



ATTORNEY JOEL STROUD  
JOEL F. STROUD, ATTORNEY, PLLC  
PO Box 516 Chesterfield, SC 29709

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(843) 623-5757

RECEIVED

NOV 02 2016

S.C. SUPREME COURT

Letter to the Supreme Court of SC Clerk Regarding the Filing of a  
Notice of Appeal for Mr. Oscar Fortune

The Honorable Daniel E. Shearouse  
Clerk of Court for Supreme Court of South Carolina  
PO Box 11330  
Columbia, SC 29211

October 27, 2016

RE: Notice of Appeal: Oscar Fortune Case Number 2009-CP-13-0323

Enclosed for filing is a notice of appeal in the above case, and the following:

1. Proof of service of the notice of appeal
2. Copies of the orders which are to be challenged on appeal
3. This appeal is being filed with the Supreme Court because it is a petition for certiorari.

Sincerely,

Joel Stroud, Attorney for Oscar Fortune (SC Bar No. 73797)  
PO Box 516, Chesterfield, SC 29709  
843-623-5757

**Other Counsel of Record:**

Jessica E. Kinard, Assistant Attorney General  
PO Box 11549 Columbia, SC 29211  
803-734-3737

**Enclosures:** Notice of Appeal

Proof of Service of Notice of Appeal  
Orders of The Honorable Paul M. Burch

cc: The Honorable Faye Sellers, Clerk of Court for Chesterfield County  
Jessica Kinard, Assistant Attorney General  
Robert Dudek, Chief Appellate Defender for SCCID  
Oscar Fortune, Appellant

A True Copy, Attest  
  
CLERK OF COURT C.P. & G.S.  
CHESTERFIELD COUNTY, SC

2016 OCT 27 PM 2 47  
FAYE S. SELLERS  
CLERK OF COURT  
CHESTERFIELD COUNTY

NOTICE OF APPEAL IN A CIVIL CASE

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THE STATE OF SOUTH CAROLINA

NOV 02 2016

In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-13-0323

2016 OCT 27 PM 2 47  
FAVRE  
CLERK  
CHESTERFIELD COUNTY

Oscar Fortune,

PCR Applicant,

v.

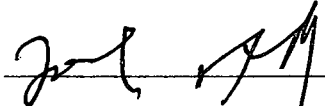
State of South Carolina,

Defendant.

NOTICE OF APPEAL

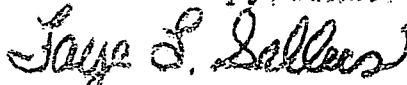
Oscar Fortune appeals the Order of the Honorable Paul M. Burch dated September 09, 2016.  
See Exhibit 01

Oscar Fortune appeals the Order of the Honorable Paul M. Burch denying his SCRCR Rule 59, (a) (2) and (e) Motion, dated October 07, 2016. See Exhibit 02

October 27, 2016 

Joel Stroud, Attorney for Oscar Fortune (SC Bar No. 73797)  
PO Box 516, Chesterfield, SC 29709 843-623-5757

Other Counsel of Record:  
Jessica E. Kinard, Assistant Attorney General  
PO Box 11549 Columbia, SC 29211  
803-734-3737

A True Copy, Attest  
  
CLERK OF COURT C.P. & G.S.  
CHESTERFIELD COUNTY, SC

**PROOF OF SERVICE OF A NOTICE OF APPEAL IN A CIVIL CASE**

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-13-0323

Oscar Fortune,

PCR Applicant,

v.

State of South Carolina,

Defendant.

**PROOF OF SERVICE OF A NOTICE OF APPEAL**

The undersigned attorney hereby certifies that a true copy of the Notice of Appeal in the above-referenced case has been served upon opposing and anticipated counsel to the proper addressees by mailing the documents with postage prepaid this 27<sup>th</sup> day of October 2016.



Joel Stroud, Attorney for Oscar Fortune (SC Bar No. 73797)  
PO Box 516  
Chesterfield, SC 29709  
843-623-5757

**Other Counsel of Record:**

Jessica E. Kinard  
Assistant Attorney General  
PO Box 11549  
Columbia, SC 29211 803-734-3737

PAGE 1 OF 1

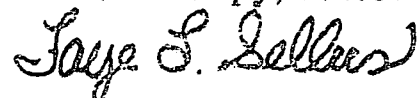
**RECEIVED**

NOV 02 2016

S.C. SUPREME COURT

2016 OCT 27 PM 2 47  
FAYEL  
CLERK  
CHESTERFIELD COUNTY

A True Copy, Attest



CLERK OF COURT C.P. & G.S.  
CHESTERFIELD COUNTY, SC



**ATTORNEY JOEL STROUD**  
**JOEL F. STROUD, ATTORNEY, PLLC**  
**PO Box 516 Chesterfield, SC 29709**

**stroudlaw@shtc.net**  
**(843) 623-5757**

**Letter to the Clerk of Lower Court Regarding the Filing of a Notice of Appeal for Mr. Oscar Fortune**

**The Honorable Faye Sellers**  
 Clerk of Court  
 PO Box 529  
 Chesterfield, SC 29709

October 27, 2016

**RE: Notice of Appeal: Oscar Fortune Case Number 2009-CP-13-0323**

Enclosed for filing is a notice of appeal in the above case, and the following:

1. Proof of service of the notice of appeal
2. Copies of the orders which are to be challenged on appeal
3. This appeal is being filed with the Supreme Court because it is a petition for certiorari.

