fisher:

Ask yourselves, ladies and gentlemen, when you are back in the jury room if you would do it for me, what reason in the world does Troy Fisher have to lie, to make up that this happened?

Why in the world would he travel all the way back to South Carolina from Maryland to come in here and identify somebody that didn't do it? He wouldn't.

He's a very smart, very educated young man, a lot of potential and a good career in front of him. He didn't come in here to hesitate with his identification.

He didn't know names, but he knew faces. And, yeah, I submit to you those are faces, especially that one, that he will never be able to

forget, whether it's two years after the fact or 20 years after the fact. I submit to you he's going to remember that same face. He will carry that with him the rest of his life.

(App. p. 389, lines 10-25)

Defense counsel did not object to the above arguments by the solicitor. In Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) this Court held a defense counsel ineffective for failing to object to a solicitor's closing argument that vouched for the State's witness. This Court wrote:

A solicitor may argue that 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 *277 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.

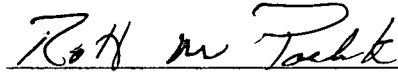
Apparently the solicitor in this case found the witnesses to be credible before the trial as he said they were honest. He wanted the jury to believe that he only called honest witnesses to the stand. As to Troy Fisher, there was no evidence introduced as to his intelligence and education. And how does the solicitor know that Fisher will remember the faces of his attackers or that he would carry it with him for the rest of his life? The solicitor is improperly vouching for his witnesses and bolstering their credibility.

Defense counsel was ineffective in failing to object to the solicitor's closing argument and there is a reasonable probability that counsel's failure to object undermined confidence in the outcome of the trial. In addition to a defense counsel being held ineffective in Matthews v. State, also see Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004) and Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002).

CONCLUSION

Petitioner's writ should be granted and he should be given a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "R. M. Pachak", is written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

LAMAR A. GRAVES,

PETITIONER,

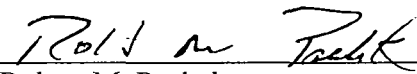
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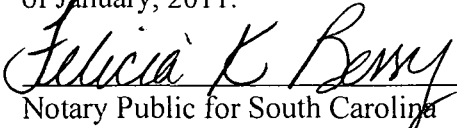
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire this 4th day of January, 2011.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of January, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.