KENNETH L. YOUNG #323282

McCI F-4 B-side
386 Redemption Way
McCormick, South Carolina 29899

April 17, 2013

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Kenneth L. Young v. South Carolina
PCR Case No.: 2010-CP-46-3470
Appellate Case No.: 2004-030594

Dear Clerk:

Enclosed for filing is the pro-se Johnson petition in reference to the above reference case.

Please return to me a clock-stamped copy of the enclosed petition at your earliest convenience.

Thank you for your assistance in this case.

cc: Personal file

Sincerely,

Kenneth L. Young
#323182

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certorari to York County

Paul M. Burch, Circuit Court Judge

KENNETH L. YOUNG,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate case No. 2012-208012

PETITIONER'S Pro-se RESPONSE TO APPELLATE COUNSEL'S JOHNSON PETITION

Kenneth L. Young #323182
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386 Redemption Way
McCormick, S.C. 29899
Petitioners, pro-se

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TRIAL COUNSEL WAS INEFFECTIVE DURING TRIAL WHEN HE FAILED TO LODGE A PROPER OBJECTION TO PRESERVE THE ISSUE OF SEVERANCE FOR APPELLATE REVIEW, WHICH DENIED THE APPLICANT DUE PROCESS OF LAW.

Issue 2

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL JUDGE'S JURY INSTRUCTIONS THAT ALLOWED THE JURY TO DISREGARD THE PRIOR CONVICTIONS OF A PROSECUTION WITNESS IN ASSESSING HER CREDIBILITY, WHICH DENIED THE APPLICANT DUE PROCESS OF LAW.

Issue 3

COUNSEL WAS INEFFECTIVE DURING TRIAL FOR FAILING TO OBJECT TO THE IMPROPER CONDUCT OF THE SOLICITOR WHICH CONSISTED OF POISONING THE MINDS OF THE JURORS IN HIS OPENING STATEMENTS, BOLSTERING OF STATE'S WITNESSES AND MAKING IMPROPER REMARKS ABOUT THE APPLICANT AND HIS CO-DEFENDANTS IN HIS CLOSING ARGUMENT, COUNSEL WAS ALSO INEFFECTIVE FOR FAILING TO MOVE FOR CURATIVE INSTRUCTIONS OR A MISTRIAL, WHICH DENIED THE APPLICANT DUE PROCESS OF LAW.

Issue 4

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO A STATE'S WITNESS'S TESTIMONY TO AN OUT OF COURT COURT MADE BY A NON-TESTIFYING WITNESS, WHICH DENIED THE PETITIONER THE RIGHT TO CONFRONT THIS WITNESS, AND WAS A DENIAL OF DUE PROCESS OF LAW.

Issue 5

COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT FOR FAILING TO INDEPENDENTLY INVESTIGATE AND LOCATE A WITNESS WHERE THE MISSING WITNESS WAS OBSERVED AT THE ALLEGED BANK ROBBERY BY THE STATE'S REPLY WITNESS, WHICH DENIED PETITIONER DUE PROCESS OF LAW.

STATEMENT AND RELEVANT FACTS

The Petitioner was convicted of armed robbery, entering a bank with intent to steal, kidnapping, assault and battery of a high and aggravated nature, possession of a firearm during the commission of a violent crime and conspiracy to commit armed robbery pursuant to a trial by judge and jury convened during the July 2007 term of the York County Court of General Sessions before the Honorable Judge John C. Hayes, III. Petitioner was represented by Phillip Jamieson at trial. Petitioner was convicted as charged and sentenced to life imprisonment without the possibility of parole for kidnapping, armed robbery and entering a bank with intent to steal, and concurrent terms of ten years on the remaining charges.

Two of the Petitioner's co-defendants became State's witnesses at trial and implicated the Petitioner in this incident. The remaining co-defendant represented himself during trial and maintained that he was innocent of the charges against him. App. p. 44, lines 17-19.

Under these conditions the Petitioner knew that he could not get a fair trial and asked his trial attorney to move for severance so that he could be tried alone and present evidence to establish that he was not guilty. Trial counsel did move for severance but failed to preserve this issue for appellate review. See App. pp. 662-665.

The Solicitor's conduct in this matter was deplorable, he made improper, inflammatory and prejudicial remarks during his opening statement and closing argument. See App. pp. 669-678.