Sincerely,

Joel Stroud, Attorney for Oscar Fortune (SC Bar No. 73797)

**Other Counsel of Record:**

Jessica E. Kinard,  
 Assistant Atty. Gen.  
 PO Box 11549 Columbia, SC 29211 803-734-3737  
 October 27, 2016

**Enclosures:** Notice of Appeal

Proof of Service of Notice of Appeal  
 Orders of The Honorable Paul M. Burch

**cc:** The Honorable Daniel E. Shearouse, Clerk of Court for SC Supreme Court  
 Jessica Kinard, Assistant Attorney General  
 Robert Dudek, Chief Appellate Defender for SCCID  
 Oscar Fortune, Appellant

2016 OCT 27 PM 2:47  
 FAYE SELLERS  
 CLERK OF COURT  
 CHESTERFIELD COUNTY, SC

A True Copy, Attest  
  
 CLERK OF COURT C.P. & G.S.  
 CHESTERFIELD COUNTY, SC



**ATTORNEY JOEL STROUD**  
**JOEL F. STROUD, ATTORNEY, PLLC**  
*PO Box 516 Chesterfield, SC 29709*

**stroudlaw@shtc.net**  
**(843) 623-5757**

**Robert Dudek**  
Chief Appellate Defender  
SCCID  
PO Box 11433  
Columbia, SC 29211

**October 27, 2016**

**Re: Notice of Appeal for Oscar Fortune**

Dear Mr. Dudek:

Enclosed are copies of the notice of appeal and proof of service, as well as the orders being appealed in the Matter of Oscar Fortune.

Sincerely,

Joel Stroud

**Enclosures:** Notice of Appeal  
Proof of Service of Notice of Appeal  
Orders of The Honorable Paul M. Burch

**cc:** The Honorable Daniel E. Shearouse, Clerk of Court for SC Supreme Court  
The Honorable Faye Sellers, Clerk of Court for Chesterfield County  
Jessica Kinard, Assistant Attorney General  
Oscar Fortune, Appellant

2016 OCT 27 PM 2 47  
FAYE S. SELLERS  
CLERK OF COURT  
CHESTERFIELD COUNTY, SC

A True Copy, Attest

CLERK OF COURT C.P. & G.S.  
CHESTERFIELD COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHESTERFIELD	)	OF THE FOURTH JUDICIAL CIRCUIT
	)	
Oscar Fortune, #314269,	)	Case No.: 2009-CP-13-0323
	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	<b>ORDER DENYING APPLICANT'S</b>
State of South Carolina,	)	<b>MOTION TO RECONSIDER</b>
	)	
	)	
Defendant.	)	

This matter is before the Court on Applicant's Motion to Reconsider the Court's Order dated September 9, 2016. In accordance with Rule 59 (f), SCRPC, the Court finds that it is not necessary to hear oral arguments on this matter. After reviewing the Court's file and Applicant's Motion, and upon careful reconsideration, the Court hereby finds that Applicant's Motion should be denied.

THEREFORE, Applicant's Motion to Reconsider is hereby DENIED.

AND IT IS SO ORDERED.



Honorable Paul Michael Burch  
Judge, Fourth Judicial Circuit

Pageland, South Carolina  
October 7, 2016

2016 OCT 11 PM 11 16  
 FANEU  
 CLERK  
 CHESTERFIELD

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

Oscar Fortune, #314269,

Applicant,

v.

State of South Carolina,

Defendant.

) IN THE COURT OF COMMON PLEAS  
) OF THE FOURTH JUDICIAL CIRCUIT

) Case No.: 2009-CP-13-0323

) 2016 SEP 12 PM 1 12

) FAYE L. COLLIER  
) CLERK  
) CHESTER

ORDER

This matter is before the Court on remittitur from the South Carolina Court of Appeals. Before the Court are three issues as outlined by the Court of Appeals. Fortune v. State of South Carolina, 2016-UP-102, filed March 2, 2016. This order affirmed in part, vacated in part<sup>1</sup>, and remanded to this Court three issues that the Court of Appeals held were not adjudicated during the initial post-conviction relief ("PCR") hearing. Specifically, these issues are (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." Id. A hearing was held on August 2, 2016, at the Darlington County Courthouse to present these issues, after which the parties submitted briefs regarding the matter.

