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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-002231

Oscar Fortune, Petitioner,

v.

State of South Carolina, Respondent.

# RETURN TO PETITION FOR WRIT OF CERTIORARI

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**INDEX**

RESPONDENT'S ISSUES PRESENTED .......... ii

STATEMENT OF THE CASE .......... 1

STANDARD OF REVIEW .......... 7

ARGUMENT .......... 9

I. THE PCR COURT'S DENIAL OF RELIEF ON REMAND SHOULD BE AFFIRMED BECAUSE THE ISSUE OF WHETHER THE PROSECUTION'S REMARKS WERE PREJUDICIAL TO PETITIONER IS PROCEDURALLY BARRED AND, TO WHATEVER EXTENT THE ISSUE IS NOT SO BARRED, BECAUSE THE PROSECUTION'S REMARKS MET, AT WORST, ONLY ONE OF THE SIX FACTORS FOR PREJUDICE SET FORTH IN U.S. V. WILSON. .......... 9

a. Post-Conviction Relief is not a substitute for direct appeal, so Petitioner cannot extract an allegation of error from a denied allegation of ineffective assistance of counsel and prevail upon it .......... 9

b. The rulings of the PCR court in the Order of Dismissal filed February 22, 2012, affirmed by the Court of Appeals, were not further appealed and are now the law of the case, which is dispositive as to any further analysis of the solicitor's remarks about defense attorneys .......... 10

c. As to the merits, the solicitor's remarks about defense attorneys were not prejudicial under Wilson where none the factors, considered in turn, support a finding of prejudice .......... 12

1. Curative instructions were given to the jury to Counsel's satisfaction .......... 14

2. Counsel invited the remarks by arguing the solicitor's job was to convict .......... 14

3. The solicitor did not deliberately make the remarks to divert attention, but made them as a heated and immediate response to Counsel's remarks in closing .......... 15

4. The strength of the case against Petitioner was overwhelming .......... 15

5. The solicitor's remarks about defense attorneys were isolated .......... 16

6. The solicitor's remarks were not necessarily misleading, but could have been presented more effectively .......... 17

II. NO EVIDENCE EXISTS TO SHOW THE STATE KNEW WITNESS STEPHANIE GASTON WOULD TESTIFY IN A MANNER INCONSISTENT WITH HER PRIOR STATEMENT TO LAW ENFORCEMENT, AND COUNSEL WAS WELL WITHIN HIS STRATEGIC PREROGATIVE TO DEEM THE CROSS-EXAMINATION SUFFICIENT TO ELIMINATE HER CREDIBILITY .......... 18

CONCLUSION .......... 20

## RESPONDENT'S ISSUES PRESENTED

**I. Is there evidence of probative value to support the post-conviction relief court's finding that Petitioner was not deprived of his right to a fair trial by the prosecution's remarks about defense attorneys where trial counsel timely objected twice, was satisfied by the trial court's curative instruction, and where the inappropriate remarks fail to meet five of the six factors set forth by U.S. v. Wilson, 135 F.3d 291, 297 (4th Cir. 1998)?**

**II. Is there evidence of probative value to support the post-conviction relief court's finding that there was no prosecutorial misconduct or ineffectiveness of counsel arising from the testimony of Stephanie Gaston because there was no evidence that her inconsistent trial statements amounted to perjury?**

## STATEMENT OF THE CASE

### Summary of Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Petitioner was indicted at the March 2002 term of the Chesterfield County Grand Jury for murder (2002-GS-13-00137). Petitioner was further indicted at the November 2005 term for possession of a weapon during the commission of a violent crime (2005-GS-13-01222). Ed Saleeby, Jr., Esq. ("Counsel") and Terrence Quinn, Esq. ("Co-Counsel") represented Petitioner at trial. Franklin Joyner, Esq. and Kevin Hales, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On March 6, 2006, Petitioner proceeded to trial before the Honorable John M. Milling and a jury. The jury found Petitioner guilty as indicted on March 9, 2006. Judge Milling sentenced Petitioner to imprisonment for concurrent terms of 37 years for the murder and 5 years for the weapon.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., who raised the following issues:

1. Whether the court abused its discretion by going forward with the trial where only sixty-four of the hundred and sixty two summoned jurors "showed up" for jury service, and only forty-one jurors were available at the time of the jury strike, since the clerk of court made no effort to ask the sheriff's office to assist in serving the jurors when the problem became apparent because appellant was denied his right to a representative jury of Chesterfield County because the jurors available were disproportionately friends of the decedent's family, or had been exposed to media coverage about the case, or had other potential biases, since the failure to make any follow-up efforts with to serve the absent jurors was not reasonable?

2. Whether the court erred by refusing [to] grant a change of venue where the small venire included potential jurors who were either friends or acquaintances of the decedent's family, or had been exposed to media attention about the case, and the total number of jurors who responded to

potential bias questions in the small venire showed a change of venue was necessary to ensure a fair and impartial jury was chosen?

By unpublished opinion decided June 1, 2009, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Fortune, Op. No. 2009-UP-259 (S.C. Ct. App. Filed June 1, 2009). The Remittitur was issued on June 17, 2009.

Petitioner filed his application for post-conviction relief on August 18, 2009 (2009-CP-13-00323). He alleged the following grounds for relief, as summarized by the State:

1. Ineffective assistance of trial counsel, in that Counsel:
   a. Failed to strike juror,
   b. Failed to object to burden-shifting self-defense charge,
   c. Failed to move for a mistrial based on solicitor's closing argument,
   d. Failed to call Detective Quick to testify; and
2. Prosecutorial misconduct, in that the prosecution:
   a. Suborned perjury, and
   b. Made inappropriate remarks in closing argument.

Respondent made its return on December 23, 2009, and an evidentiary hearing into the matter was convened on January 11, 2012, before the Honorable Paul M. Burch. Petitioner was present at the hearing and represented by Joel F. Stroud, Esq. Karen C. Ratigan, Esq., of the South Carolina Attorney General's Office, represented Respondent. Petitioner, Petitioner's wife Blanche Fortune, and trial counsel Ed Saleeby, Esq., testified. By written order dated January 16, 2012, and filed February 22, 2012, Judge Burch denied and dismissed the application. Petitioner thereafter filed a motion pursuant to Rules 59(a)(2) and 59(e), which was denied by order filed June 21, 2012.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed by Mr. Stroud on Applicant's behalf, who raised the following issues:

I. Did the PCR Hearing Judge commit reversible error by ruling that no prosecutorial misconduct occurred in his murder trial?

II. Did the PCR Hearing Judge commit reversible error by ruling that Defense Counsel offered effective assistance of counsel in Mr. Oscar Fortune's March 2006 murder trial?

III. Did the PCR hearing Judge commit reversible error by denying the SCRCP Rule 59(a)(2)(e) Motion, by dismissing Mr. Fortune's PCR Application and by not granting the Remedy of Discharge, that is provided under § 17-27-80?

Respondent filed its Return on January 7, 2013. The matter was transferred from the Supreme Court to the South Carolina Court of Appeals. On April 10, 2014, the Court of Appeals granted certiorari and directed further briefing from the parties. Fortune v. State, S.C. Ct. App. Order filed April 10, 2014. After receiving briefs from the parties, the Court of Appeals affirmed the PCR court's order to the extent it ruled on the merits of Petitioner's claims, but vacated the portion of the order concluding Fortune waived several of his claims, vacated the order denying Petitioner's 59(e) motion, and specifically remanded for rulings on three issues not adequately addressed in the original order. Fortune v. State, Op. No. 2016-UP-102 (S.C. Ct. App. filed March 2, 2016). The Remittitur was issued on March 18, 2016.

