

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUL 31 2019

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 16-002231

OSCAR FORTUNE.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

PETITIONER'S REPLY BRIEF

Elizabeth A. Franklin-Best
Elizabeth Franklin-Best, P.C.
2725 Devine Street
Columbia, South Carolina 29205
Elizabeth@franklinbestlaw.com
(803) 331-3421
Attorney for Petitioner

Other Counsel of Record:
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211-1549
Attorney for Respondent

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ARGUMENTS

I. Petitioner's claim is not procedurally barred.

Respondent argues that Petitioner's claim regarding counsel denigrating the integrity of defense counsel is procedurally barred. But, as the Court of Appeals found, in its comprehensive opinion, App. 1043-47, the PCR court failed to address all of the claims that Petitioner "properly raised to it." As the court noted, Petitioner provided evidence on this claim at the PCR, and then filed a Rule 59(e) motion, along with a memorandum in support of the motion and argued the merits of this claim there. The PCR court denied that motion. Then, after a properly filed petition for writ of certiorari, the Court of Appeals remanded the case back to the PCR court to address this claim. The PCR court then ruled on the merits and found that the remarks were "clearly improper," but that Petitioner was not prejudiced by them. App. 1062-63. Petitioner then asked the PCR court to revisit its holding on this issue by way of another 59(e) motion, but the court declined. App. 1091. The claim is not procedurally barred.

Respondent also appears to argue that this claim cannot be addressed because it has not been couched in terms of ineffective assistance of counsel per the *Simmons* doctrine. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975). See also *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983). Respondent has not raised this argument at any prior point in this litigation, and so it has defaulted the claim. See *State v. Taylor*, 355 S.C. 392, 585 S.E.2d 303 (2003) But also, this Court should address Petitioner's claim in the interests of justice. The issue is one of widespread importance to both the bench and bar of this state and offering guidance in this area serves an important policy interest. See *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016); *Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017).

II. Petitioner should prevail on the merits.

Respondent argues this Court should be guided by the Fourth Circuit Court of Appeal's decision in *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998). While persuasive, this decision is not binding on this Court. Still, even considering the *Wilson* factors, Petitioner is entitled to prevail on the merits. In *Wilson*, the Court considered the following factors: (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.

The solicitor's remarks at the end of Petitioner's trial were particularly egregious because they called into question the very foundation of our criminal justice system—the right for counsel to have zealous advocacy advanced on his behalf. Here, the solicitor told the jury that defense counsel was “manipulating the truth” and that he was somehow allowed to do so. These remarks were misleading to the jury because they were objectively false. But also, the remarks were extensive. Trial counsel had to object on two separate occasions. And, contrary to Respondent's assertions, this was far from a case of overwhelming guilt. The credibility of Petitioner's story, and his claim of self-defense was critical to his defense since the facts were largely not in dispute. Given the centrality of Petitioner's credibility to his defense, the disparagement of his counsel as somehow “manipulating the truth” was highly inflammatory and prejudicial. The solicitor's informing the jury that defense counsel was essentially lying to them likely also

distracted them from thoughtfully considering the evidence in this case since it provided them license to resolve any questionable issues against the person who was “manipulating” them and trying to “shroud the truth.” Too, the solicitor’s remarks cannot be considered as “invited” since defense counsel did not engage in any misconduct to which the State had a legitimate interest in responding to. Defense counsel simply did his job, and for that, he was called a liar by the State. The trial court judge’s curative instruction, to the extent there was one, was wholly inadequate, as argued in Petitioner’s final brief. In short, considering the *Wilson* factors, this Court should grant Petitioner a new trial. He was entitled to the assistance of zealous counsel under our state and federal Constitutions, and he was entitled to not have the State call his lawyer a “manipulator of the truth” for doing his job. In a case where the facts were open to such varying interpretation given the events of that night, the solicitor’s remarks crossed a line.

CONCLUSION

Respectfully, this Court should grant Petitioner a new trial.

Respectfully submitted,



Elizabeth Franklin-Best
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Columbia, South Carolina 29205
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PROOF OF SERVICE

I certify that I have served a copy of this reply brief on the South Carolina Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid on July 31, 2019 addressed to the following address:

South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3372



Elizabeth Franklin Best, P.C.
2725 Devine Street
Columbia, South Carolina 29201
(803) 331-3421
elizabeth@franklinbestlaw.com

Counsel for Appellant