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.

BRIEF OF RESPONDENT

ALAN WILSON
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Senior Assistant Deputy Attorney General

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PETITIONER'S ISSUE PRESENTED

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?

RESPONDENT'S ISSUE PRESENTED

Did the PCR court properly find 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 United States v. Wilson, 135 F.3d 291, 297 (4th Cir. 1998)?

STATEMENT OF THE CASE

Fortune is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Fortune was indicted at the March 2002 term of the Chesterfield County Grand Jury for murder (2002-GS-13-00137). Fortune 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 Fortune at trial. Franklin Joyner, Esq. and Kevin Hales, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On March 6, 2006, Fortune proceeded to trial before the Honorable John M. Milling and a jury. The jury found Fortune guilty as indicted on March 9, 2006. Judge Milling sentenced Fortune to imprisonment for concurrent terms of 37 years for the murder and 5 years for the weapon.

Fortune 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 Fortune'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.

Fortune 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. Fortune 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. Fortune, Fortune'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. Fortune thereafter filed a motion pursuant to Rules 59(a)(2) and 59(e), SCRCP, which was denied by order filed June 21, 2012.

Fortune filed a timely notice of appeal and a petition for writ of certiorari was filed by Mr. Stroud on his 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 Fortune's claims, but vacated the portion of the order concluding Fortune waived several of his claims, vacated the order denying Fortune's Rule 59(e), SCRCP, motion, and specifically remanded for rulings on three issues not adequately addressed in the original order:

(1) Whether Applicant 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;'"
(2) Whether Applicant was "denied a fair trial because the State knowingly allowed a witness to commit perjury;" and
(3) Whether "trial counsel was ineffective for relying solely on cross-examination to cure the prejudice of a witness's alleged perjury."

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. Fortune 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. Fortune filed a new motion

pursuant to Rules 59(a)(2) and 59(e), SCRCP, on October 3, 2016, which was denied by order filed October 11, 2016.

This appeal follows.

STATEMENT OF THE FACTS

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

On the evening of December 22, 2001, the victim and his wife, Denise Shields, were involved in an altercation with Fortune's cousin (Sonta McCall) at a Christmas party. (Appx. 163-65).[1] After a brief delay by security to give time for McCall and company to leave, Shields and his wife left the party and returned home. (Appx. 165-66). At home, Anthony told Denise that he would not let the altercation ruin the night, and that they would make the best of it; he changed his clothes left to go purchase cigarettes. (Appx. 166, ll. 3-16). Fortune 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 McCall. (Appx. 176-77). Gaston testified they met Fortune at the Huddle House. (Appx. 178). Gaston testified McCall and Fortune approached Shields' car, words were exchanged, and she heard gunshots. (Appx. 178-79, 184).

Tonnette Cash, Fortune's then-fiancé, and Fortune were asleep when McCall called to tell them about her altercation with Shields. (Appx. 187, ll. 4-18). Cash testified she drove Fortune to the Huddle House "to see what was going on with Sonta." (Appx. 187, ll. 19-25). The two pulled around to the back of the Huddle House parking lot, noticed Gaston's car, and then returned to the front, where they saw McCall emerge from the restaurant. (Appx. 188, ll. 1-17). Fortune saw Jay Jay Mungo, took a moment to chat with him, and got back in the car. (Appx.

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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.

188, ll. 19-25). McCall got in the car with Cash and Fortune and told them about her run-in with Shields at the party; McCall looked up from her story and saw Shields pull into the Huddle House parking lot. (Appx. 189, ll. 4-14). Fortune asserted he wanted to talk to Shields, so Cash pulled the car over to Shields' vehicle. (Appx. 189, ll. 15-21). Fortune retrieved a gun from the center console of the car, put it in his pocket, and stepped out of the vehicle to talk to Fortune (Appx. 189-91). Fortune walked over to Shields' truck, and Cash heard gunshots erupt. (Appx. 191, ll. 2-12). Fortune got back into Cash's car as she tried to flee the scene, and the two fled to Cash's brother's house. (Appx. 191-92).

Jay Jay Mungo spoke to McCall and Fortune at the Huddle House. (Appx. 201-02). McCall told him that Shields struck her in the head with a champagne bottle at the party, to which Mungo replied that she should "take out a warrant on him." (Appx. 201, ll. 5-13). Mungo testified Fortune said he would handle the situation and walked to the victim's vehicle. (Appx. 202-03). Mungo testified he saw Fortune "walk over to the driver's side of the car and shoot him." (Appx. 203, ll. 8-10). Fortune 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). Mungo testified Fortune walked around the vehicle and shot the victim several more times. (Appx. 204, ll. 9-17). Mungo testified he did not see Shields fire a weapon. (Appx. 224, line 2).

Vincent Davis heard gunshots in the Huddle House parking lot and saw a man with his arms in Shields' vehicle "like he was shooting or something." (Appx. 240-41). Davis saw Shields attempt to escape through the passenger side of his vehicle, but that the shooter ran around the vehicle and "was still shooting." (Appx. 241-42). Davis did not know the shooter's identity, but firmly asserted he could see the incident. (Appx. 241, ll. 4-23). Davis stated he

removed a .25 handgun from the cup holder of Shields' vehicle after the shooter fled the scene. (Appx. 243-44).

Barry Davis saw a man and woman approach Shields' vehicle at the Huddle House. (Appx. 305-06). Davis testified the woman exchanged words with Shields and the man shot him. (Appx. 306, ll. 17-21). 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 declared "[t]hat's what the fuck you get!" after the shooting. (Appx. 311-12). Davis testified he did not see Shields fire a gun. (Appx. 313-14).

