THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 24 2018

S.C. SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 16-002231

OSCAR FORTUNE.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
Elizabeth.a.franklin@gmail.com
(803) 765-1044
Attorney for Petitioner

Other Counsel of Record:
Jessica Kinard
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549
Attorney for Respondent

INDEX

QUESTIONS PRESENTED

I. Whether Petitioner was denied a fair trial because the State, in its closing argument, denigrated the integrity of trial counsel and impugned the institutional role of defense lawyers?

II. Whether Petitioner was denied a fair trial because the State knowingly allowed a witness to commit perjury?

III. Did trial counsel render ineffective assistance of counsel for relying solely on cross-examination to cure the prejudice of a witness's alleged perjury?

STATEMENT OF THE CASE

The Petitioner, Oscar Fortune, was found guilty of murder and possession of a weapon during the commission of a violent crime after trial held before the Honorable John H. Milling and a jury, in Chesterfield County, during its March 2006 term. Petitioner was sentenced to 37 years in prison. He was represented by Ed Saleeby and Terrance Quinn. The State was represented by Assistant Solicitors Franklin Joyner and Kevin Hales. Petitioner timely appealed, and the South Carolina Court of Appeals upheld his convictions and sentence. *State v. Fortune*, Op. No. 2009-UP-259 (S. C. Ct. App., *filed* June 1, 2009).

Petitioner then filed an application for post-conviction relief on August 18, 2009. An evidentiary hearing was held on January 11, 2012 before the Honorable Paul M. Burch. Petitioner was represented by Joel F. Stroud. The Attorney General's Office was represented by Karen C. Ratigan. On January 16, 2012, Judge Burch filed an order of dismissal. He then filed an order denying Petitioner's Rule 59(e) motion on May 7, 2012.

Petitioner then filed a petition for writ of certiorari. On April 10, 2014, the South Carolina Court of Appeals issued an order granting the petition. After briefs were filed, the Court of Appeals issued an opinion on March 2, 2016 denying relief on issues 3,5,6,9,10, and 11, but remanding the case for the PCR judge to rule on issues 2,4, and 7.

A remand hearing was held on August 2, 2016 before Judge Burch. The parties discussed issues 2,4, and 7, but the court did not take any additional evidence or hear additional argument. On September 9, 2016, Judge Burch issued an order denying relief. Then, on October 7, 2016, he denied Petitioner's motion to reconsider.

This petition for writ of certiorari timely follows.

RELEVANT FACTS

During the very late hours of December 23, and into the very early morning hours of December 24, 2001, there were disagreements and provocations between Sonta[1] McCall and Iris Gaston, and the decedent, Anthony Shields, at a Christmas party held at the Green Villa in Chesterfield County, South Carolina. Later that early morning, at a local Huddle House, Petitioner, who travelled to the Huddle House after being awakened when McCall, his cousin, called to tell him about her encounter with the decedent, encountered the decedent at his car. What transpired next is the basis of Petitioner's conviction. Both Petitioner and the decedent had guns, they both fired their guns, but Petitioner lived and the decedent died. Petitioner's defense at trial was self-defense. The following are relevant portions of the trial.

The State called the decedent's wife, Denise Shields, to testify. App. 162. She testified they had been at a Christmas party at Green Villa. She claimed that Sonta approached her at the party. They had some words, and she said that Sonta pushed her and then hit her. She also claimed there were no beer bottles at Green Villa that night. App. 165. She said they were served in plastic cups. App. 165. The owner of Green Villa placed her and the decedent in a separate room because she did not want anything "to be getting out of hand." She made them stay there until the others left. Later, they left and went home. Once home, the decedent told her that he was not going to let this "ruin your night." He changed his clothes and said he was going to the store to get some cigarettes.

---

[1] Pronounced, Son-Tay.

It was around 2:00 or 3:00 in the morning when he went to purchase the cigarettes. That was the last time she saw him. App. 169. Shields testified she had no idea why he went to the Huddle House. App. 171.

Iris Gaston was also called by the State to testify. App. 176. She was also at the party at Green Villa. She testified that a fight broke out between Denise Shields and Sonta McCall. App. 177. After the fight broke out, she got Sonta in her car, and they went to the Huddle House. Sonta had spoken to Petitioner earlier, and he showed up at the Huddle House, too. App. 178. Initially they were inside the restaurant. Then, they exited the restaurant. Sonta approached the decedent's truck, and then Petitioner did too. They exchanged words, and then there were gunshots. When she heard the gunshots, she took cover by her car. App. 178-79. She eventually met up with Sonta again, and they went to Petitioner's house (who lived with his girlfriend, Tonnette Cash). Later, she was arrested and gave a statement to the police. App. 181.