The trial judge also contributed to the unfairness of this trial with remarks made during jury instructions, see App. pp. 666-668, and also by allowing the State to present a witness, after the State had rested in this

case, who was not on the witness list submitted in the discovery by the State, nor any prior statements from this witness was previously presented. See App. pp. 498, lines 17-18 and pages 538-548. Plus the witness's testimony was riddled with "hearsay".

The Petitioner did not present any argument in reference to this mystery witness but did discuss this witness with his PCR attorney who informed the Petitioner that he would prepare arguments concerning this mystery witness and present them at the hearing, counsel never did present any evidence concerning this witness during the hearing and Petitioner believes that counsel's inaction was ineffective assistance of PCR counsel.

Petitioner appeal his case, but his convictions and sentences were affirmed on appeal. State v Young, Op. No. 2009-UP-505 (S.C. Ct. App. filed November 5, 2009). Lanelle Durant represented the Petitioner on direct appeal.

Petitioner filed his PCR application with the York County Clerk of Court Office on August 16, 2010. App. pp. 652-688. Respondent filed a return requesting that an evidentiary hearing be convened in this matter on February 16, 2011. App. pp. 689-692.

A hearing was convened on October 11, 2011, at the York County Courthouse before the Honorable Judge Paul M. Burch. App. pp. 693-711. Petitioner was present at the hearing and represented by Charles T. Brooks. On February 13, 2012, Judge Burch issued and order of dismissal in this case. App. pp. 713-720.

Petitioner appealed Judge Burch's order, appellate counsel Wanda H. Carter filed a Johnson petition in this matter stating that she did not believe this case has any merit and also asking to be relieved from the case. Petitioner now responds to appellate's counsel's Johnson petition to establish that this case do have merit and he is entitled to relief:

Issue 1

TRIAL COUNSEL WAS INEFFECTIVE DURING TRIAL WHEN HE FAILED TO LODGE A PROPER OBJECTION TO PRESERVE THE ISSUE OF SEVERANCE FOR APPELLATE REVIEW, WHICH DENIED THE APPLICANT DUE PROCESS OF LAW.

This issue was the first issue raised in the Petitioner's "Memorandum of Law in Support" of his application for post-conviction relief. See App. p. 662-665. The Petitioner raised this issue at his PCR hearing. See App. p. 700, lines 19-25 - p. 701, lines 1-3. The PCR court addressed this issue in its "Order of Dismissal". See App. p. 718.

At the PCR hearing trial counsel stated that he made a motion to sever and the motion was denied. See App. p. 709, lines 14-18.

This issue was also raised during the Petitioner's PCR proceeding because the Court of Appeals denied review of this issue because trial counsel failed to lodge a proper objection during trial to preserve the issue for appellate review. See copy of Court of Appeals order denying review attached and marked as "Exhibit - A".

For the reasons stated above, appellate counsel, Wanda H. Carter, should not have overlooked this very important issue for briefing during the appeals process and the Petitioner ask that this Court find that trial counsel was ineffective for failing to properly object, disregard appellate counsel Carter's motion to be relieved and order further briefing in this matter.

Issue 2

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL JUDGE'S JURY INSTRUCTIONS THAT ALLOWED THE JURY TO DISREGARD THE PRIOR CONVICTIONS OF A PROSECUTION WITNESS IN ASSESSING HER CREDIBILITY, WHICH DENIED THE APPLICANT DUE PROCESS OF LAW.

The Petitioner raised this issue in his PCR application, see App. pp. 666-668, and at the PCR hearing, see App. p. 701, lines 4-25. Although PCR counsel called trial counsel, Phillip Jamieson, to the stand during the PCR hearing, see App. p. 704, lines 9-10, he failed to inquire as to whether the Petitioner was prejudice by the trial judge's faulty jury instructions concerning disregarding the credibility of the witness nor was this issue addressed in the Order of Dismissal.

The trial judge's instructions to the jury was reversible error because this was one of the only two people who allegedly placed the Petitioner at this alleged bank robbery. The issue was made more prejudicial in light of the Solicitor's vouching for the witness's credibility and the judge allowing the jury to disregard the past convictions to determine credibility of this witness.

As the Petitioner argued in his PCR application, this Court has held that "the resolution of the credibility of the witness is within the province of the jury". State v. Needs, (S.C. 1998) 333 S.C. 134, 508 S.E.2d 857, rehearing denied. See App. p. 666.