On remand, the parties again appeared before the Honorable Paul M. Burch on August 2, 2016. Petitioner was again represented by Mr. Stroud. Jessica Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent. No new testimony was taken at the hearing, but the parties briefly argued as to the scope of the issues before the court on remand and the scope of further briefing that could be submitted to the court. By order filed September 12, 2016, the PCR court denied relief on the three remanded issues. Petitioner filed a new motion pursuant to Rule 59(a)(2) and 59(e) on October 3, 2016, which was denied by order filed October 11, 2016.

This appeal follows.

## Summary of Facts Adduced at Trial

There is no dispute that Petitioner gunned down Anthony Shields (the victim) as Anthony sat in his car and then tried to climb out the passenger side. Petitioner claimed Shields fired first.

On the evening of December 22, 2001, the victim and his wife were involved in an altercation with Petitioner's cousin (Sonta McCall) at a Christmas party. (Appx. 163-65).[1] The victim and his wife left the party and returned home. (Appx. 166). The victim subsequently left to purchase cigarettes and Petitioner shot and killed him in the Huddle House parking lot later that night. (Appx. 166-69).

Iris Gaston witnessed the fight at the party and later went to the Huddle House with Sonta. (Appx. 176-77). Gaston testified they met Petitioner at the Huddle House. (Appx. 178). Gaston testified Sonta and Petitioner approached the victim's car, words were exchanged, and she heard gunshots. (Appx. 178-79, 184).

Tonnette Cash, Petitioner's then fiancé, and Petitioner were asleep when Sonta called. (Appx. 187). Cash testified she drove Petitioner to the Huddle House "to see what was going on with Sonta." (Appx. 187). Cash testified Petitioner took her gun when he went to talk to the victim. (Appx. 189-90). Cash testified she heard gunshots after Petitioner went over to the victim's vehicle. (Appx. 191).

Jay Jay Mungo spoke to Sonta and Petitioner at the Huddle House. (Appx. 201-02). Mungo testified Petitioner said he would handle the situation and walked to the victim's vehicle. (Appx. 202-03). Mungo testified Petitioner shot the victim several times and the victim attempted to escape by climbing out of the front passenger side of his vehicle. (Appx. 203-04).

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[1] The appendix is rich in different forms of pagination. Respondent relies upon that set forth at the topmost right and left of each page. The bottommost left and right appears to be the appendix pagination from the prior appeal.

Mungo testified Petitioner walked around the vehicle and shot the victim several more times. (Appx. 204). Mungo testified he did not see the victim fire a weapon. (Appx. 224).

Vincent Davis heard gunshots in the Huddle House parking lot and saw a man with his arms in the victim's vehicle "like he was shooting or something." (Appx. 240-41). Davis testified the victim attempted to escape through the passenger side of his vehicle and the shooter ran around the vehicle and "was still shooting." (Appx. 241-42). Davis stated he removed a .25 handgun from the cup holder of the victim's vehicle after the shooter fled the scene. (Appx. 243).

Barry Davis saw a man and woman approach the victim's vehicle at the Huddle House. (Appx. 305-06). Davis testified the woman exchanged words with the victim and the man shot the victim. (Appx. 306). Davis testified the man fired three shots into the vehicle and then walked around and fired two more shots. (Appx. 306-08). Davis testified the woman said "[t]hat's what the fuck you get!" after the shooting. (Appx. 312). Davis testified he did not see the victim fire a gun. (Appx. 313-14).

Stephanie Gaston[2] witnessed the fight at the party and saw Petitioner and Sonta approach the victim's vehicle at the Huddle House later. (Appx. 357-60). Gaston testified words were exchanged between Petitioner and the victim and then she heard gunshots. (Appx. 361). Gaston testified the victim attempted to exit through the passenger door but Petitioner came around the vehicle and shot him. (Appx. 361-63). Gaston testified she did not see the victim with a gun. (Appx. 362).

Jessie Ellison was at the Huddle House when he saw a man approach the victim's car. (Appx. 371-73). Ellison testified the two men had words and then he heard gunshots. (Appx.