Ms. Gaston also testified that she saw the decedent strike Sonta McCall with a beer bottle in the face. Ms. Gaston was also struck by the decedent with a bar stool across her back. App. 182-83. She overheard Sonta speak to Petitioner, but did not hear anything that led her to believe that he was going to shoot or otherwise harm the decedent. App. 183. Ms. Gaston was charged with accessory after the fact. App. 184.

The State also called Tonnette Cash to testify. She and Petitioner were engaged at the time of these events. She had also attended the Christmas party at Green Villa. She left the party early and went home. Petitioner was asleep when she arrived. App. 187. She heard Sonta call him and tell him there had been altercation. Petitioner said he was

going to go see what was going on with her. Together, they went to the Huddle House. As they were there, Sonta said, "There is Anthony." Petitioner said to let him talk to him; to see what was going on. App. 189. Petitioner then went to speak to the decedent. First, he asked her where the gun was located. He got it out of the console and placed it in his pocket. App. 190.

Cash testified that Petitioner walked over to the decedent's car, and then she heard shots. App. 191. She testified she heard "like a small sound, small sound. Then I heard other louder sounds." App. 191. She then saw a car trying to back out. She tried to back out her car, too. Petitioner then got into the car with her and told her to take him to the police department. App. 191. Instead, they went to a brother's house in Bennettsville. She dropped Petitioner off and then went home. Soon afterwards, she found out that the decedent had died and that police wanted to talk to everyone. She went back to Petitioner's brother's house, but he was not there. The gun that was used to shoot the decedent belonged to Cash. App. 195. On cross-examination, Cash reiterated that she heard a small metal sound, and then larger sounds. App. 196. She testified she heard two smaller sounds, and then "two or three" larger sounds.

Arthur Mungo also testified. At the time of his testimony, he was in a federal holding unit for conspiracy to distribute crack cocaine. Mungo is the father of Sonta McCall's daughter. At the time of this trial, they did not have a relationship. He was at the Huddle House that night. App. 200. Sonta told him that the decedent had hit her in the head with a champagne bottle. Mungo testified he saw Petitioner shoot the decedent.

App. 204.[2] Mungo admitted that when he saw Petitioner at the Huddle House, he was not causing any trouble, or fighting anyone, or flashing a gun around. App. 217. He also admitted he did not know who fired first. App. 222. Mungo testified that law enforcement initially accused him of shooting the decedent. App. 228.

The State also called Vincent Davis to testify. Davis was also present at the Huddle House on the night and early morning of December 23-24,2001. He observed the shooting from a distance. App. 241. He saw the decedent trying to get out of the passenger side of his truck, and then he saw Petitioner run to the other side of the truck and shoot. App. 242. Davis grabbed the gun out of the cup holder in the car, put it in his pocket, and then left the scene. Two days later, SLED agents arrived at his house. He gave a statement and gave them possession of the gun. App. 244. In his statement to the police, Davis said he retrieved the gun from the passenger side floorboard. App. 248.

The State called its forensic pathologist, Dr. Inas Yacoub to testify. App. 254. She testified that his cause of death was gunshot wounds to the torso, chest, and abdomen.

---

[2] Arthur Mungo, Federal Inmate #12715-171, is currently incarcerated in the Bureau of Prisons with an expected release date of September 5, 2018. At the time of his testimony, he had an outstanding charge of possession of a stolen vehicle that was dismissed after his testimony in this trial, on July 25, 2006. He also had a previous conviction, in 2002 for assault and battery of a high and aggravated nature for which he received 5 years, suspended on the service of 18 months' probation. According to the trial testimony, Mungo also had additional convictions for assault and battery of a high and aggravated nature, and possession of a controlled substance. App. 208-09. He also had a conviction for marijuana or hash. On cross-examination, Mungo admitted that he had 9 controlled substance charges, of which he pleaded guilty to one, and the others were dismissed. App. 226-27.

App. 261. The decedent had five gunshot wounds. App. 264. She testified to notes contained in the case history portion of her autopsy that stated:

> The descendent (sic) was a 27 year-old allegedly shot while inside a vehicle parked in the parking lot of the Huddle House. Reportedly a shot was heard and then four or five shots. He got back up again.

App. 285.