Stephanie Gaston[2] witnessed the fight at the party and saw Fortune and McCall approach the victim's vehicle at the Huddle House later. (Appx. 357-60). Gaston testified words were exchanged between Fortune and Shields, followed by she heard gunshots. (Appx. 361, ll. 1-13). Gaston saw Shields "crawling," attempting to exit through the passenger door, but Fortune came around the vehicle and shot him. (Appx. 361-63). Gaston testified she did not see Shields 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 exchanged words and then he heard gunshots. (Appx. 373, ll. 8-16). 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).

McCall stated she called Fortune to ask for his assistance in "tak[ing] a warrant out on [the victim]." (Appx. 452, ll. 8-24). When Fortune arrived at the Huddle House, she told him

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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.

the details of the fight at the party. (Appx. 453, ll. 3-5). Fortune asked if Shields was "out there," which McCall initially denied, but Shields arrived at the Huddle House before the two could leave. (Appx. 453, ll. 6-16). McCall said she and Fortune individually approached the victim and that the victim fired first. (Appx. 453-54; Appx. 465, ll. 14-19).

Fortune gave a statement in which he stated he went to the Huddle House "expecting to fight the guy." (Appx. 333-35). Fortune's statement noted his assertion that he heard a shot and saw a flash and returned fire. (Appx. 334, ll. 18-21). Fortune's statement also indicated Shields had a gun in his hand when he climbed out of the passenger side of his truck. (Appx. 334, ll. 22-25). Fortune'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 Fortune's car was conclusively matched to the recovered bullets. (Appx. 327-28; Appx. 330; Appx. 395-99) The .25 that was in Shields' car before Davis took it was matched to a fired bullet and casing found in the vehicle. (Appx. 399-400). Shields' blood alcohol was not in the realm of impairment. (Appx. 410-16). Gunshot residue was found on Shields' 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, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

THE PCR COURT'S DENIAL OF RELIEF ON REMAND SHOULD BE AFFIRMED BECAUSE THE ISSUE OF WHETHER THE PROSEUCTIONS' REMARKS WERE PREJUDICIAL TO FORTUNE IS PROCEDURALLY BARRED, AND BECAUSE THE PROSECUTION'S REMARKS MET NONE OF THE SIX FACTORS FOR PREJUDICE SET FORTH IN UNITED STATES 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, the unappealed portion of the original February 22, 2012, Order of Dismissal denying Applicant relief based on the claim that Counsel was ineffective in failing to move for a mistrial after the solicitor's inappropriate remarks is still dispositive of the same issue when it is divorced from the context of ineffective assistance of counsel. Second, divorced from the context of ineffective assistance of counsel, the question of whether the prosecution's closing argument impermissibly prejudiced Fortune is a direct appeal issue not cognizable in a post-conviction relief action. Third, to whatever extent the issue can be sustained in PCR as a free-standing allegation, a prejudice analysis under United States v. Wilson shows that the total circumstances foreclose any prejudice under five of the six factors.

a. The ruling of the PCR court in the Order of Dismissal filed February 22, 2012, affirmed by the Court of Appeals, that Fortune was not prejudiced by Counsel's decision not to seek a mistrial after the solicitor's remarks was not further appealed and is 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, Fortune 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 Fortune's guilt. (Appx. 855-56). Upon these findings, the PCR court found Counsel's representation was neither defective nor prejudicial to Fortune (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 Fortune 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 Fortune was not prejudiced by the solicitor's remarks about defense attorneys, both in the context of the Wilson factors (addressed in a later subsection), and in the context of common sense. Fortune, 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 consistent conclusion to the contrary.

b. Post-Conviction Relief is not a substitute for direct appeal, so Fortune 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 Fortune was denied a fair trial by the solicitor's remarks in closing argument is very plainly an allegation of a constitutional violation without any framing as ineffective assistance of counsel and, as such, it is not cognizable in a PCR action. Fortune could have challenge the remarks at trial, and Counsel did so by objecting repeatedly. The continued

entertainment of the issue as distinct from the same issue in the ineffective assistance of counsel context (as noted in the above section) serves only to disregard an explicit statutory mandate and provide Petitioner the exceptional fortune of a second bite at the direct appeal apple and a second swing at the PCR piñata. Fortune is not so entitled.

c. As to the merits, the solicitor's remarks about defense attorneys were not prejudicial under Wilson where none of 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.

United States 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); United States 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 South Carolina 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 Fortune was very substantial.

Fourth, the strength of the competent evidence to prove Fortune's guilt was very

substantial. Fortune'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, Fortune shot the victim five times and that, two, Fortune went to the scene expecting to fight. Fortune'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.

Fortune 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. Fortune 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 object of one's ire with a .38 special. Those facts are indefensible and plainly admitted by Fortune. So it is no cavalier application of the phrase "overwhelming evidence" to use it in the present case, as the PCR court did in a section that has never been appealed, 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 entirely 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 Fortune 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 ample basis to conclude Fortune suffered no prejudice as a result of the solicitor's remarks in closing about the role of defense attorneys. Accordingly, the Court should affirm lower court's order denying post-conviction relief.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the lower-court denying post-conviction relief.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Chesterfield County

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-002231

Oscar Fortune, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Johnny E. James Jr, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy through mail and addressed to:

Elizabeth A. Franklin-Best, Esquire
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900 Elmwood Avenue Suite 200
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I further certify that all parties required by Rule to be served have been served. This 1st Day of July.

Eva Cook, Legal Assistant
For Respondent