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[2] While the witness stated her name was Stephanie Gaston, the court reporter listed it as Stephanie *Douglas* in the trial transcript. Respondent uses her provided name, Gaston, throughout this filing.

373). Ellison testified he did not see the shots but did see the man walk around the victim's car and then heard another shot. (Appx. 373-74). Ellison testified he did not see who fired. (Appx. 376).

Sonta stated she called Petitioner to ask for his assistance in "tak[ing] a warrant out on [the victim]." (Appx. 452). Sonta said she and Petitioner individually approached the victim and that the victim fired first. (Appx. 453; 465).

Petitioner gave a statement in which he stated he went to the Huddle House "expecting to fight the guy." (Appx. 333-35). Petitioner's statement noted his assertion that he heard a shot and saw a flash and returned fire. (Appx. 334). Petitioner's statement also indicated the victim had a gun in his hand when he climbed out of the passenger side of his vehicle. (Appx. 334). Petitioner's trial testimony was basically consistent with his statement. (Appx. 466-69).

Forensic examination identified five wounds in the victim: (1) a fatal intermediate wound to the left back, meaning the gun was close enough to the body that the particles landed in the wound, (2) a fatal contact wound to the left side of the torso, (3) a penetrating wound to the left buttock area, (4) a penetrating fatal wound to the left side of the stomach, and (5) a perforated wound to the left hand. (Appx. 261-64). The .38 handgun found in Petitioner's car was conclusively matched to the recovered bullets. (Appx. 327-28; 330; 395-99) The .25 that was in the victim's car before Davis took it was matched to a fired bullet and casing found in the vehicle. (Appx. 399-400). The victim's blood alcohol was not in the realm of impairment. (Appx. 410-16). Gunshot residue was found on the victim's left hand, which is not unexpected given his wound there. (Appx. 421-26).

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 389 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

## ARGUMENT

**I. THE PCR COURT'S DENIAL OF RELIEF ON REMAND SHOULD BE AFFIRMED BECAUSE THE ISSUE OF WHETHER THE PROSECUTION'S REMARKS WERE PREJUDICIAL TO PETITIONER IS PROCEDURALLY BARRED AND, TO WHATEVER EXTENT THE ISSUE IS NOT SO BARRED, BECAUSE THE PROSECUTION'S REMARKS MET, AT WORST, ONLY ONE OF THE SIX FACTORS FOR PREJUDICE SET FORTH IN U.S. V. WILSON.**

The PCR Court's denial of relief as to the issue of the prosecution's remarks in closing should be affirmed on one of two separate grounds. First, divorced from the context of ineffective assistance of counsel, the question of whether the prosecution's closing argument impermissibly prejudiced Petitioner is a direct appeal issue not cognizable in a post-conviction relief action. Second, to whatever extent the issue can be sustained in PCR as a free-standing allegation, a prejudice analysis under U.S. v. Wilson shows that the total circumstances foreclose any prejudice under five of the six factors.

**a. Post-Conviction Relief is not a substitute for direct appeal, so Petitioner cannot extract an allegation of error from a denied allegation of ineffective assistance of counsel and prevail upon it.**

An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519-20 (1993). "In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

Whether Petitioner was denied a fair trial by the solicitor's remarks in closing argument is very plainly an allegation of a constitutional violation and, as such, it is not cognizable in a PCR action. To the extent that Petitioner takes issue with the adequacy of the PCR court's denial of relief, his complaints are pointless—the PCR court shouldn't have ruled on the underlying

merits to begin with, but instead should have just observed the Simmons rule and denied relief accordingly.

**b. The rulings of the PCR court in the Order of Dismissal filed February 22, 2012, affirmed by the Court of Appeals, were not further appealed and are now the law of the case, which is dispositive as to any further analysis of the solicitor's remarks about defense attorneys.**

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015) (quoting Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). "In other words, the doctrine of the law of the case prohibits issues that have been decided in a prior appeal from being relitigated in the trial court in the same case." Id. (quoting Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997)). "The law of the case applies both to those issues explicitly decided and to those issues that were necessarily decided in the former appeal." Id. (quoting Ross, 328 S.C. at 62, 492 S.E.2d at 68). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." Id. (quoting In re Grossinger's Assocs., 184 B.R. 429, 434 (Bankr.S.D.N.Y. 1995)).