The State called Barry Davis, Jr. to testify. App. 304. He was friends with the decedent. He testified that he saw a car pull up behind the decedent's car and a person get out of it. He saw both a male and female get out of the car. He testified that words were exchanged, and then shots were fired. App. 306. Davis testified there was a "first shot" from the driver's side of the car, and then other shots on the passenger side. App. 307. He just "heard" the first set of shots. Then he observed the second set. App. 307. On cross-examination, Davis admitted that he did not see anyone actually fire a gun. App. 314.

The State called Officer Harold Haney. App. 316. Officer Haney read Petitioner's statement to law enforcement given to them on December 24, 2001 into the record. App. 333. Petitioner told them the following:

> On the morning of December 23rd '01 at about 3:15, 3:30am, I received a call from my first cousin, Sonta McCall. She said that she was just in a fight with the guy and his wife at the Green Village. I asked where she was at. She told me at the Huddle House.
>
> So I told her I would be up there. So I got up to put on some clothes. At that time Tonnette asked what was wrong so I told her and she got up. We got in the car. We got up and we got in the car and went to the Huddle House.

When we got there I saw a lot of people that I did not know. The first person I saw was Jay Jay, Sonta's baby's father. I asked him what was going on. He said nothing that he could not handle. I asked where is Sonta. He said in the Huddle House.

So I walked towards the place. At that time I saw Sonta and Iris. I asked what was going on. She proceeded to tell me about the fight in which she was hit in the face with the bottle by the guy and Iris was hit with a chair.

So I asked where the guy was. They said they did not know. So I asked what they want to do, go to my house or B-Ville as they were...answering me Sonta said there he is right there. I said where. She said in the brown Explorer. So the guy pulled in. I got in my car and pulled up where he was expecting to fight the guy.

Sonta got to him before I did. When I got to the truck him and Sonta were already exchanging words. I asked him what was up and I saw a flash and heard a bang in which at that time I felt as if he had shot Sonta so I was in fear for my life and returned fire.

He came out of the passenger side of his truck. By this time I was at the back and he pointed his gun again and I fired then I got in my car and left. And went to B-Ville and Laurinburg and then to Cheraw to turn myself.

I believe I shot four to six times with a .38 revolver. When I got out of the car the asked Tonnette to hand me the gun from the console.

App. 333-335.

Officer Haney testified there were between 80-100 people at the Huddle House that night. App. 338. He also testified that Petitioner was "very cooperative" when he came to speak to law enforcement the day after the shooting. App. 347.

The State also called Stephanie Douglas in its case-in-chief. App. 356. As other witnesses testified, she heard gunshots but did not see them. App. 361. She testified she saw Petitioner shoot the decedent has he was on the ground, App. 362, although that fact

was not contained in her statement to law enforcement after these events occurred. App. 366.

James Ellison III also testified. App. 371. He, too, was present at the Huddle House. He heard, but did not see the shots. App. 373.

The State told the court a projectile from the .25 was found on the passenger side floorboard of the decedent's car. App. 389.

Vello Paavel was qualified as a firearms expert and testified on behalf of the State. According to him, the .25 caliber gun, which belonged to the decedent, was missing its safety and "does not fire reliably." A person firing it would not have to disengage the safety to shoot. The trigger would also get stuck. App. 402-03. Also, the .25 caliber magazine would sometimes fail to feed and hold the cartridges properly. App. 403.

Dustin Smith of SLED testified the decedent had a BAC of .041% alcohol. App. 411. SLED did not screen for marijuana use. App. 414.

Evidence presented at trial also showed the decedent had a positive GSR result. Metal consistent with gunshot residue was found on the back of the decedent's left hand. App. 435.

The Court was informed that Petitioner did not have any prior criminal record. App. 440.

The defense put up a case. Petitioner called Sonta McCall to testify. App. 449. She testified that she attended a Christmas party at the Green Villa Club with Iris and Tonnette Cash. While there, she had an altercation with Denise Shields and her husband regarding an argument they had a week earlier at McDonald's. She explained that the

decedent hit her with a beer bottle, and that Iris was hit with a chair. McCall was escorted outside, and Iris followed her. They left the Green Villa. App. 451.

After the party, they called 911 on Iris's cell phone to take a warrant out on the decedent. They went to the Huddle House in Cheraw, and called Petitioner. She told him about being hit by the decedent, and wanted his help going to the police department to take out a warrant. He travelled to the Huddle House about 20-30 minutes later. While they were discussing their next steps, the decedent pulled in to the Huddle House parking lot. App. 453. Sonta then walked over to the decedent's truck. Petitioner was at his car. Sonta and the decedent started arguing and then Petitioner came around. He said something to the decedent, and then Sonta saw a flash and a bang. App. 453. Sonta testified that she saw the decedent shoot his gun. App. 453.