<sup>1</sup> As part of its order, the Court of Appeals vacated the PCR court's denial of Applicant's Rule 59(e) motion in order to procedurally allow the PCR court to reconsider these issues.

PMB

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedurally, this matter is before the Court on remand pursuant to the Court of Appeal's finding that these three aforementioned issues were not ruled upon by this Court. As such, this Court has the full jurisdiction and discretion to entertain any information and evidence it deems necessary to reach a decision on the matters. However, the Court believes that it is not necessary to add testimony or evidence to the record, and all parties agree that this Court can rule on the issues before it based on the testimony and evidence introduced at the original PCR hearing on January 11, 2012, including the transcript of the underlying trial and all information relevant to it. Based on that information, as well as the entirety of the previous record before this Court, the hereby makes the following findings of fact and conclusions of law.

As to the first issue, the Court finds that Applicants was not denied a fair trial because of the State's remarks during closing arguments. In state and federal law, the standard for judging the overall effect of a solicitor's closing argument is whether the statement "infect[ed] [the] trial with unfairness to the extent that [a] conviction was a denial of due process." State v. McFadden, 318 S.C. 404, 458 S.E.2d 61 (Ct. App. 1995). This language is directly taken from United States v. Wilson, 135 F.3d 291, 297 (4<sup>th</sup> Cir. 1998), which pulled from a line of United States Supreme Court cases regarding this issue. Wilson cited a two-pronged test that the Fourth Circuit relies on to make this determination: "Specifically, a defendant 'must show (1) that the [prosecutor's] remarks were improper and (2) that they 'prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial.'" Wilson, 135 F.3d at 297, citing Unites States v. Adam, 70 F.3d 776, 780 (4<sup>th</sup> Cir. 1995).

The exact statements made during the closing argument are:

**Prosecutor:** 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 at the SC 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... App. p. 630 Lines 13-20

**Defense Counsel:** 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. App. p. 630 Lines 21-24

**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. App. p. 630 Line 25 - p. 631 Lines 1-4

**Prosecutor:** And what that means is that we have something in the 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 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 to confuse jurors. They're job is to do whatever they have to without regard for the truth... App. p.631 Lines 7-20

**Defense Counsel:** Objection your Honor. App. p. 631 Line 21

**Prosecutor:** to get a not guilty verdict. App. p. 631 Line 22

**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. p. 631 Line 23

**Defense Counsel:** Thank you your Hon or. No need to go that far. App. p. 631 Lines 2-3.

The remarks at issue begin by stating that solicitors are held to a higher standard than defense counsel and are not necessarily improper. However, the solicitor's remarks impugning the integrity of defense attorneys and mischaracterizing their institutional role are clearly improper.

PMB

As to the second prong of the test, when analyzing whether a comment is prejudicial, the Fourth Circuit Court of Appeals developed six factors to fully analyze whether the defendant was deprived of a fair trial. These factors are:

(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; and (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.

Wilson, 135 F.3d at 299. 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.

As to the second issue raised by Applicant, the Court finds the State did not knowingly allow a witness to commit perjury. Applicant alleges that the testimony of Stephanie Douglas Gaskins ("witness") was tantamount to perjury, as her testimony at trial was contradictory to the voluntary statement she provided to law enforcement. The record clearly reveals that the witness's testimony was inconsistent with her prior statement but there is no evidence that the witness committed perjury. Much more than a contradictory statement is required to prove perjury and, as such, her testimony did not rise to the level of perjury See, e.g., State v. Byrd, 28 S.C. 18, 21, 4 S.E. 793, 795 (1888) ("a conviction for perjury cannot be sustained merely on the contradictory sworn statement 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."). See generally 70 C.J.S. Perjury, §§ 1-45 (2005).


As to the third issue raised by Applicant, because the witness's testimony cannot be considered perjury, the State should have been viewed as suborning perjury and trial counsel was not ineffective or deficient in any manner for their decision to rely solely on cross-examination to cure any potential prejudice. Through cross examination, the witness's prior inconsistent statement was read into the record and published to the jury. After this, the witness admitted that this original, voluntary statement to law enforcement was more credible than her testimony. The Court finds that trial counsel's actions were effective, reasonable, and certainly not below the reasonable standard of professional norms.

CONCLUSION

The Court hereby amends its prior rulings in this matter to include the findings of fact and conclusions of law addressed in this Order.

THEREFORE, the Court hereby DENIES Applicant's Petition for Post-Conviction Relief and DENIES Applicant's Rule 59(e), SCRPC, motion.

IT IS SO ORDERED.

  
\_\_\_\_\_  
The Honorable Paul M. Burch  
Judge, Fourth Judicial Circuit

Pageland, South Carolina  
September 9, 2016

**FROM:**

Attorney Joel Stroud

PO Box 516

Chesterfield, SC

29709

**TO:**

The Honorable Daniel E. Shearouse

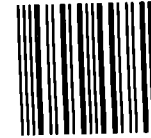
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