

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Chesterfield County

Honorable Paul M. Burch, Circuit Court Judge

OSCAR FORTUNE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 16-002231

APPENDIX

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1 That's the law of Chesterfield County and all the other
2 counties of the State, but I see the law and tell you the
3 law and Mr. Joyner tells you the law. If it is different
4 from what His Honor tells you the law you is take what the
5 Judge himself tells you is the law.

6 Because as I said time and time again and widely
7 recognized as the Judge of the law. He has the law in
8 front of him that has been set down by U.S. Supreme Court,
9 our State Supreme Court and Appeals Court. So if
10 something that I say is different from what Mr. Joyner
11 says, is different from the law don't hold that against
12 us. First understand and take what Judge Milling at the
13 send when he gives you your charge on the law. Okay.

14 I apologize. I had a trial a couple weeks ago in
15 Marlboro County and I don't take every case that comes to
16 me. Some don't want it. In this case, initially,
17 Mr. Fortune went to a partner of mine in our Florence
18 office, Kernard Redmond. Of course, he went ahead. We
19 met with them back in 2001 and sometime after that he
20 decided -- Mr. Redmond did want to go back to being the
21 Solicitor and he didn't have to run an office like I do.

22 And that's Okay. So I'm proud to represent along
23 with -- I'm proud of the job my young associate,
24 Mr. Quinn, has done and particularly proud of you'll.

25 As His Honor will tell you there is nothing more

1 important in this case and it come into this. This is a
2 murder case which he's charged and then the lessor
3 included charge of voluntary manslaughter. I've got a
4 little different take on what murder mean.

5 Murder means to me just in simple terms just the down
6 right meaning. It can be within a few seconds or thought
7 out or planned meaning just to come up and kill somebody
8 cause you're mad with them, it's a contract killing or
9 your just go decide to kill somebody.

10 And that's malice aforethought. Malice meaning with
11 depravity of an evil heart. Now, with all the facts that
12 we heard today and yesterday and day before that we have
13 heard anything evil said about Oscar? I don't think we
14 have. I haven't. Have we heard anything about his heart
15 being depraved at any point in time during the trial, even
16 at the time of the shooting? I haven't.

17 Y'all have to take the facts, if I say different from
18 what y'all heard. I wasn't here for part of the trial
19 yesterday morning. Y'all take them as y'all heard them
20 and from the stand, okay. Not as I or Mr. Joyner tell
21 you, okay, cause let there be no mistake at all. We've
22 got at lot of family up here. Kids come up here. I know
23 the man. I know the people. Y'all speak for Chesterfield
24 County and in doing that take what has happened, take what
25 has happened and the law.

1 Murder, that's one thing. That's what he says and
2 we'll get to that a little bit later on. About going
3 parent truck shoot him again. I'll talk to you about that
4 in a while. Might ask yourselves why. I'll tell you why.
5 I don't believe it was reckless. Reckless, being reckless
6 and not recklessly shooting somebody, that's not murder.
7 That's not even involuntary manslaughter. That's
8 involuntary manslaughter.

9 My young son now 17, he's got three bird in his head
10 where somebody was reckless. I turned to cover him up
11 like a daddy would do. Particularly a mother's love for a
12 child and I caught seven in the back. I had that thing
13 burst on me and by the grace of God he turned his head.
14 He still caught it here, here, and here in my ear cause
15 because people on the other side of the field were being
16 reckless shooting little bird like that he would have you
17 believe murder and voluntary manslaughter. It's not.

18 I told you when we came here in my opening that you
19 know some lawyers have told me that and I practice. Sure
20 been practicing a good long years. Can't call myself a
21 young lawyer. I wish. I've been practicing some 25, 26,
22 27 years. I lost count. I been coming up here a great
23 deal and I known the Judge all my life. I've known
24 Mr. Joyner and like him. I now Kevin and like him. Proud
25 of my associate. We no little about all y'all. Y'all

1 sort of checked on telling us about you and you know us.
2 What we were told was that y'all would do the right and
3 fair thing.

4 And I'll be prejudiced not be sympathetic because
5 somebody's dead, and let me say this right now.
6 Mrs. Shields, I am sorry. Extremely sorry that your
7 husband is not here with us today. I will be sorry if he
8 would just be shot and hurt, but I also would be just as
9 sorry if things had turned out different and Sonta or
10 Oscar were not here today and Mr. Shields was sitting over
11 here.

12 Cause a death is bad, but was it bought on by Oscar.
13 Did he have depraved malice, a depraved heart, evil
14 motive? No. So let's start talking a little bit about it
15 as quick as I can. I know I'm long winded. I apologize,
16 but I'm passionate about this case. Now in the end, 12
17 good heads together. Y'all come back with guilty -- not
18 guilty on the murder charge and the involuntary
19 manslaughter charge.

20 Contrary, we have said it was self-defense. Now,
21 Solicitor Joyner is trying to tell you that wasn't
22 self-defense or he wasn't in imminent danger or imminent
23 harm. If you see somebody and they're pointing a gun at
24 you or your way and they fire it or don't even fire it do
25 you think you're in imminent danger? I would. I don't

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1 know anybody that wouldn't.

2 So we get in the case of that. Remember if somebody
3 puts a knife on me or near me I feel I'm in imminent
4 danger. If I stand at the window and somebody just a few
5 feet from me do you think they can get away from the gun
6 or bullet? I don't think I'm that fast. I was faster
7 when I was young even though I can't outrun a bullet and I
8 don't think anybody of us can.

9 Remember the first shot was -- any of us know about
10 pistols or guns. You know the shotgun, I can that tell
11 you what gauge gun it is across a field with pistols. I
12 can about tell you what caliber gun it is. A .25 is a
13 much lower or softer sound noise than a .38 particularly
14 snub.

15 We're going to get -- we're going to run through
16 this. Let me tell you what reasonable doubts are and you
17 only need one. His Honor will instruct you because the
18 qualities are like this. This is not a case about money
19 damage. This is not about a wreck where somebody gets
20 hurt and they're crippled. Yes, that's worth some amount
21 of money. The scale must be tipped every so slightly for
22 the plaintiff -- well, because this is a case where a man
23 can go to jail for the rest of his life. Life and liberty
24 are worth a whole lot more money. Can we put a dollar
25 value on putting a man in jail if it comes out the box ---

1 MR. JOYNER: Judge.

2 THE COURT: Ladies and gentlemen, any potential
3 sentence in this matter is not considered in the evidence
4 in the case. Sentencing belongs to me just as the matter
5 of fact finding belongs to you. Your decision must be
6 reached without any regard to any penalty in the matter.

7 MR. SALEEBY: I apologize, Your Honor. Take the law
8 as the Judge gives it to you. But what we have here as
9 reasonable doubt is this, and mind you, His Honor will say
10 that you only need one. And that's just like this scale
11 looking like this. I think I remember telling y'all that
12 we will prove the State's case, the State's witnesses,
13 that Oscar is not guilty of either of the charges by what
14 we get out of the State's witnesses and the lack of
15 evidence that they have and the way they testified.

16 Remember when I told you it's not necessary the oath
17 that makes you believe if the person is telling the truth
18 but the way that they respond to the question or react or
19 don't respond or try to get around it. That makes you
20 think the person is telling the truth? Person telling the
21 truth will look straight at you and say, "Yes, and I want
22 to explain." We had a hard time doing that with a lot of
23 witnesses. We had a hard time with a lot of witnesses
24 getting them to say "Okay, yes, sir, that's the truth. I
25 didn't say it right before. That's the truth."

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1 Let's go through what reasonable doubt is. A
2 reasonable doubt -- you can't take this back to the jury
3 room. His Honor will tell you what a reasonable doubt is.
4 A reasonable doubt is a single -- a single reasonable
5 doubt. That's one. Reasonable doubt as to any defendant,
6 any defendant -- is defined as a doubt which would cause a
7 reasonable person -- y'all reasonable people to hesitate
8 to act. Which means to vote guilty. To find guilty on
9 either of those charges.

10 So if there is one reasonable doubt the law -- the
11 Judge will tell you as both charges then it is your duty
12 given toto you by the State of South Carolina and the law
13 that governs all of us, State and Chesterfield County, to
14 find Oscar not guilty.

15 And with that we say we must have justice here and
16 that's what we want is justice. Not mercy, justice.
17 Remember it only takes one reasonable doubt for His Honor
18 will tell you any criminal defendant is not guilty.

19 Let's talk about Denise Shields. I'm sorry
20 Mrs. Shields. I truly am. What caused this tragic event
21 to happen? Have we thought about that? Did Oscar Fortune
22 really start this thing up? No. This thing started up
23 some week or two or three before December 23rd at the
24 Green Villa. And while we feel sorry for Mrs. Shields it
25 was clearly by her and Sonta's testimony that there had

1 been feelings between the two for some time. Started I
2 think in McDonalds. I think both of them said that.

3 I don't know who is to blame. Doesn't matter, but it
4 wasn't Oscar. And, of course, Sonta was gone. That's his
5 cousin. Sonta's testimony had been for -- between some
6 time. We don't know again as I told you who started it
7 and what caused it. But this said whatever that was and
8 whatever was said that night at the Green Villa one, two,
9 three o'clock in the morning, whatever time it was,
10 started these thing in motion.

11 Mrs. Shields denied, flat denied -- she was right
12 there. Now, watch that scale heavier and heavier.
13 Reasonable doubt on behalf of Oscar as opposed to against
14 Oscar. Mrs. Shields, I'm sorry. She denied, you heard it
15 right up there, that either Sonta or Iris were hit with
16 only objects -- excuse me. Any object at Green Villa.
17 Remember that before? Y'all can have the testimony played
18 back if you want to. She denied that.

19 Several of the Solicitor's witnesses, the State's
20 witnesses, Mr. Joyner's witnesses, not ours, theirs, said
21 that, yeah, they contradicted the testimony. They talked
22 about the bottle up against Sonta's head, and they talked
23 about that woman you know. And they talked about Anthony
24 doing that. I told you before I was raised by my momma
25 and daddy not to hit a woman with my hand much less a

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1 bottle.

2 But right or wrong, where was Oscar during all this?
3 He was home in bed. No contradiction about that. And
4 then Iris was hit with a chair. You know I think I'm
5 looking back at a Gunsmoke Show where Matt Dillon has to
6 come in and break up -- fighting each other and even
7 hitting each other with bottles and chairs. That's what
8 started this fight.

9 Somebody said it ended peaceably. It didn't. The
10 bouncers and all had to stop the party. It was a company
11 party. And then Denise Shields told you that Anthony
12 Shields dropped her off after the party at the Green
13 Villa, changed. Dropped her off at the house. Changed
14 into the green overalls. We don't know why and left the
15 house without a gun, remember? That's what she said.

16 That's what she said. Then, I put this in red. He
17 told her he was going to get at pack of cigarettes which
18 he didn't do because they weren't found on him by the
19 police. And they lived at 190 Wren Drive. Mrs. Shields
20 admitted. I appreciate her honesty here. He left to get
21 a pack of cigarettes at the store and at the store that he
22 always got them from called Quick Fill. We're familiar
23 with where that is. Which he didn't have to pass the
24 Huddle House to get to.

25 So we're got a fight, head busted with bottles, one

1 person busted with a chair, man going home and changing
2 into his overalls, a man not telling his wife the truth
3 about getting a pack of cigarettes, 2:00, three o'clock in
4 the morning, and a man going by where he always gets his
5 cigarettes. We have truthfully, the wife saying, "That's
6 what he told me he was going to get."

7 We have the wife, the widow, I'm sorry, truly saying,
8 "No, he didn't need to go by the Huddle House to get
9 them." And he didn't stop at the store. He went on to
10 the Huddle House with a gun wherever he got that from.
11 That's in red cause that's important.

12 Reasonable Doubt Number Five. Remind you, we only
13 need one. One reasonable doubt. Scale is heavier and
14 heavier and heavier. That's Number Five. I apologize.
15 We's got so many I confuse myself. It's not hard to do
16 that for me.

17 State of mind. Oscar Fortune is in the bed.
18 Tonnette Cash was in the bed. Mrs. Shields, she was at
19 her house. Oscar was changing into overalls. Oscar was
20 going from -- coming from a party where he hit a woman
21 with a bottle. Hit another. I'm 52 years old. If I hit
22 a woman with a bottle or a chair probably fire me. Might
23 bust me in the head myself. How dare you hit a woman.
24 That's unbelievable. That's remarkable. They had a real
25 fight but what was -- I told you what Oscar's state of

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1 mind was. What was Mr. Shields'? He was made. I reckon
2 he was mad popping a bottle on one head and a chair on
3 someone else's. I guess he was mad.

4 Untruthful to his wife about what he was doing or
5 going to do. Now, ask yourself these questions and I find
6 Mrs. Shields to be a pretty nice lady for what I know and
7 heard and seen of her. Pretty, nice lady. I think
8 Anthony had told her, "Honey, I'm going to get a pack of
9 cigarettes," I think if he told her, "Honey, I got this
10 gun. I'm going down to the Huddle House to settle this
11 matter." I think she would have stopped that.

12 Visa versa to the men on the jury. If you had a mad
13 woman that smoked and wanted to get a soft drink that time
14 of the morning. And say, "Honey, I'm going to get a soft
15 drink. Going right down here to the store." Say, "That's
16 fine. Come on back come on to bed." But if to us men she
17 said, "I got my gun. I'm going on down to the Huddle
18 House. I'm taking care of some things." I think we men
19 would have stopped her. Might have been had our hands
20 full but I think we would have stopped her.

21 But she was -- you were deceived, Mrs. Shields. You
22 were deceived and I'm sorry. You might could have stopped
23 him. If fact I'm sure you would be.

24 MR. JOYNER: Judge, I'm going to object to Mr.
25 Saleeby speaking to anybody outside of the jury. I think

1 it's offensive to someone who has lost their family.

2 THE COURT: It's -- let's continue on with the
3 argument and, Mr. Saleeby, if you will just confine
4 yourself to the argument.

5 MR. SALEEBY: Yes, sir, Your Honor. We talked about
6 that, that Number Eight. That scale is getting heavier
7 and heavier is one reason it looks like that. We already
8 done got like that. Tonnette Cash, for whatever she was
9 the one driving. Said she had a smaller -- heard a
10 smaller sound of a gunshot and then a little louder
11 sounding of shots.

12 Now, whose gun was it? Well, it was Tonnette's gun.
13 Who bought it for her? Oscar. Where was that gun? In
14 the house? No. Where was that gun? In the console which
15 it is legally supposed to be in the trunk, in the console
16 or in the glove compartment. There was no getting the
17 pistol out of a draw or bed side table and putting it his
18 in pocket before went to the Huddle House after he got
19 that call from his cousin.

20 Oscar didn't do that. That gun was already there.
21 What he did do when he got there, particularly, if I drove
22 up to the Huddle House whether it be in Cheraw,
23 Darlington, McBee, Hartsville and I see 60, 70 people
24 standing outside and I've got a permit I believe I'd put
25 my pistol -- take it out and put it in my pocket, too,

1 especially at two, three o'clock in the morning.

2 That's common sense. That's good sense. Or I might
3 just turn around and go if I need to retrieve my cousin
4 from trouble, I'd probably take a gun. Remember Tonnette,
5 this is Number Ten. Remember Tonnette is charged
6 criminally in the case. Remember, Tonnette is charged
7 criminally in the case. Her lawyer was here to help her,
8 but she was charged. And she's represented by another
9 lawyer.

10 Tonnette is no longer living with Oscar. Not like
11 they're still together. Nobody is still together. So why
12 would she tell you nothing but the truth? Even if it
13 hurts her. Long wait. Going this way, Number 11.
14 Tonnette Cash had a legally licensed handgun, we talked
15 about that. The .38 pistol she kept in her console.
16 Well, wasn't anything legal or probably workable and
17 reliable about that street gun that Anthony got from
18 somewhere or had.

19 Number 12, Tonnette and Oscar were asleep in bed in
20 the middle of the night. Isn't that where you're supposed
21 to be where most people should be. Tonnette and Oscar got
22 a call from Sonta, his cousin, about her being at the
23 Huddle House and what happened and asking him to get here.
24 Talk about Arthur Mungo, Jay Jay. Jay Jay is fine with
25 me. Told us to begin with he had nothing -- this really,

1 really was like pulling jaw teeth out of Jay Jay. But he
2 finally admitted, didn't he, or he denied it a number of
3 times. Y'all heard him. He admitted that he had a baby
4 with her, but he kept saying I never had anything to do.
5 We heard it. I ain't had anything to do with Sonta ever.

6 Well, if having an affair and a baby with a woman is
7 not having anything to do with anybody, my word, how are
8 we here today? The Good Lord just didn't have us popping
9 up here and there and have babies out of the ground
10 without a seed being planted. And if that's not something
11 to do how can we believe him. But he finally admitted to
12 having a relationship with her and gone with her.

13 You know what else? He bonded her out of jail. So
14 are we to believe anything out of Jay Jay's Mungo? That's
15 the State's witness. That's the witness who says that he
16 heard Oscar say I'll take care of it. Oscar didn't tell
17 him that. Can we believe anything he says? No. Why not?
18 Well, the police interviewed him that night or the next
19 day and he had nothing to tell them. Nothing. At all.

20 But guess what? After being wired for tape and after
21 being charged with nine separate crimes of selling one of
22 the banes of our society today, crack cocaine, to
23 different people not having it. Right out there on the
24 street selling it. Dope, kid, teenagers. And whatever
25 receiving -- whatever reason having it in his possession a

1 stolen four wheeler. When those charges got dropped and
2 he goes up to the Feds he miraculously starts talking.

3 Then when he -- for the State, for the Feds and for
4 the State when he sign in a plea agreement that they will
5 ask for a down departure for him giving substantial
6 assistance to the State or to the Feds.

7 What is substantial assistance? He finally admitted,
8 yes, if I testify in this murder trial that's substantial
9 assistance and I asked him you look you pled for ten
10 years, 15 years. I said you hope to get. He said --
11 well, you're testifying here today to get your sentence
12 lower, don't you, by testifying. Well, I don't know.
13 Really didn't matter. Would it matter to y'all? If you
14 got five years cut off that ten? Can we believe anything
15 he says? Of course, the big thing he simply got a child
16 together.

17 He denied that he even been charged after 2001.
18 Solicitor didn't disagree with you about that. That's
19 their witness. They might not have known that he was
20 going to lie, but he sure did. And I guess that's enough
21 about him. He finally admitted about testifying at trial
22 he hoped he was finally going to get for the federal
23 government a lower sentence.

24 The Huddle house incident. Gets to me. Now, mind
25 you, I started and stopped numbering them, but we were at

1 Number 15. This would be 16, 17, 18.

2 Huddle House. Both Sonta and Oscar are at the Huddle
3 House. This is clear and uncontroverted by the State's
4 witnesses, by our few witnesses cause remember I told you
5 our case would be proven by the State's case that he
6 wasn't guilt of either of these charges or the gun charge
7 either cause, of course, he's not guilty of either of the
8 two charges. He is not guilty of the gun charge.

9 Both Sonta and Oscar at the Huddle House before
10 Anthony Shields before. Oscar was there to check on his
11 injured cousin who had gotten popped in the head. They
12 were going to go to Bennettsville or somewhere and get
13 away from there.

14 But before they could do that it was Anthony Shields
15 who went home to change his clothes. He then left the
16 house. He got a gun -- had a gun. Went looking for Sonta
17 or for somebody and he wasn't looking for Oscar. He
18 didn't know Oscar. He couldn't have known he was there.
19 So he gone back to Sonta and maybe Iris going after the
20 women again with a gun.

21 Crazy. That ain't the thing for us to do up here in
22 Chesterfield County. I don't believe it is. This ain't
23 the Wild, Wild West up here. It's a nice, descent county.
24 Descent people. The only reason Oscar got a gun he went
25 over to Anthony's car where because he was surrounded by

1 80 to a hundred people -- they surrounded -- they were
2 there -- people around, that he didn't know and that
3 although Anthony had already used a weapon that night by
4 hitting something else.

5 I promise you you can kill somebody with a beer
6 bottle, liquor bottle. He already used a weapon that
7 night when he hit Sonta and popped Iris with the chair,
8 whap.

9 As soon as he reached Anthony's car Anthony fired at
10 him. So Oscar while in fear of his life retrieved fire.
11 How do we know that? We know that because Oscar had the
12 gun in his pocket where I would have had mine. And think
13 of Tonnette. Different from Tonnette or Sonta. Go by
14 your memory. One or two people heard a softer sounding
15 shot first.

16 Remember first. Then followed by three or four, how
17 ever many louder shoots after that. Our common sense
18 tells us and jurors are supposed to be able to put their
19 heads together. Some people don't know about guns. Some
20 do. Couple that don't. Either way I promise you a .38
21 snub nose, y'all will have it back there, won't be able to
22 fire. It sounds a whole lot louder than a .25, and two
23 will testify they heard a softer sounding shot that would
24 be Anthony's then followed by several other more louder
25 shots.

1 Yeah, there were some words. There were some
2 arguments. What not, but I promise you in terms of
3 reasonable escape I ask you to ask and I challenge
4 Mr. Joyner. And I like him. Nice guy. But let's kid you
5 not. It's my job to present the facts in the light most
6 favorable to have y'all find Oscar not guilty of any of
7 these charges. That's my job. Tell you right now.

8 It's the Solicitor's job and law enforcement first
9 before that. We'll get to that in a minute to do justice,
10 but I'll promise you as you can tell Mr. Joyner done his
11 best to do with what he had and he didn't have that much.
12 That's not his fault. He had very little to convict of
13 murder or involuntary manslaughter Oscar guilty.

14 That's his job. That's what he gets paid for. So
15 he's not putting the facts up here. Let's not kid
16 yourselves. He wants to get a murder conviction out of
17 y'all. If he can't get that he wants involuntary -- I
18 mean a voluntary manslaughter conviction out of y'all. He
19 wants to charge guilty with the gun. That doesn't matter.
20 This was self-defense, and I asked Mr. Joyner and I ask
21 each and every one of y'all, I ask anybody, if a man
22 points a gun at you and you're inside of a car -- again,
23 we're talking about an ability to get away. But if I got
24 a gun on me, I can't outrun a bullet. I apologize. I
25 don't know any athlete that can run the 40 in 4.2, 4.3.

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1 Can't outrun a bullet. So he pulls the gun after the
2 first shot that thank goodness missed him and shot him.

3 And shot him. And we know -- we know that we'll get
4 to that in a minute. We know that Anthony shot because
5 the .25 caliber -- remember Mr. Paavel, big guy sort of
6 like me from S.L.E.D., set up here testifying. Nice guy.
7 Know him a long time. Twenty-five automatic. That shell
8 ejects. Yes, that found one in the coat cargo hatch of
9 the cab of the truck that Anthony was in.

10 And came from that gun. He matched it up. Yes, it
11 usually flies one way but it can fly the other way and
12 then hit the roof, the window. It doesn't matter here,
13 there or not. I don't understand. But if a man fires at
14 you one time we don't know how many times Anthony intended
15 on firing, do we? Why? Cause S.L.E.D. agent said it's
16 not very likely at all, I'm getting there, that but the
17 safety most likely won't ever fall off. It has to be
18 taken out, generally, and it was out.

19 So that means you go bam, bam, bam, bam, bam. Also I
20 guess Anthony didn't know that the cartridge or the clip
21 had been damaged where the bullets weren't being pushed
22 out the chamber and the hammer would stick or it has been
23 bam, bam, bam, bam, bam. If not for the grace of that gun
24 not working we may not have one person pass away. We may
25 have Oscar and the victim passed away. Twenty-five rings

1 around and hits bones.

2 As soon as he reached Anthony's car, of course, they
3 had some words, he fired at him. So Oscar while in fear
4 of his life returned fire. Pull a gun and shot him.

5 Oscar could not have known that Anthony's gun was
6 defective. We talked about that. He walked around the
7 back of the car cause Anthony got out the passenger side.

8 The gun loaded. I don't know if the gun was loaded
9 when Anthony dropped it because Vincent Davis took it.
10 That's Anthony's buddy. He knew something was wrong. He
11 took it from the scene. Vincent Davis gave conflicting
12 reports about where he got the gun and admitted to being
13 drunk when he got it.

14 There has been a stipulation that he never returned
15 that gun, that .25, to the police. Oscar did the next
16 day, turned himself in. Turned himself in with the gun.
17 Turned himself in with the shells. Hadn't touched the gun
18 at all. That sound like somebody committed a crime or
19 that sound like somebody, here I am and I got scared and
20 waited 24 hours and here is my gun I used. Here are the
21 shells. If you haven't done anything wrong why did would
22 Vincent have taken that gun? He didn't tell anybody that
23 he got it, and I it took and it's stipulated by the State
24 and us, we didn't want to have to come all this way and
25 testify, that Johnny Quick, who is on -- in law

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1 enforcement, then he had to go to Vincent Davis' house and
2 get the .25 automatic.

3 Found out that somebody else knew where it was. And
4 that was five days after the shooting. Vincent had no
5 intention of ever bringing it back. Under the law they
6 would be called what we call obstruction of justice. He
7 ain't be charged, but he's a State's witness. Not our
8 witness. Remember Oscar came back after being scared and
9 all that stuff.

10 Well, I hasn't done anything wrong just defending
11 myself and Sonta. Met with them at the police department
12 and handed them the gun. Empty shells right in there.
13 Same one. Gave a voluntary statement right there, boom.
14 You know what? He had nothing to hide. He didn't have a
15 lawyer. He did the right thing because he was right. It
16 was shoot or be killed.

17 By a man that already been whopped in the head with a
18 bottle and bust their other woman's back. Honesty.
19 Doesn't than show his honesty? Bringing the weapon. He
20 could have thrown it in the ditch. He could have thrown
21 it in the creek. He could have thrown it in the river.
22 He could have gotten rid somehow. Had a lot of time. No,
23 he just turned himself in. He called the police and said,
24 "I'm coming in. Yeah, I did it. Okay."

25 And he shot him. I'll tell you that if somebody was

1 to shoot at me and we see it on t.v, and I know a case and
2 maybe some of you do, too. You get shot. You shoot
3 somebody one or two times, they still -- they got the gun
4 had to turn around, pow, pow. You think he's down for the
5 count, but his ain't.

6 If I'm hunting up here on my farm and run across a
7 rattle snake -- around here do y'all cut off the tale of a
8 rattle and then go on? Don't think so. He can still
9 strike at you and bite you and kill you or copperhead. So
10 a wonder -- we heard the story, of course, Mr. Shields is
11 not an animal. He's a human being just like us, but the
12 old saying goes a wounded animal is more dangerous -- he's
13 not an animal. Tell you again he's a human being. Sorry.

14 But a wounded animal is more dangerous than one
15 bobcat, cougar or bear or something like that. But a
16 wounded animal is more dangerous and than they will get
17 you.

18 So that's why Oscar went around the car cause he
19 didn't know that Anthony had dropped the gun not until the
20 passenger side. Figure still had it. Going to get out on
21 the other side. Use it as cover, and lay down on him
22 again with the gun. And I, folks, would have done the
23 same thing, too. A man shoots at me one time I promise
24 you, the Judge will tell you, you ain't got to shoot just
25 one time.

1 You can shoot whatever you think is reasonable and
2 necessary, four, five, six, seven, eight, nine times to
3 make sure that person isn't able to shoot you again if
4 it's self-defense. And it's clear, two people said it,
5 the softer sounding shot was first and then the louder
6 one. This is a far cry away from getting a pack of
7 cigarettes.

8 Folks, I think we're up in the 20s here on reasonable
9 doubt and the charts getting about like that. This heavy
10 in favor of Oscar. Mind you, I don't need as to all the
11 charges. Anthony Shields determined the distance between
12 he and Oscar Fortune for firing at Oscar and Sonta while
13 he stood outside to cover. I don't know about Anthony
14 Shields. I didn't write this. He's not with us here.

15 I don't know if he, but somebody did. But it wasn't
16 far. Right there close to the car window or truck window.
17 Next, reasonable doubt is going down, down, down. I feel
18 it just like it would be y'all. Oscar left the scene. He
19 was scared. I talked to you about that. The people he
20 didn't know. He was surrounded. He didn't know those
21 folks. He didn't work at that plant. He didn't know who
22 was on whose side. He only heard that a fight is breaking
23 out. This side against that side. These friends against
24 those friends. He gets the heck out of Dodge. In this
25 case the heck out of the Huddle House.

1 Waits about 12 hours, calms down and came back.
2 After Vincent, after he took the gun. Let's talk about
3 Officer Haney. I know Officer Haney a long time. Officer
4 Haney arrested both Oscar and Sonta stating that both were
5 responsible for shooting Anthony Shields. Any of us
6 believe that?

7 Now, Sonta, with all this arguing going on and been
8 going on for a week or two or and the argument at Green
9 Villa with Mrs. Shields, that's what all this was about.
10 And that's Oscar's cousin, but she's not responsible, I
11 don't think. But there will be another day in time for
12 y'all to decide that she's charged, too. She told the
13 truth, though didn't she? At her own peril. At her own
14 peril.

15 Oscar -- Officer Haney arrested both Oscar -- both
16 responsible for the shooting. He admitted -- I wasn't
17 here when this was said. I was at the doctor getting a
18 shoot in that knee and shot in that knee. I have to get
19 them replaced sometime after Easter, hopefully. But
20 Oscar -- Officer Haney admitted this was false. Y'all
21 heard him right from the stand. I wasn't here. But.

22 Officer Haney, fine man. Well, he was coerced. And
23 guess what? Anthony Shields' brother was a policeman.
24 Has an uncle, chief of police. This happened back in
25 2001. He admitted it was false and his supervisor told

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1 him to arrest Sonta under any reason.

2 I've got to have a red pen. I can't stand it. Red
3 one, right here. I can't stand it. I appreciate it. Do
4 we want the law -- I know I don't as a resident of
5 Chesterfield County much as I spent time up here. Good,
6 clean time. Teach a kid how to fish and hunt their less
7 likely to get in trouble. They sure ain't going to be at
8 the Huddle House at two o'clock in the morning or I'll go
9 out and cut that tale even though they're 21 years old.

10 But his supervisor, he said he might not be working
11 for the department next week. I don't know. Told him to
12 arrest her for any reason. Get a reason even though they
13 knew it wasn't true. Those were his word right from that
14 stand to my associate, to my friend, Terry Quinn. I
15 wasn't here, but when I heard that I was flabbergasted.
16 Were y'all?

17 My word. For any reason. And he knew it weren't
18 her. It's been four years and the false murder warrant
19 against Sonta. She said she's charged with murder, too.
20 Is still in effect and she told you the truth. And you
21 know why they wanted a warrant on Sonta? To get a search
22 warrant or to squeeze them. Get them in different rooms
23 and say, "Oh, you better tell me this" like I see on t.v.
24 Cause of his saying this we don't do that. We ain't
25 supposed to do that in this part of the State, not in

1 Chesterfield County. We're not supposed to.

2 You heard it right from the stand, though.

3 Investigator, remarkable to me. Investigator David Lee
4 admitted that it was his job to serve -- secure the scene.
5 Then it took him 30 minutes to get there. That's okay.
6 Chesterfield County is a big county. He said he couldn't
7 guarantee if any evidence had been ruined or removed by
8 the 80 to hundred people in the parking lot. That's
9 another one going down like that.

10 Sonta, Tonnette, Iris and Oscar have all been
11 charged. All of them. We got a conspiracy going on here.
12 We got at conspiracy going on here about people at the
13 Huddle House. We got a conspiracy with Oscar whose only
14 concern is this. Let's not worry about the other people
15 there until later, Sonta and all. All we're worried about
16 is Oscar. This sounds like a conspiracy. Well, I don't
17 know how I could conspire with any of y'all if I was in
18 bed sleep when I should be in my own home.

19 Got a call to help my cousin. They charge all of
20 them. Squeeze. They've all been charged. Now, talk you
21 a little bit about what Dr. Yacoub said. Remember I told
22 you earlier that wasn't -- and she's a fine lady. I know
23 her. Fine lady. She's going to be truthful. But she's
24 paid by the Solicitor's Office. And she said says, from
25 that .38, Shoot Number One and Number Two were both boom

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1 in the back. Boom, lethal. I got it on my pad but I'll
2 tell you what. Common sense. I'll find my pad. Where is
3 my pad? Did I leave it somewhere? There it is. And
4 y'all will have the autopsy report in the back. Okay. I
5 assume it was introduced in evidence, was it not?

6 MR. JOYNER: It is.

7 MR. SALEEBY: All right. Well, after asking her ten,
8 15, 20 different times to give me a yes or no answer about
9 some things, about how she was so sure everything was so
10 accurate, about how she was so sure the first shot and the
11 second shot were the first shot and the second shot in the
12 back and show that either one of them would have been
13 lethal.

14 Both would have been lethal. You know why? That's
15 cause when you read the report what she says is one or two
16 shots and I wanted to know how Anthony crawled out the car
17 if she's correct, hit part of his heart. Two parts of
18 both lungs, heart, carotid artery or some big artery.
19 Can't remember all the words and on and on. So I wrote it
20 down. Shot One and Two were so separate or equally the
21 deadliest, lethal and immobilizing shots. Meaning you
22 won't be able to move.

23 Fire and hit your worst organ, heart, lung, liver,
24 kidney, foot, hand, and one bullet. Some people seem to
25 be shot in the fanny, holler like a dog and walk on down

1 the road. Same thing with a hand. I ain't never seen
2 anybody where the heart was hit in two places, both lung
3 hit in two places. The kidney was hit. The liver was
4 hit, and then be able to crawl out.

5 So I wonder whether he was correct. Remember she
6 didn't want to answer that yes or no. She didn't answer
7 until the Judge said yes or no. And then if I can have my
8 copy, and y'all will have it back there, the autopsy
9 report, on Page Two. Now, you know, I apologize, folks,
10 for being a little bit disjointed. No pun intended. I
11 got bad knees.

12 Y'all will have it back there, but I finally got it
13 admitted after the Judge talked to you and y'all will have
14 it back there. With Page Two, when she said everything
15 was accurate in her observation. She made a mistake, but
16 she said look under the case history when you get it back
17 there.

18 And you know this case is about who fired first. Who
19 fired first. Who started this thing. Who caused it. Who
20 is at fault. Who brought it on. Where did it start.
21 Really started at the Green Villa. Might have started at
22 McDonalds two weeks before. This certainly started at the
23 Green Villa.

24 It didn't start from Oscar's bed in the middle of the
25 night where he was. Case history says, using Dr. Yacoub's

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1 words as accurate as was told to her by law enforcement.
2 She's not sure exactly what law enforcement officer but
3 somebody in law enforcement of Chesterfield County. If
4 this doesn't tell it all nothing does.

5 "The decedent," that would be Mr. Shields, "was a 27
6 year old, who allegedly shot." Says he shot. Read that
7 again. Y'all will be able to read it. Page Two at the
8 top of the case history. She was told that, "The decedent
9 was a 27 year-old who was allegedly shot while inside, we
10 know that, of vehicle parked in the parking lot of the
11 Huddle House." At the Huddle House. Reportedly a shot --
12 a meaning one.

13 One shot was heard then, and I might add on this,
14 it's so important. Then four or five shots after it. And
15 then she says other things in here and talks about Number
16 One and Two. And that's all I want to about, but listen
17 it to again. "He was shot while inside a vehicle"
18 reportedly from a law enforcement found and got it out
19 that night. A shoot was heard.

20 A shot was heard then, being the operative word,
21 because if I'm shot at ain't going to take me long to get
22 that sub nose out of my pocket. Doesn't have a body guard
23 or anything and I have to go to some pretty rough places
24 sometimes. I try not to carry it. Reportedly a shot was
25 heard and then four or five shots after it.

1 Ain't that what we got right here. We've got Oscar
2 being shot at. Bam, bam, bam, bam. Still moving. We got
3 a gun or not, bam, bam, bam. I'd do it, too, and wouldn't
4 you?

5 In Chesterfield County I don't think you fine
6 gentlemen and women, ladies, to speak the truth,
7 veredicto, will come back -- I apologize for the sloppy --
8 with a verdict of guilty on any of the charges. Mind you
9 going over them again, murder is the intentional, willful
10 killing of another. Put in there Number Two, by a person.
11 Not a deer, dog, cat or cat or bear, with malice
12 aforethought which is the deprived -- depraved -- I'll
13 going to kill you. I mean to kill you.

14 We believe self-defense is -- His Honor will give you
15 self-defense. It's almost an affirmative defense and it
16 is the State's burden just as if it was any one of y'all
17 in the same family, wife and children. Y'all just give it
18 that what y'all deserve. That's all we ask for. What we
19 deserve. Let's put it that way.

20 That's my child. That's my brother. That's my
21 husband. That's my wife. Because what you are getting
22 ready to do here today is set a standard for Chesterfield
23 County. And an injustice here today would be an injustice
24 maybe tomorrow, day after that, day after that.

25 But it's no malice. I know I'm not -- I can't run

1 and get away and if I'm shot, think about somebody you
2 don't know and he's got that gun and he may be crawling,
3 I'm going to shoot and I -- everybody acts differently.
4 Some people just shot one time and get away.

5 The Judge will tell you it's okay to talk about
6 retreat. No man or woman has got to retreat after being
7 shoot at. They shoot back to make sure they can't shoot
8 them. That's common sense. We stand here both together
9 and a man shoots and misses you just because I can try to
10 run around the corner doesn't mean that I'm supposed to or
11 have to cause I sure might not make it.

12 And neither one of us may not. He's got the gun in
13 his hand. So on all this business about retreat it ain't
14 right. Take what His Honor tells you what the truth is
15 about the law. Not what J.R. says. It's his job to
16 convict. I understand that. It's my job to present
17 evidence in the light most truthful to y'all and that's
18 what I tried today do.

19 I've used the stick of reasonable doubt on each of
20 the charges, on each of the charges starting out before
21 the case. It's like Lady Justice. She's got a blindfold
22 on and scales like this. If it was a civil case it would
23 be like that. And in criminal cases one reasonable doubt
24 would be like this. Just one.

25 We quit with numbers and we ran out of time. We've

1 got more and I bet y'all will think of more back there.
2 But I know that I would have shot back. I know me, not
3 knowing that crowd around and him crawling around thinking
4 he had a gun in his hand trying to get to other side,
5 that's what you people would try to do is take cover and
6 shoot back again. I would have done the same dad gum
7 thing.

8 So I got to shoot a snake. I shoot. Only thing I
9 shoot until he's dead. Shot a bear one time. Didn't kill
10 him. I wasn't crazy enough to shoot the bear and go beer
11 hunting with him. I had a game warden game warden with
12 me. It was different. He said, "If you don't get him
13 right straight right between the eyes and he's still
14 moving, you shoot him again. Don't play with him cause
15 he's liable to get you."

16 Same thing with us human beings. We can't -- we
17 ain't got to wait around to see if he's going to shoot us
18 again. He's crawling with the gun in his hand. We know
19 that because he shoot him from the drive -- he shot from
20 the driver's side and they found the gun or his buddy did
21 in the passenger side.

22 So he's still gripping the gun. And let it go later.
23 Continue to go and it's clear the reasonable doubts are so
24 heavy in favor of Oscar for murder. There is not malice,
25 no meanness, no depraved heart, no recklessness. That's

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1 not what the law is. Take what the Judge says. None of
2 that. He didn't start it. I wish Sonta and Mrs. Shields,
3 they'd been arguing over the last week, two or three
4 during that time, but they had been.

5 And I wish that crowd hadn't, and I wish they hadn't
6 been arguing. Gosh, I wish at the Green Villa that night.
7 1:00, 2:00, 3 o'clock in the morning, whatever it was.
8 You know my grandmamma told me long, long time ago she
9 said, "Son -- and I always do what my grandma says. She
10 said, "Son, no need to stay out after 12:00." I said way,
11 Mimi." That's what I called her. "Cause ain't nothing
12 you can do after 12:00 that you can't do before 12:00."
13 Times have changed since then.

14 Well, one thing that happened changed and she says,
15 "Usually, nothing good happens after twelve o'clock."
16 12:00, one o'clock in the morning and you know that's
17 pretty much true. Unless you're on your way to work or
18 something or to the store or wherefore.