After the decedent shot the gun, she dropped down. She initially thought she was shot, and then she ran to her brother and sister's grandmother's house. From there, she called Iris to come and pick her up. The two of them then travelled to Tonnette's house. App. 454-55. They then spoke to police and travelled back to the restaurant to meet with them. App. 455. She went to the police station, and they served her with a warrant for her arrest. App. 456.

Petitioner also testified on his own behalf. He testified that he received the call from Sonta, and that Sonta told him she had been hit with a beer bottle. He asked where she was, and she told him the Huddle House. About 20 minutes later, he and Tonnette showed up at the restaurant. The four of them spoke and were about to leave when the decedent pulled up. Petitioner told Tonnette to pull around so he could go talk to him.

Sonta walked to his truck. She arrived there before Petitioner and was already exchanging words when Petitioner made his way to the car. Petitioner took Tonnette's gun and put it in his pocket. He felt he needed the gun for protection. App. 468-69. As he approached the decedent's truck, he asked him "what was up" and then the decedent just shot. App. 469. Once the decedent shot the gun, Petitioner returned fire. He testified that he was in fear for his life. He shot four times while he was standing outside of the driver's side door. He then saw the decedent getting out of the passenger side, so he went around the truck and shot again. App. 469-70. The decedent still had the gun in his hand when he went around the side of the car and shot him. App. 470.

After he shot the decedent, he left the Huddle House. He went to Bennettsville and then to Laurinburg. He was afraid. After about four hours, he went to the Cheraw Police Department. At that time, the officers had not known of the second gun. Petitioner was arrested and charged with murder. App. 472.

The parties stipulated that Vincent Davis had the .25 caliber pistol in his possession for 5 days until it was retrieved from him by Deputy Quick. App. 561.

ARGUMENTS

I. Petitioner was denied a fair trial because the State, in its closing argument, denigrated the integrity of trial counsel and impugned the institutional role of defense lawyers.

During its closing argument, the State argued the following:

> MR. JOYNER: Ladies and gentlemen of the jury, thank you so much for your time throughout the course of his trial. I want to start by telling you that we both have jobs here. I job is [to] present the truth. In fact if you look in the South Carolina Code of Laws which mandates that a Solicitor's job is we can't be like a normal attorney is.

A normal attorney has to advocate on behalf of his client. But on the other hand the Solicitor can't. We have to say what the truth and it's---

MR. SALEEBY: Your Honor, I normally don't object. He started out with his job is presenting the facts in the light most favorable to his case. The jury are the finders of the truth . . .

MR. JOYNER: And what that means is that we have something in law that called nolle pros, and a nolle pros a person that has been indicted for a crime or charged with a crime. After further investigation somebody else did the crime where you can dismiss it and nolle pros is the notify in which we dismiss the case.

And I know the person has done something that I think the facts show they're guilty of then I can't nolle pros it. I have to go forward with it. And as I said my job is to show the truth. On the other hand the Defense attorney's jobs are to manipulate the truth. They're job is to shroud the truth. They're job is confuse jurors. They're job is to do whatever they have to without regard for the truth--

MR. SALEEBY: Objection, Your Honor.

MR. JOYNER: To get a not guilty verdict.

MR. SALEEBY: Object, Your Honor.

THE COURT: I don't think that their job is to defraud the Court or the jury and to that extent I sustain the objection.

App. 542

The order of dismissal found the Solicitors arguments to be "clearly improper," but found the remarks to not have been prejudicial:

The solicitor's remarks, while improper, are not so prejudicial to Applicant's substantial rights 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.

App. 1063.

Respectfully, the PCR judge erred in finding that Petitioner was not prejudiced by the Solicitor's remarks and this Court should grant Petitioner's petition for writ of certiorari.

The United States Supreme Court has long held that a prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but must refrain from improper methods calculated to produce a wrongful conviction. *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). It is manifestly improper for a prosecutor to launch a personal attack upon a defense attorney, or upon defense attorneys generally. See *United States v. Bennett*, 75 F.3d 40, 46 (1st Cir. 1996); *United States v. Boldt*, 929 F.2d 35, 40 (1st Cir. 1991). See also *United States v. Vaccaro*, 115 F.3d 1211, 1218 (5th Cir. 1997) (finding prosecutor's statement that defense lawyers "muddle the issues" to be "clearly improper"); *Bruno v. Rushen*, 721 F.2d 1193, 1194 (9th Cir. 1983) (per curiam) (finding improper prosecutor's hints to jury that hiring counsel was probative of guilt).

