

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

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Certiorari to Chesterfield County  
Honorable Paul M. Burch, Circuit Court Judge

RECEIVED

JUL 03 2017

OSCAR FORTUNE,

S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002231

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PETITION TO FILE AMENDED  
PETITION FOR WRIT OF CERTIORARI  
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Pursuant to Rule 240, SCACR, counsel for petitioner would request leave to file with this Court an Amended Petition for Writ of Certiorari that is specifically in line and keeping with the Opinion of the Court of Appeals filed on March 2, 2016, remanding the above titled appeal on the question of whether the prosecutorial misconduct emanating from the case denied petitioner the right to a fair trial. In support of this motion, counsel would submit the following points.

- 1.) In the petition for writ of certiorari filed on PCR appeal dated June 26, 2017, the undersigned counsel addressed the issue of the unfairness of certain improper comments made by the solicitor and how the same denied petitioner's right to a fair trial, but the appellate argument was couched in terms of issue of this being reversible

error on appeal had trial counsel preserved the issue for appellate review; and although the appellate argument expounded on the core matter at issue, i.e., the denial of a fair trial for petitioner based on the solicitor's erroneous comments, the Court of Appeals' Opinion in effect required the matter of prosecutorial misconduct to be addressed in addition to the resulting denial of the right to a fair trial for petitioner as a result. Therefore, it is necessary for appellate counsel to address the matter of prosecutorial misconduct in full.

- 2.) With respect to the solicitor's comments that "the role of defense attorneys was to "manipulate" and "shroud" the truth and "confuse the jurors" without any "regard for the truth," the Court of Appeals remanded on what was in effect a request for a ruling from the PCR judge on the impact of these comments on petitioner's right to a fair trial and in effect also if this impugning of the institutional role of defense lawyers constituted prosecutorial misconduct.
- 3.) The remand PCR judge ruled that "the solicitor's remarks while improper [were] not so prejudicial to [petitioner] so as to deprive him of a fair trial, especially when combined with the accompanying objections of trial counsel and the curative comments of the trial judge"
- 4.) An analysis of the merits of the underlying issue of prosecutorial misconduct would include an inquiry into whether the prosecutor's comments in question involved unfair trial tactics, (See State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1999)), and how the cumulative effect of such misconduct, and the strength of the evidence of guilt, and the curative actions taken by the court all impacted the

prejudicial effect of the prosecutorial misconduct. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2012).

- 5.) Although the trial judge in this instance stated that “I do not think that their (defense attorneys job) job is to defraud the court or the jury and to that extent I sustain the objection,” it was clear that this curative instruction did not erase the prejudicial taint of the solicitor’s accusations about the role of defense lawyers taking on a fraudulent and deceitful approach in the case, especially in light of the fact that the erroneous comments were compounded by the solicitor’s explanation that the job of the prosecutor by contrast would be to seek the truth, which implies prosecutors are honest and not fraudulent like defense attorneys. Moreover, the prejudicial effect and the cumulative effect had great negative impact, particularly since petitioner’s self-defense claim was strong. Thus, the cumulative effect of the solicitor’s misconduct via the comments mischaracterizing role of defense attorneys certainly impacted petitioner’s attorneys’ self-defense argument and significantly nullified petitioner’s case in his defense. Such comments by the solicitor could not be viewed as harmless error to the extent that the prosecutorial misconduct conduct, i.e. conveying that prosecutors are honest and defense attorneys are not honest, certainly contributed to the jury’s guilty verdict.
- 6.) The PCR judge ruled that the remarks in question did not deprive petitioner of a fair trial based on the following factors regarding the 1.) degree in which the prosecutor’s remarks had a tendency to mislead the jury and prejudice the accused; 2) whether the remarks were isolated or extensive; 3) absent the remarks, the strength of the competent proof introduced to established the guilt the accused; 4.) whether the

comments were deliberately placed before the jury to divert attention to extraneous matters; 5.) whether the prosecutor's remarks were invited by improper conduct of defense counsel; and 6.) whether curative instructions were given to the jury. U.S. v Wilson, 135 F3d. 291 (4<sup>th</sup> Cir 1998). To the contrary, here, the solicitor's comments were very misleading and prejudicial to the petitioner's defense in and of itself, and because they were juxtaposed to the role of a solicitor. Also, the solicitor's remarks were extensive and detailed, and so were the contrasting remarks about the role of a prosecutor. Furthermore, the strength of the state's case was nullified by petitioner's strong self-defense claim, and it appears that the solicitor's comments were apparently deliberately put before the jury, which was proved by the contrasting view of how the role of a prosecutor is to seek the truth. Moreover, there was no conduct on behalf of defense counsel that opened the door to the solicitor's improper remarks, and as outlined in paragraph #5 above, the curative comment made by the trial judge did not cure the error because of the inherent nature of the solicitor's comments that maligned the role of defense attorneys, which was unfair to petitioner, and the credibility attack interference that the solicitor's comments had on the self-defense claim raised on petitioner's behalf at trial, all resulted in prosecutorial misconduct that was not harmless error.

WHEREFORE, based on the foregoing points, counsel would request leave to file an amended petition for writ of certiorari in order to address in full the matter of prosecutorial misconduct that occurred at petitioner's trial per the direction of the Court of Appeals in the case.

Respectfully Submitted,

  
Wanda H. Carter

Deputy Chief Appellate Defender

This 3rd day of July, 2017.

STATE OF SOUTH CAROLINA

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Certiorari to Chesterfield County

Honorable Paul M. Burch, Circuit Court Judge

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OSCAR FORTUNE,

PETITIONER

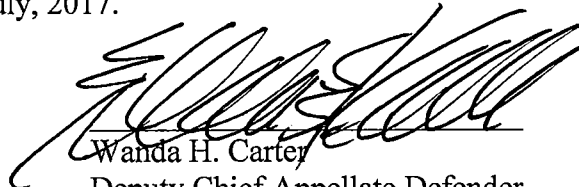
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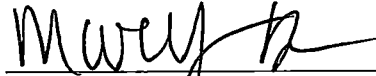
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition to file Amended Petition for Writ of Certiorari in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition to file Amended Petition for Writ of Certiorari has been served on Oscar Fortune, #314269, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 3rd day of July, 2017.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 3rd day of July, 2017.

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