19 He's in the bed. I'm asking you on behalf of this
20 man and his family back here, I'm asking you for Oscar.
21 I'm asking for his good family. A man, man I like and
22 proud of with no criminal record. Hard worker. Honest.
23 Turns himself in to the police. Tells them he's coming.
24 Be ready for me. I'm coming on in and I'm also bringing
25 the gun just like I shot it.

1 Gives the statement right there. Got nothing to
2 hide. Nothing to hide. But he's charged and then Sonta,
3 she's charged by Mr. Haney, cause his supervisor told him
4 to charge her under any cost or whatever. That ain't
5 right in Chesterfield County, Darlington County, Marlboro
6 County, Richland County, and Georgia. That ain't right in
7 California.

8 You got a fine, good, decent man here. I like him.
9 I consider him a friend. I don't take all the cases. I
10 don't mind taking this one, and yes, been told I can't
11 speak to Mrs. Shields, but I am sorry that Anthony is
12 dead. I'm sorry that anybody got hurt out of this. When
13 I sit down nobody else will be able to speak for Oscar but
14 the 12 of y'all.

15 With Mr. Hatchell the foreman all the way and when
16 you speak and come back with the verdict on the murder
17 charge remember malice, depraved heart, bad intent, ill
18 motive. Does that sound like this man?

19 On involuntary manslaughter, the intentional killing
20 of another but in the heat of the moment. Some kind of
21 words, but a gun pointed at you I guess that would get you
22 in the heat of the moment. That's self-defense, too.
23 You're not supposed to stand there and let somebody put
24 try to point a pistol at you. Somebody that you don't
25 know that good put a pistol on you what you going to

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1 think.

2 When you get out because there is a crowd standing
3 around you got a pistol in your pocket. One that's
4 legally registered, legally bought and legally kept in the
5 console box. Not one that the wife didn't know about.
6 Not one where the -- didn't go to the store to get
7 cigarettes. But went on down to the Huddle House to look.

8 That's not voluntary manslaughter. Not to get shot
9 at. And then the gun charge threw on this just to make it
10 harder during the trial, but there is no crime.
11 Self-defense takes all those crimes away and I used it
12 before and I said it. Somebody else came with this and
13 I'd like to read it. "It would be an injustice for any
14 criminal defendant to be convicted on evidence that
15 doesn't prove a criminal charge beyond a single reasonable
16 doubt." We like this.

17 If you're willing to intolerant, if we are and
18 injustice here today in Chesterfield County, then we must
19 be willing to tolerate an injustice to any of your loved
20 ones here, now, later, because we're all coming back with
21 your verdict which means verus dictum which in Latin means
22 to speak the truth and what's the truth.

23 I'm not taking up for Sonta. I don't know and can't
24 talk about the arguments between her. And she's charged.
25 I'm not involved in that. I'm just here for Oscar, and

1 I'm here for y'all, too. I'm here for us. Because I know
2 the 12 good of y'all and I ask you. May I beg you, plead
3 and implore you to do the right thing. To let the rest of
4 the people in Chesterfield County know and people around
5 Chesterfield County know we're not going to convict a man
6 or a woman because they'd been shoot at, because he'd been
7 in a fight.

8 This other man with two other women hitting with
9 bottles in the head and chairs. A barroom brawl and he
10 tells his wife a story about cigarettes and gets a cheap
11 Saturday Night Special gun off the street from somewhere
12 and shoots. We know he shot. Softer sound first. Shell
13 casings was in the back of the car goes bam, bam, bam.

14 Yes His Honor will tell you that if you return, and
15 like I would, make sure you can't kill me or anybody else.
16 Wounded. And let's let the people know and people in your
17 area know in Chesterfield County we're not going to
18 convict a man of protecting his life and liberty or the
19 life and liberty of his cousin, whether he was right or
20 wrong, after they were shot at.

21 I know. I grew up here, around here all my life.
22 Been trying cases as a kid out of law school in my
23 cousin's garage, for speeding tickets year ago to here.
24 Know y'all folks begs for the family. Judge will tell you
25 the law. We ask you please to do the right thing. I know

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1 you will and I appreciate and for Oscar and his family and
2 for the Anthony's family.

3 I appreciate y'all's attention. I do a lot of jury
4 trials. I can't remember in a long time people that have
5 paid as much attention as y'all. I really can't, and we
6 all appreciate that. Cause there is so much at stake. So
7 speak the truth for Oscar. And speak the truth for
8 Chesterfield County.

9 Then speak the truth for the whole Pee Dee. Speak
10 the truth and let justice run down as waters and
11 righteousness as a mighty stream. Say no Oscar is not
12 guilty because he got out of his bed for a call. He got
13 shot at, returned fire.

14 Oscar is not guilty of involuntary manslaughter
15 because the gun was pointed at him. No Oscar is not
16 guilty using a gun during a crime cause there wasn't any
17 cause it was self-defense and I challenge the Solicitor,
18 if he can disprove each and every one of those reasonable
19 doubts on this chart, I guess you ought to convict of
20 something.

21 But he'll probability covers it up, turn away, and
22 say he ain't got enough time. Call it the Ed Saleeby, Jr.
23 smokescreen. I know J.R. He knows me. He didn't answer
24 every one cause as I said just one, any one of these.
25 Judge will tell you beyond a reasonable doubt which causes

1 you to hesitate to act. I heard so much I moved the seat
2 back when I was hearing things. To hesitate to act. To
3 hesitate to the come back with a verdict of not guilty.

4 Now, y'all are the 12, 14 of the finest people widely
5 represented by Chesterfield County. Let's show the other
6 people in the county and the rest of the State that we do
7 the right thing. We don't wrongfully put people in jail.
8 We're not going to put someone in jail who got a call from
9 his cousin who was scared, needed to get out of there,
10 needed help, whatever. Let's do that for ourselves.
11 Let's do that so when we go to bed at night and lay our
12 head on our shoulders, on our pillow we can sleep easily.

13 When we go to church on Sunday or go to work we can
14 say we did the right thing. I thank you. I know I've
15 been long winded. Sweet like a dog, but I'm truly
16 passionate about this case. When I sit down nobody else
17 will be able to speak for Oscar but you.

18 The Solicitor will give his summation. I promise you
19 like me he'll do every dad gum thing he can do to prove
20 him guilty of murder. If he can't do that he will try to
21 find him guilty of involuntary manslaughter and show that
22 gun charge in there.

23 But I dear say, ask yourselves this question. If
24 J.R. Joyner or me or Kevin had been standing at that car
25 with the gun pointed at us and fired he got a gun. He's

Closing Statement by Mr. Saleeby

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1 got a badge. We supposed to run away? And after the shot
2 is fired are we supposed to run away? Are we?

3 I think the answer in Chesterfield County and
4 everywhere else, and J.R. did a good job cause it's his
5 right, but he had to take what he's got and do his job. I
6 thank you. Again, I apologize for being long winded. I
7 apologize on behalf of the Fortune Family. Let's go and
8 do the right thing. I know you will. I know you will. I
9 feel it in my heart. I watched you. I've watch you see
10 and here the inconsistencies. I'm proud of that man, and
11 I know y'all probably are, too.

12 I'm sorry about Mr. Shields or anybody that died, but
13 I know in my heart y'all will do the right thing. Just if
14 it was you or one of your children, family members.
15 That's what it's about. Treat them the same way. I thank
16 y'all from the bottom of my heart.

17 THE COURT: Ladies and gentlemen, considering the
18 length of time that's been involved and the opportunity
19 that the Solicitor will have to fully address you as well
20 I'm going to give you about a five minute break. Not a
21 long one. About five minutes. Step to the restroom,
22 powder your nose and whatever else and then going to come
23 out and give the Solicitor the opportunity to conclude his
24 remarks.

25 (WHEREUPON, the jury panel is excused from the

1 courtroom at 12:37 p.m.)

2 THE COURT: We'll be in recess for five minutes.

3 (WHEREUPON, Court was in recess at 12:38 p.m. and
4 reconvened at 12:45 p.m.)

5 (WHEREUPON, the jury panel enters the courtroom at
6 12:46 p.m.)

7 THE COURT: All right. Counsel, you may address the
8 jury again.

9 MR. JOYNER: Thank you, Judge.

10 CLOSING STATEMENT BY MR. JOYNER

11 MR. JOYNER: Ladies and gentlemen of the jury, thank
12 you so much for your time throughout the course of this
13 trial. I want to start by telling you that we both have
14 jobs here. My job is do present the truth. In fact if
15 you look in the South Carolina Code of Laws which mandates
16 what a Solicitor's job is we can't be like a normal
17 attorney is.

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

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

25 THE COURT: The jury is the finders of the truth. I

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1 think what he was referring to was there is also an
2 obligation on the Solicitor's Office beyond simply that of
3 presentation, but the jury does have the burden of
4 deciding what is the truth in this matter.

5 MR. JOYNER: Thank you, Judge.

6 MR. SALEEBY: Thank you, Your Honor.

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

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

21 MR. SALEEBY: Objection, Your Honor.

22 MR. JOYNER: To get a not guilty verdict.

23 MR. SALEEBY: Object, Your Honor.

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

1 the objection.

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

4 MR. JOYNER: If you remember, ladies and gentlemen,
5 Mr. Saleeby said I probably wouldn't have time to address
6 all of his points he wrote up here for you. He said -- if
7 I could address them, if I could explain them that indeed
8 you should find Oscar Fortune guilty. Those were his very
9 words and I'll started by doing so. First of all,
10 anything that Denise Shields said about this incident is
11 not a reasonable doubt.

12 In fact it doesn't matter because she wasn't at the
13 scene when I happened. She has no idea. So everything
14 she said right here has been addressed. We don't have to
15 spend time individually on showing it because we all know
16 she wasn't there.

17 State of mind. If I'm angry and upset and my state
18 of mind and somebody shoots me that has nothing to do with
19 what that person was doing. The person being shot is not
20 on trial, ladies and gentlemen. He is on trial, but yet
21 he only goes to the state of mind of the victim in this
22 case, and not the defendant.

23 Go down to Tonnette Cash. For whatever reason she
24 was the one driving. Her heard a smaller sound of a
25 gunshot and a louder sound of a gunshot. Do you want to

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1 know why first the first gunshot was lower? You can put
2 something on a gun called a silencer or suppressor. It's
3 something that connects directly to the end of the barrel
4 and it causes the loudness to be muffled.

5 Well, if you stick a gun directly in somebody's back
6 and fire the trigger that shot is going to be muffled.
7 That shot is going to be suppressed, ladies and gentlemen.
8 And that's why she heard a suppressed shot.

9 Oscar Fortune himself testified to it when I cross
10 examined him. I said, "You stuck the back to his -- you
11 stuck the gun to his back, didn't you?" We have a doctor
12 to testify to it. We have another expert from S.L.E.D.
13 that testified to it. All these people corroborated the
14 same thing. He stuck the gun to his back. That's why the
15 shot was muffled, ladies and gentlemen.

16 Next, Tonnette Cash is charged criminally in this
17 case. We have a thing in law called the hand of one is
18 the hand all. After he murdered Anthony Shields he got in
19 the car and she drove him off. He used her gun. That's
20 the reason she was charged in the first place. She had a
21 legally licensed handgun. I don't object to that. Many
22 people have legally licensed handguns, but is that
23 reasonable doubt?

24 You can take a legally licensed handgun and shot
25 somebody with it. You can murder somebody with a legally

1 licensed handgun. That has nothing to do with the case
2 and by no means that's just a statement. That's not a
3 doubt in any way at all.

4 They were asleep in bed in the middle of the night.
5 That's true. We admit that all along. That's not a
6 reasonable doubt. That's simply a statement of fact.
7 What did Jay Jay Mungo say. He never had a relationship
8 with Sonta McCall. Well, I'm not going to call this
9 statement a lie. I wouldn't say Mr. Saleeby just put a
10 plain lie up here, but it's certainly not the truth. He
11 said themselves, we have a baby, but we are not together
12 now.

13 At the time of this incident she wanted me to do
14 something but we weren't together then either. That's yes
15 I didn't do anything. So everything he said about Jay Jay
16 doesn't matter. And doesn't matter if Jay Jay is in
17 Federal court. Jay Jay saw what he saw. All the other
18 people that testified to actually the same thing Jay Jay
19 said, their not in Federal court yet everybody sees the
20 same thing.

21 Huddle House incident. They were at the Huddle House
22 before Anthony Shields went to check on his cousin so and
23 so forth. You know, I agree. Everybody agrees. That's
24 just a statement of fact. That's not a reasonable doubt.
25 Sonta began arguing with Anthony. She began. She walked

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1 up to him and began arguing. She testified to that, and
2 Oscar did, too.

3 The reason Oscar got a gun before he went to
4 Anthony's car was because he was surrounded by 80 to 100
5 people he didn't know who knew Anthony. That's not true.
6 That's a plain lie, and you want to know why it's a lie.
7 Because the day after, after he had eight to 12 hours to
8 think about what he was going to say in his statement he
9 knew was wrong. And he knew that you can't outrun the
10 police. You can't hide forever. They will find you when
11 you commit a murder.

12 And he knew they would find him, and he said, "Let me
13 get out of here. Let me get out of the State where they
14 won't know where I am. Let me think about what I did.
15 Let me come together, which is exactly what his words
16 were. I want to be clear in my mind and think how I can
17 get out of this thing."

18 But, ladies and gentlemen, he made a mistake and all
19 of his thinking the he made a mistake. He said, "I got in
20 my car and I pulled up where he was expecting to fight."
21 There can be a gun fight. When you got up expecting to
22 fight somebody and take a gun with you, you go in
23 expecting to fight with a gun, ladies and gentlemen.

24 You go in expecting to shoot somebody and that's
25 exactly what he did. And you will have the statement with

1 you in the back when you deliberate. You can look at
2 that. Anthony Shields determined the disturbance between
3 he and Oscar by firing at Oscar and Sonta while he stood
4 directly outside his car door.

5 Ladies and gentlemen, I just don't know how that
6 could be cause this man is 260. Anthony Shields was 135
7 pounds. 135. He is twice the size of the victim. And
8 you know what he said that when the victim fired at him he
9 was within arm's length. That's right here. I can shoot
10 him. If Anthony Shields shot first his would have hit
11 him. He's 260. He would have hit him. Use your common
12 sense is all I ask.

13 Because you know what. He sure didn't miss. All
14 five shots he fired hit home. They all hit right where he
15 was aiming because he stuck the gun to him, ladies and
16 gentlemen. He left the scene because he was scared.
17 Ladies and gentlemen, he left the scene because just as he
18 testified he wanted to go and think of a story that could
19 get him out of what he just did. That's why he left the
20 scene.

21 Officer Haney arrested Oscar and Sonta. You know why
22 he arrested Sonta. She's charge as an accessory before
23 the fact because she called him down there. She called
24 him down there rather than call the police. If you're
25 attacked, if you were actually hit by a beer bottle you

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1 call the police. That's what you do. You don't call your
2 cousin to come down with a gun and shoot somebody.

3 I mean I'm good. I circled it because it shows how
4 ridiculous is it. Investigator David Lee admitted it was
5 his job to secure the scene. It was his job and he got
6 there 30 minutes later. How is that a reasonable doubt?
7 It's not because it's true. It was his job. He's just
8 making statements trying to confuse you. Sonta and Iris
9 all have been charged even though this is clear that some
10 or all of them are not guilty as charged.

11 Well, guess what? If that's true, guess who is
12 guilty? Oscar Fortune is. He's the one who is guilty if
13 the rest of them aren't. He admitted to it. He pulled
14 the trigger. He said he shot him. That's it. That was
15 pretty easy. It's all been reviewed. Mr. Saleeby said
16 himself that if I could refute all of them you should find
17 him guilty.

18 Ladies and gentlemen, I ask that you find him guilty
19 because that's what's I've done. And I want to remind you
20 of a few things. If you remember when Mr. Hales got up
21 and did his opening statement when he ended he said I want
22 you to remember three things. He said they're going to
23 put a lot of stuff on you, confuse you and get you to use
24 something other than your common sense.

25 We just want you to remember the three question.

1 Three questions. Remember, the first question he said was
2 remember who started the conflict. Who started the
3 conflict? Who was sitting in their car minding their own
4 business, doing nothing? And as Mr. Fortune said he never
5 made a threat to Mr. Fortune. He never yelled at him or
6 anything.

7 Ask him how many times was each person shot.
8 Mr. Fortune wasn't shot at all. Wasn't hit with anything.
9 He said that he didn't even know him. And where were the
10 shots located, ladies and gentlemen? Well, I'm going to
11 get to that. As you go back into the jury room to
12 deliberate there is some -- quite a bit of evidence before
13 you, and you might be confused as to how to decide on the
14 evidence.

15 Well, there are two ways I think you can look to
16 decide on the evidence:

17 Number One, you want to find credibility in the
18 evidence because you believe what you find credible.

19 Well, there are two ways to find credibility:

20 Number One, you can find credibility by corroboration
21 and corroboration is just a word meaning that what one
22 person says another one says the same thing, and another
23 one says the same thing and another one says the same
24 thing. A lot of people say the same thing. It's just
25 more credible.

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1 The second way you can decide if evidence is credible
2 is if it's an expert. If it's a person who is trained,
3 who is experienced and who has studies extensively in the
4 field and they tell you something. In fact there is so
5 much credence given to it that the law just allows those
6 people to speculate and allows those people to give
7 opinions because they're so accurate with their opinions.
8 Those are the two reasons.

9 I mean this week we brought in some of the brightest
10 people. These people are the real live C.S.I. that you
11 see on t.v. We had trace evidence gunshot experts. We
12 had identification and tool mark experts in
13 Mr. Paavel Paavel. Mrs. Filiatreault was a trace evidence
14 expert as far as gunshot residue. Dr. Yacoub, who is a
15 diplomate of the American Board of Forensic Autopsy and
16 she explained the same thing.

17 She said this guy was shot five times. She said --
18 she's a doctor. It's her job to look at bodies, to
19 dissect them, to understand and decide what happened. And
20 she knew. She said there are obvious gunshot wounds, five
21 of them. In fact the wounds were consistent with a person
22 sticking the gun to it and pulling the trigger.

23 I want to go with you briefly through what some of
24 the eyewitnesses said that we saw. The first, Tonnette
25 Cash. Tonnette Cash is Mr. Fortune's girlfriend. So if

1 she's going to manipulate the truth at all then she's
2 going to do it certainly on behalf of Mr. Fortune. And
3 what did she say? She said, "Yes, he did have a gun.
4 Yes, I did drive him down there in my car. Yes, I did
5 park behind Mr. Shields."

6 Then we have Barry Davis. Barry Davis said he saw
7 those first shots. He said that he was standing right
8 there in his doorway, shot him that Anthony Shields was so
9 desperate to the away from this man shooting that he
10 crawled through is car and out the passenger side door.
11 And how do we know he was so desperate? We know because
12 the center console of his car was broken. He was crawling
13 through and as he came through it broke it going through.

14 That's how desperate -- that's how much he needed to
15 get away from this man that was filling him up with .38
16 caliber bullets. You will see these in the back, ladies
17 and gentlemen. And, Stephanie Gaston, when she testified
18 he saw the same shots that Barry Davis saw. She saw him
19 walk around and shoot him just as the defendant testified
20 himself. That's all true.

21 Jessie Ellison agreed just like the defendant said.
22 He shoot him first and then he walked around and shoot him
23 some more.

24 Jay Jay Mungo. Exact same thing. He watched it
25 happen. He shoot him. He walked around. He shot him

1 more. Empty the remainder of his bullet into him.

2 Let's look at our expert testimony person, Mr. Vello
3 Paavel, our firearms expert. He said the bullets from the
4 body matched the gun that he used. And, ladies and
5 gentlemen, I'll be honest with you. The reason we called
6 Mr. Vello Paavel is because if he would have denied
7 shooting him we would have had to prove he shot him. He
8 would have had to say, "Okay, these bullets out of this
9 body matched your gun," which would obviously mean he shot
10 him.

11 But Mr. Paavel, really doesn't matter now because we
12 know he shot him. He admitted himself. He said, "Yes, I
13 shot him." His admitted it. Dustin Smith, a forensic
14 toxicologist, we know Mr. Shields wasn't high on drugs.
15 We know that he wasn't ranting and raving and shooting
16 people and carrying on.

17 Dr. Yacoub, she testified that there were three shots
18 in the back. One in the hand. One in the side, and this
19 hand -- this shot in the hand in the left hand gunshot
20 residue was found. It was consistent with the defensive
21 wound. If he was pointing a gun at him, the gun is
22 pointed -- he's putting his hand up to stop it to not get
23 shot.

24 And in the process he gets shot in the back of the
25 hand. That's why there was gunshot residue cause the gun

1 blew out residue out of the barrel onto his hands. And we
2 know after that he turned. That's when he shot him in the
3 side and turned more to get out of the car. And as he was
4 getting out his back was turned. Everyone knows he shot
5 him in the back. We know it was a contact wound.

6 The doctor explained that for us. We know that
7 Dorothy Filiatreault, our forensic chemist and trace
8 expert, we know that she said that G.S.R. was consistent
9 with him being shot in the hand. She tested the green
10 coveralls. She said the green coveralls are consistent
11 with the gun being stuck to his back and the trigger being
12 pulled.

13 Well, now all of this evidence we can now apply to
14 the law. That's the proper thing to do. After we know
15 what the evidence is we apply that evidence to the law.
16 And, first, the elements of murder are a killing. Do we
17 have a killing? We obviously have a killing. Mr. Shields
18 died. We have to have a killing of a person. Mr. Shields
19 was obviously a person.

20 He is survived by his wife and his family and his two
21 children. With malice aforethought. And malice is an act
22 done intentionally and without just cause. And
23 intentional means simply that you can't have a spasm. You
24 can't suffer or be holding a gun in your hand and all of a
25 sudden you have a stroke and your finger locks up and you

1 put the trigger. It means that you have to mean to pull
2 the trigger. You to mean an intentional act. You have to
3 pull the trigger.

4 Well, we have that. He did that. Was there any just
5 cause to stick a gun to a man's back and pull the trigger?
6 No. No. Because he said himself in his statement, "I
7 went to fight. I went expecting a fight so I took my gun
8 with me. I was going to fight." He went with the intent
9 to do harm. He went with his heart intent on mischief.
10 He went with his heart bent on committing a murder.

11 And the fourth one, aforethought. Aforethought only
12 means that he had to have that intent, that malice before
13 he actually shot him. And he obviously did because he
14 said he went expecting it. So he was expecting to do it
15 before he it. So aforethought exists. A aforethought,
16 ladies and gentlemen, is the most obvious of any of those.

17 Now, murder has been proved. Murder had been proved,
18 yet Mr. Fortune says it's self-defense. Well, let's look
19 at some of the elements of self-defense:

20 Number One, Mr. Fortune himself would have to be at
21 not fault. No fault of his own in bringing on the
22 conflict or causing this shooting. Let's think of things
23 that he did to start this shooting.

24 He approached -- well, first of all he got out of bed
25 to get involved in something he wasn't involved in the

1 first place, drove down there, got out of the car to
2 approach a person with the intent to fight, like he says
3 in his statement, didn't just get out of his car to fight
4 a guy who was half his size. He got out of the car to go
5 fight a guy with a gun, a fully loaded .38 special.

6 There is no way. There is no way. And if just this,
7 if this is the only thing that he doesn't meet on
8 self-defense he doesn't get self-defense, ladies and
9 gentlemen. He just didn't get it. That's what the law
10 says, and he doesn't meet it. He went with the intent.
11 He was at fault in bringing on this conflict.

12 And next, a thing that's important is retreat. If
13 there was no way for him to retreat. Let's think about
14 the times he could have retreated. First of all, he could
15 have never came. Second of all, once he saw him drive up
16 he could have said, "Hum, this guy was just there in a
17 fight with my cousin. I should call the police. I think
18 I'll leave this place where he is now." That would have
19 been the prudent thing to do.

20 But he didn't do it. Instead, he said, "Hum, I think
21 I'll go over there. I'm twice his size and I'm carrying a
22 gun."

23 MR. SALEEBY: Your Honor, I object. The record --
24 Mr. Fortune never laid eye or ---

25 THE COURT: I understand your objection, please keep

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1 your remarks to the evidence that's been presented in the
2 case.

3 MR. JOYNER: Yes, sir.

4 MR. SALEEBY: Thank you, Your Honor.

5 MR. JOYNER: You know in your mind because your
6 cousin has just told you that she was in a fight with this
7 person and you see the person pull up because when they do
8 your cousin tells you that person has pulled up. Yet, you
9 still decide to go to that person with a gun. You come up
10 on that person and you shoot. And in fact you shoot them
11 in the back three times and that person goes out of their
12 passenger side of their car to try to get away from you.

13 We've all seen a Ford Explorer. Ford Explorers are
14 S.U.V.s. The top of the are about this high. There was a
15 whole S.U.V. blocking when he fell out as Miss Gaston
16 testified. Anthony Shields was crawling. He certainly
17 wasn't back up with a gun shooting at anybody as he would
18 have you believe.

19 He could have walked in this direction and retreated
20 and then say I'm going to walk in that direction, that
21 direction, that direction, that direction, that direction.
22 He could have walked in any direction except for one. The
23 only direction he retreated into was around the car right
24 to the conflict. He retreated directly to the conflict.

25 Bam, bam. He emptied the remainder of his shells

1 into his body until he didn't have any more shells to
2 shoot. And he went and got his car and left the State.
3 Ladies and gentlemen of the jury, there were ample
4 opportunities for him to retreat and Mr. Fortune simply
5 did not do it.

6 Now, I want to give you a few quotes of the defendant
7 throughout the trial that I wrote down. As far as
8 approach goes, he says in his own statement, he says, "I
9 got in my car and I pulled up to where he was expecting to
10 fight the guy." Sonta said that she and Oscar approached
11 Anthony at the Huddle House because Mr. Hales asked her in
12 cross examination and she openly admitted it what she did.

13 Next, when I asked Mr. Fortune, I said, "You shot him
14 in the back, didn't you because you say you were only an
15 arms length away?" He said, "Yes. Yes, I did." And then
16 I asked him I said, "You walked around the car and you
17 shot him more, didn't you, after you could have got away."
18 He said, "yes, I did that."

19 Now, the three questions I have posed, ladies and
20 gentlemen:

21 Number One, who started the conflict? That's
22 obvious. Sonta McCall called Oscar Fortune and they both
23 went to the conflict. Anthony Shields was sitting in his
24 car not bothering anyone. He went to his car carrying a
25 loaded gun expecting a fight.

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1 How many times was each person shot? How many times
2 was Mr. Fortune shot? That's right, he wasn't shot. If
3 Anthony Shields had wanted to shoot him there is no way he
4 could have missed shooting him. There is no way he could
5 have missed. He was within an arm's distance.

6 How many times was Anthony shoot? Anthony was shot
7 five times. He was shoot five times.

8 And the final question is where were the shots
9 located. No shots were located on Mr. Fortune, but on
10 Mr. Shields shot was located in th hand. Shot was located
11 in the side. And three shots, ladies and gentlemen, were
12 all located in the back. All of them, all three, were
13 located in the back.

14 The Judge will tell you when he finishes with his
15 charge or during the course of his charge when you go back
16 into the room to deliberate he will say, "This isn't the
17 kind of thing you think about without using your common
18 sense. And must use you common sense. It's important to
19 use your common sense."

20 And Mr. Saleeby would have you believe with his so
21 called reasonable doubt charge chart he had you believe
22 there is a search for reasonable doubt. He believes that
23 so much that he entitled his whole sheet here, 'reasonable
24 doubt,' but it's not. You under no circumstances are you
25 to search for reasonable doubt, ladies and gentlemen.

1 Your job as jurors is to search for the truth. To simply
2 search for the truth and the truth, ladies and gentlemen,
3 is that Oscar Fortune took a gun and murdered Anthony
4 Shields by shooting him in the back three times, one of
5 which was a contact wound.

6 And for that reason the State respectfully requests
7 that you find Oscar Fortune guilty of murder. Thank you.

8 THE COURT: Thank you, Mr. Joyner. Ladies and
9 gentlemen, as I told you I don't want to lose too much
10 context. I understand some of you could be hungry by now.
11 It's 1:15. We have some sandwiches which are available.
12 I'm going to ask that you to step back to your jury room.
13 Don't start talking about the case yet. Don't start
14 discussing at all any of the issues that were brought out
15 by either the State or the Defendant. Simply enjoy your
16 sandwich.

17 I don't want somebody to eat so quickly that you get
18 indigestion, but after you have had an opportunity to have
19 some lunch and get you strength back and you're prepared
20 to listen again I hopefully in the 30 minute timeframe let
21 me know and I'll bring you back out.

22 But what I'm going to do is probably rather than come
23 tapping on your door I'm going to let you tap on the door
24 to let us know you're through. If we hadn't heard from
25 you by 30 minutes from now I might make an inquiry but

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1 otherwise I'm going to let y'all tap on the door and let
2 us know you're ready to come back out. And as I say,
3 don't discuss the case.

4 (WHEREUPON, the jury panel was excused from the
5 courtroom at 1:15 p.m.)

6 THE COURT: All right. Thank you. We'll be in
7 recess.

8 (WHEREUPON, Court was in recess at 1:16 p.m. and
9 reconvened at 1:55 p.m.)

10 THE COURT: Ladies and gentlemen, I anticipate
11 finishing this charge somewhere in about the three o'clock
12 timeframe. I usually find that I end up taking 45 minutes
13 to an hour on charges. The charge may run a little bit
14 longer because we've got the murder and the voluntary
15 manslaughter charge as well as the self-defense charge.

16 So listen carefully that I include that which needs
17 to be included and don't include that that doesn't need to
18 be included. Now, there were various family members that
19 were seated behind State's table. I do not see any family
20 members in that spot. If they want to come in I'd like
21 for them to come in now. Once I start I need y'all to
22 keep the door shut.

23 MR. SALEEBY: Are you going to charge no duty to
24 retreat of being shot at and the other one was not having
25 fault?

1 THE COURT: The charge will include language that
2 says, "The absence of self-defense must be proven by the
3 prosecution beyond a reasonable doubt. I further charge
4 that an individual has no duty to retreat if by doing so
5 increases his danger of being killed or suffering serious
6 bodily injury." I will also charge -- I will charge if a
7 person is justified in defending himself or others and in
8 firing the first shot then he is also justified in
9 continuing to shoot until it is apparent that this danger
10 to his life and body or life and body of another has
11 completely ceased.

12 All right. Thank you. Very good. Keep the door
13 closed while I give the jury their instructions. If you
14 will bring them in.

15 (WHEREUPON, the jury panel enters the courtroom at
16 1:58 p.m.)

17 CHARGE OF THE COURT

18 THE COURT: Thank you very much. Mr. Foreman and
19 members of the jury, if you will give me your attention.
20 You have listened carefully to the evidence that's been
21 presented to you. You listened carefully as the attorneys
22 have addressed you in their opening remarks as well as
23 their closing remarks, and I would ask that you listen
24 carefully as I talk to you now about your
25 responsibilities, the law that applies to your

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1 responsibilities and the law that applies to this case and
2 your responsibilities to take that general law and apply
3 it to the facts as you find them.

4 In connection with the trial of the case as I
5 indicted to you at the beginning my job is sort of broken
6 into two phases. The first part of my responsibility is
7 to preside during the portion of the trial where the
8 testimony is being presented to you and the evidence is
9 being presented to you. And you have heard the evidence
10 in this case. Now, there was in essence a stipulation
11 that the parties had agreed to which I forgot to give you.

12 So I will tell you now as I understand that as a
13 practical matter rather than calling another witness the
14 testimony would have been that Vincent Davis had that .25
15 caliber pistol and it remained in his possession until
16 approximately five days later when a Deputy Quick
17 retrieved that from him. Would that be correct for the
18 State?

19 MR. JOINER: Yes, sir.

20 THE COURT: And the Defense?

21 MR. QUINN: Yes, sir.

22 THE COURT: And so that's also a fact for you to
23 consider as you consider all the other facts, but ladies
24 and gentlemen you are the fact finders. I resolve the
25 issues of what testimony should come in, what evidence

1 should come in. But once the evidence is in you are to
2 make your factual findings on the evidence that's in the
3 record of the case.

4 And if I said, "No. You can't consider that," you're
5 do disregard that part of the testimony and not to rely
6 upon it in reaching your determination as to what
7 happened.

8 Now, that responsibility to preside over the
9 presentation of the case actually begins with my opening
10 remarks to you and it continues all the way through until
11 this point in time. I have to rule on matters that maybe
12 objected to in closing arguments, but it becomes my duty
13 to charge you the law that you are to apply to the facts
14 as you find them.

15 And, ladies and gentlemen, under your oath you have
16 said that that's what you're going to do. If you have
17 some preconceived idea as to what the law should be or as
18 the what the law is and it does not coincide, if it's
19 not what I tell you today then under your oath you have
20 agreed that you are going to set aside any preconceptions
21 that you may have if any as to what the law is or what the
22 law ought to be.

23 And you are simply going to take the law and accept
24 it as I give it to you today and apply it to those facts
25 that you find in this case. That's my job. I am the sole

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1 judge of the law. But as I have told you before and I'll
2 tell you again you, ladies and gentlemen, you are the sole
3 and the exclusive judge of the facts in this case. You
4 make that determination as to what has happened. What is
5 going on in this dispute between the State.

6 Our State law and our constitution says that as a
7 trial judge, I am not to intimate to you, state, comment
8 upon or make any statement to you the jury about the facts
9 in this case. You and you alone are the sole finders of
10 facts. As I told you in my opening remarks I tell you
11 again do not infer from whatever I say to you in my
12 instructions whatever I may have said to you during my
13 presiding over the trial of the case to make you think I
14 have some opinion about what the facts are in this case.

15 Some opinion about what your findings are in this
16 case. That is not my job. That's your job. Nobody
17 else's. You and you alone are the fact finders in this
18 case. I am not permitted to have any opinion about the
19 facts in this case so please again do not think by
20 anything I have said or will say in my instructions to you
21 now to make you think I have some opinion?

22 Ladies and gentlemen, you have the duty, you have the
23 responsibility to determine the effect, the value, the
24 weight and truth of the evidence that has been presented
25 to you during the trial of this case. And necessarily,

1 ladies and gentlemen, as a part of that you must assess
2 the credibility or the believability of the witnesses who
3 have testified here in connection with the trial of this
4 case.

5 It becomes your duty as the jurors to analyze and to
6 the evaluate the evidence that's been given to you and to
7 determine that evidence which convinces you of it's truth.
8 Now, ladies and gentlemen I am going to talk with you
9 about some general principles. These general principles
10 that you can apply in determining the believability or the
11 credibility of witnesses who have testified apply to both
12 expert witnesses and to lay witnesses.

13 You have heard the testimony of various individuals
14 who have been qualified by the Court as experts in
15 particular fields. Because of their education, their
16 training, their background of experience they are entitled
17 to come and offer you opinions about matters that are
18 within their area of expertise.

19 They are here for the purpose of assisting you in
20 evaluating and determining what happened on these events
21 that have been described going to December 22nd to
22 December 23rd 2001. Their testimony is to assist you.
23 It's not for purposes of controlling your finding in this
24 matter.

25 You take the testimony of the expert and you evaluate

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1 it and you determine what you're going to believe just as
2 you would any other evidence that's offered to you in the
3 case. You're not bound to accept the testimony of an
4 expert just because they are an expert. You can consider
5 their testimony and weigh it and determine what to believe
6 and not to believe just as you can any witness' testimony.

7 I further instruct you that in determining the
8 credibility or the believability of witnesses who testify
9 that you may believe one witness as against several
10 witnesses or you may believe several witnesses as against
11 one witness. You may believe a part of the testimony of a
12 witness and disregard the balance of that same witness'
13 testimony.

14 If you have a good and a sound reason you can believe
15 the witnesses testimony in it's entirety or you can reject
16 a witness' testimony in it's entirety. You may consider
17 whether there is any prejudice, bias or any other motive,
18 anything that can gain or loss, anything that might affect
19 or give motive to a witness one way or the other as they
20 offer testimony in the matter.

21 You may consider whether or not the testimony of a
22 particular witness has been made stronger by other
23 testimony and evidence in the case or has that testimony
24 been made weaker by other testimony and evidence in the
25 case.

1 Ladies and gentlemen, you can consider the demeanor
2 of a witness who testifies, their appearance. Are they
3 open, forthright. Are they guarded or are they hesitant.
4 You can consider these things if you feel it is
5 appropriate to do so when you are considering the
6 testimony of a witness. And you are evaluating and
7 determining the credibility to be give to that witness
8 testifying.

9 Ladies and gentlemen, the testimony of a witness
10 maybe discredited or impeached by showing that a
11 particular witness previously made statements which are
12 inconsistent with their trial testimony. The earlier
13 contradictory statements are also admissible to establish
14 the truth of those earlier statements. It is totally up
15 to you the jury to determine the credibility if any to be
16 given to the earlier statement as well as to the
17 credibility to be given to the trial testimony of any
18 witness who has been impeached.

19 If a witnesses shown knowingly to have testified
20 falsely concerning any matter that is material you may
21 consider that determining whether to trust such witness'
22 testimony in other particulars. You may reject all the
23 testimony of that witness or parts of that witness'
24 testimony. Or you may accept it all in it's entirety.

25 The credibility of a witness whose testimony has been

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1 impeached is solely up to you the jury. Our rules of
2 evidence also provide that the testimony of a witness
3 maybe discredited or impeached by showing that the witness
4 has been convicted of a crime for which they could have
5 been in prison for more than one year or a crime that
6 involves dishonesty or moral turpitude.

7 As to this time of evidence as to any criminal record
8 of someone that is offered solely for the purpose of
9 determining that witness' credibility and you make such
10 determination as you consider be appropriate in evaluating
11 the testimony of any witness who has shown to have a prior
12 criminal record for a crime where that could have gone to
13 jail for more than one year or a crime involving
14 dishonesty.

15 Ladies and gentlemen, you may also, of course,
16 consider the opportunity for a person to know those things
17 about what they have testified. Where they in a position
18 to here, see, smell, touch, taste those things about which
19 they have offered you testimony.

20 Ladies and gentlemen, also it is proper for you to
21 consider the reasonableness of the testimony that has been
22 given by a witness. These considerations, however, ladies
23 and gentlemen, you do not exercise arbitrarily. But if in
24 your good judgment there is sound reason in the record of
25 this case for consideration of those factors then you may

1 consider them.

2 You're objective, ladies and gentlemen, is to find
3 the truth from the testimony that has been presented to
4 you. Whether it comes from a witness or witnesses for the
5 State or a witness or witnesses for the Defendant. Makes
6 no difference. Truth is not determined by counting up the
7 number of witnesses who testified on one side or the
8 other. In exercising your mental processes and in
9 determining what are your consider to be true the law
10 simply requires that's you exercise your good judgment,
11 your common sense, your sense of logic and reason, and
12 your experiences in life. You then apply these attributes
13 which you bring in to the evidence and determine what you
14 the jury consider to be truthful evidence in this case.

15 And to these true statements of law as determined
16 solely by you the jury you apply -- or to true statements
17 of fact as determined only by you the jury you apply the
18 law as I give it to you and thus you arrive at a true
19 verdict in this case.

20 Ladies and gentlemen, by your verdict you have no
21 friends to reward. You have no enemies to punish. Your
22 verdict is not to be the result of any passion, any
23 prejudice or any sympathy you may have for anyone. You
24 have the responsibility to step back and to in an
25 emotionless way weigh that evidence, determine what took

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1 place, and then apply law as I give it to you.

2 You are by your verdict to speak the truth as to this
3 dispute between the State and the Defendant. It comes
4 from Latin, verus dictum. Verus meaning truth and dictum
5 meaning to speak. So that is what you do and you write a
6 verdict. You speak the truth as to the dispute between
7 the State and the Defendant.

8 Ladies and gentlemen, during the trial of this case
9 there are generally two types of evidence that are
10 presented to you. There is direct evidence and there is
11 circumstantial evidence. Direct evidence is the testimony
12 of a person who asserts or claims to have actual knowledge
13 of a fact such as an eyewitness.