Credibility was a major issue in relations to this witness because this case rested on the testimony of this and one other

witness. None of the alleged victims could place the Petitioner at the scene of this alleged bank robbery, nor was there any fingerprints or any type of DNA evidence linking the Petitioner to any crimes. This witness's past conduct is based on dishonesty which implicates the propensity to lie.

The crimes which are generally spoken of as meeting the test of giving a basis for an inference of a "propensity to lie" and which "bear directly on whether jurors ought to believe her" are those which "rest on dishonest conduct", Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), or carry "a tinge of falsification", United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977), or involve "some element of deceit, untruthfulness, or falsification", United States v. Thompson, 559 F.2d 552, 554 (9th Cir. 1977). Id.

The crimes for which Ms. Laws, one of the co-defendant in this case, testified that she was convicted of was possession of stolen property, utter, forgery and embezzlement, see App. p. 339, lines 3-7, all of which are crimes of dishonesty.

The jury should have been allowed to consider these crimes to determine whether Ms. Laws' testimony was worthy of their belief.

For the reasons stated herein, this issue deserves to be brief and presented to this Court. The Petitioner ask that this Court disregard appellate counsel's motion to be relieved and order further briefing on this issue.

In the alternative, Petitioner ask that this Court remand

this case to the post-conviction relief court to have this issue addressed pursuant Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997); and Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

Issue 3

COUNSEL WAS INEFFECTIVE DURING TRIAL FOR FAILING TO OBJECT TO THE IMPROPER CONDUCT OF THE SOLICITOR WHICH CONSISTED OF POISONING THE MINDS OF THE JURORS IN HIS OPENING STATEMENTS, BOLSTERING OF STATE'S WITNESSES AND MAKING IMPROPER REMARKS ABOUT THE APPLICANT AND HIS CO-DEFENDANTS IN HIS CLOSING ARGUMENT, COUNSEL WAS ALSO INEFFECTIVE FOR FAILING TO MOVE FOR CURATIVE INSTRUCTIONS OR A MISTRIAL, WHICH DENIED THE APPLICANT DUE PROCESS OF LAW.

The Solicitor's opening statement was prejudicial to the Petitioner and warrants reversal of the convictions. A review of the Solicitor's closing argument by this Court is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting convictions a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). The appropriateness of a solicitor's closing argument is a matter left to the trial court's discretion. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003); State v. King, 349 S.C. 142, 160, 561 S.E.2d 640, 649 (Ct. App. 2002); State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000). The trial court was denied the opportunity to use its discretion because counsel failed to lodge an objection.

A trial judge is allowed broad discretion in dealing with the range and propriety of closing arguments to the jury. State v. Raffaldt, 318 S.C. 110, 114-15, 456 S.E.2d 390, 393 (1995); State v. Bell, 302 S.C. 18, 33, 393 S.E.2d 364, 372 (1990); State v. Woomer, 278 S.C. 468, 474, 299 S.E.2d 317, 320 (1982). But once it gets out of hand as it did in the instant case, counsel should have objected, move for a mistrial or request curative instructions.

"A solicitor's closing argument must not appeal to the

personal biases of the jurors nor be calculated too arouse jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it". Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); accord Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); See also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999)("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)(holding that because the solicitor's closing argument must be "carefully tailored" to not appeal to personal bias of juror nor calculated to arouse his passion or prejudice"); State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003)("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors.").

Specifically, the Solicitor "bolstering" the credibility of the only two witnesses that could place the Petitioner at the scene of this alleged bank robbery and calling the Petitioner and his cohorts "clowns" during his closing argument constitutes reversible error.

This issue was not addressed in the Order of Dismissal, but because of the critical nature of this issue, the Petitioner ask that this Court order further briefing on this issue or remand this case back to the post-conviction relief court to have this issue addressed pursuant to Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997); and Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

Issue 4

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO A STATE'S WITNESS'S TESTIMONY TO AN OUT OF COURT DECLARATION MADE BY A NON-TESTIFYING WITNESS, WHICH DENIED THE PETITIONER THE RIGHT TO CONFRONT THIS WITNESS, AND WAS A DENIAL OF DUE PROCESS OF LAW.

During trial the State presented a late witness, a female, that counsel had no ideal who she was or what her testimony would be.