Law of the case doctrine applies in post-conviction relief actions just as it would in any other civil matter. See Ramirez v. State, 419 S.C. 14, 22 n.7, 796 S.E.2d 841, 845 n.7 (2017) (applying the doctrine in a PCR matter); Caprood v. State, 338 S.C. 103, 112, 525 S.E.2d 514, 518 (2000) (declining to consider a finding of deficiency not appealed by the State, finding it to be the law of the case).

In addition to the stand-alone allegation that he was denied a fair trial, Petitioner also

properly framed it in the context of ineffective assistance of counsel, arguing Counsel was ineffective for failing to move for a mistrial after he objected to the solicitor's remarks. The PCR court ruled on that claim of ineffectiveness. (Appx. 855-56). The PCR court agreed with trial counsel's testimony reasoning the Court's curative instructions cured any potential error, and further found the State presented **overwhelming evidence** of Petitioner's guilt. (Appx. 855-56). Upon these findings, the PCR court found Counsel's representation was neither defective nor prejudicial to Petitioner (Appx. 855-56). The PCR court's ruling in this regard was affirmed by the Court of Appeals and not thereafter appealed before the matter was remanded. (Appx. 1043-47). As such, the PCR court's original findings that Petitioner was not prejudiced in the Strickland context and that the evidence was overwhelming against him are both the law of the case.

The findings of the PCR court which now carry forward as the law of the case inexorably lead to the conclusion that Petitioner was not prejudiced by the solicitor's remarks about defense attorneys, both in the context of the Wilson factors (addressed in the following subsection), and in the context of common sense. Petitioner, having accepted that Counsel's representation was neither deficient nor prejudicial by virtue of not appealing the affirmation to that effect, functionally argues that he was prejudiced irrespective of how well Counsel handled the situation. No finding of prejudice as to the free-standing issue could be reconciled with a finding of no prejudice in the context of ineffective assistance of counsel. Therefore, not only does "any evidence" exist to support the PCR court's order, as a matter of law there's no conceivable way to reach a contrary conclusion.

**c. As to the merits, the solicitor's remarks about defense attorneys were not prejudicial under Wilson where none the factors, considered in turn, support a finding of prejudice.**

To address the issue on its merits, when the solicitor's remarks are analyzed under the six Wilson factors, the PCR court's finding of no prejudice is well founded. When analyzing whether an inappropriate comment by the prosecution is prejudicial, the Fourth Circuit Court of Appeals developed six factors to fully analyze whether the defendant was deprived of a fair trial:

(1) The degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused;

(2) Whether the remarks were isolated or extensive;

(3) Absent the remarks, the strength of competent proof introduced to establish the guilt of 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 F.3d 291, 299 (4th Cir. 1998); see also Simmons v. State, 331 S.C. 333, 338 503 S.E.2d 164, 166 (1998) (favorably citing Wilson for proposition the appellate court must view alleged impropriety of argument in context of the entire record); U.S. v. Wilson, 624 F.3d 640, 656 (4th Cir. 2010). "These factors are examined in the context of the entire trial, and no one factor is dispositive." Wilson, 135 F.3d at 299. Comments about opposing counsel are subject to prejudice analysis. See State v. Lunsford, 318 S.C. 241, 246-47, 456 S.E.2d 918, 921-22 (Ct. App. 1995) (finding no prejudice from remark "that defense counsel was one of the finest defense attorneys")

The closing argument exchange at issue was as follows and constituted the initial portion

of the State's closing arguments:

> **MR. JOYNER:** Ladies and gentlemen of the jury, thank you so much for your time throughout the course of this trial. I want to start by telling you that we both have jobs here. My job is [to] present the truth. In fact if you look in the South Carolina Code of Laws which mandates what a Solicitor's job is we can't be like a normal attorney is.
>
> A normal lawyer has to advocate on behalf of his client. But on the other hand the Solicitor can't. We have to say what the truth is 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.
>
> **THE COURT:** The jury is the finders of the truth. I think what he was referring to was there is also an obligation on the Solicitor's Office beyond simply that of presentation, but the jury does have the burden of deciding what is the truth in this matter.
>
> **MR. JOYNER:** Thank you, Judge.
>
> **MR. SALEEBY:** Thank you, Your Honor.
>
> **MR. JOYNER:** And what that means is that we have something in the law that [is] 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. [Their] job is to shroud the truth. [Their] job is confuse jurors. [Their] 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.

**MR. SALEEBY:** Thank you, Your Honor. No need to go that far.

(Appx. 540-42). The State did not return to the subject of the roles of the attorneys for the remainder of its closing argument. (Appx. 542-58).

***1. Curative instructions were given to the jury to Counsel's satisfaction.***

The Wilson factors here are best applied in reverse order to consider the entire relevant record. First, the Court cured each error by way of correcting the solicitor's remarks immediately to the jury. When confronted about why he did not seek a mistrial after the cures, Counsel testified "I thought I objected strongly, and I think the Judge cured it by what he said and sustained my objection. It was a strong cure I thought[.]" (Appx. 827, ll. 18-20). Counsel noted the jury never left their presence. (Appx. 827-28). Counsel's judgment in this regard was persuasive to the PCR court, which agreed the cure was adequate. (Appx. 855). Counsel's judgment should remain persuasive now, given his nearly three decades of experience at the time of trial and his opportunity to contemporaneously judge the quality and adequacy of the cure, elements of which are inevitably lost when reduced to the written word. As previously noted, the PCR court's approval of the cure in the Strickland context was affirmed on appeal and not further appealed to the S.C. Supreme Court.

***2. Counsel invited the remarks by arguing the solicitor's job was to convict.***

Second, Counsel invited the response throughout his own closing:

> . . . I challenge Mr. Joyner. And I like him. Nice guy. But let's kid you not. It's my job to present the facts in the light most favorable to have y'all find Oscar not guilty of any of these charges. That's my job. Tell you right now.
>
> It's the Solicitor's job and law enforcement before that. We'll get to that in a minute to do justice, but I'll promise you as you can tell Mr. Joyner done his best to do with what he had and he didn't have that much. That's not his fault. He had very little to convict of murder or involuntary manslaughter Oscar guilty.
>
> *That's his job. That's what he gets paid for. So he's not putting the facts up here.*

> *Let's not kid yourselves. He wants to get a murder conviction out of y'all.* If he can't get that he wants involuntary – I mean a voluntary manslaughter conviction out of y'all. He wants to charge guilty with the gun.

(Appx. 518, ll. 3-19) (emphasis added). Counsel dinged the prosecution's motivations again when advising the jury to listen to the trial judge's instructions:

> Take what His Honor tells you what the truth is about the law. Not what J.R. says. It's his job to convict. I understand that. It's my job to present evidence in the light most truthful to y'all and that's what I tried today [to] do.

(Appx. 531, ll. 14-18). Counsel again briefly circled back around to the subject near the end of his argument: ". . . J.R. did a good job cause it's his right, but he had to take what he's got and do his job." (Appx. 539, ll. 4-5). In light of the Counsel's three-part knock on the prosecution explicitly alleging motives other than justice, a response was both invited and inevitable.

***3. The solicitor did not deliberately make the remarks to divert attention, but made them as a heated and immediate response to Counsel's remarks in closing.***

Third, the comments were not offered as a distraction. The solicitor's credibility and motivations were placed in issue by Counsel. The comments clearly were intended to respond directly to Counsel's repeated statements and insinuations that the solicitor was presenting the case as part of his job to convict at all costs. That the comments were made right at the outset of argument shows the solicitor argued the subject in the heat of the moment, and that the remarks were not a calculated diversion.