14 Circumstantial evidence on the other hand is a proof
15 of a chain of facts. A proof of chain of facts and
16 circumstances that indicates the existence of another
17 fact.

18 Direct evidence as I say is usually the type of
19 evidence when a witness comes forward and says, "I have
20 smelled it. I have tasted it. I have touched it. I have
21 heard it." Those types of things that we perceive by the
22 means of our five senses. That's what usually direct
23 evidence is. Somebody comes in and talks to you about
24 that.

25 But circumstantial evidence is that proof of a chain

1 of events and issues that indicate the existence of
2 another fact. Often times I will use a summer thunder
3 shower to explain what circumstantial evidence is about.
4 Often times if you want to go in South Carolina in this
5 area in particular to a movie and you go at 7:00 o'clock
6 in July the sun is still going to be shining. And if you
7 go at this time and the pavement is dry and all the
8 automobiles that are parked there in the parking lot at
9 the movie theater are dry your go in and while you're in
10 the theater you don't see what's going on but you might
11 hear some rumbling outside. You come out of the theater.
12 It's nine o'clock at night and quite likely the sun is
13 still going to be shining in the middle of July.

14 Now, you find there are puddles in the depressions in
15 the parking lot and there are little puppy dog feet all
16 over your windshield. Well, you can from the set of
17 circumstances determine that a fast moving thunder shower
18 came through while you were in the movie. You didn't see
19 it. You didn't smell it. You didn't actual perceive it
20 with the means of your senses as normally you would with
21 direct evidence. But yet, you've got that se of
22 circumstance s. It was dry when you went in. It's wet
23 when you come out. Sun shining, sun shining, so it must
24 be a fast moving thunder storm went through.

25 Our law makes absolutely no distinction between the

1 weight or value to be given to direct or circumstantial
2 evidence. Nor is a greater degree of certainty required
3 of circumstantial than of direct evidence.

4 Ladies and gentlemen of the jury, as jurors you must
5 weigh all the evidence in the case and after weighing all
6 of evidence if you're not convinced of the guilt of the
7 defendant beyond a reasonable doubt you must find the
8 defendant not guilty. Ladies and gentlemen, conjecture,
9 speculation, suspicion or probabilities do not constitute
10 circumstantial evidence.

11 Now, ladies and gentlemen, as I have talked with you
12 before the fact that the defendant has been arrested, been
13 charged, been indicted in this case is not any evidence of
14 the defendant's guilt and cannot be considered by you as
15 any evidence of the defendant's guilt in this matter.

16 It does not create any inference or presumption of
17 guilt. These two indictments, 2002-GS-13-137 and
18 2005-GS-13-1222, simply are notice documents. They put
19 the defendant on notice as to what the defendant has been
20 charged with. They are not any evidence of that
21 defendant's guilt.

22 It tells the defendant what it is the State has
23 accused him of. The burden of proof is always on the
24 State to prove guilt beyond a reasonable doubt. So,
25 ladies and gentlemen, do not consider the fact that the

1 defendant has been charged and indicted as any evidence
2 whatsoever of the defendant's guilt. This defendant has
3 pled not guilty to those two indictments.

4 By doing that the defendant has cast the burden on
5 the State to prove him guilt beyond a reasonable doubt. A
6 person who is charged with committing a criminal offense
7 in South Carolina is never required to prove themselves
8 innocent. I charge you, ladies and gentlemen, that it is
9 a cardinal, that is an important rule of the law of
10 evidence that a defendant in a criminal trial no matter
11 how serious the charge maybe that is pending against that
12 defendant will always be presumed to be innocent of the
13 charge for which they have been charged and indicted and
14 unless their guilt has been proven be evidence which
15 satisfies you and each of you of that guilt beyond a
16 reasonable doubt.

17 That presumption of innocence does not cease when you
18 go back to your jury room. But it is with the defendant
19 from the time that they have been charged throughout the
20 trial and until such point as, ladies and gentlemen, you
21 and each of you are convinced by the evidence of this case
22 that th State has proven the defendant's guilt beyond a
23 reasonable doubt.

24 Our Supreme Court has said that this presumption of
25 innocence is like a robe of righteousness that has been

1 placed about the shoulders of the defendant and it remains
2 with the defendant and assigns the defendant to the class
3 of individuals known as innocent individuals until that
4 presumptive robe of righteousness has been striped from
5 his person by evidence that satisfies you of his guilt
6 beyond a reasonable doubt.

7 Ladies and gentlemen, the presumption of innocence is
8 not mere legal theory. It's not just some legal phrase.
9 It is a substantial right to which every defendant is
10 entitled until you the jury are satisfied from the
11 evidence submitted to you in this case of the defendant's
12 guilt beyond a reasonable doubt.

13 Ladies and gentlemen, what is a reasonable doubt? A
14 reasonable doubt is a doubt which make an honest, sincere,
15 conscience juror in search of the truth in the case to
16 hesitate to act.

17 Proof beyond a reasonable doubt must therefore be
18 proof of such a convincing character that a reasonable
19 person would not hesitate to rely and act upon it in the
20 most person of his or her affairs.

21 Stated another way, proof beyond a reasonable doubt
22 is proof that leaves you firmly convinced of the
23 defendant's guilt. There are very few things in this
24 world that we know with absolute certainty and in criminal
25 cases the law does not require proof that overcomes every

1 possible doubt. The law doesn't require that.

2 If based on your consideration of the evidence you
3 are firmly convinced that this defendant is guilty of the
4 crime charged you must find him guilty. If on the other
5 hand you think there is a real possibility that he is not
6 guilty you must not -- you must give him the benefit of
7 that doubt and find him not guilty.

8 Ladies and gentlemen, reasonable doubt may arise from
9 evidence which is in the case or from a lack or absence of
10 evidence in the case. You the jury must determine whether
11 or not reasonable doubt exists as to the guilt of this
12 defendant. The State has to burden of proving each and
13 every element of a crime beyond a reasonable doubt. And
14 any reasonable doubt that you may have in your
15 deliberations should be resolved in favor of the
16 defendant.

17 If you have a reasonable doubt as to the guilt of the
18 defendant he is entitled to that doubt and would be
19 entitled to a verdict of not guilty. Ladies and
20 gentlemen, there are two charges against this defendant.
21 There is the charge of murder and there is the charge of
22 possession of a weapon during the commission of certain
23 crimes.

24 You must consider each of these charges independently
25 and quite frankly, ladies and gentlemen, under the law of

1 this State if the defendant is not found guilty of murder
2 or of voluntary manslaughter then, of course, he could not
3 be found guilty of possession of a weapon during a crime
4 of violence. He must be found guilty of that primary
5 charge before you could find him guilty of the other
6 charge of possession of a weapon during the crime of
7 violence.

8 Ladies and gentlemen, intent is a necessary element
9 of every crime that's charged. Therefore, criminal intent
10 must be proven by the State beyond a reasonable doubt.
11 Criminal intent is always a matter that must be determined
12 by the jury from the circumstances surrounding the
13 situation. There is no way to prove intent on a
14 mathematical certainty. There is no way medical science
15 can dissect a person's brain and determine what they had
16 in mind.

17 So the law says that criminal intent may be inferred
18 from the circumstances that are shown to have existed.
19 This is how you the jury make a determination as to
20 whether or not the State has established intent beyond a
21 reasonable doubt.

22 Ladies and gentlemen, the first charge I want to talk
23 with you about is the charge of murder. Murder is defined
24 as the killing of any person with malice aforethought. In
25 order for the State to prove the defendant guilty of

1 murder it must be proved beyond a reasonable doubt that
2 the defendant did kill a person and that the killing was
3 done with malice aforethought.

4 State is not required to prove any motive for the
5 killing but the State must prove that that defendant did
6 kill another person with malice aforethought. Ladies and
7 gentlemen, malice is the intentional doing of a wrongful
8 act without just cause or excuse and with an intent to
9 inflict injury. Malice is also defined as being hatred or
10 ill will. Malice is wrongful intent to injure another
11 person.

12 It indicates a wicked or depraved spirit intent on
13 doing wrong. Malice is a legal term implying wickedness
14 and excluding a just cause or excuse. The term malice
15 indicates a formed purpose and design to do a wrongful act
16 under the circumstances that exclude any legal right to do
17 it.

18 A aforethought means that that intention to do the
19 unlawful act was conceived or planned some time before the
20 actual commission of the unlawful act. The malice need
21 not exist for any particular period of time prior to the
22 killing. As I say, ladies and gentlemen, malice is a word
23 that suggests a wickedness or a hatred or a determination
24 to do what one knows to be wrong without just cause or
25 excuse or legal provocation.

1 The malice need not be in the mind of the one doing
2 the killing any particular length of time before the act
3 of the killing in order to render the killing murder. If
4 it is present in the mind of the one doing the killing any
5 length of time before the act then it's presence would be
6 sufficient to render the killing murder.

7 Malice maybe expressed or malice maybe implied. The
8 words express or inferred do not mean different kinds of
9 malice but merely the only kind known to the law may be
10 shown to exist. Ladies and gentlemen, malice is said to
11 be express malice where something manifested a violent
12 deliberate intention to unlawfully take away the life of
13 another human being.

14 Malice maybe inferred where one intentionally and
15 deliberately does an unlawful act which he or she knows to
16 be wrong and in violation of their duty to another.

17 Malice maybe inferred where no legal excuse or legal
18 provocation for the killing appears and when circumstances
19 attending a killing show an abandoned heart or a
20 malignment heart fatally bent on mischief.

21 Ladies and gentlemen, one who unlawfully inflicts an
22 injury upon another person is deemed by the law to be
23 criminally responsible for the person's death if the
24 injury inflicted contributed mediately or immediately to
25 the death of that person. The fact that other causes

1 contributed to the death does not relieve the actor of
2 responsibilities.

3 In other words, the act of the defendant must be a
4 proximate cause, one of many perhaps. A person's act or
5 injury inflicted maybe regarded as the proximate cause of
6 death if it was a contributing cause of death. That is if
7 it was a real or an efficient cause of death and without
8 which the death would not have occurred.

9 Ladies and gentlemen, the law says if one
10 intentionally kill another with a deadly weapon the
11 inference of malice may arise. A deadly weapon is any
12 object or substance which reasonably could be used to
13 cause bodily harm. Malice maybe inferred from the use of
14 a deadly weapon.

15 You the jury are permitted to infer malice from the
16 conduct of the defendant in the use or handling of a
17 deadly weapon if such conduct results directly in the
18 death of another and if such conduct was so inexcusable so
19 aggravated and grossly reckless as to show an actual,
20 intentional disregard of the consequences to human life.

21 A conduct sufficient to show a deliberate and
22 intentional design to use, employ or handle a deadly
23 weapon as to endanger the life of another or of others
24 without just cause or excuse is sufficient to raise an
25 inference of malice.

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1 Ladies and gentlemen, if fact are proven beyond a
2 reasonable doubt sufficient to raise an inference of
3 malice if any from the use of a dead weapon to your
4 satisfaction this is inference would be simply an
5 evidentiary fact to be taken into consideration by you
6 along with other evidence in the case bearing on the issue
7 of malice and you may give it such weight as you determine
8 it should receive.

9 The defendant is not required to prove the absence of
10 malice. Furthermore, you may accept or reject any
11 inference that arises as to malice. Ladies and gentlemen,
12 if you find that the State has not proved beyond a
13 reasonable doubt that this defendant did kill the victim
14 in this case with malice aforethought you may consider the
15 crime of manslaughter.

16 If you have a reasonable doubt as to whether the
17 State has proved murder you must resolve that doubt in
18 favor of a finding of manslaughter if your find the State
19 does in fact prove manslaughter beyond a reasonable doubt.
20 Manslaughter is known under the law as a lesser included
21 crime of murder.

22 In order for the State to prove the defendant guilty
23 of manslaughter the State must prove beyond a reasonable
24 doubt that the defendant took the life of another in a
25 sudden heat and passion and upon sufficient legal

1 provocation. The law recognizes that sudden heat and
2 passion may for the time being affect one's self-control.
3 Temporarily disturb the sway of one's reason and therefore
4 reduce the crime from murder to manslaughter provided
5 there was sufficient legal provocation.

6 Sufficient legal provocation must be such as would be
7 calculated to cause a person of ordinary reason and
8 caution to become enraged; that is to experience sudden
9 heat and passion thereby to lose control of himself.

10 Words alone, however vulgar, or insulting are not
11 sufficient to constitute legal provocation.

12 Ladies and gentlemen, merely by way of illustration
13 and illustration alone the following maybe acts of
14 provocation that are sufficient to negate malice which
15 will reduce the crime of murder to manslaughter if it
16 appears the act was done in sudden heat and passion.

17 As I said certain things you can consider, and
18 consider this by way of illustration, are the pointing of
19 a gun at a defendant, excessive force to effect or
20 otherwise affect at lawful arrest can constitute those
21 types of legal provocation, sudden combat which one person
22 was killed by another without previously formed intent to
23 do so.

24 Finding one's spouse in the act of adultery, finding
25 one child in the act of illicit intercourse, previous or

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1 prior fighting or an unjustifiable assault made with
2 violence. These, ladies and gentlemen, are simply
3 illustrations of those things that if you find they exist
4 can constitute a sufficient legal provocation to reduce a
5 crime from the crime of murder to manslaughter.

6 To be manslaughter the killing must be in sudden heat
7 and passion. If the heat and passion had cooled or if
8 there was sufficient time between the provocation if any
9 and the killing for the passion to cool the killing would
10 not attributed to heat and passion but to malice. Any
11 sufficiency of cooling time depends upon whether there was
12 time considering all the circumstances for a person of
13 ordinary reason to cool off.

14 If you find that the State has not proven murder
15 beyond a reasonable doubt and you then consider the crime
16 of voluntary manslaughter and you find that the State is
17 also not proven voluntary manslaughter beyond a reasonable
18 doubt then, ladies and gentlemen, you would be required to
19 find to defendant not guilty.

20 In addition to the crime of murder which also
21 includes the crime of voluntary manslaughter should you
22 find that there has been sudden heat and passion that
23 produced the killing there is the crime charged which is a
24 violation of Section 16-23-490 of our code of laws. This
25 section reads, "that if a person is in possession of a

1 firearm do visibly displays what appears to be a firearm
2 or visibly displays a knife during the commission of a
3 violent crime and is convicted of committing or attempting
4 to commit a violent crime then they will be subject to
5 additional penalties for having that weapon during the
6 crime of violence.

7 Ladies and gentlemen, the State's burden of proof is
8 to show that this defendant did here in Chesterfield
9 County either have possession of a firearm, visibly
10 display what appeared to be a firearm or visibly have a
11 knife as part of the elements of this crime. Also the
12 State would be required to show that the defendant was in
13 fact guilty of a violent crime and I do tell you that both
14 murder and manslaughter are violent crimes.

15 So before you could find that you even address the
16 issue of whether or not the State has met it's burden of
17 proof as to the elements of the possession of a crime --
18 I'm sorry. The elements of possession of a weapon during
19 a crime of violence you must first find that the defendant
20 has in fact committed a crime of violence.

21 Ladies and gentlemen, the laws of South Carolina
22 recognizes right of every person to defend themselves from
23 death or serious bodily harm. And to do that a person may
24 use such force as is necessary even to the point of taking
25 human life. In other words self-defense is a complete

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1 defense and entitles one who is charged with murder to a
2 finding of not guilty if the legal elements of
3 self-defense are shown to your satisfaction from the
4 evidence.

5 Since self-defense is a complete defense if, it is
6 established you must find the defendant not guilty. There
7 are four elements required by law to establish
8 self-defense:

9 First, the defendant must be without fault in
10 bringing on the difficulty.

11 Second, the defendant must have actually believed he
12 was in imminent danger of losing his life or sustaining
13 serious bodily injury or that he actually was in such
14 imminent danger.

15 Third, if his defense is based upon his belief of
16 imminent danger a reasonable, prudent man of ordinary
17 fitness and courage would have entertained that same
18 belief. If the defendant actually was in imminent danger
19 the circumstances were such as would warrant a man of
20 ordinary prudence, firmness and courage to strike the
21 fatal blow in order to save himself from serious bodily
22 harm or losing his own life.

23 In evaluating the reasonableness person standard you
24 may consider along with all the other factor you deem
25 reasonable and appropriate, the physical condition of the

1 parties, the circumstances surrounding the events that
2 were going on as to whether there had been any prior
3 difficulties that had existed, and.

4 Fourth, ladies and gentlemen, is that the defendant
5 had no other reasonable means of avoiding the danger of
6 losing his own life or sustaining serious bodily injury
7 than to act as he did in this particular instance.

8 The absence of self-defense must be proven beyond the
9 State -- by the State beyond a reasonable doubt. So it is
10 not incumbent on a defendant to prove self-defense. It is
11 upon the State to prove beyond a reasonable doubt that
12 self-defense does not exist. I further tell you, ladies
13 and gentlemen, that an individual has no duty to retreat
14 if by doing so they would increase their danger of being
15 killed or suffer serious bodily injury.

16 Ladies and gentlemen, as I told you one of the
17 elements of self-defense is that the defendant was without
18 fault in bringing on the difficulty. This requires some
19 further elaboration. The reason for the requirement is
20 obvious. It would be entirely unreasonable to permit a
21 man to deliberately provoke an act of aggression against
22 himself and then shield himself against responsibility for
23 the death of his adversary by pleading the law of
24 self-defense.

25 It would be just as unreasonable to withhold from a

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1 man the right to defend his life against the deadly
2 assault merely because he had been guilty of some rudeness
3 or bad manners or disrespect not intended nor reasonably
4 calculated under all the circumstances to provoke a deadly
5 assault. So both common sense and the law agree that one
6 is not deprived of the right to plead self-defense in
7 justification of a killing unless their conduct or fault
8 was of such a nature as was reasonably calculated to and
9 did provoke the deadly assault.

10 Self-defense is not available to a person who uses
11 such language so derogatory as is reasonably calculated to
12 bring on a difficulty in which does actually contribute to
13 the bringing on of a physical encounter. Now, the person
14 who is being assaulted, being themselves without fault by
15 that I mean legal fault reasonably apprehends death or
16 serious bodily harm unless he had killed the other person
17 the killing is excusable and the accused is entitle to be
18 acquitted.

19 The party who is attacked is the judge of their peril
20 and can act safely upon the appearance, facts and
21 circumstances surrounding them at that time they shoot.
22 In the situation should be determined from the standpoint
23 of the defendant. It being for you the jury to say
24 whether or not his apprehension of immediate death or
25 injury or serious bodily harm was reasonable and would

1 have been felt that way by a man of ordinary reason and
2 firmness.

3 Now, whether there was reasonable appearance of
4 danger to justify the killing is a question of fact for
5 you the jury and as I say in making your determination you
6 should consider the condition of both parties. You could
7 consider all of the circumstances that were existing at
8 that time. The appearance to the defendant at the time
9 the fatal shoot was fired or was such that he could not
10 reasonably and safely avoid taking of the life of the
11 deceased and a man of ordinary reason and courage would
12 have arrived at such a decision then it is not necessary
13 for him to go any further. He should be acquitted.

14 Ladies and gentlemen, one who has a right to use
15 force in repelling force or in his self protection cannot
16 be required to make an exact calculation of the degree or
17 quantity of force which must be necessary for his complete
18 protection from loss of life or serious bodily harm.

19 If you find that the defendant was without fault in
20 bringing on the difficulty he has the right of
21 self-defense and the right to use such necessary force as
22 required for his complete protection from loss of life or
23 serious bodily harm. And he could not be limited to the
24 degree or quantity of the attacking, opposing force.

25 That is to say the defendant would not be required to

1 expect in defending himself to use just as much force as
2 was used against him and no more. But he had the right to
3 use so much force as appears to be necessary for his
4 complete self protection and which in the mind of a person
5 of ordinary reason and firmness would have appeared to be
6 necessary to prevent the loss of life or serious bodily
7 harm.

8 To that end, ladies and gentlemen, if a person is
9 justified in defending himself or others and in firing the
10 first shot then he's also justified in continuing to shoot
11 until it is apparent that the danger to his life and body
12 has completely ceased.

13 Ladies and gentlemen, one may act on appearances.
14 That person make mistaken. The law does not hold someone
15 to a refined assessment of danger provided of course they
16 acted as a person of ordinary coolness and courage would
17 have acted or should have acted in meeting the appearance
18 of danger.

19 A person does not have to wait until their assailant
20 gets a drop on them. They have the right to act under the
21 law of self-preservation to prevent the assailant from
22 getting the drop on him. In determining whether or not a
23 defendant had a right to use force and self-defense as I
24 say you may consider all of the circumstances surrounding
25 the events that were taking place at the time and whether

1 or not a reasonable and prudent person would have felt
2 that they themselves were in danger under those
3 circumstances and that it was necessary to fire the fatal
4 shots.

5 Ladies and gentlemen, if you have a reasonable doubt
6 of the defendant's guilt after consideration of all the
7 evidence including the evidence of self-defense then you
8 must find him not guilty. On the other hand if you have
9 no reasonable doubt of the defendant's guilt after
10 considering all of the evidence including the evidence of
11 self-defense then you would be required to find the
12 defendant guilty.

13 Ladies and gentlemen, each of you have undertaken an
14 oath. You have told the State and you have told the
15 Defendant and you have told the system that you will well
16 and truly try this case and a true verdict deliver based
17 on the facts as you find them and the law as I have given
18 it toto you as you apply to those facts. When you do
19 that, ladies and gentlemen, no one will have a right to be
20 upset with your verdict whatever that verdict maybe
21 because you will have fulfilled your obligations in this
22 matter. As I said you have no friends to reward here.

23 You have no enemies to punish here. You have been
24 selected as you neutrals to listen to this case, to weight
25 the evidence, to determine what took place, and to

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1 determine whether or not the State has met it's burden of
2 proof to establish beyond a reasonable doubt the defendant
3 guilty as to those charges.

4 Your verdict in this matter must be unanimous. It
5 cannot be an eight and four or seven and five or nine and
6 three or some combination. Therefore, it must be a
7 unanimous verdict. I have printed out a verdict form.
8 And it got the possible verdicts on it. Please, again, do
9 not infer by the way that I have listed the possible
10 verdicts that I am somehow suggesting to you what your
11 verdict should be. Again, I have no opinion in this
12 matter.

13 But when you list something you have got to put
14 something in front of something else, so that's what I
15 have had to do. There are two separate indictments. You
16 should consider the indictments separately. The first
17 indictment is 2002-GS-13-137. It charges murder. The
18 verdict form says, "We the jury by unanimous consent find
19 the Defendant, Oscar James Fortune," and you have three
20 choices.

21 You can find the defendant not guilty. You can find
22 the defendant guilty of murder. You can find the
23 defendant guilty of voluntary manslaughter. Then it goes
24 on to say as to Indictment 2005-GS-13-1222 charging
25 possession of a weapon during the commission of a violent

1 crime, "We the jury by unanimous consent find the
2 Defendant, Oscar James Fortune," and you can find him
3 either not guilty or you can find him guilty.

4 As I told you previously that if you find that the
5 defendant is not guilty of either murder or voluntary
6 manslaughter, then, obviously, he could not be guilty of
7 possession of a weapon during the crime of violence
8 because you have not found he committed any crime of
9 violence.

10 Now, ladies and gentlemen, in just a moment I'm going
11 to ask that you step back to your jury room. I'm going to
12 ask that you sit there and once again not discuss the case
13 because I will have a chance to talk with the lawyers
14 about the instructions that I just gave you and I will
15 have to make a determination if they have any questions as
16 to whether or not I need to bring you back out and give
17 you any further instructions.

18 Now, of course, if you don't come back out you will
19 then get the verdict form and you will get all the
20 exhibits. At that point in time I would need the
21 alternates to come out. So when the bailiff brings the
22 verdict form and the exhibits the alternates would come
23 out.

24 Then, ladies and gentlemen, you would know it is time
25 for you to begin your deliberations. As I say when you

1 have reached a verdict, whatever your verdict may be, Mr.
2 Foreman, you would need to sign it and date it on behalf
3 of the jury, knock on the door and let us know you have
4 reached a verdict.

5 There are other times that you are entitled to come
6 out. If you have some question about what is the
7 testimony in a -- as to a particular issue you can write
8 us a note to that effect. Sign it and date it. Knock on
9 the door. Give it to the bailiff and it will be presented
10 to me and I will advise the attorneys as to what your
11 question is. If it relates to testimony we will locate
12 that testimony, bring you back out and play it back for
13 you so you can hear the witness' testimony.

14 In the event that we have a malfunction in the
15 recording then we'll have the court reporter read back to
16 you what it is that has been testified to. And unless
17 there is a stipulation as there was with respect to how
18 the gun was retrieved; that was the .25 caliber, we don't
19 tell you what the evidence is. We bring you back out and
20 you listen to the testimony because you have to make your
21 factual determinations.

22 Likewise, if you have some question as to what my
23 legal instructions were, write me a note to that effect
24 and I'll bring you back out and give you such further and
25 additional and clarifying instructions as maybe

1 appropriate if you have some question.

2 Ladies and gentlemen, again, thank you very much for
3 your attentiveness in this matter. If all 14 of you would
4 at this time step back to the jury room while I discuss
5 the matter with the attorneys.

6 (WHEREUPON, the jury panel was excused from the
7 courtroom at 3:48 p.m.)

8 THE COURT: Any proposed additions or deletions by
9 the State?

10 MR. HALES: Your Honor, only one thing with respect
11 to the self-defense charge. I didn't hear and you may
12 have said it, was element test. If any one of those
13 elements is not met then self-defense is not available to
14 the defendant.

15 MR. SALEEBY: I think Your Honor covered that. That
16 was all in the -- it was up to the State to prove beyond a
17 reasonable doubt that it was not self-defense and went on
18 to name ---

19 MR. HALES: And, yes, sir, you did do ---

20 MR. SALEEBY: You were reading straight from the book
21 when you did that.

22 THE COURT: And as to the Defense, does the Defense
23 have any proposed additions or deletions?

24 MR. SALEEBY: No, sir.

25 THE COURT: All right. I think I'm just going to

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1 bring the jury back and I'll cover it this way. I'll tell
2 them this way, "With respect to the charges murder,
3 voluntary manslaughter and possession of a weapon during a
4 crime of violence that the State has to prove all elements
5 of those charges. Failure to do so will be a failure of
6 the State to meet it's burden of proof.

7 Likewise, if there is one of the elements of
8 self-defense that does not exist then self-defense does
9 not exist as well."

10 MR. HALES: Thank you.

11 THE COURT: If you will bring the jury back.

12 (WHEREUPON, the jury panel enters the courtroom at
13 2:50 p.m.)

14 THE COURT: Thank you very much. Members of the
15 jury, briefly I just want you to understand that when the
16 State has the burden of proof it must prove beyond a
17 reasonable doubt each and every element of the crime that
18 has been charged. So if a crime has got three elements
19 and the State proves two out of the three it is failed to
20 meet it's burden of proof and therefore the defendant
21 would not be guilty of the charge because the State had
22 not proven all the elements of that charge beyond a
23 reasonable doubt.

24 As it relates to the defense of self-defense there
25 are various elements of that defense and therefore, if all

1 of those elements do not exist, if one of those is missing
2 so is the defense of self-defense. But the burden is
3 always on the State to prove each and every element of a
4 crime beyond a reasonable doubt.

5 And, likewise, the burden on the State to prove
6 beyond a reasonable doubt that at least one of the
7 elements does not exist with respect to self-defense.
8 Now, having said that I am going to ask that all jurors
9 return to the jury room. Other than Mr. Reed and Mr.
10 Jackson and if y'all will just stay outside while the 12
11 go back I would appreciate it.

12 So all other jurors return to the jury room. If
13 either of you have got something in there go back and get
14 your jacket or anything else.

15 (WHEREUPON, the jury panel was excused from the
16 courtroom at 2:54 p.m.)

17 THE COURT: Sixty one and circle. Your name, 156 and
18 I apologize. I had never written it in. One matt that I
19 need to get, gentlemen, from you is that everyone looks to
20 be in good health and I anticipate that all will be able
21 to complete the process of deliberating and reaching a
22 verdict.

23 But I am going to ask that if you will on this sheet
24 of paper write down a telephone number where you can be
25 reached in the event that somebody quickly becomes ill or

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1 something. Because of this I don't want you to talk with
2 anybody about the case or allow anyone to talk with you
3 about the case. I'm going to still consider you an active
4 status at this particular point in time.

5 Hopefully, we won't need you back but in the event
6 that we did I would want to be able to have you come back,
7 place you under oath and you be able to truthfully tell me
8 that nobody had talked with you; that you hadn't talked
9 with anybody; that you hadn't read any news articles; that
10 you hadn't watched anything on t.v; that you had done just
11 like this jury and kept yourself pure as a lily of the
12 field and were not being in any way influenced by anything
13 outside of the testimony you heard today.

14 I appreciate that very much. Should I not see you
15 again I appreciate your conscience service this week as a
16 juror and you are if not called back you are excused.
17 Thank you very much.

18 Counsel, if you will please get the exhibits together
19 to be sure we have everything and take a look at the
20 verdict form.

21 (WHEREUPON, the jury panel was excused from the
22 courtroom to begin deliberations at 2:58 p.m.)

23 (WHEREUPON, the Court is in recess at 3:00 p.m. and
24 reconvenes at 4:00 p.m.)

25 QUESTION FROM THE JURY

1 CLERK OF COURT: Both of them give me their cell
2 phone number if the jury had any questions or reach a
3 verdict. They would be five minutes from the courthouse.

4 THE COURT: Well, it is now about seven minutes after
5 4:00 o'clock. At four o'clock we were given a request by
6 the jury as to further instruction. Have you called these
7 individuals as a result of the information that they gave
8 you?

9 CLERK OF COURT: Wayne Jordon was calling outside the
10 door.

11 THE COURT: And when Mr. Jordan called outside the
12 door for both of them what did you find out?

13 CLERK OF COURT: Kevin's voice mail picked up and I
14 asked him to call. The jury had a question, and I think
15 he may have got J.R. on the phone but he said he couldn't
16 understand and believe he said -- I understood J.R. said
17 he was in Patrick.

18 MR. JORDAN: I left to two voice mails for both of
19 them to call in.

20 THE COURT: And how long ago has it been?

21 MR. JORDAN: It was like two or three minutes ago and
22 I think he said Patrick. I don't want to be wrong.

23 THE COURT: All right. I will wait until ten minutes
24 after 4:00 by the clock here in the courtroom, and if we
25 have no further information from them I will bring the

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1 jury out and proceed in their absence.

2 MR. JORDAN: He said he would be here in five
3 minutes.

4 THE COURT: Tell him to be here in five minutes or
5 bring his check book.

6 When this Court is in session and the jury is out I
7 don't want y'all wondering off particularly without
8 clearing it with the Court. I didn't give permission to
9 anybody to be gone for five minutes or anything else. I
10 don't anticipate making juries wait 15 minutes because
11 y'all have decided that you have some place more important
12 to be than being in the courtroom.

13 When a case starts that's what is important not to be
14 off somewhere else and not without permission of the
15 Court. Each of you gentlemen understand that?

16 MR. JOYNER: Yes, sir.

17 MR. HALES: Yes, sir.

18 THE COURT: Very good. Bring me a jury.

19 (WHEREUPON, the jury panel enters the courtroom at
20 4:15 p.m.)

21 THE COURT: Ladies and gentlemen, I have received a
22 note indicating that you would like for me to go over
23 again my charge of murder as well as my charge of
24 voluntary manslaughter and give to you some examples where
25 murder may be reduced to the crime of voluntary

1 manslaughter as a result of examples of passion and heat
2 in a moment and so I'm going to do that for you.

3 I didn't tell you previously but in fact that murder
4 is a statutory crime. As far as a definition is concerned
5 the definition has been in large part defined by case law.
6 The statute says, "Murder is the killing of any person
7 with malice aforethought, express or implied. So the
8 definition of murder is very simple. When you look at it
9 from a textbook standpoint we find what murder is in
10 practical terms might not be that easy to place it in
11 layman's language.

12 So murder is the killing of any person with malice
13 aforethought, express or implied. In other words, for the
14 State to prove that a defendant is guilty of murder the
15 State it must be proved beyond a reasonable doubt that the
16 defendant who has been charged did kill a person and that
17 the killing was done with malice aforethought.

18 As I previously told you the State is not required to
19 prove any motive for the killing. The State must prove
20 that that defendant did kill another person with malice
21 aforethought.

22 Malice is the intentional doing of a wrongful act
23 without just cause or excuse and with the intent to
24 inflict injury. It's also indicates a wicked or depraved
25 spirit that is intent on doing wrong. It implies

1 wickedness and excludes just cause or just excuse.

2 It indicates a formed purpose and design to do a
3 wrongful act under the circumstances that excludes any
4 legal right to do it. The term, 'aforethought' means that
5 that intention to do the unlawful act was conceived or
6 planned some time before the actual commission of that
7 illegal act. It is not necessary that malice exist for
8 any particular length of time prior to the killing
9 occurring.

10 The malice need not be in the mind of someone doing
11 the killing for any particular length of time before the
12 act of killing in order to render the killing murder. So
13 if malice is there, if it's present in the mind of the one
14 who is doing the killing any length of time before the
15 killing then it's presence would be sufficient to render
16 that killing murder.

17 So there must be malice aforethought. It must be at
18 some point in time prior to the killing but if it is there
19 for any length of time before the doing of the act, doing
20 the killing, then it satisfies that portion that's
21 required it aforethought.

22 Malice may be either express or it may be inferred
23 malice. Now, ladies and gentlemen, the word 'express or
24 inferred' do not mean any different kinds of malice but
25 merely the manner in which the only kind known in the law

1 is shown to exist. When that's express malice, that's
2 where there something manifested a violent, deliberate
3 intention to unlawfully take away the life of another
4 human being.

5 On the other hand malice maybe inferred where one in
6 intentionally and deliberately does and unlawful act which
7 he or she knows to be wrong and in violation of their duty
8 to another. Malice may be inferred where no legal
9 excuse or legal provocation for the killing appears and
10 when circumstances surrounding the killing show an
11 abandoned heart or a heart fatally bent on mischief.

12 Now, ladies and gentlemen in order for the act of the
13 defendant to be murder it is always necessary that the act
14 of the defendant be the act that is the proximate, the
15 direct, the cause for which the death would not have
16 occurred but for the fact by the defendant.

17 Now, there can sometimes be various contributing
18 causes in order to have somebody being guilty of murder.
19 Their act of shooting or stabbing or administering poison
20 or whatever the mechanism maybe. Doesn't have to be the
21 exclusive reason that the person died but it has to be a
22 main contributing cause of that person's death in order to
23 convict someone of murder.

24 Now, our law says that one intentionally kills
25 another with a deadly weapon the inference of malice can

1 arise from the use of a deadly weapon. Our law as defined
2 a deadly weapon to include any object or substance which
3 reasonably could be used to cause bodily harm and a weapon
4 such as a pistol is a dead instrument.

5 Malice may be inferred from the use of that dead
6 weapon. You are permitted to infer malice from the
7 conduct of the defendant in the use or handling of a
8 deadly weapon if their use or handling of the deadly
9 weapon that conduct results directly in the death of
10 another and that conduct is so inexcusable, so aggravated,
11 so grossly reckless to show an actual, intentional
12 disregard of the consequences of how they were handling
13 that weapon and an indifference towards human life.

14 Now, ladies and gentlemen, if facts are proved beyond
15 a reasonable doubt sufficient to raise an inference of
16 malice from the use of a deadly weapon or the improperly
17 handling of a deadly weapon. Handling a deadly weapon in
18 such an aggravated, grossly reckless manner as to show a
19 conscious disregard for the consequences that may happen
20 on how you handle the weapon.

21 If those facts are proved beyond a reasonable doubt
22 an inference can arise of malice. But this is just an
23 inference. It's not mandatory that you find malice from
24 that, but you can infer malice from the use of a deadly
25 weapon or the gross negligence and intentional disregard

1 of the consequences to human life and how you handled that
2 weapon.

3 You may infer it. It is an evidentiary fact that is
4 to be taken into consideration with you along with all the
5 evidence in this case from whatever source it may come
6 that relates to the issue of malice. You can give it such
7 weigh as you determine it should receive. A defendant is
8 the not required to prove the absence of malice and,
9 therefore, ladies and gentlemen, you may accept or reject
10 any inference that may arise from the use of a deadly
11 weapon.

12 If you find that the State has not proved beyond a
13 reasonable doubt that this defendant did kill a person
14 with malice aforethought then you may consider the crime
15 of voluntary manslaughter. And if you have a reasonable
16 doubt as to whether the State had proved murder beyond a
17 reasonable doubt or whether they've proved manslaughter
18 beyond a reasonable doubt then the defendant would be
19 entitled to that doubt and would be entitled to a finding
20 of guilty on the charge of manslaughter versus murder.

21 But, of course, you can't find a defendant guilty of
22 anything unless the State proves each element of murder
23 beyond a reasonable doubt, and unless the State proves the
24 elements of manslaughter beyond a reasonable doubt. But
25 if you had some doubt between which it was you would

1 resolve that doubt in favor of voluntary manslaughter.

2 Now, in order for the State to prove a defendant
3 guilty of voluntary manslaughter the State must prove
4 beyond a reasonable doubt that the defendant took the life
5 of another in a sudden heat and passion and upon
6 sufficient legal provocation. The law recognizes that
7 sudden heat and passion may for the time being affect
8 one's self-control, temporarily disturb the sway of one's
9 reason and therefore reduce the crime from murder to
10 manslaughter provided there was sufficient legal
11 provocation.

12 Sufficient legal provocation must be such as would be
13 calculated to cause a person of ordinary reason and
14 caution to become enraged; that is to experience sudden
15 heat and passion and thereby to lose control of themselves
16 temporarily. Words alone, however, vulgar or insulting
17 are not sufficient to legal provocation.

18 As I indicated to you merely by way of illustration
19 and illustration alone the follow acts of provocation
20 sufficient to negate malice which will reduce the crime
21 from murder to manslaughter if it appears the act was done
22 in sudden heat and passion or such things as follow:

23 Pointing a gun at the defendant, excessive force to
24 effect an otherwise lawful arrest, sudden combat in the
25 which one person was killed by another without previously

1 forming an intention to do so, finding one's spouse in the
2 act of adultery, finding one's child in an act of improper
3 or illicit intercourse, previous or prior fighting between
4 the parties or an unjustifiable assault made with violence
5 or such circumstances of indignity such as spitting in the
6 face of someone can constitute circumstances that would
7 result in heat and passion.

8 Therefore, ladies and gentlemen, any of above or any
9 such act which is upon sufficient legal provocation based
10 on the evidence in this case would allow you to make a
11 finding that the killing was one that occurred during
12 sudden heat and passion as opposed to one under
13 circumstances of murder.

14 Ladies and gentlemen, are there other questions that
15 you have at this time as it relates to your particular
16 question? Mr. Foreman, are you aware of whether or not
17 the jury in it's discussions and your writing this
18 question out needs for me to go over anything else?

19 JURY FOREPERSON: Not specifically at this moment.

20 THE COURT: Very good. Then I'm going to let you
21 step back to your jury room and again begin your
22 deliberations. I will bring you back out in the event I
23 need to cover something else with you.

24 (WHEREUPON, the jury panel was excused from the
25 courtroom at 4:30 p.m.)

Question from the Jury

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1 (WHEREUPON, Court's Exhibit No. 1 was marked for
2 identification and received into evidence.)

3 (WHEREUPON, a bench conference was held off the
4 record, but out of the presence of the jury.)

5 MR. SALEEBY: We would ask -- testify about the
6 number of times he was shot, the deceased, that Your Honor
7 charged again and than it's the State's duty to prove that
8 the defendant did not act in self-defense and that if he
9 can shot once or if he's shot at. If he shots once he can
10 shoot whatever number of times, whatever the words are,
11 that a prudent person feels necessary to feel safe from
12 continuing to be harmed. I think they dovetails into what
13 they looked at.

14 THE COURT: I was asked at this time only to cover
15 the issues of the difference between murder and voluntary
16 manslaughter. And at this particular point in time, not
17 having been asked by the jury, I would decline to charge
18 them on self-defense until such time as they indicate
19 further.