After the State had rested during trial, see Appendix, p. 498, lines 16-22, and the Petitioner had testified, see Appendix pp. 500-536, the State presented the testimony of "Janie Kendrick, see Appendix, pp. 537-547, who testified that she was at the Bank of York on the day and time of the alleged bank robbery. She testified that she went through the drive-thru at the bank and that there was "another lady" and that "when I pulled up to the drive-thru lane the lady rolled her window down and said I've been sitting here quite awhile and she said nobody has come to wait on me which is unlike the tellers there. And she said I <u>think maybe the bank might be getting robbed</u> and I was like, no, not really. And then I drove around, I just drove the bank and back into the teller line, there was no activity in front of the bank at that time". See Appendix, p. 539, lines 5-25.

The Petitioner was denied his right to confront this "other lady" who was at the bank and told Ms. Kendrick that she "think maybe the bank might be getting robbed". She may have seen all of the robbers prior to them entering the bank and may have been able to identify them and support the Petitioner's contention that he was not present during this alleged crime. The Petitioner

should have had the right to examine and cross-examine the "other lady" during trial.

The Confrontation Clause provides: "In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him." Article I, Section 14 of the South Carolina Constitution gives an accused the same right: "Any person charged with an offense shall enjoy the right ... to be confronted with the witnesses against him." See also the Sixth Amendment of the United States Constitution. Section 17-23-60 of the 1976 Code of Laws of South Carolina restates this right. State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956)

Because trial counsel was ineffective for failing to raise this issue, this Court should remand this issue back to the PCR court to have this addressed pursuant to Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

Issue 5

COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT FOR FAILING TO INDEPENDENTLY INVESTIGATE AND LOCATE A WITNESS WHERE THE MISSING WITNESS WAS OBSERVED AT THE ALLEGED BANK ROBBERY BY THE STATE'S REPLY WITNESS, WHICH DENIED PETITIONER DUE PROCESS OF LAW.

Counsel's failure to investigate the "other lady" listed in Issue 4, who could have had information to exonerate the Petitioner in this crime was constitutionally deficient performance.

Petitioner asserts that he was not at the scene of the alleged bank robbery, had counsel properly investigate this witness the Petitioner may have had someone to support his version of events.

The primary question is whether counsel's performance fell below an objective standard of reasonableness, and the performance prejudiced the Petitioner 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". Strickland v. Washington, 104 S.Ct. 2052, 2068 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial". Cherry v. State, 386 S.E.2d 624, 625 (1989).

"Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation'". Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007)(quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)). "[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty

to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." State v. Lounds, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008)(quoting Ard, 372 at 331-32, 642 S.E.2d at 597); see also Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982)("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.")(quoting Cole v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)).

Because trial counsel was ineffective for failing to raise this issue, this Court should remand this issue back to the PCR court to have this issue addressed pursuant to Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

CONCLUSION

For the foregoing reasons the Petitioner believes that appellate counsel Wanda H. Carter's decision to file a Johnson petition in this matter was error and ask that this Court deny counsel's motion to be relieved and order further briefing in this matter.

Date: April 17, 2013

Respectfully submitted,

Kenneth L. Young #323182

Kenneth L. Young #323182
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Petitioner

EXHIBIT-A

Assistant Attorney General Julie M. Thames, all of Columbia, Kevin Scott Brackett, of York, for Respondent.

PER CURIAM: Kenneth Lovette Young appeals the circuit court's refusal to sever his trial from that of his co-defendant, as well as the court's admission of certain items into evidence. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to Young's severance motion: See I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that in order for an issue to be preserved for appellate review, it must have first been raised to and ruled upon by the circuit court); Tupper v. Dorchester County, 326 S.C. 318, 324 n.4, 487 S.E.2d 187, 190 n.4 (1997) (stating an appellant cannot bootstrap an issue for appeal by way of a co-defendant's objection); White v. Livingston, 231 S.C. 301, 307, 98 S.E.2d 534, 537 (1957) (citation and quotation marks omitted) ("[A] party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with or different from that taken by him at the trial, and [. . .] the parties are restricted to the theory on which the cause was prosecuted or defended in the court below.").

2. As to the admission of items into evidence: State v. Adams, 377 S.C. 334, 337, 659 S.E.2d 272, 274 (Ct. App. 2008) (recognizing the admission of evidence is left to the discretion of the circuit court and will not be reversed absent an abuse of discretion).

AFFIRMED.

HEARN, C.J., and KONDUROS, J., and LOCKEMY, J., concur.

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