***4. The strength of the case against Petitioner was overwhelming.***

Fourth, the strength of the competent evidence to prove Petitioner's guilt was overwhelming. Petitioner's case rested on a strategy of self-defense. (Appx. 769, ll. 11-14). When a defendant claims self-defense, the State must disprove the elements of self-defense beyond a reasonable doubt, which are:

(1) The defendant was without fault in bringing on the difficulty;

(2) The defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;

(3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief; and

(4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (citing State v. Wiggins, 330 S.C. 538, 544-45, 500 S.E.2d 489, 492-93 (1998)).

It is undisputed that, one, Petitioner shot the victim five times and that, two, Petitioner went to the scene expecting to fight. Petitioner's own statements and testimony provide as much. His assertion of self-defense accordingly falls apart, as he brought about the difficulty and could have avoided by going home and going to bed. Furthermore, as emphasized in Section I.b., above, the PCR court already determined the evidence against Petitioner was overwhelming, and the Court of Appeals affirmation of that finding by the PCR court was not further appealed.

Petitioner argues passionately and at great length in the petition that nobody credible saw anything and that those witnesses who claim to have seen him shoot first are all liars. Petitioner frames the case as one of self-defense that hinges on the question of "who shot first?" But that question is almost irrelevant. One cannot go to a public place in the middle of the night to pick a fight and then perforate the subject of one's ire with a .38 special. Those facts are indefensible and plainly admitted by Petitioner. So it is no cavalier application of the phrase "overwhelming evidence" to use it in the present case, and as such the prejudice of the solicitor's remarks is minimal, if it exists at all.

#### *5. The solicitor's remarks about defense attorneys were isolated.*

Fifth, the remarks were isolated and did not extend beyond the start of the State's closing argument. After two objections and two corrections from the Court, the solicitor let the issue be. The extent of the solicitor's remarks compares favorably to the repeated, well developed, strategically placed reminders by Counsel, and certainly pales in comparison to the sort of pervasive prejudice at issue in Wilson, 135 F.3d at 300. As above, the prejudice of the solicitor's remarks is minimal, if it exists at all.

#### *6. The solicitor's remarks were not necessarily misleading, but could have been presented more effectively.*

Sixth, the Solicitor's argument was not necessarily misleading, but it was heated, uncivil, and inappropriate just the same. Were the State permitted to continue *ad nauseum* down the path of railing against defense attorneys, prejudice could surely follow, but in the circumstances before the court, for many of the reasons set forth above, no prejudice came by Petitioner as a result of the remarks. The remarks were not the imputation of some other crime outside of the record, nor a plea to the jury to put themselves in the victim's shoes, but a heated response to provocative and effective closing by Counsel that, if anything, blew up in the State's face given the multiple corrections by the bench.

These six factors considered in the context of the entire trial, the PCR court had more than "any evidence" to conclude Petitioner suffered no prejudice as a result of the solicitor's remarks in closing about the role of defense attorneys. Accordingly, the petition for writ of certiorari by way of the first claim of error should be denied and the order of the PCR court affirmed.

## II. NO EVIDENCE EXISTS TO SHOW THE STATE KNEW WITNESS STEPHANIE GASTON WOULD TESTIFY IN A MANNER INCONSISTENT WITH HER PRIOR STATEMENT TO LAW ENFORCEMENT, AND COUNSEL WAS WELL WITHIN HIS STRATEGIC PREROGATIVE TO DEEM THE CROSS-EXAMINATION SUFFICIENT TO ELIMINATE HER CREDIBILITY.