20 I gave the jury sort of a change to respond to the
21 Foreman by asking if I had correctly interpreted the
22 question and he indicated to me that there was nothing
23 further that I need to advise him about at this point. So
24 I note your request and I am going to respectfully deny it
25 at this time.

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1 MR. SALEEBY: Note my exception.

2 THE COURT: We will continue to be in recess. All
3 parties please do not leave the courthouse grounds.

4 (WHEREUPON, Court's Exhibit No. 2 was marked for
5 identification and received into evidence.)

6 (WHEREUPON, Court was in recess at 4:31 p.m. and
7 reconvenes at 5:01 p.m.)

8 VERDICT OF THE JURY

9 THE COURT: Ladies and gentlemen, I do not know what
10 the verdict is going to be in connection with this trial.
11 I do know, of course, that any time matters such as this
12 is being handled in Court that there are certain feelings
13 by the individual who has suffered the loss of a loved one
14 and there are feelings by individuals whose loved one is
15 being charged with causing that loss improperly.

16 But everything that has been done to this point has
17 been done in a very deliberate fashion. All of you have
18 behaved yourself very well. For that I commend you. I
19 know this is the type of case that's difficult for all
20 involved.

21 I am going to have to request that you continue to
22 behave yourself in that way. I can't tolerate any
23 outbursts, any carrying on. The victim is probably going
24 to disappoint somebody as most verdicts do. But this jury
25 has worked hard. They have paid close attention to

Verdict of the Jury

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1 everything that has taken place and they deserve to have
2 their jury verdict received, whatever it is, without a
3 long emotional outburst.

4 Should that large emotional outburst occur I will
5 have no choice other than to deal with that as a contempt
6 of Court which would have to result in someone being
7 sentenced for contempt regardless of what the outcome is.
8 So whether you are disappointed or elate and made happy by
9 this verdict you must keep your emotions in check or else
10 you will be subjecting yourself to a contempt of Court
11 citation. Bring me the jury.

12 (WHEREUPON, the jury panel enters the courtroom at
13 5:10 p.m.)

14 THE COURT: Mr. Foreman, have you reached a verdict.

15 JURY FOREPERSON: Yes, we have.

16 THE COURT: Thank you very much. If you will hand it
17 to the bailiff. Mr. Foreman, members of the jury, I want
18 to thank you for your services that you have provided in
19 connection with the trial of this case. Once I read your
20 verdict it will then be necessary that I impose some
21 sentence on the defendant or not impose some sentence on
22 the defendant depending on what happens when I read the
23 verdict form.

24 After a verdict is announced and the Judge does
25 whatever the Judge does based on the verdict form you will

1 be dismissed. If someone wants to talk with you about
2 what took place there in your jury room then you can talk
3 with them if you would like to. If you don't want to you
4 don't have to and they can't make you and should they
5 insist on talking to you then you are, of course, entitled
6 to report that to the Clerk and I will deal with anybody
7 who tries to invade the sanctity of your jury room.

8 If you decide to talk with someone and later make a
9 determination or while you're talking the decide I don't
10 want to talk anymore you have an absolute right to stop at
11 that time and tell the people that you don't want to talk
12 anymore. So I want you to understand that and I want to
13 tell you again that I appreciate so much your services and
14 your hard work that you have done in connection with this
15 matter.

16 As to the case of the State of South Carolina County
17 of Chesterfield in the Court of General Sessions as to
18 Indictment 2002-GS-13-137 charging murder we the jury by
19 unanimous consent find the Defendant, Oscar James Fortune,
20 guilty of murder.

21 As to Indictment 2005-GS-13-1222 charging possession
22 of a weapon during the commission of a violent crime we
23 the jury by unanimous consent find the Defendant, Oscar
24 James Fortune, guilty. Mr. Hatchel, is this the verdict
25 of each member of your jury?

Verdict of the Jury

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1 JURY FOREPERSON: It is.

2 THE COURT: Ladies and gentlemen, if you would if
3 this is in fact your verdict would you please raise your
4 right hand to indicate that. Let the record reflect that
5 all members of the jury have indicated a raising of their
6 right hand. Individual polling request by the Defendant?

7 MR. SALEEBY: None, Your Honor. No, sir.

8 THE COURT: Thank you. My hearing hadn't gotten any
9 better during the course of the week. Again, thank you
10 very much. I am going to -- I see that you have checks
11 available for you at this time. They are simply a token of
12 our appreciation for your services. If you need some
13 excuse for work that will be available for you. I am
14 going to require that all people who are currently in this
15 courtroom other than you jurors to remain where you are so
16 that you will have an opportunity to leave and go get in
17 your cars and have a comfortable time going home. We'll
18 not see you tomorrow. My best to you and thank you again.
19 You're excused at this time.

20 (WHEREUPON, the jury panel was excused from the
21 courtroom at 5:08 p.m.)

22 SENTENCE OF THE COURT

23 THE COURT: Mr. Fortune, Mr. Quinn, Mr. Saleeby AND
24 State's attorneys, if you will come forward for
25 sentencing. You have a verdict -- do you have a

1 sentencing sheet prepared?

2 MR. JOYNER: Yes, sir. Mr. Hales is going to get it.

3 THE COURT: All right. Having heard all of the
4 evidence in connection with the trial of the case I do not
5 need a further -- and the jury having made the decision in
6 this matter, I do not need a further recitation of facts
7 at this time. So, Mr. Saleeby, I will be glad to hear
8 from you or Mr. Quinn in connection on behalf of
9 Mr. Fortune.

10 MR. SALEEBY: Yes, sir. Mr. Fortune is 37 years old,
11 Your Honor. His wife is Blanche Lee Fortune is 44. He
12 has five children. [REDACTED]

13 [REDACTED]
14 [REDACTED] all of which he
15 supports, Your Honor, and always has.

16 He's graduated and he graduated from Bennettsville
17 high school in 1986. He worked for Takata/Highland
18 Corporation for two years from '89 to '91. Worked for
19 Georgia Pacific for six years from '91 through '97 and
20 then for CV Transport Corporation for three years from '97
21 to 2000. And then for KO Truck for six years, 2000
22 through the present.

23 He has absolutely no criminal record at all, and the
24 jury has spoken this time. He's is a model citizen, Your
25 Honor. Of course, we'll have motions after your

1 sentencing. I would say with regards to Your Honor does
2 have leeway with this -- as you can particularly with the
3 gun charge; that two guns involved. A legal registered
4 gun was there. It was not retrieved from anywhere. There
5 was no evidence to contradict he was in the car.

6 And if, Your Honor, I know paid very, very good
7 attention to the facts. I feel particularly for
8 Mr. Fortune in that this incident didn't start with him.
9 And won't been ending with him, probably. But he's the
10 first of some that it will. So he's been a model client,
11 a model parent, a model citizen, Your Honor. One that we
12 can be proud of and its quite unusual. It's quite
13 unfortunate. Particularly unfortunate that he was in his
14 bed minding his business and his cousin -- two ladies and
15 a man had some dispute. Uncontroverted by the State's
16 witness. He got out of head and went to help or whatever
17 happened.

18 Of course, the jury found what they found. I've got
19 different ideas why they found what they found, but that's
20 within their purview. I would ask particularly with the
21 gun charge and any other way you can with the murder
22 charge to be as lenient on him as you can be.

23 He is -- we know what the punishment is, Your Honor.
24 Don't think he needs to be rehabilitation. I think he
25 acted like 75 percent of men would have. And we just ask

1 for the mercy of the Court?

2 THE COURT: Thank you. Anything further from the
3 State?

4 MR. JOYNER: Judge, if we could I'd like to give Mrs.
5 Shields an opportunity to be heard. Also there is
6 Mrs. Denise Shields who is Anthony's wife. This is Mr.
7 Damien Shields who is his brother.

8 THE COURT: I will be glad to hear from each of you.
9 You can choose which between the two of you would like to
10 go first. Either Mr. Shields or Mrs. Shields. Makes no
11 difference to the Court.

12 MRS. SHIELDS: Your Honor, I stand here today on
13 behalf of not just Anthony but our family as well. I can
14 hear that the Defense has described Mr. Fortune as you
15 know an upstanding citizen but so was my husband. He had
16 to leave behind two children, leave me to be a single
17 mother, leave my inlaws to help me raise my children.

18 It shouldn't have to be that way. It should never
19 have happened. Anthony was killed two days before
20 Christmas. Can you imagine how I felt having to tell my
21 children two days before Christmas that their daddy was
22 never coming back home.

23 And it's not just. That happened four years ago. We
24 live through this every single day. He's a free man.
25 Yes, you can enjoy your children. My husband didn't get

1 the opportunity. We had plans, but, no, I didn't have the
2 opportunity to enjoy my husband along with my children.

3 So, Judge, would you please, I beg your mercy to give
4 him the maximum sentence for what he has been charged
5 with. Thank you.

6 THE COURT: Mr. Shields.

7 MR. SHIELDS: Your Honor, I'd like to say that I
8 appreciate everything the State has done to make this a
9 case as strong as it's was. That's the on brother I had.
10 That's the only brother I had. I had to go on that call
11 and see my brother lying out there dead. Behind what?
12 Nothing. Over nothing. Really, over nothing. He lost
13 his life. I had to take that phone call. I had to
14 witness my brother laying out like that. And I know you
15 got a brother, and he will want the same type justice for
16 you.

17 I late that it had to take this long to come to this
18 cause we live through this four years. Every day, every
19 single day. Everybody walks around doing what they want
20 to do. Do you know how much nights of sleep I lost? How
21 many days I cried, wanting to touch my brother, for him to
22 be at my wedding. I couldn't enjoy none of that. That's
23 all I have, Judge.

24 THE COURT: Thank you, Mr. Shields. Mr. Saleeby,
25 Mr. Quinn, prior to imposing sentence considering the

1 matter further. I am assuming that there is a motion by
2 the Defendant for a new trial based upon an insufficiency
3 of the evidence that you would like to make.

4 MR. SALEEBY: Yes, sir, certainly, Your Honor. We
5 think there was insufficient -- we're sure that it is.
6 It's just uncontroverted that there were shots fired by
7 several State's witnesses and by Mr. Shields. And that
8 was the .25 caliber which the shell casing was found in
9 the cab cargo area of his truck. It was a Saturday Night
10 Special, whatever Your Honor wants to call it. And we do
11 know that it was fired and two witnesses, at least two
12 testified, that they heard a shot that was lighter or
13 softer in sound and then several other shots as His Honor
14 charged the law.

15 Then can't escape back in the car man's got a gun
16 pointed at you. Fortunate nobody else was hit. It's not
17 whether he was hit or whether it was Sonta McCall was hit.
18 Either one that force was justified. And he did that and
19 it's unfortunate that it happened at all.

20 But the case is replete with that type of evidence
21 particularly from Special Agent Paavel. And the other
22 witnesses that talked about the shoot first of the .25
23 caliber and then the louder shot from a .38 which anybody
24 knows anything about guns the bigger the somehow lie --
25 came out. What's that got to do with contact, but we

1 think the evidence is replete with the lack of evidence.
2 We ask you to sit aside the verdict as to guilty of both
3 charges.

4 We would also renew all our other objections, Your
5 Honor, particularly the one sort of bifurcated with regard
6 to change of venue. I don't have the numbers in front of
7 me. It's on another pad somewhere, but if Your Honor is
8 correct under the Statute 75 -- it used to be return
9 receipt requested. It's not now. Seventy-five notices to
10 appear have to be sent out by the Clerk duty and she said
11 she sent out 160 something, but it is quite unusual, Your
12 Honor, that less than half showed up and there was no
13 attempt made as I've seen in every other Court that I
14 practiced in there was no reason given as to why they were
15 not here.

16 Now, as the Court very diligently poled the jury and
17 I find it quite hard to believe human nature being what it
18 is that the enormous number of people that either knew
19 Anthony Shields or his family or law enforcement that
20 worked this case. If you take away them, Your Honor, that
21 only left 14 people out of the entire hundred and 60
22 something notices that were sent out for us to pull this
23 jury from.

24 This case, Your Honor, reminds me I think dovetails
25 with the civil case which I think the legislature passed a

1 law or they anticipate to have, Your Honor, the about
2 stopping any and everyone from suing the railroad and what
3 not down in around Barnwell County because everybody is so
4 close with the attorneys and that's exactly what we have
5 here.

6 There were several, several witnesses that were
7 allowed to stay out there and several that were on the
8 jury that said at first it would affect them and then
9 backed up and said that they could be fair. With all the
10 reasonable doubts we had in this case and quickly as this
11 verdict was reached we don't think that that was the case,
12 Your Honor. And we think that clearly and Old England
13 Days you were tried by a jury of your peers which is what
14 our law says.

15 But a jury of your peers -- and Your Honor is a very
16 learned man, in the old days a jury of your peers were
17 people that knew your. Your neighbors and what not that
18 knew who you were and how you were and your truthfulness
19 and voracity. And today's Court system both federal and
20 state do our best, both sides, to eliminate the jurors
21 that have a connection with one side or do other.

22 And here, Your Honor, I clearly think in this
23 particular case and I have tried cases in just about every
24 county of this State, have never seen such a small pool of
25 jurors that did not have some relationship with either law

1 enforcement, by going to school with them, church with
2 them, work with them, seeing them, knowing the Shields
3 family, by work, church, social friends, and clearly the
4 number I wrote down and I maybe wrong I think was there
5 were only 14, 14 out of the whole hundred and sixty odd
6 people that were first noticed that were that didn't say
7 they had any connection to either side.

8 And that, Your Honor, is our basis and was and still
9 is our basis for a new trial on that ground in addition to
10 insufficient evidence.

11 THE COURT: All right.

12 MR. SALEEBY: For lack of a fair jury trial in that
13 this jury did not -- clearly, did not more than any I have
14 ever seen and heard of was not representative of the make
15 up of Chesterfield County. And also there is terms of
16 being impartial and in terms of not knowing the
17 individual.

18 Cause even one individual, Your Honor, that had read
19 the paper March 2nd and two said yes when they read that
20 paper they pretty much thought Mr. Fortune was guilty.
21 The second person said well then they thought -- well,
22 they probably thought that, but that was probably written
23 by the prosecutorial side and at this point in time I
24 would ask Your Honor that I think -- this is no disrespect
25 to either you or the Solicitor, but the remarks that were

1 made and that newspaper column that I think six or seven
2 people read it.

3 At least that is admitted reading it came directly --
4 again, no disrespect to Mr. Joyner, was in my 26 years of
5 practicing law from my first case with Judge Chandler and
6 all the other many judges I've been with I have always
7 been told by both sides that you never, ever, ever, should
8 make comments to the paper or the press before a trial
9 starts.

10 And this was a front page article and it clearly as a
11 number of jurors said clearly came from Mr. Joyner or
12 Mr. Hales. I think Mr. Joyner -- I don't think he meant
13 to do wrong. I'm not accusing him of that, Your Honor. I
14 think he's a fine young man. I think it is -- it was lack
15 of knowledge of what we've all had as judicial warnings
16 and indeed, Your Honor, are taught in judicial school in
17 class with regards to publicity.

18 March 2nd this case it's just to close. It's a week
19 from this trial. It's the only paper around here that
20 people read. And that along with again with the make up
21 of the jury and who knew who. Went to school with who,
22 and church and did everything, Your Honor, the jury found
23 clearly, clearly, not one we could get a fair shake from.
24 We used up all ten strikes with that fifth jury and we
25 were at the mercy of whatever came out of the box after

1 that. And we don't think that Mr. Fortune got justice by
2 the jury of people that were totally indifferent, totally
3 set aside their brothers.

4 I mean their friendship or knowledge of Mr. Shields
5 particularly with his brother being a police man and
6 particularly with I think his cousin not to long ago chief
7 of police right over in Cheraw where this happened. So we
8 would also ask you to set aside the verdict on those
9 grounds, Your Honor, and we renew our motion for change of
10 venue?

11 THE COURT: Thank you. I find that based upon the
12 responses of the jury that the time I initially that your
13 motion for change of venue and your concerns about the
14 selection process were appropriate. That there was a fair
15 and impartial jury that was presented to sit on this case.
16 And I again renew or deny your motions and will allow that
17 to be decided by somebody else.

18 I do not find there was no gag order in particular
19 issue with respect to this case while sometimes it's
20 different when matters are brought to a jury panel's or
21 pool's attention is prior to trial. I still feel like
22 that the instructions I gave to the jury, the questions
23 that I asked and the conversations that I had with them as
24 they came to the rail satisfied all requirements that they
25 had set aside any prejudice if any that they had formed

1 against this defendant by reaching any opinion that they
2 may have had as to his guilt or innocence.

3 I think that that is further I a way exhibited by one
4 of the jurors who was sitting on the jury who brought to
5 everybody's attention that just to be sure she wanted you
6 to know that the same article appeared in Pageland Paper.
7 And so I asked about that as well and I did that.

8 So I feel the jury was found to be fair and impartial
9 to all parties. So your motions are respectfully denied
10 as to a new trial and as to setting aside the verdict on
11 insufficiency of the evidence and renewing your motions
12 based on issues of the jury. It never ceases to make me
13 scratch my head and pull my hair and wondered what is
14 going on when fights break out at gatherings where people
15 are supposed to be at to have a good time and how people
16 who really have nothing do with it got involved with it.

17 And then all of a sudden you are no longer in your
18 bed. You're at the Huddle House and you're not sitting in
19 the car. You're standing at an open door with a pistol.
20 This jury if I recall correctly was given evidence that
21 lead was retrieved from the floorboard passenger side of
22 the Explorer.

23 That being the case they could have concluded that
24 pistol was pointed in that direction at the time the shoot
25 that was fired was fired and that Mr. Shields could have

1 been reaching for his pistol after he had been shot in the
2 shoulder. He was in essence turned that way. Did have no
3 safety, and he could have been shot as he was reaching and
4 reflex from being shot through the shoulder area could
5 have caused him to pull the trigger.

6 Jury could have concluded that it was Mr. Fortune who
7 pulled the pistol out first. That it would have been
8 difficult for him to have gotten a pistol out of his
9 pocket so quickly in order to respond before he was shot
10 by Mr. Shields if he was shooting second.

11 Of course, the jury could have been believed his
12 story. There was simply evidence for them to make their
13 own determination, and they determined based upon the
14 evidence as it appeared to them it was not self-defense
15 nor was it voluntary manslaughter.

16 Mr. Fortune, you have lived a life which was
17 exemplarily. I get so many people who don't graduate,
18 don't work and do things that just make no sense as to how
19 they even get along, but you have been out shouldering
20 your responsibilities as a good citizen of the State and
21 the community until this event happened.

22 I don't know what your cousin told you about how bad
23 things were, but would not be surprised if it didn't, the
24 sound of that phone went off and woke you up, as if there
25 was something much more severe than it actually turned out

1 to be even when she didn't even need medical treatment.

2 However, death had occurred. The jury has found you
3 guilty of murder in connection with that. I am considering
4 all matters and considering also your absence of a prior
5 criminal record and I am sentencing you to 37 years on the
6 murder charge. Five years on the possession of a weapon
7 during the commission of a violence crime. For these
8 matters to run concurrent with each other.

9 Whatever time you have been in jail prior to any bond
10 being posted you will get credit for that. Good luck to
11 you in the future. Thank you very much.

12 END OF TRANSCRIPT OF RECORD

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County

John M. Milling, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OSCAR FORTUNE,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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?

STATEMENT OF THE CASE

Appellant was indicted by the Chesterfield County grand jury for the offenses of murder and possession of a weapon during a violent crime. R.330 – 333. His case was called to trial on March 6, 2006 before the Honorable John M. Milling, and a jury. Edward Saleeby, Jr. and Terrence Quinn represented appellant. Franklin Joyner and Kevin Hales were the assistant solicitors. R. 1.

The jury was ultimately given the verdict options of not guilty by reason of self-defense, guilty of voluntary manslaughter or guilty of murder. R. 282, l. 22 -302, l. 22. On March 9, 2006 the jury found appellant guilty of murder and possession of a weapon during a violent crime. R. 303, l. 16 – 304, l. 1. Judge Milling sentenced appellant to thirty-seven years imprisonment for murder and five years imprisonment for a possession of a weapon during the commission of a violent crime. R. 316, ll. 2- 8.

This appeal follows.

ARGUMENT

1.

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. Appellant was denied his right to a representative jury of Chesterfield County particularly where the remaining jurors disproportionately knew the decedent's family, had been exposed to media coverage about the case, or responded to other potential bias questions since the failure to make any follow-up efforts to serve the absent jurors was not reasonable.

Relevant Facts

After the judge questioned the venire, defense counsel Saleeby told the judge that a hundred and sixty-two jurors had been summoned for appellant's trial: "[O]f that hundred and sixty-two only sixty-four showed up. We all know that basic law that a jury panel is supposed to be of the complexity [complexion] and reflect the make-up of the county. That we do not have." R. 45, ll. 7-11. Defense counsel continued regarding the small venire and its ties to the decedent's family:

So 162, only half showed up and we have heard nothing from the Clerk or from the Solicitor's Office as to why they're not here. Not as to age. We couldn't find them. They couldn't be served. No returned. So that 64 only of that did show up. 41 of the potential jurors are here of that.

And that 41, cause the rest were excused, 29 of the 41 got up at least one time. That leaves 12 that didn't stand up at least one time [in response to a bias question]. Now, but I read the paper Friday. I worked with them. Some say they can do

this, that and the other. Eat dinner. Some say Mon, dad, and the other.

Your Honor, I think it's absolutely impossible and there [this is] is one Supreme Court that they'd love to get their hands on here.

R. 45, ll. 12 – 17.

The judge responded:

Well, they're going to get their chance. I do not find anything that has been shown by ya'll, the defense, with any of the people who were not present nor does it appear the jury panel is not a reasonable and accurate reflection of the makeup of male and female and a rational [racial] composition of Chesterfield County.

As to the individuals who have got close personal ties with the family members I have excused most of them. The broad questions that I asked at your request were hardly designed to have somebody stand up. At least one of those people who did stand up in response to the broad questions they properly identified them as to whether they could or could not be fair and impartial to both the State and the Defendant.

And so I do not feel there is anything wrong with the group that we have and that a fair and impartial jury can be selected from the 41 who are available for which we can draw the 12 with the State exercising its five strikes and the Defendant exercising its ten strikes.

R. 46, ll. 1 – 19.

Defense counsel Saleeby took exception to the judge's ruling. He questioned what the clerk of court had done about the "no returns or checking why summoned jurors were not present." R. 46, ll. 20 – 24. The clerk responded: "All of them that I have read I checked were here except for five which I drew a circle by. I don't know why they weren't here." R. 47, ll. 6 – 8.

The following then occurred between the judge, the clerk of court, and the solicitor:

The Court: Do you know why from the Sheriff's Department why out of the 162 ---

Clerk of Court: They were all put in the mail and were returned by the post office because he went on the new 911 system.

The Court: Did they attempt to find out why those people were not served at their known addresses and to be available?

Clerk of Court: They just come back from the post office as no such address.

The Court: Have you checked with the Sheriff's Department?

Clerk of Court: *No, Your Honor. I have not.*

The Court: And in light of what the Clerk has told me about the effort to make contact with the individuals being the names of the individuals, they being close to 100, that were not received information about that they simply had the form sent back. *They have addresses and the Clerk's Office did not ask the Sheriff's Office to assist in any way. What's the State's position in the matter?*

Mr. Joyner: Judge, I think we should proceed.

The Court: All right. This is what I am going to do. I'm going to go forward. I'm going to note your objection. I don't think we are prejudiced by attempting to select the jury, and if you can get me some case law since we're not swearing them until in the morning anyhow if you can get me case law that supports your respective positions I'll be glad to.

Mr. Saleeby: May I ask Your Honor in terms of that breach the rules or just in Your Honor's discretion where the Court - *- when there is no explanation send - - direct the Sheriff's Department to go out to find these people.*

The Court: At this particular point in time I want to select a jury and we may end up or may not weight (sic) your

position in the matter. I don't know until I have the people and an alternate seated.

Mr. Saleeby: Never seen anything like this, Your Honor.

R. 47, l. 9 – 48, l. 22.

After the jury was selected defense counsel Saleeby renewed his motion. R. 49, ll. 9 – 18. The following day the judge again repeated that he was ruling that the venire was properly summoned to court, and that he was rejecting the defense arguments on this issue. He again stated he was denying all of appellant's motions for relief on that basis. Defense counsel Quinn then renewed the objection to the "low number of jurors from which they were selected and a number that stood up for one exception [bias question] or the other . . ."

R. 54, l. 23 – 55, l. 2.

As to the change of venue issue discussed infra, the judge stated: "Maybe some four to six who indicated they may have had some opinion after reading the article. After discussing it with them they all indicated there was not problem with respective following the court's instruction to disregard those matters and set them aside. So I deny the motion for your change of venue." R. 55, ll. 3 – 20.

***Voir dire* of the available jurors**

During *voir dire*, the judge excused juror Gantz because of her relationship with the victim's family. R. 4, ll. 6 – 24. The judge also excused juror Wilson because she was best friends with the decedent's family. R. 5, l. 8 – 6, l. 8.

Juror 132, Ms. Tillman, was related to the decedent's family by marriage. She told the judge she did not know if she could be impartial. When the judge pressed

Tillman she said she could be fair. She was allowed to remain in the panel. R. 6, l. 9 – 7, l. 9.

Juror 67, Juror Lee, went to school with the decedent's father. She said she could be fair and impartial. R. 7, l. 13 – 8, l. 7. Juror 181, Juror McMillian, was a classmate of the decedent's father. He said he could be fair and was allowed to remain. R. 8, ll. 7 – 22.

Juror 13, Juror Brown was excused because she said knowing the family of the decedent might interfere with her ability to be impartial. Juror Brown was excused. R. 9, ll. 5 – 25.

In all, twelve jurors were friends, acquaintances, or related to the decedent's family. These were Juror Gantz, Juror Wilson, Juror McMillian, Juror Brown, Juror Watson, Juror Williams, Juror McQueen, Juror Robinson, Juror Jordan, and Juror Oliver, Juror Tillman, and Juror Lee. Of these twelve jurors four (Gantz, Brown, Watson, and Oliver) were excused on that basis. R. 3, l. 6 – 14, l. 14.

Six jurors were exposed to media coverage about the case. Juror Patrick, Juror Hancock, Juror Cauthan, Juror Rivers, Juror Jones, and Juror 75. R. 14, l. 15 – 22, l. 12. Thus, twelve jurors knew the decedent's family, and six jurors had been exposed to pre-trial publicity. That was eighteen of the available jurors.

In addition, eleven members of the venire knew witnesses in the case, and two knew the victim, Damien Shields. R. 28, l. 1 – 35, l. 23. Eight jurors also knew law enforcement members, and two knew the solicitor trying the case. R. 35, l. 24 – 42, l. 4. R. 317 – 328.

A well remembered event

During the trial the decedent's wife testified as to her version of what occurred that night. As stated the issue was whether the shooting was self-defense, voluntary or murder. R. 57, l. 1 –67, l. 24.

The incident started at a Christmas party at the Green Villa on December 22, 2002, when the decedent allegedly hit appellant's first cousin in the face with a beer bottle, and it ended in a shooting when appellant was called at home about the incident and he went to meet his cousin at the Huddle House.

Appellant said the shooting occurred when Sonta, his cousin, approached the decedent's truck, when the decedent arrived there, in the parking lot of the Huddle House. Appellant approached, and asked the decedent "what was up and he just shot." Appellant said he returned fire, and shot the decedent because "my life was in danger." R. 262, l. 4 – 280, l. 12.

Appellant understands that normally the trial record, or parts of the trial record, would not be required in the record on appeal given the pre-trial nature of the objections, but appellant has included parts of the record to show that this was a well remembered major event that started at a Christmas party at the Green Villa that was stopped because of the big fight that night, and ended early the next morning at the Huddle House where a large number of people were present for the shooting. R. 247, l. 1 – 261, l. 25.

Discussion

S.C. Code §14-7-300 allows the trial court the discretion to cure any deficiency in the number of petit jurors. The judge can have the jury commissioners, under the direction of the court, draw "from the jury box the number of jurors as a court considers necessary to fill the deficiency."

S.C. Code §14-7-200 provides "not less than fifteen nor more than thirty-five days before the first day of each week of any regular or special term of the circuit court the jury commissioners shall proceed to draw at least seventy-five petit jurors to serve for that week only."

S.C. Code §14-7-200 grants the chief administrative judge or the presiding judge the discretion to either increase or decrease the number of jurors drawn if he considers it necessary. However, the statute mandates that at least seventy-five jurors must be drawn. The judge's ruling was that at least seventy-five jurors were summoned, but as argued below there were not any reasonable efforts made to remedy an obvious service problem in this case.

S.C. Code § 14-7-390 further provides that the "clerk of court of a county may serve a summons for jury duty by first class mail. In the alternative, the clerk of court may contract with the state's election commission to serve a summons for jury duty by first class mail.

If the clerk of court chooses not to serve a summons by first class mail or contract with the election commission for that purpose, the clerk of court can serve a summons by certified mail with a return receipt requested as allowed by S.C. Code § 14-7-410.

S.C. Code §14-7-400 which provided that jurors could be summoned by the sheriff at least four days before the trial fixed for them was repealed by 1992 Act No. 483, § 5.

Here, the clerk of court stated she had the jurors served by first class mail. The clerk admitted she did not take any remedial action when only sixty-four of the hundred and sixty-two jurors summoned responded. Defense counsel complained the small venire that actually appeared were disproportionately ties to the decedent's family, and he noted the large number of jurors who "stood up" to potential bias questions given the small venire left, and he argued that appellant could not get a fair trial before an impartial jury with what little was left.

Our Supreme Court has recognized that judges have the discretion to summon more jurors, as here, where requested. State v. Jackson, 32 S.C. 27, 10 S.E.2d 769 (1890); State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960).

As seen above, the clerk of court can have jurors served in several manners. However, our Supreme Court has noted: "it matters little how they get noticed to appear in court, so they are fit and rightly selected. They ought to be summoned in a formal manner, and all named in the venire, *who can with reasonable diligence be found, ought to be summoned, and all ought to attend*; but a formal summons is not necessary, if they attend." State v. Crosby, Harp. 91; State v. Tidwell, 100 S.C. 248, 84 S.E.2d 778, 780 (1915). (emphasis added)

In State v. Derrick, 44 S.C. 344, 22 S.E.2d 337 (1895) the Court refused to grant relief where the sheriff certified that he had served the thirty-six people so drawn "except

the juror J. W. Shaw, who was absent from the state. There was no showing made at trial that J.W. Shaw was in the state.” State v. Derrick, 22 S.E.2d at 338.

In State v. Jeffcoat, 26 S.C. 114, 1 S.E.2d 440 (1887), the court noted the importance of an objection to the process of summoning jurors. Here, defense counsel strongly objected to the process, and lack of any effort to remedy the problem. The court in State v. Jeffcoat wrote the important object in all of this was obtaining an impartial jury. State v. Jeffcoat, 1 S.E.2d at 441.

Here, defense counsel correctly argued there was not only not a reasonable effort by the clerk of court to determine why only sixty-four of the hundred and sixty-two jurors summoned actually appeared for court. Counsel noted that only forty-one were left. R. 45, ll. 7 – 22.

The clerk of court told the judge “they [the jury summons] where all put in the mail and were returned by the post office because we went on the new 911 system . . . they just came back from the post office as no such address.” R. 47, ll. 9 – 18.

The judge correctly observed the problem in regard to the clerk of court’s total lack of effort since “they being close to a hundred, that were not received information about that they simply had the form sent back. They had addresses and the clerk’s office did not ask the sheriff’s office to assist in any way.” The judge then asked for the solicitor’s position. The solicitor responded “I think we should proceed,” and the judge then said he was going forward with the trial. R. 48, ll. 6 – 12.

Defense counsel renewed his objection to a low number of jurors from which they had to select “and the number that stood up to one exception or the other . . . for the number of jurors summoned.” R. 54, l. 23 – 55, l. 22.

Defense counsel properly argued under these unusual circumstances of this case, that the defense could not obtain a fair jury with the small amount of jurors available. The judge denied relief on that grounds, and he also refused to change venue. R. 54, l. 2 – 55, l. 20.

The judge reasoned that S.C. Code §14-7-390 did not require the clerk of court to get seventy-five returns back. R. 51, l. 6 – 52, l. 6. A fair reading of the cases shows the clerk of court's office was obligated to make some effort by having the sheriff's department assist in serving jurors or otherwise. Since the clerk of court here did not make **any** effort to remedy the problem defense counsel correctly argued that the trial should not go forward with the present small jury panel.

Following the verdict defense counsel again argued, "there was no attempt made [when less than half of the jurors appeared] as I've seen in every other Court that I practiced in there was no reason given as to why they were not here." Counsel also noted the "enormous number of people that either knew Anthony Shields or his family or law enforcement. If you take them away, that only left 14 people out of the entire hundred and 60 something notices that were sent out for us to pull this jury from." R. 309, l. 16 – 311, l. 17. The judge again repeated that counsel's prior motions "were appropriate," but that he did not agree with counsel's conclusions regarding the venire. R. 313, l. 11 – 315, l. 15.

There was a total lack of diligence in this case to remedy an obvious problem. The "911 explanation" by the Clerk for the problem is admittedly incomprehensible. Regardless, whatever the structural problem was, there was not only no reasonable diligence on the clerk of court's part to follow-up and seek assistance from the sheriff to

solve the problem -- there was no effort at all. State v. Crosby, Harp. 91; State v. Tidwell, 100 S.C. 248, 84 S.E.2d 778, 780 (1915). The right to a fair and impartial jury is obviously a most important right, and appellant should be granted a new trial given these unusual circumstances. Chambers v. Florida, 309 U.S. 227, 236-237 (1940); Ristaino v. Ross, 424 U.S. 589 (1976).

2.

The court erred by refusing the grant a change of venue where the small venire included potential jurors who were either friends or acquaintances of the decedent's family, had been exposed to media attention about the case, or responded to other potential bias questions. This highly unusual record showed a change of venue was necessary to ensure a fair and impartial jury was chosen.

Relevant Facts

As seen, twelve jurors knew the decedent's family or were related to them. Six jurors had seen newspaper coverage about this case. As further seen, given the small number of jurors to pick from defense counsel noted:

So 162, only half showed up and we have heard nothing from the Clerk or from the Solicitor's Office as to why they're not here. Not as to age. We couldn't find them. They couldn't be served. No return. So that 64 only of that did show up. 41 of the potential jurors are here of that.

And that 41, cause the rest were excused, 29 of the 41 got up at least one time. That leaves 12 that didn't stand up for any reason. Now, but I read the paper Friday. I worked with them. Some say they can do this, that and the other. Eat dinner. Mom, dad and the other.

Your Honor, I think its absolutely impossible and there [this] is one Supreme Court case that they'd love to get their hands on here.

R. 45, ll. 12 – 25.

The judge ruled that from the forty-one available jurors he thought a fair and impartial juror could be found. This Court has seen the responses to the potential bias questioning of the venire above. The judge also refused to change venue. R. 46, ll. 15 – 19; R. 54, l. 2 – 55, l. 20.

Following the verdict defense counsel renewed his objection to the judge refusing to change venue and to the small number of jurors available. Counsel argued that the jury panel was too small, and that the jurors also had some relationship with the decedent or his family or law enforcement: "[B]y going to school with them, church with them, work with them, seeing them, knowing the Shield's family, by work, church, social friends . . ." Counsel argued that only fourteen of the potential jurors did not fit into that class. R. 309, l. 4 – 311, l. 17.

Counsel also argued that newspaper coverage denied appellant a fair trial. R. 312, l. 18 – 313, l. 10. The judge responded that he thought the concerns about the jury process and the motion for a change of venue "were appropriate." Nonetheless the judge said: "I feel the jury was found to be fair and impartial to all parties and deny the motion for a new trial. R. 312, l. 18 – 314, l. 16

A criminal defendant is entitled to an impartial jury, "free of prejudice, passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236-237 (1940); Ristaino v. Ross, 424 U.S. 589 (1976); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the trial judge's duty to ensure that the jury is fair and unbiased. Gaskins. The failure to ensure juror impartiality "violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

The denial of a motion to change venue based on pretrial publicity may violate due process. Patton v. Yount, 467 U.S. 1025 (1984); Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, *supra*; Rideau v. Louisiana, 373 U.S. 723 (1963). To establish such a violation, the defendant must either demonstrate "identifiable prejudice" or circumstances that involved "such a probability that prejudice will result that that [the

trial] is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, 542-543 (1965); Rideau, *supra*.

A motion to change venue is within the sound discretion of the trial court. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). There is no error if the jurors "had the ability to set aside any impressions or opinions" created by the publicity and to make their decision based on the evidence presented at trial. Sheppard; Manning. However, the jurors' own assurances that they are "equal to the task cannot be dispositive of the accused's rights." Murphy v. Florida, *supra*, at 421 U.S. 800. In certain cases, exposure to inflammatory pretrial publicity creates such a presumption of prejudice "the jurors' claims that they can be impartial should not be believed." Patton v. Yount, *supra*, at 476 U.S. 1031, 104 S.Ct. 2889.

This is a truly unusual case. Forty percent of the jurors that were summoned appeared (64 of 162). However, as seen above, that is misleading given that a small number was eligible jurors from those that appeared.

As seen, twelve jurors were friends, acquaintances, or related to the decedent's family. These were Juror Gantz, Juror Wilson, Juror McMillian, Juror Brown, Juror Watson, Juror Williams, Juror McQueen, Juror Robinson, Juror Jordan, and Juror Oliver, Juror Tillman, and Juror Lee. Of these twelve jurors four (Gantz, Brown, Watson, and Oliver) were excused on that basis. R. 3, l. 6 – 14, l. 14.

As stated, six jurors were exposed to media coverage about the case. Juror Patrick, Juror Hancock, Juror Cauthan, Juror Rivers, Juror Jones, and Juror 75. R. 14, l.

15 – 22, l. 12. Thus, twelve jurors knew the decedent's family, and six jurors had been exposed to pre-trial publicity. That was eighteen of the available jurors.

In addition, eleven members of the venire knew witnesses in the case, and two knew the victim, Damien Shields. (Oxendine, Cagle, Hatchell, Tillman, Williams, Jackson, Quirk, Mack, Cauthen, King-Miles, and Oliver, who was excused). R. 28, l. 1 – 35, l. 23.

Finally, eight jurors also knew law enforcement members, and two knew the solicitor trying the case (Vaughn, Bradley, Stevens, Lee, McQueen, Jowers, Blevins, Byrd, Oxendine). R. 35, l. 24 – 42, l. 4.

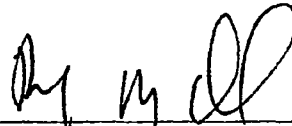
The trial judge abused his discretion by refusing to grant a change of venue in this case. Chambers v. Florida, 309 U.S. 227, 236-237 (1940); Ristaino v. Ross, 424 U.S. 589 (1976); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). Defense counsel correctly argued appellant could not obtain a fair and impartial jury given the small jury panel available to him at the time, and after what was disclosed during *voir dire* confirmed counsel's great concern about this small jury panel.

This is a most unusual case given the above, and appellant should be granted a new trial for the refusal to grant a change of venue, and for the refusal to continue the trial until the jury service problem could be remedied.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Chesterfield County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

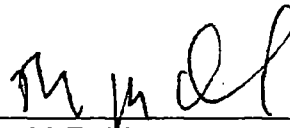
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September 24, 2008

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 24, 2008



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

John M. Milling, Circuit Court Judge

THE STATE,

RESPONDENT,

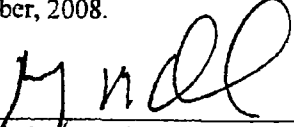
V.

OSCAR FORTUNE,

APPELLANT

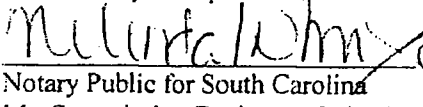
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 24th day of September, 2008.


Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 24th day of September, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: November 10, 2008

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Honorable John M. Milling, Circuit Court Judge

THE STATE,

Respondent,

v.