Both the Fifth Amendment's right to due process and the Sixth Amendment's right to counsel require that a prosecutor refrain from attacking defense counsel. As the United States Supreme Court observed in *Gideon v. Wainwright*, defense lawyers are an integral part of system that ensures that every defendant receives a fair trial. They are "necessities, not luxuries." 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). A defendant possesses a due process right to present his case to a jury, and a prosecutor's disparaging remarks about defense counsel may impermissibly strike at this fundamental right. *Bruno*, 721 F.2d at 1195. See also *U.S. Ollivierre*, 378 F.3d 412 (4th Cir. 2004), *rev'd on other ground, U.S. v. Ollivierre*, 278 Fed. Appx. 253 (2008).

As the order of dismissal acknowledges, the Solicitor's remarks were wholly improper. But the order fails to acknowledge how deeply prejudicial these remarks were. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974) (courts should assess whether the solicitor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'). First, although defense counsel objected twice during the offending closing argument, the trial court judge did not give a sufficient curative instruction. The trial court judge said, "I don't think that their job is to defraud the Court or the jury and to that extent, I sustain the objection." The trial court judge sustained the objection, but he did not tell the jury to disregard the statements, nor did he impress upon the jury the fundamental role defense counsel play in the administration of our criminal justice system. Nor did the trial court judge correct the Solicitor's misstatements that it is trial counsel's job to "manipulate[] the truth" or "shroud" the truth. He did not correct the Solicitor's misstatement that defense lawyers' jobs are to "confuse jurors." By stating "to that extent, I sustain the objection" the Court indicated that it was only correcting the misstatements insofar that defense lawyers should not commit a fraud on the court. And even then, he did not tell the jury that there was no evidence counsel had committed a fraud, or was otherwise not doing anything improper. After hearing the judge's remarks, a juror could not have been left with any other impression but that defense counsel, in fact, had done something improper. See *Scala v. State,* 213 So.3d 1085 (2017) (Reversing conviction after finding the following statements improper and prejudicial: "You know as a prosecutor I take an oath and have an obligation-- affirmative obligation everyday I

work. I work everyday I walk into court to only argue those things that I know are in good faith are (sic) true. The defense layers in this case didn't find themselves so bound.")

The remarks were additionally prejudicial because the State's case was not strong. The sole issue in this case was whether Fortune was justified in shooting, and ultimately killing the decedent in self-defense. There was no question that the decedent had his own gun at the scene, which was removed by Vincent Davis but later turned into law enforcement weeks later. There was also very little question that the decedent had been violent himself earlier that night when he struck two women, one with a beer bottle and the other with a chair. We also know that the decedent had left the Green Villa but then decided to head to the Huddle House where other people who had attended the Green Villa party had gone, but without his wife, and contrary to what he told her about where he was going. We also know that the decedent actually fired his gun. We also know that the decedent's gun did not have a safety on it, and that it was not a "reliable" shot due to its defects. Evidence admitted at trial also showed that witnesses heard an initial shot, followed by successive shots, which corroborated Petitioner's and Sonta McCall's testimonies (and this version of events was also included in the pathologist's autopsy report). We also know that Petitioner voluntarily surrendered himself to the police to discuss what happened.

This case really came down to credibility-- the credibility of Petitioner and his cousin, Sonta McCall, and the State's witnesses, including Mungo with his extensive criminal history and Stephanie Gaskins who was impeached by her prior inconsistent statement. In a case such as this, the Solicitor's remarks that it was Petitioner's lawyer's

job to "manipulate" them, and to "shroud" the truth, and to "confuse them"--without meaningful correction by the trial court judge who was asked to rule on the issue--overwhelmingly prejudiced Petitioner.[3] The PCR judge's order additionally commits an error of law when it failed to consider the prejudice to Petitioner by assessing the strength of the State's case against him. See *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (reaffirming that the South Carolina Supreme Court will reverse a decision of the PCR court when it is controlled by an error of law").