Petitioner very briefly asserts that State's witness Stephanie Gaston committed perjury, claims the State knowingly suborned perjured testimony, argues Counsel should have had Gaston arrested, and concludes the PCR court erred in denying relief on these grounds, but offers little to support these claims of error. "It is unlawful for a person to willfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State." S.C. Code Ann. § 16-9-10(A)(1). Perjury cannot be sustained merely on the contradictory sworn statements of the accused perjurer, but rather the falsehood of one of the statements must be proven by other evidence than the contradictory statement. State v. Burns, 120 S.C. 523, 113 S.E. 351, 352 (1922).

At trial, Co-Counsel Terrence Quinn asked Gaston if she gave a statement to law enforcement on December 23, 2001, which she confirmed. (Appx. 363-64). Quinn then made her read the entire statement into the record. (Appx. 364-66). Co-Counsel introduced the written statement as Defendant's Exhibit No. 5 and pressed Gaston further:

> Q. You wrote that statement the day of the incident, correct?
>
> A. No, I think that they came back because I was hysterical. They came back.
>
> Q. But you wrote it soon after the incident?
>
> A. Yes, sir.
>
> Q. And it's clearly different than your testimony here today. Which is true? Your testimony here today or what you wrote in your sworn statement soon after the incident?
>
> A. Both of them is true.

Q. That can't be possible. Which one is true?

A. The statement.

(Appx. 367, ll. 10-21). At the evidentiary hearing, Counsel testified there was no forewarning that Gaston's testimony would contradict her prior statement, that he felt Co-Counsel did "as good a job as anybody could have done in impeaching her or crossing her up or making her disbelievable, whatever way you want to term it." (Appx. 756-58). Counsel did not think to seek a mistrial because he felt Co-Counsel did a fine job cross-examining her, and further cited his own judgment of the solicitor's experience and character, who he always found to be truthful. (Appx. 758-59).

All that is present in the record is an inconsistent statement and an admission that the statement made closer in time to the killing was more accurate. That alone is not perjury. There is no evidence the witness knowingly and willfully testified falsely. Further, there is *no evidence* in the record to show any knowledge on the part of the prosecution that the witness' testimony would be inconsistent at trial. Petitioner declares Counsel should have sought to have the witness arrested. Counsel's judgment to rely on satisfactory cross-examination should be accorded its due deference. See Whitehead, 308 S.C. at 122, 417 S.E.2d at 531. Therefore, Petitioner's petition for writ of certiorari by way of the second and third claims of error set forth should be denied and the order of the PCR court affirmed.

## CONCLUSION

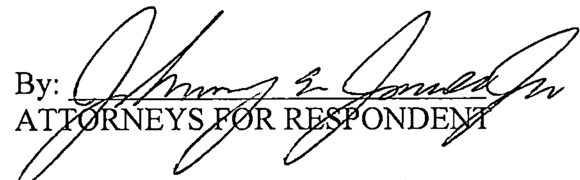
For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General



By: ______________________
ATTORNEYS FOR RESPONDENT

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May 18, 2018

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

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Appellate Case No. 2016-002231

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Oscar Fortune

Petitioner,

v.

State of South Carolina

Respondent.

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**PROOF OF SERVICE**

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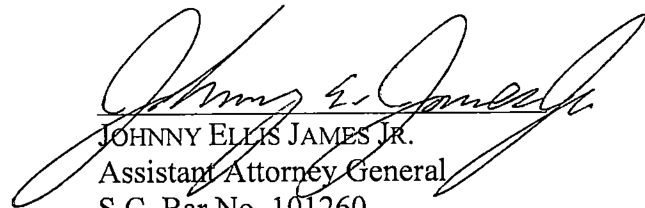
I, Johnny Ellis James Jr., certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.

This 18th day of May, 2018.



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MAY 18 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

May 18, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***Re:*** **Oscar Fortune v. State of South Carolina**
**Appellate Case No. 2016-002231**
**Lower Court Case No. 2009-CP-13-0323**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Johnny Ellis James Jr.
Assistant Attorney General
SC Bar #101260

JEJ/jacc
Enclosures

cc: Elizabeth A. Franklin-Best, Esquire
Victim Advocacy Division (without enclosure)