OSCAR FORTUNE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

DID THE TRIAL JUDGE ERR IN PROCEEDING WITH TRIAL DESPITE A LOW TURNOUT OF POTENTIAL JURORS, AND DID THE JUDGE ERR IN REFUSING TO CHANGE VENUE, WHERE THE SUMMONING PROCESS COMPLIED WITH THE LAW, AND WHERE, REGARDLESS OF THE CONTEXT IN WHICH THE ISSUE IS RAISED, APPELLANT'S JURY WAS FAIR AND IMPARTIAL?

STATEMENT OF THE CASE

In 2002, the Grand Jury of Chesterfield County indicted Appellant, Oscar Fortune, for murder (2002-GS-13-0137). In 2005, Grand Jury of Chesterfield County indicted Appellant for possession of a firearm during commission of a violent crime (2005-GS-13-1222).

Appellant was represented at the trial level by Ed Saleeby, Jr., Esquire, and Terrence Quinn, Esquire. Petitioner was tried from March 6th to 9th, 2006 before the Honorable John M. Milling and a jury. The jury convicted Appellant as charged. {R. 303-304}. Judge Milling then sentenced Petitioner to concurrent sentences of thirty-seven (37) years for murder and a concurrent five (5) years for possession of a firearm. {R. 316}.

This appeal follows.

STATEMENT OF FACTS

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

A. The fight at the Green Villa Christmas party

At a Christmas party on December 22, 2001, the victim's wife, Denise Shields, got into an altercation with Sonta Williams. Appellant intervened and was trying to separate the two women when Denise was struck on the ear. Denise and Anthony went home, and then Anthony changed clothes and went out to get cigarettes. Denise never saw him alive again. {R. 57-63}.

B. Eyewitnesses to the murder at the Huddle House

A number of people witnessed in at least some fashion the murder at a nearby Huddle House parking lot.

Iris Gadson also witnessed the fight at the Christmas party. She went with codefendant Sonta Williams to the Huddle House, where they met up with Appellant. Sonta then approached Anthony's car, words were exchanged, and Iris heard gunshots. {R. 70-74}.

Appellant's then fiancé Tonnette Cash stated she and Appellant were at home asleep when Sonta called. Tonnette and Appellant got dressed and Tonnette drove them to the Huddle house. Once Anthony arrived, Appellant said "let me go talk to him" and got Tonnette's gun and put it in his pocket. Appellant walked over to Anthony's truck and gunshots erupted. {R. 80-86}.

Jay Jay Mungo has a child by Sonta. He was at the Huddle House when Sonta told him she had been hit over the head by a champagne bottle at the Christmas party. Jay Jay told her to take a warrant out on Anthony. Later, Appellant asked Jay Jay "what he was gonna do about it", and Jay Jay said he was going to talk to Anthony. Appellant then said he would handle the situation, and walked over to Anthony's window. Appellant then shot Anthony, who tried to escape by climbing out of the passenger side. Appellant walked around to the other side of the vehicle and shot Anthony some more. Appellant and Sonta then fled. {R. 93-100}.

Vincent Davis was in the parking lot when he heard gunshots and looked over to see a man with his arms in Anthony's truck "like he was shooting or something". Vincent also described Anthony's unsuccessful attempt to escape from the passenger side and the shooter's continued firing on the other side of the vehicle. After the shooter fled, Vincent went to Anthony's car and pocketed a small .25 gun he saw in the console. Later, police found out about it and came and got the gun from him. {R. 133-138}.

Barry Davis was at the Huddle House when he saw a girl having a "real serious conversation" with Anthony. A man in a black leather jacket walked up, fired three shots into the car, then walked around the car and fired two more shots. After the shooting, the woman with the shooter screamed "That's what the fuck you get!" {R. 193-201}.

Stephanie Douglas, who also witnessed the fight at the Green Villa, was at the Huddle House in time to see Appellant approach Anthony's truck. After some words were exchanged between the men, Stephanie heard gunshots and "hit the floor". She saw Anthony trying to crawl away on the passenger side when Appellant came around the

vehicle and shot Anthony in the back. She saw no gun in Anthony's hand. {R. 211-218}.

Jesse Ellison also heard shots, saw Anthony attempt to crawl out the passenger side, and the shooter walk around the back of the vehicle to shoot again. {R. 219-224}.

C. Appellant's statement

After turning himself in, Appellant gave a statement in which he admitted Sonta called him and told him about the fight at Green Villa. Appellant admitted he pulled up next to Anthony's car "expecting to fight the guy", but he heard a shot and saw a flash. Believing Sonta had been shot, Appellant returned fire. Appellant claimed that the victim came out of his truck on the other side still pointing a gun at him so he continued to fire. {R. 208-210}.

D. The forensic evidence

Anthony had five bullet wounds: (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. {R. 156-158}.

The .38 handgun found in Appellant's car was conclusively matched to the recovered bullets. {R. 202-208; 225-232}. The .25 that was in Anthony's car before Vincent took it was matched to a fired bullet and casing found in the vehicle. {R. 233-234}.

A forensic toxicologist testified Anthony's blood alcohol was not in the realm of impairment. {R. 235-240}. A trace evidence expert found gunshot residue on Anthony's left hand, which is not unexpected given his wound there. {R. 241-246}.

E. The defense case

Sonta testified for the defense, asserting that she merely called Appellant, her cousin, to ask for help in going to the police department to swear out a warrant, and that Anthony fired first after she went to his car and started arguing with him. {R. 246-252}.

Appellant testified for the most part consistently with his statement, asserting that he only had the gun in his pocket for protection, that Anthony just opened fire on him when he asked "what's up", and that Anthony still had his gun in his hand when Appellant shot him on the passenger side of the vehicle. Appellant admitted he was expecting to fight Anthony but did not take his gun out of his pocket until Anthony fired first. {R. 262-270}.

ARGUMENT

THE TRIAL JUDGE DID NOT ERR IN PROCEEDING WITH TRIAL DESPITE A LOW TURNOUT OF POTENTIAL JURORS, AND DID NOT ERR IN REFUSING TO CHANGE VENUE, WHERE THE SUMMONING PROCESS COMPLIED WITH THE LAW, AND WHERE, REGARDLESS OF THE CONTEXT IN WHICH THE ISSUE IS RAISED, APPELLANT'S JURY WAS FAIR AND IMPARTIAL.

Appellant contends the trial court abused its discretion in going forward with trial even though a large number of potential jurors did not show up. He contends that given the nature of the crime and the people involved, the remaining jurors were simply insufficient in number to assure a fair trial. He also contends in the alternative that the trial court erred in failing to grant a change of venue due to pretrial publicity.

For convenience's sake these two issues will be addressed together. The bottom line is that the clerk did comply with the statutes in summoning the jurors, and the low turnout was due to issues in conversion of rural addresses to city-style addresses as part of efforts to improve the 911 system. However, even if the summoning process was deficient, Appellant must show a specific prejudice and the lack of a fair and impartial trial. Whether in this context, or in the context of a change of venue based on pre-trial publicity, Appellant cannot show such prejudice.

A. Events at trial

Of course, the trial court in this case conducted the typical voir dire, asking the usual questions designed to elicit excusals for cause. On the whole, those who indicated they could be fair remained, and those who could not were excused.

The judge began voir dire by asking the usual question as to whether anyone knew the defendant, and no one stood. {R. 2-3}.

Next, the judge asked if anyone knew the deceased or his wife Denise. Four people were relations or friends of Anthony or his family, and were excused when they indicated it would affect them. Seven potential jurors with connections of various degrees stated they could remain impartial and were not excused. {R. 4-14}.

When the judge asked if anyone had seen an article on the case in the Cheraw Chronicle, only seven jurors stood. All of them stated they could remain impartial, and one stated he had not even read the article. {R. 14-21}.

No one stood when questions were asked about an article in the Pageland paper, about those at the Huddle House during the shooting, and about those who had talked about or received information about the case. {R. 21-22}.

One juror stood when a question was asked as to those who had connections to crimes of violence, but he was not excused when he stated he could remain impartial. {R. 22-24}.

Two jurors stood when a question was asked as to those who had family members who had suffered crimes of violence, and after colloquy with the judge one was excused and one remained. {R. 24-27}.

When the judge read the witness list, which included, for example, eyewitnesses, officers, and SLED personnel, thirteen jurors stood. Two were excused, including one who had already been excused, and the rest indicated they could be impartial and were retained. {R. 27-36}.

When the judge asked if anyone was employed by or friends with those in law enforcement, medical services, or emergency agencies, six jurors stood, and all were

retained after indicating they could remain fair and impartial. {R. 27-40}.

When those with connections to the attorneys were asked to stand, only three stood, and all indicated they could be fair. {R. 40-43}.

No one stood when the judge asked the general question as to their ability to follow the law – and the judge specifically asked for those who would find someone guilty regardless of the evidence. {R. 43}.

Before actual selection occurred, the defense argued the potential jurors did not reflect the “makeup of the county” in that of the 162 summoned, only 64 reported, and of those 23 were excused, leaving 41. The defense contended that of those remaining 41, only 12 did not stand up at least once during *voir dire*. {R. 45}.

The judge found nothing had been shown by the defense that the panel of potential jurors did not reflect an appropriate composition of race and gender in the county, and noted he excused most of the jurors with close personal ties with family members. The judge concluded there was nothing wrong with the group and 41 was plenty to draw a jury even with the State and the defense exercising all of their strikes. {R. 46}.

The defense complained that it had never seen selection done with under 60 jurors, and asked if there were any returns or other forms explaining why the other jurors were not present. Upon inquiry by the court, the clerk noted she did not know why the others were not here, stating:

They were all put in the mail and were returned by the Post Office because we went on the new 911 system.

* * *

They just come back from the Post Office as no such address.

When the judge asked if the clerk had checked with the Sheriff's Office about the matter,

she stated she had not. {R. 47}.

The judge then decided to go forward, finding no prejudice in the selection of the jury, but offering the defense the night to research the issue and provide any additional argument. The court denied for the moment the defense request to have the court direct the Sheriff to go find the missing jurors, as they had not attempted to select the jury yet. {R. 48}.

Jury selection then occurred. After it was completed, the judge pointed out that S.C. Code Ann. § 14-7-660 only requires 75 to be summoned, and disagreed with the defense position that at least 75 had to show up. The court also pointed out that S.C. Code Ann. § 14-7-390 allows summoning by first class mail, and noted no statute required the clerk to do anything else if she does not get 75 returns back. Since there had been ample potential jurors to conduct jury selection, the judge denied the motion, unless the defense could point to something with specificity. {R. 50-52}.

The next morning, the defense renewed its objection to the court's ruling that the summoning process had been properly followed, arguing that the number was too low. However, the defense conceded its research indicated the judge's ruling was correct. The court also denied the defense motion for a change of venue, finding that the jurors exposed to pre-trial publicity all indicated they could be fair and rely only on the evidence. The judge also found there was insufficient pretrial publicity to grant a continuance to "allow the matter to cool off". {R. 54-55}.

At the end of trial, prior to sentencing, the defense again renewed its objection to the low number of returns, and argued that an inordinate amount of them knew the victim

or were connected with law enforcement. The defense argued the point of modern jury selection was to find people not connected in any way with the parties or the case, and that the jury was not representative of the makeup of Chesterfield county. Finally, defense counsel argued the article in the paper a few days before trial was too prosecution-oriented, and when coupled with the jurors who had connections with the family, the jury was "not one we could get a fair shake from". The defense noted it used all its strikes. The judge again found that a fair and impartial jury was selected, based on the *voir dire* that occurred and the court's instructions. {R. 310-314}.

B. General Rules

S.C. Code Ann. § 14-7-200 (Supp. 2007) provides that prior to each term "at least seventy-five jurors must be drawn", a number which may be increased by the chief administrative judge. This rule is reiterated in S.C. Code Ann. § 14-7-260 (Supp. 2007). S.C. Code Ann. § 14-7-390 (Supp. 2008) provides that a clerk may "serve a summons" for jury duty by first class mail, or may get the State Election Commission to do it by mail. The statute states that in the alternative, the clerk may serve the jurors by certified mail, as set forth in S.C. Code Ann. § 14-7-410, or have the sheriff do it, as set forth in S.C. Code Ann. § 14-7-400. However, S.C. Code Ann. § 14-7-400, which merely provided the sheriff could serve the jurors "as provided by law", has been repealed.

C. The judge correctly concluded that the jury was drawn and summoned in accordance with law.

The judge was correct in concluding there was no issue with the drawing and summoning of jurors in this case. As noted in the preceding subsection, S.C. Code Ann. § 14-7-200 requires at least 75 jurors to be "drawn", then goes on to require the clerk to

issue its "writ of venire facias" for the drawn jurors, requiring their attendance. S.C. Code Ann. § 14-7-260 requires the jury commissioners to "draw and summon" at least 75 jurors. Here, it is undisputed that at least 162 were drawn. The question remains as to whether they were "summoned".

And it is clear they were. The clerk stated on the record, and it is undisputed, that 162 jury summons went out by first class mail as allowed by S.C. Code Ann. § 14-7-390 (Supp. 2008). This is enough to show compliance with the statute. Indeed, the reason more jurors are called than may be necessary is because it is unlikely that any term has 100% return from those summoned.

The issue here surrounds the clerk's explanation that the summons "were returned by the Post Office because we went on the new 911 system", and "they just come back from the Post Office as no such address". {R. 47}. Appellant contends in his brief this explanation is "admittedly incomprehensible", and perhaps to someone that lives in the city it is. However, this refers to the change, going on throughout rural counties across the nation and common knowledge there, to convert all rural type addresses such as, for example, "Route 3, Box 311", to city-style addresses such as, for example, "33 Court of Appeals Way". This is necessary for modern 911 systems to allow first responders to quickly find residents in need of help. See, e.g. www.usps.com/ncsc/addressservices/addressqualityservices/lacsystm.htm.

The problem is that, as is also common knowledge, the post office will only forward for six months. Thus, if someone gets a new city-style address and does not change his or her license, voter registration, or other state documents, then, after the forwarding period expires, the post office will no longer forward communications from local or state

governmental agencies addressed to the old address. See, e.g. Sykes v. State, No. 03-02-00783-CR, 2004 W.L. 392874 (Tex. Ct. App. March 4, 2004) (addressing the same problem, and noting that the defendant had not shown rural residents were a "distinctive group" as part of an argument that an inadequate representation of the community was achieved). This of course is not the fault of the clerk, and may explain why so many summons were sent out during this transition period, to ensure sufficient response. The bottom line, though, is that the trial court was correct in concluding that nothing in the statutes requires 75 returns; it only requires drawing and summoning for 75, which was clearly done.

However, even if those with the "911 problem" were not sufficiently summoned and this is somehow the fault of the clerk, Appellant has not shown that at least 75 were not properly summoned at otherwise valid addresses. Just because only 64 "showed up" does not necessarily mean that all remaining 98 were returned by the post office for "no known address". It may be that some people, as happens every term, moved without a forwarding address, simply ignored the summons, or had one of any of the other myriad reasons and explanations.

D. A strong showing of prejudice is necessary for his claim.

Regardless of whether the jury was properly summoned, Appellant cannot show prejudice, which is necessary for his claim. South Carolina caselaw specifically provides that the statutes as to summoning are "directory only", that the entire summoned venire does not have to be present, and that irregularities in the summoning of jurors do not provide any relief to the defendant absent clear proof of an incompetent and impartial jury. As stated in State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974):

Even if the instant motion is considered to be something other than for a continuance such as a motion to quash the venire or a challenge to the panel or array, appellant's exception is without merit. The burden is upon one challenging the array, as the moving party, to introduce or to offer strong and convincing evidence in support of his motion, and the failure to prove such contentions is fatal. Such a challenge is without merit where it consists solely of an attorney's statements, unsworn and unsupported by any proof or offer of proof. 47 Am.Jur.2d, Jury, Section 228; 50 C.J.S. Juries s 265. Also the objection must go to the whole array not merely to individual persons. 47 Am.Jur.2d, Jury, Section 229.

In the case of *State v. Wells*, 162 S.C. 509, 161 S.E. 177, we held, *'our court has been liberal in holding that the provisions as to the drawing and summoning of jurors are usually directory only and not mandatory.'*

* * *

In addition to the above the law is well settled that the defendant has no right to a trial by any particular jury or jurors and has the right only to a trial by a competent and impartial jury. 47 Am.Jur.2d, Jury, Section 27; 50 C.J.S. Juries s 195, which is precisely what appellant received in the court below.

* * *

Forty-four of these fifty jurors were in court. As heretofore stated a full venire is not a pre-requisite to the commencement of a criminal proceeding.

263 S.C. at 382, 210 S.E.2d at 609. See also State v. Smith, 200 S.C. 188, 20 S.E.2d 726 (1942) ("A motion to quash jury panel in murder prosecution for alleged failure to publish notice of time and place of drawing of the venire was properly overruled, where public drawing was actually had and defendant suffered no prejudice through lack of notice."); State v. Rasor, 168 S.C. 221, 167 S.E.2d 396 (1933) (erroneous placing of a name in the jury selection box of a potential juror disqualified due to age was not enough to quash the entire panel, even though the requisite number of jurors was not met); State v. Derrick, 44 S.C. 344, 22 S.E. 337 (1895) (failure of sheriff to serve summons on one of the jurors who left the county was not enough to affect the entire array, even though the minimum of 36 was not served).

Indeed, the reason for this requirement is there is no guarantee that had the number of jurors reporting increased it would necessarily lower the percentage of people who had been exposed to pretrial publicity or who had connections with the victim's family or police. To reverse without specific prejudice would be wasteful form over substance.

E. Appellant cannot show prejudice.

Whether in the context of the summoning procedure, the denial of a change of venue, or of the denial of a continuance, Appellant cannot show anything but that he had a fair trial by twelve impartial jurors.

In the context of the alleged bias or prejudice of an individual juror, the determination whether a juror is disqualified is within the discretion of the trial judge and will not be reversed on appeal unless wholly unsupported by the evidence. State v. Tucker, 320 S.C. 206, 211, 464 S.E.2d 105, 108 (1995). On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, (1990). See also State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005) (despite potential juror's experience with a violent crime against a family member, there was sufficient support in the trial court's colloquy with the juror to qualify the juror).

In the context of a change of venue, "the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant". Sheppard v. South Carolina, 594 S.E.2d 462 (2004); State v. Manning, 495 S.E.2d 191 (S.C. 1997); State v. Caldwell, 388

S.E.2d 816 (S.C. 1990). Mere exposure to pretrial publicity does not automatically disqualify a juror, and it is not improper to deny a change of venue when jurors are able to lay aside any impressions or opinions and give a verdict based only on the evidence. State v. Kelsey, 502 S.E.2d 63 (S.C. 1998) (also citing Irwin v. Dowd, 366 U.S. 717 (1984) for the proposition that jurors do not need to be totally ignorant of the case as long as they can set aside any prior impressions). The defendant has the burden of showing *actual juror prejudice* as a result of the publicity. State v. Owens, 359 S.E.2d 275 (1987).

Unlike other jurisdictions, South Carolina has never expressly adopted or applied any sort of presumed prejudice standard from extensive pretrial publicity, in the absence of proof of actual juror prejudice. See State v. Kelsey, 502 S.E.2d 63 (S.C. 1998) (rejecting claim of inherent prejudice from extensive publicity and the large number of jurors remembering the case, where the jurors selected all stated they could put publicity aside and fairly decide the case on the evidence); Sheppard v. South Carolina, 594 S.E.2d 462 (2004) (noting that a petitioner failed to meet his burden of showing actual juror prejudice, and noting that the mere assertion of inherent prejudice from the nature of the crime and the number of jurors who remembered the case is insufficient). Cf., e.g. Meeks v. Moore, 216 F.3d 951 (11th Cir. 2000) (noting that actual prejudice requires a showing that the seated jurors actually entertained a pretrial opinion that the defendant was guilty which they could not set aside, and presumed prejudice requires a showing that the publicity was sufficiently inflammatory and "saturated the community").

Here, Petitioner has presented absolutely no evidence in court of actual juror prejudice. As is typical, especially in a small county, most of the jurors had tenuous connections with witnesses, the defendant's family, law enforcement, or the solicitor, and

anyone who expressed an inability to serve was disqualified. As to pre-trial publicity, only seven jurors total stood when asked if they had seen the article, and one of them did not read it. All of them stated they could be fair. See generally State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999) (denial of change of venue for pretrial publicity not required where jurors are found to be able to lay aside exposure and base verdict on evidence at trial); State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998) (relevant inquiry is whether jurors have such fixed opinions that they cannot judge evidence impartially, and credibility of juror responses is for trial court).

Indeed, when looking at the jurors actually selected, it is clear there was no prejudice regardless of the context of the issue. Of the twelve people selected and two alternates, seven did not stand in response to any question. Of those who did: Juror P (157) had only read the article but could remain impartial {R. 15}; Juror KH (66) knew one witness who testified in the Jackson v. Denno hearing and another who did not testify at all {R. 35}; Juror Mc (75) saw the article but did not read it {R. 20}; Juror BI (08) had a cousin who works on a medical helicopter, which is not law enforcement {R. 38}; Juror H (47) knew through the community a chain of custody witness and an eyewitness unconnected with any of the parties {R. 29-30}; and Juror Ox (154) knew a testifying eyewitness and recognized the prosecutor through the community and school {R. 28; 40}. Only Juror T (132) stated she had an aunt who was related to the victim's wife by marriage, but stated she was not personally related. The judge pressed her on her ability to be fair, and Juror T agreed she could. {R. 6}. Juror T also knew two eyewitnesses and a witness who did not testify, but again stated this would not affect her impartiality. {R. 30}.

There is ample support in the record to sustain the decisions on these jurors by the trial court, who was on the scene and best able to determine the credibility and demeanor of the juror's responses. There is also insufficient proof of such pretrial publicity that would establish prejudice. Appellant had a fair jury and a fair trial.¹

¹ For this reason also his request for a continuance fails. As to a claim about a valid cross-section of the community, Appellant would have to show (1) group excluded is distinctive, (2) representation of this group is not fair and reasonable, and (3) underrepresentation is due to systematic exclusion of the group. Duren v. Missouri, 439 U.S. 357, 364 (1979). Not only did he not present evidence or argument along these lines, and thus the issue is not preserved, but the jury reflects an adequate cross-section among the recognized distinctive groups of race and gender.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the convictions and sentences should be affirmed.

Respectfully submitted,

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Attorney General

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Chief Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

BY: 

S. Creighton Waters

September 26, 2008

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Honorable John M. Milling, Circuit Court Judge

THE STATE,

Respondent,

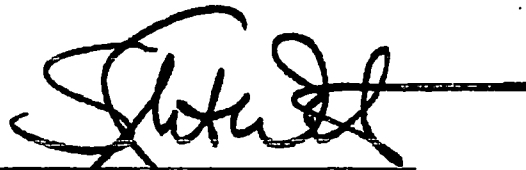
v.

OSCAR FORTUNE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.



S. CREIGHTON WATERS
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

September 26, 2008.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Oscar Fortune,

Appellant.

Appeal From Chesterfield County
John M. Milling, Circuit Court Judge

Unpublished Opinion No. 2009-UP-259
Submitted May 1, 2009 – Filed June 1, 2009

AFFIRMED

Deputy Chief Appellate Defender Robert M. Dudek,
of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Assistant Attorney General S. Creighton

Waters, all of Columbia; and Solicitor Jay E Hodge, Jr., of Cheraw, for Respondent.

PER CURIAM: Oscar Fortune appeals his convictions for murder and possession of a deadly weapon during the commission of a violent crime. Specifically, Fortune argues the trial court 1) abused its discretion in proceeding with jury selection due to the small jury pool, juror biases, and media exposure and 2) abused its discretion in refusing to grant his request to change venues. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in proceeding with trial based on the small jury pool: State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974) ("A motion for a continuance is addressed to the sound discretion of the trial [court]."); S.C. Code Ann. §14-7-200 (Supp. 2008) ("[J]ury commissioners shall proceed to draw at least seventy-five petit jurors to serve for that week only. The chief administrative judge or the presiding judge of that circuit may increase or decrease the number of jurors drawn if he considers it necessary; however, at least seventy-five jurors must be drawn."); Rogers, 263 S.C. at 382, 210 S.E.2d at 609 ("[A] full venire is not a prerequisite to the commencement of a criminal proceeding. An accused has no right to insist upon the attendance of all the veniremen directed to be summoned, nor to demand the presence of the maximum number of jurors provided for by statute to be drawn or summoned.").

2. As to whether Fortune received a trial by a competent and impartial jury: Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 765 (2004) (internal citation omitted) ("[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury."); Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) (finding the trial court must ask whether potential jurors have any bias or prejudice against a party to ensure a fair and impartial jury); State v. Patterson, 324 S.C. 5, 14, 482 S.E.2d 760, 764 (1997) (holding any claim that a jury was not impartial must focus on the jurors who were ultimately

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

seated); State v. Rogers, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974) ("[T]he general principle that error must be prejudicial in order to be ground for reversal applies to rulings on excusing a juror.").

3. As to whether the trial court erred in refusing to change venues based on juror biases: State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997) ("A motion to change venue is addressed to the sound discretion of the trial [court] and will not be disturbed on appeal absent an abuse of discretion."); State v. Owens, 293 S.C. 161, 167, 359 S.E.2d 275, 278 (1987) (finding there is no abuse of discretion in refusing to change venue if the trial judge has screened jurors to insure the defendant a fair trial); State v. Gardner, 332 S.C. 389, 392, 505 S.E.2d 338, 339 (1998) (finding no error when "[t]here is no showing of actual juror prejudice, nor is there a lack of evidentiary support for the trial judge's ruling [and] Appellant has failed to demonstrate an abuse of discretion in the denial of his motion for a change of venue.").

4. As to whether the trial court erred in refusing to change venues based on pretrial publicity: State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997) ("A motion to change venue is addressed to the sound discretion of the trial [court] and will not be disturbed on appeal absent an abuse of discretion."); Id. ("When jurors have been exposed to pretrial publicity, a denial of a change of venue is not error when the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial."); Id. (finding a juror is not automatically disqualified because of pretrial publicity); State v. Evins, 373 S.C. 404, 412-13, 645 S.E.2d 904, 908 (2007) ("The relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant."); Id. at 413, 645 S.E.2d at 908 (holding the defendant bears the burden of proving actual juror prejudice from the pretrial publicity).

AFFIRMED.

SHORT, WILLIAMS, and LOCKEMY, JJ., concur.

09-CP13-323

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Chesterfield)OSCAR FORTUNE 314269)

Full name and prison number, if any, of applicant.)

v.)

State of South Carolina)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

A True Copy. Attest

Faye L. Sellers2009 AUG 18 AM 10 39
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, SCINSTRUCTIONS - READ CAREFULLY
JULY 2008 P.P. # 9.3
CHESTERFIELD COUNTY SC

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention BROAD RIVER CORR INST
2. Name and location of Court which imposed sentence Chesterfield County Central Sessions Court, Chesterfield County
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2002-GS-13-0137
 - (b) 2005-GS-13-1222
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) MARCH 9, 2006
 - (b) 37 YEARS 100%
 - (c) 5 YEARS 85%

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

☒ (b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. June 1 2009

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinions No 2009-UP-259

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEFFECTIVE ASSISTANCE OF COUNSEL

(b) PROSECUTORIAL MISCONDUCT

(c) Other issues to be amended according to Rule 71.(d) SCACR

2009 AUG 18 AM 10 39
PAGE 1, STILENS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

10. State concisely and in the same order the facts which support each of the grounds set out in ⁽⁹⁾

- (a) Failing to strike jury TILMAN, Failing to object to burden shifting self defense charges
- (b) Subornation of perjury, Closing Argument

A Failing to move for mistrial based on solicitor's closing argument Failing to call Det. Johnny Quick to testify.

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law?

N/A

- (b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

N/A

- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) N/A

- (d) any other petitions, motions or applications in this or any other Court?

N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

- (b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

- (c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

2009 AUG 18 AM 10 39
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) P.C.R. would be appropriate avenue at this time
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
YES
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? N/A

2009 AUG 18 AM 10 39
 FAYE L. SELLERS
 CLERK OF COURT
 CHESTERFIELD COUNTY, S.C.

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. EDWARD E. SALSBY JR
- ii. TERENCE A. QUINN
- iii. ROBERT M. DUDAK

(b) the proceedings at which each such attorney represented you:

- i. TRIAL, ARRAIGNMENT, SENTENCING
- ii. TRIAL, ARRAIGNMENT, SENTENCING
- iii. DIRECT APPEAL

18. State clearly the relief you seek in filing this application.

REVERSE AND REMAND FOR NEW TRIAL
VACATE AND SET ASIDE JUDGEMENT OF CONVICTION AND SENTENCE

19. Are you now under sentence from any other court that you have not challenged?

NO

2009 AUG 18 AM 10 39
 FAYE L. GELLERS
 CLERK OF COURT
 CHESTERFIELD COUNTY, S.O.

STATE OF SOUTH CAROLINA)

COUNTY OF Chesterfield)

VERIFICATION

I, Oscar Fortune, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Sworn to and subscribed before me

This 17th day of August, 2009

[Signature] L.S.

Notary Public for South Carolina My Commission Expires

My Commission Expires August 25, 2015

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Oscar Fortune, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Sworn to and subscribed before me

This 17th day of August, 2009

[Signature] L.S.

Notary Public for South Carolina My Commission Expires

My Commission Expires: August 25, 2015

Applicant

2009 AUG 18 AM 10 39
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2009-CP-13-0323
COUNTY OF CHESTERFIELD	)	
	)	
Oscar James Fortune,	)	
S.C.D.C. No. 314269,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed August 18, 2009, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Chesterfield County Clerk of Court's orders of commitment. The Chesterfield County Grand Jury indicted the Applicant at the March 2002 term of General Sessions for murder (2002-GS-13-0137) and at the November 2005 term for possession of a weapon during commission of a violent crime (2005-GS-13-1222). Edward E. Saleeby, Jr., Esquire and Terrence A. Quinn, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty as indicted. On March 9, 2006, the Honorable John M. Milling sentenced the Applicant to concurrent terms of thirty-seven (37) years for murder and five (5) years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense

perfected. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Fortune, Op. No. 2009-UP-259 (S.C. Ct. App. filed June 1, 2009).

Attached herewith and incorporated herein by reference are the records of the Chesterfield County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial 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.
2. Prosecutorial misconduct:
 - a. Subordination of perjury.
 - b. Closing argument.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

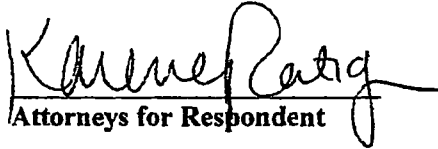
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By:


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December 23, 2009

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF CHESTERFIELD) 2009-CP-13-00323

OSCAR FORTUNE)
 APPELLANT)
 vs.) TRANSCRIPT OF RECORD
)
 STATE OF SOUTH CAROLINA)
 RESPONDENT)

January 11, 2012
 Darlington, South Carolina

B E F O R E:

THE HONORABLE PAUL M. BURCH, JUDGE.

A P P E A R A N C E S:

JOEL F. STROUD, ESQUIRE
 Attorney for the Appellant

KAREN C. RATIGAN, ASSISTANT ATTORNEY GENERAL
 Attorney for the Respondent

EDWARD SALEEBY, Esquire
 TERRENCE QUINN, Esquire

HATTIE O. GORDON
 Circuit Court Reporter

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

I, HATTIE O. GORDON, Official Court Reporter for the 4th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Chesterfield County, South Carolina, on the 9th day of March, 2006.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

April 12, 2007

[Handwritten signature]

HATTIE O. GORDON, Court Reporter

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EXHIBITS

NO EXHIBITS WERE MARKED OR ADMITTED INTO THE RECORD

Colloquy

4

COLLOQUY

MS. RATIGAN: Your Honor, Oscar James Fortune. The Docket Number 2009-CP-13-0323. Mr. Fortune was indicted for murder and possession of a weapon during the commission of violent crime. He was represented on those charges by Mr. Saleeby and Mr. Quinn. That case was brought to trial. He was found guilty as indicted.

On March 9, 2006 Judge Milling levied concurrent terms of 37 years for murder and five years for the weapons charge. An appeal was filed with the Court of Appeals. That Court affirmed Mr. Fortune's conviction and sentences in June of 2009. This application was timely filed, and we're ready to proceed.

THE COURT: All right. I had a chance to look over the petition and I need to take a minute or two and talk to Mr. Fortune. Good morning, sir.

MR. FORTUNE: Good morning.

THE COURT: Mr. Fortune, in reviewing your petition I saw where Judge Milling -- the sentence I believe was 37 years.

MR. FORTUNE: Yes, sir.

THE COURT: Okay. A lot of times when these petitions are initially filed by a petitioner or either help from a non-attorney there is some confusion about what relief the Court may grant. I'm sure you've probably

1 talked with your attorney about it, but I always take a
2 few minutes to make sure we have an understanding about
3 what I can do if relief were to be granted:

4 If you pursue this petition the only relieve that the
5 Court can make available to you would be to grant a new
6 trial. I cannot adjust or change a sentence. There is no
7 provision within the law as it stands now for me to go in
8 and lessen a sentence or on the other hand increase a
9 sentence at this time.

10 In other words there is no relief for the length of a
11 sentence as it stands now. As far as finding in your
12 favor, if that were to happen, it would have to be under
13 those strict terms that you would need to understand that
14 the State could retry you. When I say that I mean that
15 they can go back to ground zero as we say and they can
16 reinstate all the original charges unless the jury found
17 you not guilty. All those original charges, whatever they
18 may be if that applies, could be reinstated.

19 You could be retried. For example, you could be
20 retried on the murder charge, and as you already know from
21 your prior experience, what a jury can do. If a jury were
22 to find you guilty again of murder you could be sentenced
23 to life. I believe at that time the law had been changed.
24 Correct me if I'm wrong, counsel, but it would be life
25 without parole. So you could, under that scenario which

1 has happened. It's not an if. It has happened. I have
2 seen it happen. You could receive a life sentence and be
3 in prison for the rest of your life without parole. Those
4 of us that have been working here at the Darlington County
5 Courthouse witnessed that a few years ago when a person
6 was granted a P.C.R. petition and had gotten a lessor
7 sentence on a murder charge and came back and was retried
8 and received a life sentence.

9 So it's just a gamble that you need to know about. I
10 don't know if you have discussed that with counsel or if
11 anybody has reviewed that with you, but that's always a
12 possible. And it has happened and has happened here. So
13 there are some pitfalls so keep that in mind. If you
14 would like to take a minute or two and discuss that with
15 counsel. If that may have -- may be of new information to
16 you I'll certainly grant you time to do that.

17 MR. FORTUNE: No. I'm ready to proceed. Counsel
18 informed me.

19 THE COURT: Okay. I think I've covered everything I
20 want to cover about that. Once again, I apologize for
21 Monday. Over 20 years I've very seldom missed Court on
22 account of being sick. I think the good Lord, but I got
23 hit pretty hard Sunday night. So hopefully that's all by
24 us. I'm doing pretty good today. We will hopefully be
25 able to conclude this, but if I start to falter or

1 whatever we will stop and we will reconvene at another
2 time if we need to. But, hopefully, that won't happen. I
3 feel a lot better today than I did yesterday. Thank you
4 very much. You may be seated. Anything else before we
5 get started?

6 MS. RATIGAN: I just put in the procedural history.
7 Note that Mr. Quinn and Mr. Saleeby are here, however,
8 I've been informed that Mr. Stroud has a motion to make.

9 MR. STROUD: I do.

10 THE COURT: Mr. Stroud.

11 MR. STROUD: I have some witnesses back here for the
12 plaintiff, and I would like to request that they be
13 sequestered and brought in individually as their testimony
14 is needed.

15 THE COURT: Any objection from the State?

16 MS. RATIGAN: I mean it's a civil case, so I don't
17 know that that would be necessary. And if we're just
18 talking about the witnesses that he has here under
19 subpoena that's one thing. But if he's also referring to
20 Mr. Quinn and Mr. Saleeby I would need them here the
21 entire time.

22 MR. STROUD: No, I'm not talking about them. Just
23 ours.

24 THE COURT: I don't have any problem with that.

25 MR. STROUD: Okay.

1 THE COURT: We can sequester them. We can't put them
2 individually.

3 CLERK OF COURT: They can sit outside the courtroom
4 on the bench and you can call them when you need them.

5 THE COURT: Make them comfortable, Mr. Clerk.

6 CLERK OF COURT: Who do you specifically want? Do
7 you know?

8 MR. STROUD: Let's see. Yeah, the order is Mr.
9 Saleeby is going to go first. Then Ms. King. Then Oscar,
10 Mr. Fortune. Then Suzanne Blevins. And then Blanche
11 Fortune and then Greg Zerfrost.

12 CLERK OF COURT: Okay.

13 THE COURT: All right. Witnesses are secured. You
14 may proceed.

15 MR. STROUD: Your Honor, I'm going to defer an
16 opening statement and just have a closing. And as I said
17 my first witness will be Mr. Saleeby, counsel of record
18 for the trial.

19 THE COURT: If you will come around and be sworn.

20 EDWARD SALEEBY, after being duly sworn,
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. STROUD:

24 Q. Good morning, Mr. Saleeby?

25 A. Good morning, Mr. Stroud.

1 Q. I hope you're in better health this morning. I know
2 we talked to you. It looks like you're feeling better.

3 A. Yes, sir. I'm not much left of me to be replaced.

4 Q. Let me just get started here. Did you represent Mr.
5 Fortune in his 2006 trial?

6 A. Well, of course I did, sir.

7 Q. What was the outcome of that trial?

8 A. Unfortunately he was found guilty of murder and
9 having possession of a firearm during a violent crime.

10 Q. Okay. What was your reaction when you learned Mr.
11 Fortune was granted a P.C.R. hearing?

12 A. I'm sorry. I didn't catch that.

13 Q. What was your reaction when you learned that Mr.
14 Fortune was granted a P.C.R. hearing?

15 A. Well, I was not surprised, you know. Most people do
16 they catch that much time. Even if it's just to come out
17 of the jailhouse and come to Court.

18 Q. Okay.

19 A. Not my first rodeo.

20 Q. Right. What material did you use to prepare for this
21 P.C.R. hearing?

22 A. What material?

23 Q. Um hum.

24 A. Well, to tell you the truth, Mr. Stroud, I thought we
25 had lost. And I asked Mr. Quinn, I said -- well, my

1 secretary one. She gave it to him. He got to looking for
2 them and then, thank you very much, they -- you had them
3 or we came to find out when you called you were bringing
4 them to our office. And you had had them. So I'm glad
5 you had them for your use. So what I prepare I basically
6 read the transcript, I read your petition.

7 Q. All right. Okay. Are you able to remember the
8 March 2006 trial of Mr. Fortune?

9 A. I am.

10 Q. All right. Now, in 2012 how can you remember the
11 trial that was held in 2006?

12 A. Why shouldn't I be able to? I'm not that ---

13 Q. Okay.

14 A. I've tried a number of murder trials. I don't know
15 how many you've tried. This is the only murder trial that
16 I ever lost. Excuse me. I lost. I had a verdict come
17 back in Marlboro County, but we got that up -- shocked
18 everybody of guilty. But I had juror come to me three
19 days later and, on her own, and tell me she was too upset.
20 She had to talk to me about it, and came to find out that
21 Judge Cottingham had done a very ---

22 Q. Now, that was Marlboro County. Let's ---

23 A. Well, that was the only other case I lost. I don't
24 how many I've tried. This is the only one I've lost,
25 lost, which I was surprised at.

1 Q. Okay. When did your knee start giving you trouble in
2 relation to the 2006 trial?

3 A. Oh, my knees were probably giving me trouble since
4 2005, 2004, and I stopped, if you want me to elaborate on
5 that?

6 Q. Let's wait.

7 A. All right. You go ahead.

8 Q. Okay. In 2006 how much did you weigh for
9 Mr. Fortune's trial?

10 MS. RATIGAN: I'm going to object, Your Honor. This
11 is absolutely irrelevant.

12 MR. STROUD: Your Honor, it is relevant in that we
13 know for a fact that Mr. Saleeby had health problems, and
14 he had knee problems. And his weight at the time would be
15 relevant to his medical condition. And that's what the --
16 one of the main areas of this P.C.R. hearing is about is
17 the state of Mr. Saleeby's health. So I believe it would
18 be relevant or -- relevant and its probative value is very
19 significant in this case.