This Court should also consider that the remarks made about defense counsel were deeply personal, and not about his trial strategy. The Solicitor's remarks were a far cry from the "smoke and mirrors" closing arguments that Solicitors often make. The Solicitor's remarks, if true, would have amounted to personal breach of professional ethics, and this Court should not allow a conviction to stand under these circumstances. See *United States v. McLean*, 695 Fed. Appx. 681 (2017) (Drawing a distinction between comments on the strength of the defense and personal attacks on defense counsel); See also *State v. Thomas*, 177 Conn. App. 369 (2017) (Prosecutor is expected to refrain from impugning, directly or through implication, the integrity or institutional role of defense counsel; there is a distinction, however, between argument that disparages the integrity or role of defense counsel and argument that disparages a theory of defense).

---

[3] And this Court should consider the additional prejudice of the Solicitor's personal improper vouching that he really believed Petitioner was guilty or else he would have *nolle prossed* the charges. See *Tappeiner v. State* (citation); *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012); *Vaughn v. State*, 362 S.C. 163, 607 S.E.2d 72 (2004); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001).

This Court should grant Petitioner's petition for writ of certiorari and allow additional briefing on this issue.

II. Petitioner was denied his right to a fair trial because the State knowingly allowed a witness to commit perjury.

The PCR judge found that the record clearly reveals that Stephanie Douglas Gaskins' testimony was contradictory to the voluntary statement she gave to law enforcement. App. 1063.

A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice." *Giglio v. U.S.*, 405 U.S. 150, 153, 92 S. Ct. 763 (1972). The failure to correct false evidence is as reprehensible as its presentation. *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996). See *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006). See also *Napue v. Illinois*, 360 U.S. 264 (1959); *State v. Stanley*, 365 S.C. 24, 615 SE 2d 455 (2005).

Because Stephanie Douglas Gaskins perjured herself at Petitioner's trial, Petitioner respectfully asks this Court to grant his petition for writ of certiorari.

III. Trial counsel rendered ineffective assistance of counsel for relying solely on cross-examination to cure the prejudice of a witness's alleged perjury.

The PCR judge found that trial counsel rendered effective assistance of counsel on this issue because the Gaskins's prior inconsistent statement was read into the record and published to the jury, and because trial counsel had the witness admit that her original, voluntary statement to law enforcement was more credible than her testimony. App. 1064. Trial counsel should have moved to have Gaskins arrested for perjury. *Strickland v.*

Washington, 466 U.S. 668 (1984). But see *State v. Burns*, 120 S.C. 523, 113 S.E.351, 352 (1922) ("It is well settled that a conviction for perjury cannot be sustained merely on the contradictory sworn statements of the defendant. The state must prove which of the two statements is false, and must show the statement, which is made the basis of the perjury charge, to be false by other evidence than the contradictory statement.") Respectfully, Petitioner asks this Court to grant his petition for writ of certiorari.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

Elizabeth Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
Elizabeth.a.franklin@gmail.com
(803) 765-1044
Attorney for Petitioner

January 22, 2018.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY

RECEIVED
JAN 24 2018
S.C. SUPREME COURT

Honorable Paul M. Burch, Circuit Court Judge

Case No. 09-CP-13-00905
Appellate Case No. 2016-002231

Oscar Fourtune, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Petition for Writ of Certiorari was served by first class United States mail, postage prepaid, this 22nd day of January, 2018, upon the following:

Jessica Kindard
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill B. Abernethy

BLUME FRANKLIN-BEST & YOUNG, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
ELIZABETH FRANKLIN-BEST
LAURA W. YOUNG
KEIR M. WEYBLE *OF COUNSEL*
DAVID I. BRUCK *OF COUNSEL*

900 Elmwood Avenue, Suite 200
COLUMBIA, SOUTH CAROLINA 29201
PHONE: (803) 765-1044
FAX: (803) 765-1143

January 22, 2018

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RE: *Oscar Fortune v. State of South Carolina*
2016-002231

Dear Mr. Shearouse:

Please find enclosed for filing, along with certificate of service, the original and seven additional copies of the Petitioner's Petition for a Writ of Certiorari in regards to the above captioned case. Please clock-in the additional copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Jill B. Abernethy
Paralegal

Enclosure

cc: Jessica Kinard, Esq.
Oscar Fortune

BLUME FRANKLIN-BEST & YOUNG, LLC
ATTORNEYS AT LAW
900 ELMWOOD AVENUE, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

UNITED STATES POSTAL SERVICE.

Retail

P

US POSTAGE PAID
$7.25

Origin: 29201
Destination: 29211
1 Lb 13.60 Oz
Jan 22, 18
4518040202-10

1024

PRIORITY MAIL 1-Day ®

Expected Delivery Day: 01/23/2018

B099

USPS TRACKING NUMBER

9505 5103 2375 8022 1560 94

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211