20 THE COURT: I'm going to give you some leeway, but
21 you better be careful about weight now. You might get to
22 treading on the wrong person.

23 MR. STROUD: I know. Thank you, Your Honor.

24 BY MR. STROUD:

25 Q. About how much did you weigh?

1 A. I have gone up. Up and down, excuse me. But I think
2 probably 275, 280. Somewhere in that range.

3 Q. Now, how were your knees at the time of the trial?

4 A. How were they? They were stiff.

5 Q. Stiff, okay.

6 A. I had arthritis in both knees.

7 Q. All right. How did you feel physically when the
8 trial began in March?

9 A. I felt -- well, I had a lot of surgery. I've had a
10 lot of arthritis. Let me say it that way, and I'm used to
11 pain. I don't pay that much attention to it. But at this
12 particular time it wasn't as much pain as it was, you
13 know, pressure on my knee in terms of mobility and what
14 not.

15 Q. Okay.

16 A. Of which I received, and it's in the transcript, I
17 got a shot. And that those shots were not pain shots. I
18 got a shot in my left knee and right knee. I had them
19 replaced since then. These are my real knees, and I had
20 Dr. Hassler, who said he talked to -- would talk to y'all
21 by phone, letter or come and testify.

22 Q. That's ---

23 A. Two cortisone shots.

24 Q. We just wanted some background information for right
25 now about your pain. Were you -- did your knees have any

1 problems as far as sleeping?

2 A. No.

3 Q. Okay, now, did this knee problem, did it require any
4 medicines? I know you've said some shots, but were there
5 any medicines that have to be either prescribed or
6 recommended by your doctor?

7 A. I think I maybe wrong, but I think I was taking
8 Celebrex. I think it was Celebrex at the time which is an
9 antiinflammatory. Not a pain medicine. Antiinflammatory.

10 Q. Okay.

11 A. Specifically for arthritis.

12 Q. Okay. As I was reading through the transcript I read
13 that you were profusely sweating during your closing
14 statement. Was that just related to some other factors
15 than your health?

16 A. No, sir. I got that from my momma. She was in
17 church. It was 65-degrees this past Sunday, and she was
18 just a fanning away just as hard as she could fan.

19 Q. Okay.

20 A. And it wasn't because she was going through the
21 change of life which was a long time ago.

22 Q. Okay.

23 A. We just hot natured.

24 Q. All right. All right. Now, about how long after Mr.
25 Fortune's trial did you have your knee replaced?

1 A. My left knee was replaced on April the 10th 2007.
2 Q. Okay?
3 A. My left knee was reattached because I tore it over in
4 rehab over at Health South loose. And I've had a third
5 operation on it.
6 Q. All right. Now ---
7 A. The right knee was replaced on June 19th of 2007.
8 Q. All right. I was just asking.
9 A. Well, you want to know. I had both of them replaced
10 in 2007.
11 Q. Well, I was just asking. Specifically, the timeframe
12 is pretty much after -- right after the trial?
13 A. The trial was in 2006, wasn't it?
14 Q. It was in March of 2006; that is correct.
15 A. Okay. Well.
16 Q. All right.
17 A. Good while.
18 Q. Now, regarding your knees or your opening statement
19 what did you tell the jurors about how you planned to deal
20 with some of your medical problems?
21 A. I don't know the transcript. I don't remember it
22 word for word.
23 Q. Well, I'm jut asking in general.
24 A. Well, I don't remember. I read -- I can read it from
25 the transcript.

1 Q. Okay. We'll just wait on that.

2 A. I mean it was some referral in there about that I had
3 to go be attended to. And this is just in generality I'm
4 talking. There was some referral. I apologize, but I had
5 to be doctored on. Something to that effect, and that
6 Mr. Quinn would be left handling things.

7 Q. Okay.

8 A. And I didn't want to hold them up.

9 Q. All right. Now, like I said, these are some just
10 general questions. What in your position as lead counsel,
11 what affect did the knee problems have?

12 A. Me? None.

13 Q. None. Okay?

14 A. They didn't hurt cause they were -- it was sort of
15 like a rusty joint and metal when you have arthritis. The
16 cortisone stays in the socket, relieves inflammation and
17 you don't have no rubbing or that pressure. It makes you
18 just walk better.

19 Q. All right. Now, so you didn't, if I understand
20 correctly, you didn't ask for any continuance or anything
21 in March, 2006 because of your knees; that is correct, or
22 your health?

23 A. Not that I remember. No reason to.

24 Q. All right. Now, when would you say an attorney has
25 an ethical duty to consider his health in regards to the

1 ethics rule about competency and whether, at that
2 particular time, his competent to practice?

3 A. If he has -- he or she has whatever kind of medical
4 condition ---

5 Q. Um hum.

6 A. --- that affects their ability to think, to
7 understand, to comprehend, to, you know, understand what's
8 going on.

9 Q. Okay.

10 A. And being basically -- basically being in charge of
11 your mental faculties.

12 Q. Okay.

13 A. And I have been -- had a number of cases continued
14 because of the various operations that I've been through.
15 I wasn't in any shape to try a case.

16 Q. All right.

17 A. The Court's been very kind to me.

18 Q. All right. Did you consider possibly that Mr. Quinn
19 might do some more of the duties in your -- in the March
20 trial?

21 A. I'm sorry. I apologize. I didn't understand that.

22 Q. In March of 2006 you were the lead counsel, and in
23 regards to your health problems, did you consider that
24 maybe Mr. Quinn would do some of the other duties such as
25 opening or closing?

1 A. If I remember correctly, contrary to your brief, I
2 did opening. I did the closing. I did two witnesses.

3 Q. Um hum.

4 A. The forensic pathologist, who was working for Dr.
5 Joel Sexton from somewhere out west. She was flying in.
6 And I did another witness, and I think the count was he
7 did 15 witnesses and I did two. I did the opening and I
8 did the closing, which so I thought the close was the most
9 important part. He and Oscar seemed to clique, you know,
10 really. And in that sense, so some people clique better
11 with others, and he cliqued with the witnesses.

12 And I thought that was good, and Oscar had no problem
13 at all with him doing that.

14 Q. Okay.

15 A. And, of course, I was there to back him up or correct
16 whatever.

17 Q. All right. All right. Now, let's move on a little
18 bit. I want to ask some questions about the opening
19 statement. Now, in your opening statement, if you
20 understand correctly, you did tell them that you were
21 having some health problems. Do I understand correctly?

22 A. Well I meant by that my knees were stiff.

23 Q. All right. All right. Now, in that opening
24 statement what was said about -- to the jury how you would
25 prove Mr. Fortune's case?

1 A. I think I said I could -- I'll continue to talk while
2 I'm looking for it. I think I said, which I say a lot of
3 times ---

4 Q. Um hum.

5 A. --- in murder trials and that is and other trials
6 that I have that I have -- I think the evidence is such
7 that I will be able to prove Mr. Fortune innocent by the
8 State's own witnesses. I think I said that.

9 Q. All right.

10 A. And I think we did except the jury didn't agree with
11 it.

12 Q. Okay. All right. Now, how effective do you believe
13 that strategy was in Mr. Fortune's case?

14 A. How effective do I think it was?

15 Q. Um hum. Using the evidence and allowing the State
16 to -- basing on the State's evidence?

17 A. Well, I thought I did -- it was like pulling teeth
18 with any forensic psychologist -- I mean pathologist;
19 pathologist for the State.

20 Q. Um hum.

21 A. I thought I did -- I felt -- I thought I did a good
22 job. With the doctor it was like pulling teeth, but I got
23 him to admit a number of things finally with Judge
24 Milling's help on making her answer my questions
25 specifically.

1 Q. Um hum.

2 A. As to range -- I mean there was talk about how, you
3 know, close up like rifling on him, gunfire, and she and I
4 had a colloquy back and forth. And I had to pin her down.
5 There wasn't anything in her report that there was close
6 up gunfire or intermediate gunfire. No where written in
7 her report or anything that she relied upon, and we had, I
8 think in the transcript, you will find that Judge Milling
9 argued that whatever she was saying about this or that had
10 to be coming from S.L.E.D. agents or some other
11 investigating officer. She had no independent knowledge
12 of that.

13 Q. All right?

14 A. She didn't have any knowledge of what size caliber or
15 gun or bullets it was or -- five of them I think there
16 were.

17 Q. All right.

18 A. --- that penetrated the man's body.

19 Q. So would you say then that the pathology report did
20 not help Mr. Fortune because of these problems that you
21 noted?

22 A. I would said that the report did not help
23 Mr. Fortune. I think I clearly overcame that cause I
24 finally got that woman to answer my questions that, yeah,
25 she could not say where the gun was, how far it was.

1 You've got the transcript. Finally with Judge Milling
2 ordering her to get specific, and I made her read line by
3 line. And I said, "Where in here does it say that you
4 independently can testify -- say that it was close?
5 Intermediate? She was talking about powder burns and that
6 kind of thing.

7 We also talked about the G.R.S, the gunpowder on his
8 hands. I got her to admit that she didn't test for
9 gunpowder. Silly enough, she said she didn't test for
10 gunpowder because they already fingerprinted him. And if
11 you know anything about fingerprints that's just on the
12 tip of your fingers. If you fire a gun, if you've had as
13 many trials as I've had in this kind of situation, you
14 know that gunpowder blasts over your whole hand and even
15 up to your wrist and what not and gets on your clothes.

16 Q. Okay.

17 A. And she argued, well -- and we got into -- sounds
18 like midnight regarding a good meal. She came in
19 testified that the hands were not bagged.

20 Q. Okay.

21 A. So all that I thought was -- I think I took a -- did
22 a good job of taking apart her written report.

23 Q. All right. Okay, do you think the job you did with
24 the pathologist was effective regarding the jury? Did
25 they come out with the message you wanted them to hear?

1 A. I think that a -- well, you have to ask the jury what
2 was the reason they returned the jury -- you know, the
3 verdict on.

4 Q. You must ---

5 A. But, no.

6 Q. --- some impression?

7 A. From anything I've heard or seen, pathology report,
8 did nothing but help us. Now, there were other testimony
9 from other people that were being offered. I don't mean
10 this as a cuss word sense, but more damning towards Mr.
11 Fortune. But it certainly wouldn't be the pathologist.

12 Q. All right. Okay, let's move to another area now. Do
13 you think that the client's right to have effective
14 assistance of counsel begins from the time the client is,
15 the defendant, is arrested from that point to the time
16 that you retained him all the way up to the trial?

17 A. Well, you know, somebody is arrested I don't know of
18 anybody. I've had people try to put me on retainer for
19 criminal charges. I don't think that's ethical. I ain't
20 researched it, but of course, everybody's got to have
21 their rights read to them.

22 Q. Sir?

23 A. That's not exactly true either. They don't have to
24 have their rights read to them. It's whatever they say
25 can't be used against them and the right to an lawyer.

1 But in terms of a lawyer, from the time that that
2 lawyer -- that client engages the lawyer at that point in
3 time he is entitled to effective assistance of counsel.

4 Q. Okay.

5 A. To the verdict.

6 Q. Okay. Now, would you say that a client's right to
7 have effective assistance of counsel includes
8 communicating with the client?

9 A. To what extent you need to, yes.

10 Q. Okay.

11 A. Depends on the case.

12 Q. Just ---

13 A. Of course, you've got to communicate with your client
14 a trial. There is a lot of stuff that a lawyer has to do.
15 I mean you need to talk to your client.

16 Q. Okay. All right. Now, what about this right to
17 effective counsel. When does that right include meeting
18 with the client to discuss the facts and issues involved
19 in his case?

20 A. When I deem that we need to meet or if a client's got
21 questions he is free to come in any time he wants to and
22 talk to me.

23 Q. All right. What exactly do you mean when you deem
24 that you need to have a meeting with him?

25 A. Well, Mr. Stroud, sometimes clients will come in.

1 I'll get the facts. Let me tell you what I mean by that
2 by example, and I'll say, "Okay. All you need to do right
3 now is behave. Okay, I've got certain work to do I'll
4 call you in when I need you." And what I mean by certain
5 work is information, evidence. You have to gather up
6 what's good, what's bad. You gather all that up you have
7 you wasn't. He initially hired Kernard Redmond.

8 Q. Well, let's not get into that right now, but I'm not
9 questioning that yet. I'm saying just related to the
10 client's right to effective assistance of counsel?

11 A. If the mean I need to talk to him everyday and
12 babysit him, if that's what you're getting at.

13 Q. Well, let's just move on right now?

14 A. All right.

15 Q. Thank you. We've got your ideas. What about this
16 right of the client to have effective counsel? Would it
17 include things like discussing the law firm strategy in
18 how the counsel would present the case to the fact
19 finders?

20 A. We did that. We did that with Mr. Fortune.

21 Q. Well, so ---

22 A. It would and we did.

23 Q. Okay. Well. I'm just saying in general right now.
24 I'm not asking specifically of Mr. Fortune?

25 A. Specifics is what this case is about. We're not

1 talking about general; was I specifically ineffective in
2 this case. You asked me that. My answer is, yes, in this
3 case, as with any other, it is essential. And we did do
4 that on more than one occasion.

5 Q. All right. Let me back up. See if I'm understanding
6 this. Wasn't talking ineffective specifically in
7 Mr. Fortune's case. You met sufficiently with Mr. Fortune
8 to -- for him to know the strategy that you were going to
9 use in the upcoming -- in his upcoming trial?

10 A. Be specific which we did on this case. I like Oscar.
11 Liked him from the first day. Still do. I'm sorry, but
12 we met with Oscar a number of times to give him our
13 strategy. Now, when he hired Kernard Redmond -- I'm
14 saying when he hired Kernard Redmond Mr. Redmond went to
15 go with the Solicitor's Office. I took over, as you saw,
16 because of my representation and I'm proud of it.

17 But we met with him, but I've got -- this is just my
18 philosophy. He didn't hire me, but in cases this serious,
19 and it doesn't get more serious than this, for no extra
20 fee I always have either -- sometimes Mr. Cox, my partner,
21 has been practicing law longer than me.

22 Or I have an associate attorney on the case because
23 two heads are better than one. But both Mr. Quinn and I
24 were time after time after time met with Mr. Stroud [sic],
25 explaining things to him, going to Cheraw, going up to the

1 Huddle House, having him show us where he was, having him
2 walk us through the events, where was the alleged victim's
3 vehicle, where did it happen.

4 All that. We did that more than one time, and so,
5 yeah, we spent plenty of time with him, and he understood
6 everything.

7 Q. You said something in there that I'm not sure I heard
8 correctly. You said you don't, when you take a serious
9 case like this, you don't charge any extra for having
10 other counsel involved; is that correct?

11 A. No. When Mr. Fortune hired me he hired me. I could
12 have tried it by myself, but I just think that on cases
13 like this I'm not a sole practitioner. I bring in another
14 head at no additional cost. If I'm getting paid, for me
15 the extra lawyer, two heads are better than one.

16 Q. Okay. All right. Let's move on now to -- what
17 about, and, again, I'm just talking generally right now,
18 but since you brought up philosophy. What about this
19 right of your client to have effective assistance of
20 counsel? Would you say that it included meeting with the
21 clients? Discuss potential witnesses to the client's
22 defense?

23 A. I would tell you, yes. We did that.

24 Q. Okay. And so Mr. Fortune, I understand, specifically
25 would have known who the potential witnesses were that you

1 were going to call?

2 A. Knew every one of them.

3 Q. Okay. All right. Let's move on a little bit more.

4 In the area again of this general philosophy of yours what
5 about effective assistance of counsel in regards to
6 meeting with the client to discuss potential defenses that
7 might apply in presenting the case to the fact finders?

8 A. Yes, we did that.

9 Q. Hum?

10 A. We did that.

11 Q. All right. And, okay. And, again, going back to
12 specifics. So let me understand here. You're saying you
13 did that. What does that mean?

14 A. You're talked about going over defenses and I
15 questioned with Mr. Fortune. I can't be any clearer. I
16 said, yeah, we did that. I mean we did go over the
17 defenses.

18 Q. Okay.

19 A. If you want me to get very specific the defenses of
20 that the deceased fired first; that there had been -- that
21 he came up to the Huddle House, and he had been there
22 earlier. And Sonta had gone by and seen him or his
23 vehicle. There was a crowd there from Greenville at the
24 Huddle House. And that Sonta had gone by and then drove
25 back by, and he was gone. And she had called Mr. Fortune,

1 and Mr. Fortune was in bed.

2 And girlfriend got up. She had gun that was licensed
3 to her in her car. Went down there, and in terms of
4 defense we're talking about trying to show -- I think we
5 did; that the deceased fired first.

6 Q. Um hum.

7 A. Testimony was, and I don't think it was contradicted,
8 that the gun Mr. Fortune was carrying, he had not walked
9 up to the car. The victim -- wasn't pulled out or
10 pointing it at anybody.

11 Q. Right?

12 A. And it was only after that. That's a defense, okay.
13 And you've got a gunshot coming from the car. I don't
14 know whether it's towards Oscar or if was towards Sonta.
15 That's a defense. Either self defense or defense of
16 others. Went over that with him.

17 Q. So you did go over defense of others you're saying?

18 A. Yes, I did.

19 Q. Sounds like we can move on to something else now.

20 Now, ineffective assistance of counsel, according to your
21 philosophy, you've got to prepare for the client's trial;
22 is that correct?

23 A. I don't mean to be silly, Mr. Stroud, but any lawyer
24 that doesn't have to prepare for their client's trial, he
25 should be disbarred.

1 Q. Okay. Pardon me for being stupid. All right. I
2 think we need to move on now. When did Defense counsel
3 first learn that the State was set for Mr. Fortune's trial
4 to begin?

5 A. Defense counsel? You talking about me? You talking
6 about Mr. Quinn?

7 Q. I'm assuming, based on your testimony, you consider
8 you have several -- you had two attorneys. So I'm just
9 assuming you learned it together as defense counsel?

10 A. Well, Mr. Quinn and I would have found out at the
11 same time. And I don't exactly remember when I found out,
12 but we were prepared way before we found out from the
13 State. I think this case happened in 2001 and was tried
14 in 2006.

15 Q. Um hum.

16 A. And we had all the time in between.

17 Q. Okay?

18 A. So we had it prepared and some time went by, and so
19 then we refresh. So we actually prepared twice or better
20 for the case.

21 Q. Okay. All right. Now, which was -- what was the
22 first date that you found out that Mr. Fortune's trial was
23 set to begin?

24 A. I can't tell you. It was whenever Solicitor called
25 me up and told me.

1 Q. All right.

2 A. I don't know if that was a month. Generally, they
3 tell me -- in Chesterfield County they generally tell me a
4 month or so before. But right now I don't have any exact
5 recollection? No, sir, I don't.

6 Q. All right. Well, it was in November of 2005; that
7 the first term of Court was in November 5 2005 that his
8 first trial was going to be held. So with that knowledge
9 do you remember when you prepared for this November 2005
10 trial?

11 A. It was tried in 2005 or was it tried in 2006?

12 Q. The first trial was -- the first scheduled docket for
13 this trial occurred in 2005. Everything was ready for
14 jury and everything?

15 A. Wait. You're right about that, Mr. Stroud. That was
16 Chesterfield County. They can schedule. That doesn't
17 mean anything. That doesn't mean a thing in the Fourth
18 Circuit.

19 Q. Okay. That may occur. All right. So if I
20 understand correctly you will -- you are refreshed enough
21 to say that in November 2005; that at least a date was set
22 for the trial; is that correct?

23 A. I think that's right, and we were ready to go.

24 Q. All right. All right.

25 A. As far as I know.

1 Q. What happened during this 2005 term of Court?

2 A. Tell you the truth I don't know.

3 Q. Okay. Let me ask this.

4 A. If you know tell me. I'll agree with you or not.

5 Q. Do you remember anything at this trial about a list
6 of potential witnesses? That is might have been 61
7 witnesses?

8 A. If you say it was 61. I remember a long list of
9 witnesses. It must have been 90 to hundred people in the
10 parking lot of the Huddle House.

11 Q. All right?

12 A. But that was not our list. That would have been the
13 State's list.

14 Q. Okay. And so when did you -- so you weren't
15 dependent on the State providing the list? You had
16 done -- you had gone out and done some interviewing of
17 some of those witnesses that the police told you that were
18 at that scene?

19 A. Yes.

20 Q. Okay. Then?

21 A. No, I didn't need all that cause Sonta and Oscar told
22 me, too.

23 Q. Okay.

24 A. And other people told me. Everybody was one big,
25 happy family. You know, they had come up from a company

1 party slinging beer bottles and chairs and moseyed on up
2 to the Huddle House to sober up.

3 Q. So you don't remember anything that transpired in
4 November -- at this 2005 scheduled date that would have
5 caused the presiding judge to provide a Court order in
6 chambers?

7 A. Provide a Court order in chambers?

8 Q. Um hum, to the State?

9 A. Mr. Stroud, I apologize. I've tried so many cases.

10 Q. Excuse me?

11 A. I try so many cases that I do not remember that
12 particularity. If I have it and tell me about it that
13 maybe might refresh my memory.

14 Q. Defense -- just somehow it became known to Defense
15 counsel that a list existed, and you say it was
16 independent of any witnesses that you had contacted in
17 order to determine potential defendant's witnesses. And
18 during this trial then it appears that the November trial
19 was stopped and the State was ordered to turn over that
20 list of witnesses?

21 A. That is correct.

22 Q. Okay?

23 A. I remember that now with your help.

24 Q. Okay. All right. Now, did you, and from what I
25 understand and you may have to refresh my memory on this,

1 too, is that the presiding judge apparently set or
2 somebody set another trial date of January 30th for the
3 trial of Mr. Fortune. And it was contingent on the State
4 honoring its Court order. And I guess my question is
5 this: When did you, as Mr. Fortune's defense counsel,
6 receive that list?

7 A. I can't tell you exactly. It was sometime well
8 before trial.

9 Q. Sometime when?

10 A. Sometime well before trial.

11 Q. Well before which trial?

12 A. The second trial.

13 Q. Okay. January?

14 A. The one we're here about today.

15 Q. Okay. All right. Because you had ---

16 A. The March 6th through 9th 2006 trial.

17 Q. All right. So there was a letter that both you and
18 Mr. Quinn signed and you sent to Assistant Solicitor
19 Joyner. Do you remember that letter that you sent? It
20 was regarding these witnesses?

21 A. I remember we had to get -- we were having to get on
22 J.R. about getting us a list of witnesses.

23 Q. Okay.

24 A. And that may be what you're referring to.

25 Q. All right. So you're saying ---

1 A. You've had my complete file six months. If it's in
2 there -- I've only had it a couple of days. You've had
3 more time to work with it.

4 Q. All right. Well, your files didn't give me a lot to
5 go on, honestly. So would it refresh your memory -- in
6 the complaint that you said you read there was a list of
7 exhibits in the back and that letter was in there.

8 Exhibits. I hate to belabor this point, but it's seem to
9 be a rather ---

10 A. Should I -- well, let me just help you help me.
11 Should I look in your complaint?

12 Q. Well, I ---

13 MR. STROUD: May I approach, Your Honor?

14 THE COURT: Sure.

15 BY MR. STROUD:

16 Q. This is a letter that was faxed to the Solicitor and
17 mailed?

18 A. All right. I read that.

19 Q. So my question to you is when did you receive that
20 list that you told the State that you didn't have it, but
21 by the time the January 30th trial started you would be
22 forced to, according to your letter, you would be forced
23 to ask enter a dismissal?

24 A. Now, I'm not sure, okay, so don't hold me to it, but
25 I think it was before January -- I mean before what Judge

1 Burch here now. Orally ordered, I think, before the end
2 of the month.

3 Q. All right. So what ---

4 A. I think. I'm not sure, okay.

5 Q. What caused the January 30th trial to be continued?

6 A. It might have been that we didn't have it or it just
7 could be the way things are.

8 Q. All right. And I guess another question about this
9 list is what could have caused this list to be needed
10 because you said that you had already sufficiently
11 interviewed the witnesses of this crowd of 80 to 100
12 people?

13 A. Now, I ain't say I interviewed that many people. I
14 interviewed a good number of people. That many I can't
15 tell you.

16 Q. What's a good number cause I didn't see anything in
17 your file at all about the witnesses you did interview?

18 A. In the ballpark of 20.

19 Q. Twenty. Okay?

20 A. And if you're wondering why I did not have, you know,
21 listed in my file?

22 Q. Um hum. Well?

23 A. Well, wait a minute.

24 Q. I was just asking?

25 A. Are you asking now cause I can give you a reason.

1 Q. Not really because I'm sure somewhere at some point
2 you told -- well, let me ask you this. When did you tell
3 Mr. Fortune that you were going to interview these 20
4 people?

5 A. I said 20. Might be 21, 22, 23. Might be nine, 18.

6 Q. At what point?

7 A. At some point is -- I told him sometime before. I
8 did it way back. I mean several years before trial.

9 Q. Then?

10 A. Reviewed and re-interviewed a number of them again
11 before trial.

12 Q. Then why was such a commotion made about the
13 Solicitor's 61 witnesses?

14 A. Well, Mr. Stroud, I protected my client's rights.
15 Had I interviewed 20 or 40 or all 61 witnesses Judge Burch
16 ordered, if my memory is correct, but Judge Burch ordered
17 the Solicitor and/or the Sheriff's Department to get
18 statements from these 61 witnesses. They didn't have the
19 hands to produce, and that was supposed to be given to me
20 if they intended to call them before January the 30th or
21 whatever is on the order.

22 Q. So you're saying then you never -- the State never
23 gave you that list of 61 witnesses?

24 A. I had my own list, and ---

25 Q. Not your own list, but ---

1 A. --- you asked.

2 Q. Not your own list.

3 A. You may ask Mr. Quinn. He may remember.

4 Q. That's not ---

5 A. But I can't tell you whether they did or didn't. I

6 mean everyone that they put up on the stand I knew they

7 were going to put up on the stand.

8 Q. Okay. Then what prevented you from carrying out the

9 terms of your letter where you stated you got it -- you

10 stated that ---

11 A. I moved for dismiss.

12 Q. --- you were going to ask for a dismissal, and I have

13 found no record in the Court anywhere that you did ask for

14 this dismissal.

15 A. Well, you're correct. I didn't. You want to know

16 why?

17 Q. All right. I'm asking why didn't you ask for a

18 dismissal ---

19 A. Because when I said I got ---

20 Q. --- if you never ---

21 A. Cause Mr., when I got ---

22 Q. --- if you never got these witnesses?

23 A. Because there ---

24 Q. This was an opportunity to possibly get Mr. Fortune

25 off or at least come to some sort of agreement that might

1 have been allowed for him to have some other opportunities
2 other than the March trial in which you were sick?

3 A. No, sir, I was not sick at that March trial.

4 Q. Well, in bad health then?

5 A. My knees were inflamed.

6 Q. Again, I'm asking ---

7 A. To answer your question is that letter about
8 dismissal, in the real world, in the real work there are
9 hundreds of trials that I've tried in 30 something years,
10 in the real world even though Judge Burch ordered ---

11 Q. Let's not go there. It just ---

12 A. You wanted to know the reason why ---

13 MS. RATIGAN: Your Honor, I object. Mr. Saleeby
14 needs to be able to answer the question before Mr. Stroud
15 is jumping on him with another one.

16 MR. STROUD: All right, but he's getting off topic.

17 BY MR. STROUD:

18 Q. I don't care about a hundred trials that you may have
19 tried. We're asking -- just confine your remarks to Mr.
20 Fortune's situation?

21 A. I apologize. I was trying to do that, and it was
22 relevant. In my experience ---

23 Q. Um hum.

24 A. --- even though a Judge orders something such as a
25 witness list by such and such a time -- Judge Burch didn't

1 say what he was going to do or not do. He just ordered
2 that it be done. I just know from experience that not
3 just Judge Burch here. Most any judge would be hard
4 pressed not to give some more time if I move for
5 dismissal. Some more time, invoke sanctions, whatever, to
6 get the State to do what they need to do.

7 But I had no idea realistically that Judge Burch or
8 any other Circuit Court Judge on a case as such -- as
9 serious as murder would dismiss the case with préjudice.

10 Q. Okay. So if I understand you correctly you went just
11 by your experience, and decided not to at least put it
12 before the Court that you did not have these witnesses; is
13 that correct?

14 A. I was constantly talking to Mr. Joyner. Mr. Quinn
15 was talking to Mr. Joyner. We kept getting -- being
16 promised they were coming. We all knew each other. I
17 knew dog gone well that I wasn't going to get the case
18 dismissed, but I put it in the letter. I tried to pump
19 him up, but in reality they was sort of blowing in the
20 wind.

21 Q. All right. When did ---

22 A. Of course, that's just my opinion.

23 Q. Okay. So you went to trial in March without having
24 this list of witnesses?

25 A. Well, it was a long time ago. I mean we had a list

1 of witnesses.

2 Q. All right, sir. We understand that.

3 A. Will you let me finish my answer, please?

4 Q. Was a short list. This was a specific list of 61
5 witnesses that was gathered the night of the shooting. In
6 the preliminary hearing Kernard Redmond of your firm knew
7 that list existed and it had potential witnesses that
8 could have been helpful to Mr. Fortune.

9 So, again, are you saying that you went -- you knew
10 that the State did not provide them and you went to trial
11 in March without that list? Yes or no?

12 A. My answer is that I knew from Mr. Joyner who his
13 witnesses are going to be. I knew from Mr. Joyner,
14 Solicitor Joyner, who the witnesses were going to be, his
15 witnesses.

16 Q. But that's not ---

17 A. That's not the whole 61 because he was not going to
18 call 61 witnesses.

19 Q. I realize that?

20 A. And if you're familiar with the Three Witness Rule
21 you can't put, unless the Judge allows wide discretion,
22 put more than three witnesses up on the stand there, boom,
23 boom, boom. I mean they're not going to let you put 20
24 people up there. And I was standing there and I thought
25 this shot happened and all one after the other.

1 Q. All right.

2 A. The Three Witness Rule. You can't put 61 people up.
3 The same rule.

4 Q. All right. Obviously, I didn't mean that you would
5 call -- put on 61 witnesses. You would -- let me just ask
6 you this. How -- Mr. Arthur Mungo did not make a
7 voluntary statement. But yet police, obviously through
8 that list, found him through that list and had him testify
9 for the State. Isn't it possible that you might have done
10 the same thing?

11 A. I talked to Mr. Mungo.

12 Q. Yeah, I realize that, but what I'm asking is if the
13 State found Mr. Mungo on the basis of using that list then
14 isn't it possible that if you had that list you may have
15 found another witness that would have been helpful?
16 Because as it stands now, as I understand now, you left
17 out quite a few people that you did not interview. That
18 might have had pertinent knowledge about the facts of this
19 case. Am I understanding you correctly?

20 A. I don't know. If I interviewed a witness and that
21 witness would not be helpful to Mr. Fortune on this
22 particular case I did not make notes of it. I didn't jot
23 it down and I didn't put it in the statements.

24 Q. That's not the question that I'm asking.

25 A. Well, I'm saying I did that, and there were witnesses

1 that I did not want their testimony -- what they were
2 going to say written down.

3 Q. I understand that, but what I'm asking is you,
4 obviously, could not interview any of those 61 witnesses
5 other than possibly the 20 or so you said you interviewed.
6 And, obviously, you didn't find them helpful because you
7 only called in to testify on behalf Mr. Fortune, Mr.
8 Fortune and Ms. McCall.

9 So I'm having a little trouble understanding how you
10 ascertained that none of those witnesses had anything to
11 say that was helpful to Mr. Fortune?

12 A. Well, I tried to make -- clear that up. Mr. Quinn
13 and I thought, from what we -- the people we had
14 interviewed, that as in this case I said and I thought
15 that we would prove through the State's witnesses and the
16 State hadn't called we would didn't need most of them.

17 Q. All right. So ---

18 A. That we didn't need another 15 people saying the same
19 thing.

20 Q. Okay. So, again, what you're saying is that rather
21 than force the issue of making the State produce that your
22 strategy was to tag team on the State's witnesses and
23 cross-examine them; is that correct?

24 A. You can say that, yes.

25 Q. Okay. Was that a -- do you think the jury found that

1 effective?

2 A. Well, again, Mr. Stroud, I think you have to ask
3 which sometimes you can't.

4 Q. We've got some jurors here.

5 A. Okay. Good. I, Mr. Quinn, and a number of the
6 people in the courtroom were surprised when the jury came
7 back with a guilty verdict. I can't tell you their names
8 right now, but a number of Court personnel said, "You got
9 this one. You got this one. You won this case." We
10 thought we had it.

11 Only thing I thought might go wrong would have been
12 that somebody or some people on the jury panel that were
13 kin to, didn't tell the truth about it, knew something
14 that we didn't know or what not and got on the jury. It's
15 happened a good bit. Just because the Judge, you know, in
16 voir dire goes over all that with them there are people
17 willing not to tell what -- the way they really are.

18 Q. All right. Let's move on, but first I need a clear
19 answer. Are you saying that you, in lieu of forcing ---

20 MS. RATIGAN: Your Honor, this has been asked and
21 answered numerous times.

22 MR. STROUD: But I don't have an answer. I just need
23 to find out what his final answer is. He brought up that
24 he used the State rather than calling witnesses, and I
25 just need to verify that if that's the case.

1 BY MR. STROUD:

2 Q. You did not receive the list of 61 witnesses; is that
3 a true statement?

4 A. I could not tell you we did not receive it, and we
5 had witnesses. I thought we had -- the reason I didn't
6 call extra people is because I and Mr. Quinn thought --
7 and you don't think so, but I thought Mr. Quinn did an
8 excellent job. That except for some parts, which Mr.
9 Fortune was aware of, and the testimony that came out,
10 that an effective job as to reasonable doubt was done.
11 Plenty of reasonable doubt, but ---

12 Q. All right. Let's just move on.

13 A. Or we could have called another 10 or 15 witnesses.

14 Q. Okay. Let's just move on. Go to something else.
15 What would you -- when did you become aware that the
16 Solicitor had charged both Mr. Fortune and Ms. McCall with
17 independently shooting Mr. Shields with a .38 caliber gun
18 with malice aforethought causing the death of Mr. Shields?
19 And keep in mind that the Grand -- that the indictment
20 was -- they're not listed as codefendants but
21 independently. When did you become aware of that?

22 A. I don't know exactly when, but it was way before
23 trial.

24 Q. Which trial or which term of docket that was supposed
25 to be tried but didn't?

1 A. Mr. Stroud, I wish that my memory was that good, but
2 I can't tell you.

3 Q. Okay. All right.

4 A. But they were tried -- he was charged, as I
5 understand it, under the theory of hand of one is the hand
6 of all.

7 Q. No. Judge Milling said absolutely not. That's in
8 the transcript.

9 A. Well, that was coming from the Solicitor's Office.

10 Q. Okay.

11 A. There was no issue of her having the gun in her hand.
12 There was no issue. She was fussing with the folks.
13 There was to issue of her having any weapon at all, and
14 when that first shot came through she took off.

15 Q. Yeah. All right.

16 A. There was no weapon on her. She took no weapon to
17 the car.

18 Q. Um hum.

19 A. And J.R. Joyner and I talked about it. I mean he
20 said to me, and I assumed that he was speaking the truth,
21 the hand of one is the hand of all.

22 Q. Well ---

23 A. Ask Mr. Joyner. Get him up here. I'm just telling
24 you what he told me.

25 Q. Okay. All right. Let me move on to ---

1 A. And I might add if you want that that case was
2 dismissed pretty quickly after Mr. Fortune was committed.

3 Q. Yeah, it was. We'll deal with that in just a bit.
4 Now, would you say that you did not -- it would be wise to
5 force the Solicitor to present sufficient evidence, if
6 there was sufficient evidence, that he would be able to
7 prior to a trial narrow down precisely which of the two
8 people killed Mr. Shields, is that correct?

9 A. You're asking me what, Mr. Stroud?

10 Q. All right?

11 A. If he would narrow down if either between Oscar and
12 Sonta -- you were calling her a different name earlier,
13 but Sonta, his cousin, who did the shooting?

14 Q. Well, they had active warrants, active warrants and
15 active indictments. And Ms. Sonta spent seven weeks in
16 jail.

17 A. I understand that, but your questions was who did
18 the shooting.

19 Q. Yeah. No. If you had moved, maybe to show cause or
20 something, then at least you could have forced the
21 Solicitor to reexamine the evidence and so that at the
22 trial it wouldn't be an issue that -- on one hand you're
23 saying this man, beyond a reasonable doubt, shot this
24 person independently. But yet at this trial they were
25 saying that someone else independently shot the same

1 person and it was not co-defendants.

2 So as a lawyer wouldn't you have wanted to do
3 something prior to March 6th to clear up that matter or at
4 least use it to your advantage in saying that it's a
5 illegal impossibility that the two people independently
6 shot this man when the witness statements were at least
7 were all clear in saying that Sonta ran. And you said
8 yourself that she ran.

9 So what if you didn't force the Solicitor to make the
10 decision, and you didn't use it to your advantage at Mr.
11 Fortune's trial why not? At least you could have moved
12 for a dismissal.

13 A. Yes, sir. No, sir, I couldn't.

14 Q. Huh?

15 A. Well, I could have. I can do a lot of things, but I
16 don't make frivolous motions.

17 Q. So that was ---

18 A. In that point that would have been a frivolous motion
19 because all of the testimony, including Mr. Fortune's own
20 testimony, his own re-accounting of the facts, Sonta
21 recalling the facts, Sonta knowing that whatever she was
22 indicted and that whatever she said could be held against
23 her in Court. But everybody knew and other witnesses, the
24 State's witnesses, knew that Sonta never had the gun.

25 There was no evidence of her having the gun. The gun

1 was not Oscar's. It was his girlfriend's. It was
2 licensed to her.

3 Q. Yep.

4 A. In her car. He got out with it. Uncontroverted
5 testimony. He admitted it. I wasn't going to have him
6 lie to the Court.

7 Q. No.

8 A. And he was the one that -- and they got shot at. He
9 or they got shot at, however you want to take it, and he
10 put -- that's when he then pulled the gun out. Then, the
11 only gun and fired it. And then he went around to the
12 other side of the car where the victim had crawled, gotten
13 out or whatever, and shot him again.

14 Q. All right. Well ---

15 A. Now, there was talk about ---

16 Q. Well, let me ---

17 A. --- Sonta ---

18 Q. --- let me tone in ---

19 A. Well, what motion would you have made me make that
20 would help him on that?

21 Q. Well, from a legal standpoint it is very disturbing
22 in light of the prosecutor's special responsibilities to
23 not to convict to ensure justice that the right person is
24 on trial. I mean just having an indictment against you is
25 certainly causing collateral damages to anybody. So the

1 motion that an effective lawyer would have done is to try
2 to clear up that legal inconsistency?

3 A. Mr. Stroud, they were just ---

4 MS. RATIGAN: Your Honor, is there a question here or
5 just argument?

6 THE COURT: He's getting into the representation of
7 the other lady. I'm going to sustain the objection.

8 MR. STROUD: All right.

9 BY MR. STROUD:

10 Q. Then let's move on. So you knew that self-defense of
11 Oscar was going to be his best defense, I guess?

12 A. Yes.

13 Q. Okay. Now, if that is the case why did you have a
14 Jackson v. DeNiro [sic] hearing to try to ---

15 A. I'm sorry. I was crunching on ice. I'm sorry.

16 Q. Why didn't you in the March 6th trial have a Jackson
17 v. DeNiro [sic] hearing to try to exclude Mr. Fortune's
18 voluntary statement in which he said, "I shot this man in
19 self-defense and in fear when I thought Miss McCall went
20 down I was afraid that she had been shot and I was fearful
21 for her."

22 So I'm just trying to understand in view of the fact
23 that you just said that everyone knew that the voluntary
24 statement, what it said. So why were you trying to
25 exclude it?

1 A. That is pretty simple if you know the facts. There
2 were things not in that statement that I knew were going
3 to come out at trial. Therefore, that would have had hurt
4 his credibility by what he said on the statement. Yes, he
5 talked about self defense. Talked about this and that,
6 but there were several things that he didn't talk about
7 that I knew was coming out from my talking to the other
8 witnesses.

9 And so I wanted that statement kept out so it wasn't
10 be any contradiction. And the Solicitor was able -- if
11 you're saying this now and calling these witnesses now why
12 didn't you tell us that when you gave law enforcement --
13 when you gave your statement.

14 Q. All right. So ---

15 A. So it was more issues than just self-defense I think.

16 Q. Okay. Well, what was the main issue then?

17 A. Well, about him, about the decedent still being in
18 the car when Oscar went around the car as told to me, you
19 know, not before trial. From jump street and shot into
20 the car.

21 Q. You said, 'from the street'?

22 A. From jump street. I apologize. From the beginning.
23 That's what Mr. Fortune had told me; that he shot, went
24 around the car and shot into the car. And he was
25 concerned about being shot.

1 Q. And ---

2 A. That's still self-defense. If that comes out --
3 there is testimony we knew it was coming in or had
4 indication it was coming in that he didn't tell us about
5 that the victim was crawling outside on the ground and Mr.
6 Fortune shot him. Now, he didn't put that in his
7 voluntary statement, therefore, I didn't want what he was
8 saying, you know, you know coming out and them being able
9 to jump on him on cross, why didn't you tell us about that
10 part of it.

11 Q. So let me understand this correctly. You had
12 knowledge then that Miss Steph -- Miss Douglas Gaskins
13 would contradict her voluntary statement? And you also
14 then knew that Arthur Mungo must have been lying when he
15 said that Mr. Shields jumped out of the car. So how did
16 you pre-Court -- I mean pretrial decide that it was a fact
17 that Mr. Shields was crawling when in fact the pathology
18 report ---

19 MS. RATIGAN: Your Honor, he's getting into a
20 compound question that is difficult to answer.

21 MR. STROUD: Okay. All right. But it's hard not to
22 with this witness cause he's said statements -- he's
23 rambled so much that it's hard to pin him down.

24 BY MR. STROUD:

25 Q. All right. So what led you to conclude that the

1 veracity of the street was more important than what the
2 pathologist's report stated in light of the crawling
3 testimony or the crawling, whatever on the street?

4 A. Wasn't the street. It was the parking lot.

5 Q. What?

6 A. It wasn't the street. It was the parking lot.

7 Q. I realize that, but I thought you said that word --
8 you used some kind of word?

9 A. Oh, I said -- I used the slang term. I realized or I
10 knew about other contrary testimony to Mr. Fortune's
11 statement from jump street. That's a saying. That means
12 from the get go. From the beginning.

13 Q. All right. What I'm ---

14 A. May be I'm old school.

15 Q. What I'm trying to understand is how did you know
16 about this testimony?

17 A. By talking to witnesses. You asked, I told you.

18 Q. Okay. But Miss Stephanie Gaskins' statement,
19 voluntary statement, made contemporaneously in time to the
20 event in 2001, said that he ran from the car and that was
21 a writing. Now, which witnesses did you know had more
22 credibility than either Miss Stephanie Gaskins or your own
23 client?

24 A. I thought Mr. Fortune was much more credible a client
25 than Miss Gaskins.

1 Q. All right. So what was this witness that lead you to
2 decide that it was better to exclude his statement?

3 A. What was the -- let me get you right. Your question
4 is what did this witness -- you mean who ---

5 Q. Who ---

6 A. --- were the witnesses?

7 Q. Who or what was so compelling about the witness that
8 you interviewed that was more credible than the
9 pathologist's report which scientifically shows that the
10 interval between the shot -- between the first shot and
11 the time of death was minutes. And it clearly showed that
12 the last shot was a defensive wound in the back of the
13 left hand.

14 So I'm just asking what was this witness's testimony
15 that was so damaging that made you choose a strategy of
16 just wiping out Mr. Fortune's voluntarily given statement?
17 That's all I'm asking?

18 A. Well, I would think you got about four or five
19 questions in that one.

20 Q. Because I've had to rephrase so many times.

21 A. I apologize if I'm hard to understand. So let me do
22 my best ---

23 Q. Okay?

24 A. --- to be specific. If I wasn't you correct me.

25 Q. Um hum.

1 A. You tell me if I'm wrong. I want to get you the
2 right specific answer.

3 Q. Right.

4 A. You're asking what witness gave me certain
5 information?

6 Q. Or why was it so -- or what I'm really asking is why
7 was this witness that you did not -- that told you
8 something, why was that more credible in view of the
9 pathology report that at this early stage you elected to
10 exclude Mr. Fortune's voluntary statement?

11 A. It was one or more witnesses that had the decedent
12 outside of the vehicle on the ground in some form or
13 fashion as opposed to Mr. Fortune saying that -- if you're
14 going to read his statement in the record, fine. But that
15 he went around the car and shot into the car.

16 Q. All right. But did ---

17 A. Not shot him on the ground.

18 Q. Okay, but, yet, why would ---

19 A. So why would I want -- just let me finish my
20 question. So it ---

21 Q. Let me finish my question.

22 A. So it would be ---

23 THE COURT: Wait a minute. Wait a minute. Hold up,
24 now. Both of you are experienced attorneys. You know the
25 court reporter can't take down both of you talking at the

1 same time. So please one at that time.

2 MR. STROUD: I'm sorry.

3 THE COURT: I've got to protect her.

4 MR. STROUD: All right.

5 BY MR. STROUD:

6 Q. Now, may I interject something. You invited me to
7 correct you?

8 A. Yes, sir.

9 Q. Okay. My question or correction would be that
10 whatever this outside witness was you did have the
11 voluntary statement of Miss Gaskins, Douglas Gaskins,
12 Stephanie, in as part of your discovery that said that
13 Mr. Shields ran out of the car. So with that to back up
14 Oscar and with the pathologist's report to back up Oscar
15 why did you lend so much credibility to these statements
16 that aren't on the record anywhere of various witnesses
17 that said that he was running -- he shot him while he was
18 crawling out of the car. And that in turn -- you placed
19 so much credibility on that that you decided to hold a
20 Jackson v. DeNiro [sic] hearing and exclude ---

21 A. It's Denno, not DeNiro.

22 Q. Well, sometimes I have problems with my
23 pronunciation, but the point is you exclude -- you tried
24 to exclude Mr. Fortune's voluntary statement. So what
25 made this outside witness or witnesses, whether it's no

1 documentation of what they said, so credible that you took
2 it as apparent truth over these other things? It's a
3 simple question. I just need a direct answer?

4 A. I'm going to be as simple and to the point as I can,
5 but I need to ask you a question. One question. You want
6 me to talk about Miss Gaskins' voluntary statement?

7 Q. Well, no. I want you to talk about this witness or
8 witnesses?

9 A. Well, no. You raised her name and said that she was
10 running out of the car visa vie what he said.

11 MR. STROUD: Your Honor, we can at least ---

12 THE WITNESS: I'm sorry. I'm confused. I'm just
13 asking for clarification.

14 BY MR. STROUD:

15 Q. So answer one question which is what was so credible
16 about this unknown witness that has not been verified
17 anywhere in the record that you close to place so much
18 credibility on that -- or one or more witnesses instead of
19 relying on recorded voluntary statements and the
20 pathologist report? What made these witnesses so credible
21 to you that it caused you to exclude -- try to exclude
22 Mr. Fortune's voluntary statement?

23 A. Once again, there were oral but not written down
24 statements obtained from several different witnesses that
25 contradicted Mr. Fortune's statement. I did not

1 necessarily -- not my job to convict Mr. Fortune. It's
2 not my job to hand over to the State evidence that would
3 hurt him. And to protect him, and if those people had
4 been called that would have been -- been a direct,
5 terrible contradiction of what he stated his voluntary
6 statement said.

7 Q. Okay, but again ---

8 A. It would make him look like a liar.

9 Q. Okay. But what made it so credible at that point in
10 your preparation for this trial?

11 A. As simply put as I can tell you, there were several
12 people saying the same thing.

13 Q. Okay, but were they called by the States?

14 A. No.

15 Q. Well, then obviously, the State didn't find them so
16 credible?

17 A. I don't know if the State talked to everybody I
18 talked to.

19 Q. Well, if it's -- I believe the -- did you hire a
20 private investigator? What basis did you ---

21 A. No. No, sir. I do sometimes, you know. I'm of the
22 philosophy, whether it be me or you or any other lawyer,
23 we can get more of what we need and give a decision or
24 render our own opinion of making an evaluation of whether
25 that person is telling the truth or not better than a

1 private investigator can.

2 Q. And ---

3 A. And so I interviewed these people personally, and if
4 I don't like what they're going to say I mean I don't take
5 any written statements.

6 Q. All right?

7 A. But I do not think that it is my job as being the
8 best lawyer that I can be, as you like to say as effective
9 as I can be, for me to then go run and say to Mr. Joyner
10 or any other Solicitor he needs to go talk to Jack Jones
11 and Sally Mae and Sue Johnson over here cause their
12 testimony is going to help you a whole lot.

13 Q. But, again ---

14 A. Well, that's it, sir. That's the answer.

15 Q. Okay. So while we move on, basically, you just
16 decided these other unknown witnesses that the State
17 didn't call were more credible than the pathologist and
18 Mr. Fortune and the voluntary statement given by Miss
19 Douglas Gaskins. Okay, let's leave it at that.

20 A. No, sir. No, sir. You asked a question. In that
21 trial ---

22 Q. Okay, in March ---

23 A. --- as in most trials.

24 Q. --- in cross ---

25 A. Well, Your Honor, he asked me.

1 THE COURT: I'm going to tell both of you one more
2 time. If I hear both of you talking at the same time
3 again you're going to pay.

4 MR. STROUD: All right.

5 THE COURT: Y'all understand me?

6 MR. STROUD: I do.

7 THE COURT: Now, you asked him a question. He
8 answered it and you tried to rephrase his answer. Don't
9 do that any more.

10 MR. STROUD: Okay.

11 THE COURT: You ask your questions, you answer it,
12 and let's move on.

13 MR. STROUD: Well, all right. Now ---

14 THE WITNESS: I apologize, Your Honor.

15 BY MR. STROUD:

16 Q. Okay, so how were you going, if the Jackson hearing
17 had been successful, how were you going to bring up the
18 issue of self-defense?

19 A. By Oscar's and Sonta's testimony.

20 Q. So if I understand correctly you would -- you did not
21 believe the truthfulness of their statements, but you were
22 going to allow them to testify to it?

23 A. I believe the truthfulness of the statement, but it
24 was just not complete or there were not things in there
25 that a had gleamed from questioning other witnesses.

1 Q. Okay. So but you didn't -- you were going to wait
2 until the very least trial when you called these two
3 witnesses to interject self-defense?

4 A. Well, I did that, Mr. Stroud, in my opening
5 statements. Talked all about self-defense.

6 Q. Okay?

7 A. Talked all about what had started -- I mean where it
8 started. The argument started in Greenville. Gave the
9 whole set of facts. Fight being broken out there. Crowd
10 going down the road to the Huddle House. Sonta being
11 there seeing the car. She goes off for 15, 20 minutes,
12 comes back by. Sees that the car is gone. Pulls in the
13 Huddle House. Calls Oscar at home.

14 He's in the bed. He gets out of the bed and he goes
15 and comes there with his girlfriend. Sonta shoots out
16 when he gets there and goes to the victim's car. The
17 victim, decedent's car. Shot came out. Mr. Fortune's gun
18 was not out. In his pocket, and then pulled it out, as he
19 told me, in self-defense of himself and/or Sonta, who had
20 jumped, ran, whatever, after the first shot.

21 Q. All right. What -- in that opening statement there
22 were three questions that the State said that the jury
23 should keep thinking about during the trial. Now ---

24 A. In my opening statement?

25 Q. No. No. In the State's.

1 A. All right, sir.

2 Q. These three questions, one of them was how many times
3 Mr. Shields was shot. One was -- let's see. Had to do
4 with where the wounds were, and I can't remember the other
5 one. But, in their opening statement, besides raising
6 self-defense, what did you do to tell the jury your
7 response to those three questions?

8 A. I gave them the facts as we said that they would be
9 shown to be. Just what I gave you a minute ago.

10 Q. All right. Now, what -- let me move in a little bit
11 different direction. Do you know if Mr. Redmond, at any
12 time he represented Mr. Fortune, did he make any motions
13 for dismissal?

14 A. If he did I'm not familiar with it. I mean I don't
15 remember. Sorry.

16 Q. All right. Did -- when did you in your
17 representation of Mr. Fortune discuss with Mr. Fortune the
18 Jackson v. DeNiro [sic] hearing?

19 A. V. Denno.

20 Q. V. Denno.

21 A. Sometime before trial. The day before trial, what
22 not.

23 Q. The day before trial. Okay?

24 A. The night before trial sometime.

25 Q. Okay. Did he know that you wanted his voluntary

1 statement excluded?

2 A. I told him why, and he didn't -- I think Oscar, he
3 put his trust in me as to why.

4 Q. All right. So he then had to put his trust in you
5 throughout this trial; is that correct?

6 A. He as any client would, yeah.

7 Q. Okay. When did you tell Mr. Fortune that the only
8 witnesses you were going to call would be him and
9 Miss McCall?

10 A. I told him the day or so before trial that depends on
11 how the State's case went ---

12 Q. Um hum.

13 A. --- we could -- we may be calling he, Sonta, some
14 other witnesses, just call him and Sonta. But I believe I
15 made that decision -- couldn't until the case rested. I
16 mean the State rested.

17 Q. Until what?

18 A. Until the State rested.

19 Q. I realize that, but ---

20 A. I just told you I talked to him a day or two before
21 that.

22 Q. Okay. All right. So then a day or two before the
23 trial you, again, because of your strategy of letting the
24 State prove the case, that's basically when you were able
25 to see if any other witness might apply? Not sometime

1 between 2000 -- let's see. Mr. Redmond got the case in
2 2002. He left in 2003. So in between 2003 and the first
3 trial that was scheduled November 5th are you saying that
4 you did not have any thought or preparation about these
5 witnesses, the 20 or so witnesses, that you did interview;
6 that you just had to wait until the State's case rested to
7 determine if there were any witnesses that you wanted to
8 put on the stand?

9 A. I was ready to put them on the stand if I needed to.

10 Q. Hum?

11 A. Some good number of the 20 I didn't want on the
12 stand?

13 Q. All right. So other than Mr. Johnnie Quick how many
14 did you subpoena?

15 A. I had subpoenas ready for about nine or ten more.

16 Q. So again there was no valuable information that
17 caused you to serve any of these subpoenas?

18 A. Mr. Stroud, I knew -- I thought I knew basically what
19 the State's witnesses were going to say.

20 Q. Okay?

21 A. I had the statements of some or all. I had the
22 autopsy report. I had talked to Johnnie Quick. I had
23 talked to many other officers. We raised questions
24 about -- I forget his name, but why a friend of the
25 decedent's got his gun -- the decedent's gun out of the

1 car and took it home with him. And I think it was some
2 two weeks later when Officer Quick retrieved it and we
3 knew about that. Talked about that.

4 So I was ready to call other people, but you can talk
5 to them out in the field. But one thing that I've
6 learned, and I knew with these witnesses and it could
7 happen with any, they tell you one thing in the field and
8 then get on the stand and tell you something completely
9 else. And you're in a position where you can't impeach
10 your own witness until you have the Court declare them a
11 hostile witness for some particular reason. That's a
12 danger you take when you put up what I call wildcard
13 witnesses.

14 Q. So that's the reason that you generally like to prove
15 your case by the State's case?

16 A. I don't say generally. No, I wouldn't say generally.

17 Q. Okay?

18 A. But I say that in that a good, effective lawyer, and
19 I think I did on the two witnesses I did, thing that are
20 cross-examined. I think Mr. Quinn did also did an
21 effective job on cross-examining these people, the State's
22 witnesses.

23 Q. All right. Let's go back to something you said
24 earlier. Earlier you said that you didn't charge -- when
25 you charged a fee that that was that and you -- and

1 correct me if I'm paraphrasing this wrong, but you said
2 something about the fee and I didn't want to change that
3 fee or charge that fee. And that you would put other
4 counsel on the case. Am I paraphrasing the question
5 correctly?

6 A. No.

7 Q. All right.

8 A. It's not what I said.

9 Q. Would you mind restating that?

10 A. I said it is my practice, my individual practice,
11 that if I'm hired on -- as I said there was a very serious
12 case. Not always, but a good number of the percentage of
13 the times I will have either my partner, Jim Cox, or an
14 associate help me with the case because its got nothing to
15 do with my fee. Not any more. Not any less. I don't
16 have to do it. I can do it by myself, but I think it's to
17 the client's benefit to have two heads as opposed to one.

18 Q. Right.

19 A. My partner, Jim Cox, if he's got a serious case he
20 will ask me to help him or one of our associates to sit
21 and help him and partake in the case. You know, do other
22 law firms do that? I know some that do. I know some
23 where it's one lawyer does it all. I just think two heads
24 are better than one.

25 Q. All right.

1 A. Mr. Cox thinks that. My father thought that. I'm
2 just trying to provide as good a service as I can to my
3 client.

4 Q. All right. Thanks for clearing that up for me. All
5 right. What was the attorney's fee Saleeby and Cox Law
6 Firm charged when -- for the year and a half or so that
7 Mr. Saleeby -- I mean Mr. Redmond represented Mr. Fortune?

8 A. If you know you can tell me. I don't remember.

9 Q. All right. It was \$15,000?

10 A. How much?

11 Q. \$15,000.

12 A. All right.

13 Q. And that was paid in full. Now, do you remember the
14 first time you met Mr. Fortune after Mr. Redmond had left?

15 A. I don't remember the particularities of it. No sir.

16 Q. All right. How much -- or how did you determine that
17 the original attorney's fee of \$15,000 was too low?

18 A. Because I generally charge much more. I, generally,
19 for me. Generally I charge a fair bit more than that for
20 a murder case.

21 Q. All right. Did -- was the paperwork that Saleeby and
22 Cox Law Firm used to set forth their attorney's fee, did
23 it clearly provide that you can increase that fee?

24 A. You talking about from the beginning when Mr. Redmond
25 signed him up?

1 Q. Right. For the \$15,000?

2 A. I don't know if it did or not. You show it to me and

3 I'll tell you.

4 Q. I'm assuming you had written -- did you have a

5 written ---

6 A. Well, I did.

7 Q. --- representation agreement?

8 A. I mean it's in the file how much it was, and I don't

9 even remember how much Kernard charged. I never got --

10 Mr. Redmond charged him.

11 Q. All right. So when did you -- or how did you explain

12 to Mr. Fortune that he had to pay an additional \$5,000 for

13 his representation?

14 A. My minimum fee depends on the circumstances. My

15 minimum fee involving this potentially huge number of

16 witnesses, and I say, 'potentially'.

17 Q. Right.

18 A. The seriousness of the crime, my expertise or lack

19 therefore, at least my having tried a number of these

20 cases, I said -- I think I told you earlier that my

21 minimum is \$25,000. Since Mr. Redmond charged him \$15,000

22 I met in the middle and didn't charge him. I didn't ask

23 for \$10,000 more. I just asked for \$5,000 more.

24 Q. Okay. And so that additional \$5,000 ---

25 A. Or he could have -- let me tell you this. I could

1 have refunded his \$15,000 and told him he could go get
2 another lawyer.

3 Q. Right. Okay. So that extra \$5,000 was it used in
4 any way to help with the defense of Mr. Fortune?

5 A. Mr. Quinn may can remember if there was any cost or
6 expense out of that \$5,000, but I treated it based on
7 giving my services.

8 Q. All right. When did you meet with Mr. Fortune to
9 discuss the status of his case now that Mr. Redmond had
10 left?

11 A. I think I told you. I can't remember when I first
12 met.

13 Q. All right. But you did inform him clearly what
14 Mr. Redmond had done and how you were going to take over
15 and take his case and go from there?

16 A. Yes, sir.

17 Q. Okay, now, did you meet with Mr. Fortune from the
18 time that you found out there was a November trial up to
19 the March 6th, how many meetings, approximately, do you
20 think that you had to discuss everything about the case?

21 A. I don't know. A fair number. I don't have a record
22 of how many times.

23 Q. All right. Did you discuss anything about how the
24 State viewed this case in terms of a plea agreement or
25 anything with Mr. Fortune?

1 A. The only thing about a plea agreement that I talked
2 to Mr. Fortune was after talking with him several times,
3 getting his factual situation straight in my head, talking
4 with Sonta, talking with some other witnesses. It wasn't
5 offered, as I remember, but I asked him if he wanted me to
6 pursue obtaining a plea bargain with regards to voluntary
7 manslaughter ---

8 Q. Um hum.

9 A. --- and what the ramifications of that may or might
10 not be and he said, 'no'.

11 Q. Okay.

12 A. And I understood why he said no.

13 Q. Right. Okay.

14 A. It was sort of iffy as to whether it was voluntary --
15 whether the Judge would charge voluntary which I did get
16 him to at trial.

17 Q. Okay. At that meeting is when -- did you inform Mr.
18 Fortune that there were these witnesses out there that you
19 believed would substantially damage him and so he was --
20 he had an informed decision about the plea agreement?

21 A. No, sir.

22 Q. You said what?

23 A. No, sir.

24 Q. Okay.

25 A. When -- that was based just solely upon Mr. Fortune

1 telling me -- he told Mr. Quinn the same thing, and
2 admitted that the situation was that there was a decedent
3 that drove up. Sonta drove over -- Sonta jumps out, and
4 there was some arguing going on. Mr. Fortune gets out of
5 his vehicle, goes over that way.

6 He already told me he was expecting a fight. I asked
7 him why did you get out of the house. Get up out of bed
8 go back down there and, first, you had that gun. Why did
9 you put it in your pocket. He said, "I was expecting a
10 fight." And then so you have initial shootings going on
11 the driver's side of the car.

12 Q. Um hum.

13 A. Now, I may be wrong, and I've been wrong before, many
14 times, but as the first shot happened Sonta took off.
15 Mr. Fortune fired either two or three shots. I don't
16 remember exactly. I know five in total were fired.

17 Q. Right. The gun was turn in with all five spent
18 cartridges still in the gun, and the decedent was hit five
19 times. And the part that got me, in terms of the
20 voluntary manslaughter, was you had one person. It was
21 Sonta charged with murder for whatever reason you want to
22 call it. Had him charged with murder, but she fled. He
23 didn't.

24 It concerned me, although I was going to try to
25 justify it at trial, that he did not back off after not

1 being hit, after firing two or three times and left. I
2 mean instead went around the car. Seem goes to the other
3 side and shot a couple more times.

4 Q. Okay. All right.

5 A. That would be heat of passion. An argument going on,
6 shots fired. I guess that make you mad.

7 Q. Okay. Okay. Now, let's move on to the -- your
8 opening -- well, your closing statement. How do you think
9 your closing statement was received by the jury?

10 A. Well, you -- well, you've got a couple jurors here,
11 and they can say what they need to say. I thought --
12 well, I misspoke on a few things in terms of the name I
13 use a couple times. There are a number of misspelled
14 words on there, and me and Mr. Quinn and Judge Milling.
15 And there is some verbiage that is not correct which would
16 make it read a little more -- you said incoherent or
17 miscomboobulated, whatever word you want to use. And ---

18 Q. Right.

19 A. And, so -- but, and I think -- and if you want me to
20 read it you. As I said because the reading it is much
21 better ---

22 Q. Well ---

23 A. --- generally. I would be happy to read it to you.

24 Q. You talk about the clothes ---

25 A. I think ---

- 1 Q. Let's hold off on that. It was very lengthy.
- 2 A. All right.
- 3 Q. I believe it was.
- 4 A. Well, I have always been accused of being lengthy in
5 my ---
- 6 Q. Well ---
- 7 A. Always.
- 8 Q. All right?
- 9 A. The longest one I've ever done was a Statewide Grand
10 Jury trial, and I had four defendants all of which were
11 found not guilty. And it started here in Florence, and I
12 had four hours to argue. And Judge Johnnie Waller was the
13 judge, and he said, "Please, Ed, you've got, under the
14 rule, four hours with four clients. Please don't take
15 four hours." I didn't. I took three and a half.
- 16 Q. Three and a half. Okay. You met their requirement?
- 17 A. And they were all found not guilty.
- 18 Q. All right. Now, let's talk a little bit. During the
19 trial Miss Douglas Gaskin made some statements as a
20 State's witness. When did you read her voluntary
21 statement?
- 22 A. Can't tell you exactly when. Whenever I got it.
- 23 Q. But you did read it?
- 24 A. Yes.
- 25 Q. Now, did the State inform you prior to her Court

1 testimony would absolutely contradict the contemporaneous
2 statement she made in 2001? Did they inform you that this
3 was going to be a total 360-degree turn or 180?

4 A. No, sir. No, sir. Not ever.

5 Q. They never did?

6 A. Only time we found out when I heard it come from the
7 stand.

8 Q. All right. What was the affect you any on that
9 statement to the jury?

10 A. Well, Mr. Quinn had been pegged to hand sit her as a
11 witness.

12 Q. Um hum.

13 A. And several others. Mr. Quinn is very bright young
14 man. Can factually remember a great number of things in
15 detail, and he as I had not heard anything different the
16 voluntary statement before that. And all he could do at
17 that point in time, maybe, there was a motion out there
18 that he could have made or should have made. Mistrial. I
19 don't know what exactly, but -- cause Mr. Joyner had not
20 notified us what he was eliciting out of her at that time
21 was way different than what was on paper.

22 Q. And?

23 A. And so Mr. Quinn did what I think is as good a job as
24 anybody could have done in impeaching her or crossing her
25 up or making her unbelievable, whatever way you want to

1 term it.

2 Q. All right. So you didn't believe at that time there
3 was any objection that you could have made to Judge
4 Milling instead of relying on cross-examination?

5 A. You know in the heat of the moment, no, except for
6 possibly a mistrial.

7 Q. All right. What about ---

8 A. But we didn't do that. We decided to go ahead.

9 Q. Okay. Now, again, what do you think the jury's
10 impression of that statement was?

11 A. Well, I don't know. I can't get in the jury's mind.

12 Q. Well, let's just skip that, all right? Did you -- so
13 in the heat of the moment you really didn't just want to
14 have a side bar and try to have a chambers meeting based
15 on the rules of evidence that the probative value
16 outweighed -- no. The -- if whatever it is.
17 Outweighed -- the prejudicial affect outweighed the
18 probative value? At least ---

19 A. No, sir. I thought Mr. Quinn was doing a good enough
20 job of making her not a credible witness.

21 Q. Okay, and ---

22 A. I mean what you're talking about doing is, you know,
23 asking for a mistrial. Asking the Court -- I've known
24 J.R. Joyner for a long time. Asking the Court to
25 literally hold him not only -- well, contempt wouldn't be

1 the right word. Hold him under an allegation from us for
2 prosecutorial misconduct of which it just didn't enter my
3 mind to do that. If I'm wrong, I'm wrong, but it didn't
4 enter my mind to do that to Mr. Joyner.

5 Q. All right. And ---

6 A. I like Mr. Joyner. That has nothing to do with my
7 decision making.

8 Q. Right.

9 A. But I always found Mr. Joyner to be truthful with me.
10 Maybe hard to get stuff out of sometimes, but he was
11 truthful with me.

12 Q. All right. So ---

13 A. And a fine young man.

14 Q. All right. So was there, short of going to that
15 extreme step, let's say, could you have recalled -- you
16 did make motions to recall the witnesses instead of
17 letting them go, right?

18 A. I think so, yeah.

19 Q. Okay. So other -- of course, Miss Yucum, or whatever
20 her name is, she had already left?

21 A. She had to catch a plane, yes.

22 Q. But the testimony of, as we discussed before, the
23 testimony of Arthur Mungo at least would have contradicted
24 Miss Gaskins' statement or did you consider bringing that
25 to the Court's attention?

1 A. No, sir. At that time Mr. Quinn and I thought that
2 we were in a good position. Didn't want to muddy the
3 waters, sir. We didn't know what was going to come out of
4 her mouth. We had a loose cannon up there.

5 Q. Okay. All right. Let's move on. What about -- I'm
6 sure that the pathologist's report has been entered into
7 evidence. Did you consider taking that report and
8 explaining that it was scientifically impossible for that
9 last shot to be a -- put into the back of Mr. Shields?

10 A. Well I'm a man. I'll take my spanking. If that is
11 true I'm in error because I thought the last shot was
12 through the back of the hand.

13 Q. Right. It was the back of the hand, but her
14 testimony was that his last shot was fired into the back
15 of Mr. Shields as he crawled on the ground.

16 A. And I thought that I did a good enough job on cross
17 to have her -- what she thought by everybody else's
18 whoever that might be information to her discredit.

19 Q. All right.

20 A. Cause she was -- she was not there. She didn't see
21 it. She can't tell, and we talked about that in trial.

22 Q. Well, now ---

23 A. We brought it up at trial. She was not there. She
24 couldn't say who was where and did what.

25 Q. Now. She was there because she made a voluntary

1 statement. We're talking about ---

2 A. No. No. No. I'm talking about she was not at the

3 scene of the crime.

4 Q. Well, how could she make a voluntary statement?

5 A. I thought you were asking me about the pathologist.

6 Q. Oh, okay.

7 A. Weren't you asking me about the pathologist?

8 Q. Yes, but ---

9 A. Well, that's what I'm giving you an answer for.

10 Q. Well, I was saying the pathology report?

11 A. The pathologist made her report.

12 Q. Yeah, and it was entered into evidence ---

13 A. Yeah.

14 Q. --- as a document or scientific document, okay?

15 A. But I thought I had attacked it well enough in my

16 cross of her, that, yeah, it would be whatever was in

17 there, but it was to be taken for what it's worth.

18 Q. Okay. Just to clear the record. Was Mr. Quinn's

19 cross and ---

20 A. --- the pathologist.

21 Q. Yeah -- no -- well ---

22 A. I've got it right here. I'll read you my cross from

23 the pathologist.

24 THE COURT: We're getting crossed up. You're talking

25 about the ---

1 MR. STROUD: Pathologist.

2 THE COURT: --- witness that was there, Miss ---

3 MR. STROUD: Yucom. Her report actually ---

4 THE COURT: And you're talking about the pathologist?

5 MR. STROUD: Yeah.

6 THE COURT: Y'all are on different wave lengths.

7 BY MR. STROUD:

8 Q. Because she testified definitely, you're right.

9 Couldn't bring her back at that moment, but you did have
10 something that would have had some affect if a scientific
11 document -- all right. Let's just move on. Now, and as
12 you said that statement was very damaging. Did ---

13 A. I'm sorry. Which statement are you referring to?

14 Q. I'm just asking you testified that statement was
15 extremely damaging, and in light of that would you say
16 that the defense counsel was effective in the way they
17 handled that?

18 A. Again, I'm sorry. My attention span must be lacking.
19 Which statement? Whose statement? I'll be happy to
20 answer.

21 Q. All right. The statement of Miss -- the Court
22 statement of Miss Gaskins, Douglas Gaskins ---

23 A. Oh, you're going back to her now?

24 Q. Yeah. I'm just saying the way that defense counsel
25 handled that was it effective assistance of counsel?

1 A. I think so.

2 Q. Okay. All right. Now, let's talk about the point in
3 the trial where Judge Milling was giving the instructions
4 to the jury. Do you -- what do you remember when he was
5 talking about presumption of malice from the use of a
6 deadly weapon?

7 A. Or that the law was that if a deadly weapon, handgun,
8 is used malice can be inferred. I believe it's inferred.

9 Q. All right. Maybe in a robbery, but just the use in
10 ordinary circumstances, use of a deadly weapon, is
11 unconstitutional burden for him to use that instruction?

12 THE COURT: Well, we can shortcut that. The law is
13 clear from the Supreme Court decision that now you can't
14 use that charge any more, but it's not retroactive back to
15 this time. So you can make your point on it, but I don't
16 know if it's going to be relevant because I think the
17 Supreme Court was pretty clear.

18 MR. STROUD: It was. Okay. All right. Thank you.

19 THE WITNESS: May I speak to that?

20 THE COURT: Yes, sir.

21 THE WITNESS: Thank you, Your Honor.

22 MR. STROUD: Yeah.

23 THE WITNESS: I knew what the law was or I thought I
24 did. I did not disagree. I mean I didn't think I had
25 legal reason to disagree with Judge Milling.

1 BY MR. STROUD:

2 Q. Right.

3 A. This alleged crime gives him the benefit of the
4 doubt. This alleged crime happened in 2001, and you use
5 the law at that time of the occurrence of the crime.

6 Q. Um hum?

7 A. And it would be continued there.

8 THE COURT: I believe that the Supreme Court made it
9 clear in that decision a year or so ago that it's not
10 retroactive. So I'll let y'all develop it on the record,
11 but to me it's going to be irrelevant.

12 BY MR. STROUD:

13 Q. Well, let's move on.

14 A. To make it short that's why I did not object because
15 the law changed, Your Honor.

16 BY MR. STROUD:

17 Q. All right. And I agree. You were right, okay.

18 MR. STROUD: Now, Your Honor, what I'd like to do at
19 this time is call my next witness and reserve the right to
20 recall Mr. Saleeby.

21 THE COURT: All right. Let's take about six or seven
22 minutes and then we will hopefully break for lunch around
23 1:00. Let me talk both counsel just a minute before y'all
24 take a recess. Everybody else can go ahead and relax,
25 restroom breaks or whatever.

1 (WHEREUPON, Court is in recess at 12:05 p.m.

2 And reconvenes at 12:22 p.m.)

3 THE COURT: All right, counsel, if you will retake
4 the stand. I mean -- what am I saying. Right. We're
5 moving on. Mr. Quinn, if you will take the stand.

6 MS. RATIGAN: Actually, I need to cross Mr. Saleeby.

7 THE COURT: Counsel, I was right to start with.
8 Counsel, if you will retake the stand, and I was right to
9 start with. Subject to recall; that's what I was trying
10 to say.

11 CROSS-EXAMINATION

12 BY MS. RATIGAN:

13 Q. So, Mr. Saleeby, you testified that Mr. Fortune had
14 originally hired Kernard Redmond from your firm?

15 A. Yes, ma'am.

16 Q. And that after Kernard went back to the Solicitor's
17 Office you assumed representation?

18 A. Yes, ma'am.

19 Q. So by the time you assumed representation had Kernard
20 already filed discovery motions?

21 A. I think so. Yes.

22 Q. And you had reviewed those discovery materials?

23 A. Yes, ma'am.

24 Q. Did you review those with Mr. Quinn?

25 A. Yes, ma'am.

1 Q. And did you review those with Mr. Fortune?

2 A. Yes, ma'am.

3 Q. And did that include incident and supplemental
4 report, witness statements, things of that nature?

5 A. Yes, ma'am.

6 Q. Did that include Mr. Fortune's statement?

7 A. Yes, ma'am.

8 Q. Did you review with Mr. Fortune his version of what
9 had happened at the Huddle House that night?

10 A. Yes, ma'am, which was somewhat different than his
11 voluntary statement.

12 Q. Did you review with him the impact that statement
13 would have on his trial?

14 A. Yes, ma'am.

15 Q. Did you review with him that the impact of the
16 differences between his voluntary statement and his
17 version of what happened that night? That those
18 differences would also have an impact at trial?

19 A. I was trying to say that earlier, but, yes, ma'am.

20 Q. Did Mr. Fortune give the names of any witnesses to
21 contact who could corroborate his claim of what happened
22 that night?

23 A. Yes, ma'am.

24 Q. And I assume that was Sonta McCall?

25 A. That's one of them. Yes, ma'am.

1 Q. Do you remember off the top of your head the names of
2 any of the other witnesses he asked you to contact?

3 A. There were several others I can't tell you off the
4 top of my head that we contacted.

5 Q. So you were able to contact the witnesses that he
6 provided to you?

7 A. All of them and others. Yes, ma'am.

8 Q. Sonta obviously testified at trial. Did the other
9 witnesses give you stories that differed from what she had
10 to say?

11 A. Yes, ma'am.

12 Q. Is that why you did not call them at trial?

13 A. That is correct.

14 Q. And you testified on direct that you and Mr. Quinn
15 and Mr. Fortune actually went out to the Huddle House and
16 Mr. Fortune walked you through what happened that night?

17 A. Step by step.

18 Q. Were there any other -- was there any other
19 investigation that you undertook in addition to contacting
20 witnesses and going to the scene?

21 A. Well, I had chartered the scene out so I have it to
22 memory. I actually go walk through probably three times.
23 It was at least two, possibly three, and the witness --
24 the other witnesses -- she wasn't around, but I knew from
25 the list, you know, at the scene at some point in time

1 whether they were going to be called or not. And the
2 names that he had given me. That's all on those other
3 witnesses, and if their testimony was not viable I didn't
4 write anything down.

5 Q. Did you speak to the doctor, the pathologist, in the
6 case? Did you speak to her prior to the trial?

7 A. No, ma'am.

8 Q. But you reviewed the autopsy report?

9 A. Yes, ma'am.

10 Q. Did you speak to any of the officers who had
11 investigated this case prior to trial?

12 A. Excuse me?

13 Q. Officer Quick and ---

14 THE COURT: Just a second. Hold up just a second.

15 MR. STROUD: Can you -- I'm having trouble hearing.

16 THE WITNESS: I apologize.

17 MR. STROUD: Okay.

18 BY MS. RATIGAN:

19 Q. So you talked to Officers Quick and Haney prior to
20 trial?

21 A. Yes, ma'am.

22 Q. And you had reviewed their incidental and
23 supplemental that they had filed as a part of discovery?

24 A. I did.

25 Q. And so did the State ever make you a plea offer in

1 this case?

2 A. Not to my knowledge.

3 Q. And your testimony ---

4 A. Not to my remembrance.

5 Q. And your testimony was that Mr. Fortune was not
6 interested in a guilty plea?

7 A. Not as voluntary manslaughter or anything I mean.
8 And I understood that. He thought he had a good shot.

9 Q. And this was going to be a trial from day one?

10 A. Yes, ma'am.

11 Q. And I believe you testified that your strategy for
12 trial was going to be disprove the State's case and put
13 forth a self-defense argument; is that correct?

14 A. That is correct.

15 Q. And you had discussed that this would be the
16 strategy? You discussed this with Mr. Fortune?

17 A. Yes, ma'am. With the addition to that -- this was
18 ahead of the case. But if it was what we thought the
19 State's witnesses would say that -- through
20 cross-examination, even though some of them were lying --
21 would be lying, that we could handle that. But that that
22 ultimate decision would not be made until we heard what
23 came out on the stand.

24 Q. And I believe you testified on direct that you,
25 Mr. Fortune, Mr. Quinn had discussed the idea of a defense

1 of others argument; is that correct?

2 A. We had.

3 Q. And is that something you argued at trial, do you
4 recall?

5 A. I think I brought it up. Yes, ma'am.

6 Q. Was Mr. Fortune helpful in preparing the case for
7 trial?

8 A. Yes. Well, he told us as best he could everything
9 that we asked of him. Yes, ma'am. He did not -- I had to
10 do this on my own, find some of those witnesses because I
11 think it may be in his statement that when he pulled up
12 there was a crowd of people or I think he said in his
13 statement that he didn't know any of them so that, you
14 know.

15 Q. Right. In your opinion did the State have a strong
16 case against your client?

17 A. I thought we should have -- well, obviously, the --
18 you convict, but I thought we won the case.

19 Q. So you thought you put up a good defense in this
20 case?

21 A. Yes. So did others in the courtroom.

22 Q. And you had reviewed with Mr. Fortune prior to trial
23 the witnesses that you knew the State was going to call to
24 testify?

25 A. Me and Mr. Quinn did, yes.

1 Q. And Mr. Fortune testified in his own defense at
2 trial; is that correct?

3 A. Yes, ma'am.

4 Q. And in your opinion was his testimony helpful to the
5 case or harmful to your case?

6 A. You want the long answer or the short answer?

7 Q. Well, how about start short and then explain it?

8 A. No.

9 Q. You thought it was harmful to the case?

10 A. To some degree because it was not as explaining and
11 as factual -- as good a job as Mr. Quinn did on direct as
12 I thought it was going to be and from our conversing back
13 and forth a long time about what had happened. You know
14 clients tend to freeze up sometimes on the stand.

15 Q. So there was a long period of time between when you
16 assumed the file from Kernard Redmond and the trial began.
17 Would that be fair to say?

18 A. Yes, ma'am, years.

19 Q. And in your opinion is there anything else you could
20 have done in that period of time to prepare the case for
21 trial?

22 A. You mean going back over a second, no, ma'am. I mean
23 it may be, but nothing I can recall.

24 Q. Okay. And it's been testified to that both Sonta
25 McCall and your client testified for the Defense's case.

1 Looking back on it now are there any other witnesses that
2 you think if they had testified may have helped the
3 defense?

4 A. I don't know if we tried to get him or he had moved
5 or we held -- that it was held that it would be improper
6 or it was hearsay, but to my recollection Johnnie Quick
7 had made -- allegedly made the statement that -- to tell
8 you the truth I can't -- might have been to me, but I
9 can't remember that he couldn't say that Oscar was guilty
10 beyond a reasonable doubt.

11 We did not call him, and like I said I don't know if
12 it was because he wasn't around, changed his story or what
13 not. There was something. There had to be some reason.

14 Q. And just for the record's sake who is Johnnie Quick?

15 A. Johnnie Quick worked for the Cheraw Police
16 Department.

17 Q. Okay. And in your opinion if he had testified for
18 the Defense would it have changed the outcome of the
19 trial?

20 A. Well, I think a smart Solicitor would have jumped up
21 and said that he can't give his opinion as to reasonable
22 doubt.

23 MS. RATIGAN: Beg the Court's indulgence, Your Honor.
24 That's all I have, Your Honor.

25 MR. STROUD: Just a short redirect.

1 THE COURT: Yes, sir.

2 REDIRECT EXAMINATION

3 BY MR. STROUD:

4 Q. Mr. Saleeby?

5 A. Yes, sir.

6 Q. Did I hear you correctly when you said you did not
7 think the -- a plea deal was offered to Mr. Fortune?

8 A. If I said that under direct. I don't remember if one
9 was or not.

10 Q. Okay?

11 A. I mean right off hand. I don't remember.

12 Q. Okay. Just to set the record straight. It appears
13 that they did offer a 25 year plea bargain, but Mr. Quinn
14 elected not to take that and ---

15 THE COURT: You mean Mr. Quinn or?

16 MR. STROUD: I think it was. It was one of Defense
17 counsel.

18 THE COURT: Okay.

19 THE WITNESS: And it may have been me. In talking
20 with Mr. Fortune I'm just saying that I did not remember.
21 I do tell you this. If a plea bargain -- if a plea offer
22 were offered I certainly would have taken it. I've never
23 not taken one. By law you've got to take it to the
24 client. He can take it or not, but we discussed the pros
25 and cons. If one was offered to either me by myself or

1 had Mr. Quinn go over with him. I mean that's just
2 elementary policy. A must for me or any other lawyer.

3 Q. Okay, but, now ---

4 A. But I would argue against the 25 years. I mean I
5 would give my opinion, but no to 25.

6 Q. Okay, now, where is it -- where did you bring up
7 defense of others? Your testimony on cross was if I heard
8 correctly that you did have defense of others?

9 A. I think so, and I think it's not in any questioning
10 that I did. I mean any examination that I did. It would
11 either be in the opening or possibly in my closing.

12 Q. All right. I think ---

13 A. You've had the file for six or eight months. I've
14 only had it a couple days. I haven't been able to read
15 everything.

16 Q. All right. Again, the file really didn't offer us
17 any ---

18 A. I'm talking about what was in the transcript.

19 Q. Oh, yeah. Yeah, the State and the transcript. I was
20 talking about your files that Mr. Quinn gave us. Those
21 files I did not find helpful. All right. Are you -- what
22 steps did you take to let the Judge know that you would be
23 using defense of others cause you can't just talk about it
24 in your opening?

25 A. Well, I'd have to pull it out the transcript and see

1 if it was open or close. But I don't know why I would
2 have to tell the Judge that I would be using defense of
3 others in my close. If that was improper and that's what
4 I did I expect the Judge to stop me and I'll withdraw it.
5 I don't think it was improper.

6 Q. Okay.

7 MR. STROUD: Beg the Court's indulgence just one
8 minute here.

9 BY MR. STROUD:

10 Q. Okay, if I'm not mistaken the defense of others in
11 State v. Cook and State v. Hayes you -- I believe you do
12 have to at least bring it up to the Judge.

13 A. Okay. If you say so. I don't know if you do or not.
14 I take the position that you don't.

15 Q. All right. Cause I know no instruction, jury
16 instruction, was given on that, and you can't link it to
17 self-defense. It has to be a separate ---

18 MS. RATIGAN: Is there a question? It seems to be an
19 argument.

20 MR. STROUD: Okay.

21 BY MR. STROUD:

22 Q. The question is how -- what shows that you did have
23 defense of others?

24 A. Well, sort of do. Sort of don't. And what I mean by
25 that precisely is a shot was fired. That's

1 uncontroverted, from the inside of the car. Both were
2 charged with murder, Sonta and Oscar Fortune. The
3 difference being before second shot got off Sonta dove
4 off, run off, gotten away, and immediately took flight.
5 Put it like that.

6 Oscar then, you know, was doing the firing. Now,
7 whether she could have been hit and where she was I never
8 got that exactly straight. When there were no more shots
9 you can't anticipate how many more might come from inside
10 the car.

11 Q. Okay.

12 A. I know it never was real clear where she was. She
13 was right at that window. I know that, and she took off.
14 She went off that way. Mr. Fortune shot, went around the
15 car, and three more shots.

16 Q. All right. So, okay ---

17 A. Okay. So defense of others being her and
18 conceivable. Of course, she's running and gone, but she
19 was in shot range meaning a second shot now. Not the
20 first one. Assuming another one is coming. I don't know
21 where she it was. I think I threw that in there any way,
22 but whether that was realistic or not I don't know.

23 Q. Okay. But you know Oscar's voluntary statement did
24 say that he was protecting himself -- in fear of his life
25 and of Sonta's?

1 A. He said that in his opening statement, yeah.

2 Q. All right.

3 A. And I'm sure he thought that in his mind.

4 Q. All right. So, any way, we know for a fact that the
5 transcripts don't reflect any jury instructions and I ---

6 A. I understand that, sir, but you tell me or not. I
7 don't have them in front of me. I think I brought that up
8 in the closing, defense of others.

9 Q. Okay. But, again, you do understand that bringing it
10 up in closing is not sufficient to raise that defense?

11 A. In my years of experience if I said it and a jury
12 heard it, in all due respect to the Court, the Court
13 doesn't need to say it.

14 Q. Okay?

15 A. It was not objected to.

16 Q. But you will admit it's not in the jury instructions?

17 A. Yes. I mean if you say so. I don't remember, but if
18 you say so, give me the instructions I can tell you.

19 Q. And you did -- you were talking about Johnnie Quick.
20 Do you -- what do you remember about subpoenaing him for
21 the 2005 trial?

22 A. I don't remember. I think we did, but I can't tell
23 you. You know, swear to it with you.

24 Q. But one of the -- in the 2006 trial you agreed to
25 stipulate that Mr. Quick's testimony would be the same as

1 Mr. Davis'?

2 A. Yes, if you say -- if you have it in front of you,
3 yes.

4 Q. Okay. All right.

5 MR. STROUD: I have no more questions on redirect.

6 MS. RATIGAN: I have no re-cross, Your Honor.

7 THE COURT: So I will be clear still subject to
8 recall.

9 THE WITNESS: Okay, sir.

10 THE COURT: Let's go ahead and it's a good time to
11 break for lunch rather than fire up and then quit in ten
12 minutes.

13 MR. STROUD: I think we all deserve a break right
14 now.

15 THE COURT: Hour enough?

16 MR. STROUD: Yes, sir.

17 MS. RATIGAN: Yes, sir.

18 THE COURT: We're in recess for an hour.

19 (WHEREUPON, Court was in recess at 12:46 p.m. and
20 reconvened at 2:00 p.m.)

21 COLLOQUY

22 MR. STROUD: Your Honor, I've got a couple of
23 pretrial matters. First one is -- do you want to go ahead
24 and do it now? That way they're free to -- do I just
25 basically -- it's something you got to write or just go

1 ahead and say it for the record or what?

2 THE COURT: About the costs?

3 MR. STROUD: Yeah.

4 THE COURT: You just prepare me an order. It will
5 have to go t Indigent Defense.

6 MR. STROUD: All right.

7 THE COURT: And it will be the standard fee.

8 MR. STROUD: All right. You don't need to sign
9 anything.

10 THE COURT: Those that came Monday I'm going to sign
11 an order for Indigent Defense to be sure and pay that fee
12 and hopefully -- well, I can't promise you, but we will do
13 our best to cover both days. And that -- if you will just
14 get one of those form orders, Mr. Stroud. I'll take care
15 of it. It will take us a while now. Not going to be the
16 next day or two.

17 MR. STROUD: Yes, sir. And the other thing that
18 maybe we need to conference on is the remedy of this
19 charge. Can we approach?

20 THE COURT: Sure.

21 (WHEREUPON, a bench conference was held on the
22 record.)

23 MS. RATIGAN: Mr. Stroud wants to be noticed on the
24 record his request that the Court review and possibly
25 grant discharge as he understands it under the statutory

1 and case law provisions that's in his petition.

2 MR. STROUD: Um hum.

3 MS. RATIGAN: Thank you, Judge.

4 MR. STROUD: Your Honor, we're ready to call our next
5 witness and that would be Mr. Fortune.

6 THE COURT: Was there anybody you wanted to let go?

7 MR. STROUD: Everybody.

8 THE COURT: You're welcomed to stay.

9 OSCAR FORTUNE, after being duly sworn, testified
10 as follows:

11 DIRECT EXAMINATION

12 BY MR. STROUD:

13 Q. Good afternoon, Mr. Fortune?

14 A. Good afternoon.

15 Q. Let me first ask are you able to remember your March
16 2006 murder trial?

17 A. Yes.

18 Q. Okay. And, again, I just for conformation how can
19 you in 2012 remember a trial that was in 2006?

20 A. Cause I was convicted.

21 Q. All right. Now, what is your understandings of a
22 P.C.R. trial?

23 A. It's my one bit at the apple to bring forth
24 constitutional claims.

25 Q. And do you understand that -- what the purposes are

1 and things like that?

2 A. Yes.

3 Q. Okay. All right. What today is going to be
4 important about your testimony?

5 A. That I'm bringing forth my claims.

6 Q. Okay.

7 A. My constitutional claims that were violated. My
8 constitutional rights.

9 Q. Okay.

10 A. That were violated to obtain my conviction.

11 Q. All right.

12 MR. STROUD: Your Honor, at this time I would request
13 that Mr. Fortune be allowed to give a short narrative
14 statement based on his first hand perspective cause he's
15 the only one who isn't a defendant, and he has the unique
16 knowledge; that this narrative statement would also lay
17 the proper foundation for claims correct and the State's
18 cross.

19 And there is a case, while it's not South Carolina or
20 Fourth Circuit, it is the Ples and Cummings case, where it
21 shows that there is nothing in and of itself that would
22 disqualify a short narrative statement.

23 THE COURT: Any comment from the State?

24 MS. RATIGAN: Your Honor, we would object. If Mr.
25 Fortune wishes to make a short narrative statement about

1 the facts that he wishes to present them he could have
2 done that in his P.C.R. application or the amended
3 application. This is a bench trial. This just isn't a
4 free-form evidentiary hearing. It should be question and
5 answer form much like we went through with Mr. Saleeby
6 this morning.

7 THE COURT: And I don't mind being liberal with this
8 and letting him have some great leeway in responding to a
9 general question, but we need to reel it in now to what
10 we're concerned about, now. That is ineffective
11 assistance of counsel. We don't need to retry the case.
12 I think she does have a point there.

13 MR. STROUD: Right. Right.

14 THE COURT: But you do need to frame it with a proper
15 question.

16 MR. STROUD: Okay.

17 THE COURT: Even though it may be the general type

18 ---

19 MR. STROUD: All right.

20 THE COURT: --- of question, okay.

21 MR. STROUD: Okay. Do you need this for your record?

22 BY MR. STROUD:

23 Q. Mr. Fortune?

24 A. Yes, sir.

25 Q. What, based on your unique perspective, in a very

1 short narrative, would you describe as to why you believe
2 that your defense counsel was ineffective and that it
3 would be personal? Would it -- it would meet as I've
4 explained to you, meet some of the legal tests for
5 prejudice and would have made a difference under the
6 Strickland Test?

7 THE COURT: Okay.

8 THE WITNESS: Well, I listed several things in my
9 application. One of them was the Solicitor's closing
10 argument because they didn't preserve it for appellate
11 review. The Solicitor said some things when he opened and
12 in his closing argument which I think were very
13 prejudicial towards me. If I'm allowed to read it. Can I
14 read it.

15 THE COURT: Sure.

16 THE WITNESS: Okay. This is his opening: "Ladies
17 and gentlemen of the jury, thank you so much for your
18 time. Throughout the course of this trial I want to start
19 by telling you we both have jobs here. My job is to
20 present the truth. In fact if you look at the South
21 Carolina Code of Laws which mandates what the Solicitor's
22 job is, we cannot be like a normal attorney. A normal
23 lawyer has to advocate on behalf of his client.

24 But on the other hand a Solicitor can't. We have to
25 say what the truth is and at that point Mr. Saleeby

1 objected. Your Honor, I normally don't object. He
2 started out with his job as presenting the facts in the
3 light most favorable to his case. The jury are the
4 finders of the truth. The Judge ruled the jury are the
5 finders of the truth. I think he was referring to what --
6 that there was also an obligation on the Solicitor's
7 Office simply beyond that of presentation.

8 But the jury had -- does have the burden of deciding
9 what the truth is in the matter. So Joyner continued and
10 what that means is that we have something in law called
11 nolo pros. Am I saying that right; nolo pros.

12 THE COURT: Nolle pros.

13 THE WITNESS: And a person has been indicted for a
14 crime or charged with a crime after further investigation
15 somebody else did the crime where you can dismiss it and
16 nolle pros is to notify and which I can dismiss the case.
17 And I know a person has done something that I think the
18 facts show them guilty of then I can't nolle pros it. I
19 have to go forwards with it.

20 And as I said my job is to show the truth." Now, my
21 lawyer never objected. What the Solicitor is stating here
22 is that because I was indicted and he didn't dismiss it
23 that that means that I'm guilty. My lawyer never objected
24 to that. Then he spoke on my lawyer's job. "On the other
25 hand the defense attorney's jobs are to manipulate the

1 truth. Their job is to shroud the truth. Their job is to
2 confuse jurors. Their job is to do whatever they have to
3 do without regard for the truth." Saleeby objected.
4 Joyner said to get a not guilty verdict. Saleeby objected
5 again. The Court ruled, "I don't think their job is to
6 defraud the Court or the jury to that extent. I sustain
7 the objection."

8 I'm saying Saleeby settled for that when he should
9 have moved for a curative instruction and/or a mistrial.
10 And preserve it for appellate review. And then it could
11 have been looked at on direct appeal. That's not my
12 lawyer's job. That's not what I hired him for. I didn't
13 hire him to manipulate, to shroud, to confuse. I hired
14 him to advocate on my behalf. To represent me in this
15 case that I knew that I was not guilty of murder.

16 So I feel as if he took away my entire Sixth
17 Amendment Right to Counsel with that, and it should have
18 been looked at by the appellate courts.

19 BY MR. STROUD:

20 Q. Okay. Very quickly. Is there any other things, any
21 other issue that would help this Court and the State what
22 in laying a proper -- in it's direct and cross based on
23 this short narrative statement?

24 A. Well, not only do I want to frame this argument as an
25 ineffective counsel I also want to bring force that same

1 argument as a due process violation on prosecutorial
2 misconduct. That's in my initial application. So I want
3 it looked at both ways so if it's fine that I did not meet
4 the two prong of Strickland then I want it looked at as a
5 due process with his misconduct because he affected my
6 trial in fairness when he did that. When he told the jury
7 that their job was to lie, and his job was to tell the
8 truth. He's bolstering not only himself but every witness
9 he put on the stand.

10 Q. Okay. What is your job at the Broad River Prison?

11 A. I'm the law clerk. I'm currently the law clerk.

12 Q. And what is your record with your disciplinary record
13 while you've been at Broad River?

14 A. Well, not only Broad River, but the six years I've
15 been in I have on disciplinaries, no write-ups.

16 Q. Okay. All right. I'm going to take you back now to
17 some of the beginning events. This thing started in 2001,
18 and then the trial was in 2006. So I'm taking you back to
19 when the killing of Mr. Shields started, all right. When
20 did you know that your cousin, Miss McCall, had been
21 arrested for the murder of Mr. Shields by shooting him in
22 the chest with a .38 caliber gun?

23 A. December the 23rd of 2001.

24 Q. All right. How did you know this?

25 A. We were arrested. We were in jail at the same time.

1 I was arrested on December 23rd.

2 Q. Okay. When did your counsel let you know that y'all
3 were or were not co-defendants?

4 A. He didn't let me know that we weren't codefendant. I
5 always knew we weren't co-defendants.

6 Q. Okay. What about -- what -- when did you actually
7 meet with Mr. Saleeby and Mr. Quinn?

8 A. July of 2005.

9 Q. Okay, how many meetings with defense counsel did you
10 have from 2005 until your trial date beginning with
11 March 2006?

12 A. You mean March or November of 2005?

13 Q. Yeah, okay, I guess what I'm doing is from the first
14 time that you met with defense counsel all the way up to
15 March the 2006 and then I'll break it down but just ...

16 A. Oh, probably eight times in those initial dates until
17 the trial date.

18 Q. All right. Now, let me narrow that in a little bit.
19 During the time from the -- November 2000 -- up to the --
20 during the time that you took up -- Mr. Saleeby took over
21 up till the November 5th trial date how many times did you
22 meet with your defense counsel?

23 A. I would have to say out of the eight, five.

24 Q. Five times til November.

25 A. Five.

1 Q. What was the substance of those five meetings that
2 y'all talked about?

3 A. Well, the initial meeting we talked about \$5,000 that
4 I was charged. The extra \$5,000.

5 Q. Um hum.

6 A. We talked about Johnnie Quick. We talked about
7 Sonta. We talked about myself.

8 Q. All right. Then what about the second meeting before
9 the November 5th trial or attempted trial?

10 A. The same.

11 Q. The same thing. Okay. Then the third meeting would
12 have been when? Up to November 5th?

13 A. Our trip to the Huddle House.

14 Q. Okay. What you do at the Huddle House?

15 A. Went over what happened.

16 Q. Okay. Any other? And I believe you said there was
17 one more meeting prior to the -- when y'all went to Court
18 at least. This is November.

19 A. Yeah.

20 Q. What was happening in that meeting?

21 A. Talked about the trial. Going over what happened.

22 Q. Okay, what did you discuss?

23 A. Well, we talked about the defense. We talked about
24 self-defense. We talked about defense of others.

25 Q. Okay. Now, what did you do? Was there anything

1 brought up about the self-defense or anything -- I guess
2 when you say talked about it. What exactly, if you
3 remember, what exactly did that involve?

4 A. Just the evidence. The evidence of the gun that was
5 retrieved by Detective Johnnie Quick. Would it match with
6 the bullets and the casings that was found on the scene.
7 The bullets that were retrieved from the decedent matching
8 to the gun that I turned in. Went over the autopsy
9 report, and that's when I pointed out that there had to be
10 a statement missing because in the autopsy report it
11 stated that reportedly one shot was fired followed by four
12 to five shots.

13 So there was no statements matching up to that
14 autopsy report. She wasn't there. Law enforcement wasn't
15 there, so somebody off the scene had to tell them that.
16 And there was no statement matching up. So that is when
17 it was determined that something was missing.

18 Q. And what was that something?

19 A. We still don't have the statement.

20 Q. All right.

21 A. When we got at trial Saleeby asked Judge Milling to
22 have the State ---

23 Q. Judge Milling?

24 A. Judge Milling.

25 Q. Okay. November of 2005?

1 A. No, I said when we got to trial Saleeby asked Judge
2 Milling ---

3 Q. Okay. In March?

4 A. Right.

5 Q. Okay?

6 A. --- to have the statement available who took the body
7 to New Berry because he wanted to know where that
8 statement came from. But I feel as if that's something we
9 should have known before we stepped in the courtroom, and
10 that's something we could have known through
11 investigations.

12 Q. Okay. At any -- in that I guess fifth meeting prior
13 to the November 5th what else did y'all -- what else did
14 y'all talk about?

15 A. That's it. We really ...

16 Q. Okay. How did your defense counsel inform you of the
17 witnesses that they would be calling at this trial?

18 A. For the defense?

19 Q. Yeah.

20 A. I guess I just always knew it was going to be me,
21 Sonta and Johnnie Quick. I knew that's who was on our
22 witness list.

23 Q. Okay. How did they prepare you for the testimony?

24 A. They didn't. They didn't have to prepare me.

25 Q. Well ---

1 A. From my statement to my testimony, its been
2 consistent. I haven't lied about anything. So they
3 didn't have to prepare me.

4 Q. All right. Do you know if they met with Johnnie --
5 Officer Quick?

6 A. No, I don't.

7 Q. All right. When did they meet with Ms. McCall
8 since -- in preparation for that November 5th meeting?

9 A. They didn't meet with her in preparation for that.
10 The only time they met with her is March 8th of 2006.
11 After trial we went back to Saleeby's office and -- me,
12 Sonta and Mr. Quinn.

13 Q. Okay.

14 A. That's when they talked to her about her testimony
15 cause she was testifying the next day.

16 Q. Next day. Okay. All right. So you at -- at that
17 November 2005 term of court when did you first learn that
18 this was an actual trial -- going to be an actual trial?
19 Not a docket appearance or something like that?

20 A. Well, we were about to pick a jury.

21 Q. All right. But what I mean is prior to the
22 November -- to being at the November 5th when did you
23 learn that there was going to be a November 5th?

24 A. We were proceeding to trial?

25 Q. Yeah. Um hum.

1 A. About two weeks before.

2 Q. How did you learn that?

3 A. Mr. Quinn.

4 Q. Okay. And then when you -- what happened when you
5 appeared in Court on that November 5th day?

6 A. Mr. Quinn had some -- he wanted to know where the
7 Arthur Mongo and Nicole Byrd names come from because there
8 were no statements for them. So I told him that they were
9 on the names of the 61 people.

10 Q. Yeah.

11 A. They didn't have the list of the 61 witnesses. So
12 Joyner gave him a list with about 12 people's names on it
13 and told them that that was the list. Mr. Quinn brought
14 the list to me and asked me was that the list, and I told
15 him no. After that everybody went in the chambers.

16 Q. Okay. And were you -- did your defense counsel
17 inform you why your trial was up for -- or what was
18 scheduled for your trial? Was it continued?

19 A. Yes.

20 Q. Okay, now, so when did you actually -- when did you
21 know your defense counsel has interviewed the 20 witnesses
22 that Mr. Saleeby was referring to earlier?

23 A. Well, the 20 witnesses that Mr. Saleeby referred to I
24 never gave him any names of 20 people. I never did that.

25 Q. All right. And ---

- 1 A. Let me -- from my statement you can see that I didn't
2 know anyone on the scene except for J.J. Mungo, Arthur
3 Mungo. So I didn't know 20 names to give him.
- 4 Q. Now, so these 20 people then where did they come
5 from?
- 6 A. I can't answer that.
- 7 Q. Okay?
- 8 A. Because I don't know what 20 people ---
- 9 Q. All right.
- 10 A. --- he was referring to.
- 11 Q. Okay. Did you ever meet with your defense counsel to
12 discuss what value these 20 people were?
- 13 A. Again, I don't know what 20 people.
- 14 Q. Okay, but what I'm asking is did you and your defense
15 counsel meet and talk about those 20 people?
- 16 A. No.
- 17 Q. All right. When did you -- when did your defense
18 counsel inform you that those 20 people either were good
19 witnesses or bad? How did you know what value those
20 witnesses had to your case?
- 21 A. We never discussed 20 people.
- 22 Q. Okay. All right. Then when did Mr -- when did your
23 defense counsel talk with you about what was happening
24 with this list of 61 witnesses?
- 25 A. That date, that November date, they told me that we

1 weren't proceeding because they had kept the list from us.
2 The next thing I saw was the newspaper; where the
3 newspaper, the Cheraw Chronical, had put out the list that
4 was kept from us. And that's the last I heard of a list.

5 Q. Okay. So you never, other than -- if I'm
6 understanding correctly, other than seeing an article in
7 the newspaper you never were told by defense counsel
8 anything about this list of 61 witnesses?

9 A. No. After I told them that the list existed I never
10 heard anything else about it.

11 Q. Okay. Can you tell me your -- what your father said
12 about when you hire an attorney?

13 MS. RATIGAN: I'm going to object to hearsay, Your
14 Honor.

15 MR. STROUD: Okay.

16 BY MR. STROUD:

17 Q. Let's ask this. What did you -- how did you
18 determine that Mr. Saleeby and Mr. Quinn were working on
19 your case because you paid them \$15,000 and then you had
20 another \$5,000. So if -- how did you know that you paid
21 the bill? You knew that -- how did you know that they
22 were on your case?

23 A. I never knew that they were on top of the case. I
24 just knew that I hired them for representation, and I knew
25 what happened. So I felt that with Saleeby's reputation

1 that I would come out okay, you know. I never knew that
2 they were doing this, that or the other. I just knew they
3 said they charged \$20,000. I paid them \$20,000 dollars.
4 I'm not a lawyer, so I wasn't even familiar with the
5 judicial system being that I didn't have a criminal
6 record.

7 Q. All right. So let's move on now. You found out that
8 the March trial was continued because of those witnesses.
9 When did you next meet with Mr. Saleeby from November
10 until the January 30th 2006 trial date?

11 A. I never knew about the January 30th 2006 trial date.
12 I only found out about that through you when you showed me
13 the letter.

14 Q. Okay. So if that hadn't, and again, do you know why
15 that January 30th trial date did not happen?

16 A. No.

17 Q. Well, all right, sir. So if I understand correctly
18 you're saying from November 5th until -- of '05 until
19 January 30th you had no more meetings Mr. Saleeby?

20 A. No, not with Saleeby. Me and Mr. Quinn would
21 converse on the phone, but no meetings.

22 Q. All right. Could you tell me what or can you tell me
23 about those telephone calls?

24 A. Just I'll let you know when we're ready to proceed.

25 Q. Okay, all right. And let's move now to the

1 timeframe. It's from January 30th 2006 till March 2006.

2 How much time total did you meet with your defense team in
3 person between those two dates?

4 A. I would say three.

5 Q. Three times.

6 A. Yes.

7 Q. All right. What happened when -- was the first time
8 and what happened? When was the first time?

9 A. I can't recall the exact date.

10 Q. Okay?

11 A. First time. But it was more or less Mr. Quinn was
12 getting me prepared for what's about to take place.

13 Q. Okay. What -- in that first meeting what did he do
14 to get you prepared?

15 A. We mostly just talked.

16 Q. What you talk about?

17 A. Self-defense, defense of others, the ballistic
18 report, the autopsy report. Things like that.

19 Q. So it is true then that Mr. Saleeby did raise at
20 trial defense of others?

21 A. As he said he talked about it, but he never asked for
22 a jury charge. Him talking about it and asking for that
23 specific charge is two different things.

24 Q. Okay. When -- what -- you said at that first meeting
25 why did you meet with Mr. Quinn instead of both Mr. Quinn

1 and Mr. Saleeby?

2 A. I don't think Mr. Saleeby was available.

3 Q. Okay?

4 A. But Mr. Quinn was there.

5 Q. Okay. All right. Now, you said there were these --
6 what happened at that second meeting, and do you remember
7 what time when that was?

8 A. I can't give an exact date, but it got to the point
9 where I understand that they have to meet with me. You
10 know, so it got to the point where it was repetitive, if
11 you understand what I'm saying. It became repetitive as
12 far as the conversations.

13 Q. All right. And what was the gist of the repetitive
14 conversations?

15 A. Just talking about our defense. We felt good going
16 in.

17 Q. Okay. Then what happened at the third meeting, and
18 do you remember when that was?

19 A. At the third meeting that is when I was told the
20 State made an offer of 25, and I wasn't going to plead to
21 25.

22 Q. Okay. Then so -- all right. What did you know about
23 the Jackson v. DeNiro hearing?

24 A. Nothing. What do I know about it now or then?

25 Q. Then.

1 A. I didn't know what it was.

2 Q. Okay. When did your defense counsel discuss that
3 they wanted to exclude your voluntary statement?

4 A. We never discussed that.

5 Q. Okay. When did your defense counsel discuss with you
6 what the credibility of the witnesses that Mr. Saleeby
7 referred to that would have said damaging things and
8 therefore would have weakened your voluntary statement?
9 Did they discuss that with you?

10 A. We never discussed anything like that.

11 Q. All right. So then you ended up appearing in the
12 March 6th trial?

13 A. Yes.

14 Q. Okay. Did you know what the plan was or anything,
15 the strategy, he was going to use or your defense counsel
16 was going to use?

17 A. I just knew we were going with self-defense. Again,
18 I didn't know how the judicial system worked as far as
19 actual trials or anything like that. I just knew that we
20 were going with self-defense.

21 Q. Okay. Then what was your, I guess, when you did meet
22 with Mr. Saleeby, either the first time or during any
23 meetings he was there, what -- did you notice any medical
24 problems or anything like that?

25 A. No.

1 Q. Okay.

2 A. I seen him take medication, but -- prescribed
3 medication but I didn't notice any medical problems.

4 Q. Okay. Now, when did you determine that he did have
5 some medical problems?

6 A. At trial.

7 Q. At trial. Okay, how did you learn about that?

8 A. From watching what was taking place at trial.

9 Q. Okay. And how -- what was taking place that alert
10 you to this?

11 A. Incoherent, repetitive, sweating. I mean he was
12 saying that the court reporter's transcribe was wrong, but
13 it's not wrong. It's not wrong. It's -- that's what
14 happened.

15 Q. Okay. Did -- was there anything discussed at any --
16 during this trial that Mr. Saleeby would be doing both
17 opening and closing? When did you find that -- they
18 discuss that with you?

19 A. They didn't.

20 Q. Okay. Now, did you -- when we here -- when we first
21 got this P.C.R. case do you remember the first thing you
22 told me concerning an attorney visiting you?

23 A. That visits had more substance.

24 Q. Say that one more time?

25 A. That's that our visits had more substance. We talked

1 about my case in more detail.

2 Q. And what basically was the basis of that statement
3 that you determined that the meetings with your defense
4 counsel for a murder trial was repetitive?

5 A. Cause if you're not familiar with the system and
6 you're not familiar with what an effective lawyer is and
7 if you don't know your constitutional rights sometimes
8 you -- there is no way you could know they're being
9 violated.

10 Q. Um hum.

11 A. So in between 2001 and 2006 up until now that's a big
12 difference with the things that I know that I didn't know
13 then.

14 Q. Okay. Well, what, as a layman so to speak, what as
15 the trial progressed in March 2006, from a layman's terms,
16 what went on that subjected that there was some medical
17 issue or something that you believe was happening at your
18 trial that maybe did not jive with what you'd seen on t.v.
19 or something?

20 A. Well, not so much what I seen on t.v, but more of the
21 long pauses in the middle of closing; the being off track
22 with calling me Anthony and calling Anthony Oscar.
23 Calling Tonette Sonta and calling Sonta Tonette. You
24 know, just seeing things that shouldn't having been
25 happening; that shouldn't have been going on.

1 Q. Okay. Where or -- did you form any opinion that
2 because Mr. Saleeby admitted to the jury about his health
3 problems that he also was going to do the opening and the
4 closing? Did that alert you to anything unusual?

5 A. No, because I really had nothing to compare it to.

6 Q. Okay.

7 A. First time I've ever been at trial so I don't have
8 anything to compare it to.

9 Q. All right. Now, do you remember Sara Dew? We went
10 to visit you in Columbia and you used a cartoon metaphor
11 to describe the action that -- at the that trial you felt
12 was going to happen; that you told us it never did?

13 A. Yes.

14 Q. Can you tell the Court that?

15 A. I was waiting for Superman to come through the door,
16 and he never showed up.

17 Q. He never showed up?

18 A. Yes.

19 Q. Why did you say that Superman never showed up?

20 A. Because he didn't. Because he didn't. Because I
21 went off the reputation of what I heard about Saleeby, you
22 know. And that's why I paid the \$20,000. So you wait,
23 and you wait, and you wait, and he never comes. It never
24 happens.

25 Q. Okay. Now, in the opening statement were you

1 familiar with what the opening was going to be? Was going
2 to consist of?

3 A. No.

4 Q. Okay. Did you -- were you prepared for Mr. Saleeby's
5 opening in that it -- in that the State had previously in
6 their opening asked the jurors to consider three
7 questions. Did, in the opening of Mr. Saleeby, did you
8 hear or understand his answers to those three questions?

9 A. No.

10 Q. Okay. Was the State's closing -- which was shorter,
11 the State's or Mr. Saleeby's?

12 A. The State's.

13 Q. Okay. Now, in the closing statement what -- back up.
14 Of course, by this time you had had the progress of the
15 trial, and at the closing where did you learn -- did you
16 have -- did you ever discuss with the trial counsel about
17 what the closing was going to address?

18 A. No.

19 Q. Okay. What about the length of Mr. Saleeby's
20 closing?

21 A. Well, it was 41 pages of my transcript.

22 Q. And was there meat or substance to the closing in
23 your opinion?

24 A. Not to me, no.

25 Q. Okay? In that closing did Mr. Saleeby suggest

1 anything that might have proposed to the jury some
2 explanation for Miss Gaskins', Douglas Gaskins' statement?

3 A. No.

4 Q. Okay. Did -- or in that closing statement what did
5 you see as his main point?

6 A. What was his main point?

7 Q. In that closing, yes.

8 A. We proved our case that the State's witness's that
9 testified it was self-defense.

10 Q. Okay. In his closing do you remember that -- what
11 was used at Mr. Saleeby's closing that he kept referring
12 to? Okay, what about how did Mr. Saleeby ask the jury
13 questions in terms of reasonable doubt?

14 A. Could you repeat that, please?

15 Q. In his closing how did Mr. Saleeby try to focus the
16 jury on reasonable doubt?

17 A. Oh, with his reasonable doubt charge.

18 Q. Yeah.

19 A. Right.

20 Q. What did he do with that charge?

21 A. He put up what he deemed to be reasonable doubt and
22 said that if the Solicitor could refute each and every one
23 of these then the jury should convict me.

24 Q. Okay. So in the State's opportunity to again end
25 with closing did Mr. Joyner take advantage of that?

1 A. Yes.

2 Q. And ---

3 A. He went and touch bases on everything that was on the
4 chart and followed up by saying that Saleeby just told you
5 that if I could prove reasonable doubt on each and every
6 one of those then you should convict. So I just did it,
7 so convict.

8 Q. Okay. Okay, now, what other than the chart -- what
9 do you remember about the closing in terms of how he
10 delivered the closing?

11 A. As I said it was 41 pages of my transcript.

12 Q. All right. Now, are you reading? You're not reading
13 from the transcript, are you?

14 A. No. No. No. I'm not.

15 Q. Okay. Let me -- do you need to? Do I need to let
16 you refresh your memory?

17 A. No, I'm not refreshing my memory.

18 Q. Let's just try to go from memory and not look at
19 that?

20 A. Okay.

21 Q. That transcript, I didn't realize you had that.

22 Okay. So what was other than that chart what was the main
23 points that he was telling the jury about why your case
24 was self-defense?

25 A. Well, he went over the ballistics report. He went

1 over the testimony of the S.L.E.D. firearms expert. He
2 went over the forensic report. And he just talked about
3 the facts that I could have been killed or Sonta could
4 have been killed. It could have been easily one of us
5 instead of Mr. Shields.

6 Q. Okay, now, in terms of the closing what, I guess, did
7 he propose -- let me rephrase this one. In the State's --
8 in the progress of the State's case, the case, do you
9 remember what affect the State made of Mr. Shields .357
10 caliber bullet being found on the floorboard of his car as
11 opposed to conflicting your testimony which said that you
12 heard a shot? Did the State ---

13 A. Yes.

14 Q. How did they use that during the?

15 A. They said if he wanted to shoot me that then I would
16 have been shot. But he didn't because the lead was found
17 on the floor board.

18 Q. Okay. And did he ever refer to why -- when I say he,
19 Mr. Joyner. What else do he refer do in terms of how
20 self-defense was improbable based on the trajectory of the
21 bullets and the fact that you weren't hit?

22 A. Other than saying that because I wasn't shot?

23 Q. Um hum. Did he -- okay. So he -- when I said he,
24 Mr. Joyner, didn't talk about -- do you remember if he
25 talked about why you as a large man would be less likely

1 to claim self-defense?

2 A. Oh, he said because I wasn't hit. That meant that
3 Anthony was a bad shot and that I shouldn't have been
4 afraid of a man who was that bad of a shot.

5 Q. Okay.

6 A. Which I don't understand that.

7 Q. Now, did your defense counsel provide any theory as
8 to why that might not be the case?

9 A. Well, he did say that Anthony had one of the most
10 deadly guns because it was a .25, and while it goes in it
11 doesn't have enough to come out which makes it a dangerous
12 gun to be hit with.

13 Q. All right. Let's move now to the -- basically what
14 happened to when the pathologist was testifying in terms
15 of what your defense counsel was focussing on?

16 A. Well, they -- he wanted her to say something, and I
17 guess she wouldn't say it. So he was passionate about
18 getting her to testify to why would she say that these
19 were fatal shots, but yet he was still able to get out of
20 the car because he said that didn't go together. Because
21 if they were fatal for right then and there he shouldn't
22 never been able to move. He should have been immobile.

23 This man was able to get out of the car and probably
24 about 30 feet away from the car. Not 30. I can't -- it
25 escapes me now how far, but it was a substantial distance

1 away from the car before he collapsed.

2 Q. All right. Was he -- or do you remember did he try
3 to use the pathologist in the establishment of credibility
4 to help you in your trial?

5 A. Well, like I said he was on or about saying that like
6 the person perished right there in the vehicle when we
7 knew that wasn't true.

8 Q. Okay. All right. What about did Mr. Saleeby discuss
9 with you at any time in a meeting what the implications
10 were of the pathology report?

11 A. No.

12 Q. Okay. Did he -- did anybody in the defense counsel
13 get together and explain what value if any or what the
14 State maybe was trying to accomplish in having Mr. Mungo
15 testify?

16 A. Well, the State was trying to get Mr. Mungo or rather
17 the State got Mr. Mungo to say that I had a particular
18 conversation with him.

19 Q. Um hum.

20 A. And Saleeby pulled out that Mr. Mungo was actually
21 there for downward departure. That's the reason he was
22 testifying.

23 Q. All right. Did Mr. Saleeby in his cross-examination
24 did he try to bring out any information that Mr -- that
25 Mr. Mungo may have said on direct that would have been

1 helpful to you?

2 A. Mr. Mungo testified that, one, Sonta ran when the
3 shot was fired. And, two, that Anthony Shields jumped out
4 of the passenger side of the car. He testified to that.

5 Q. And so but he testified to that on direct. So my
6 question is did your defense counsel try to use -- try to
7 bring that out again in showing that that might be
8 beneficial to you?

9 A. Well, no. He -- what he did was attack J.J. --
10 Arthur Mungo's credibility for stating that I made a
11 statement to him.

12 Q. All right.

13 A. He didn't go over that.

14 Q. Did he take up, in your opinion, was he argumentative
15 or trying to tear down Mr. Saleeby's testimony?

16 A. Mr. Mungo's testimony?

17 Q. Yeah, Mr. Mungo's testimony, yeah?

18 A. It got pretty heated between the two.

19 Q. Okay, what about let's take you back to the again the
20 time that Miss Douglas Gaskins was testifying. Did you
21 know when she was going to testify what she was going to
22 say ---

23 A. Well ---

24 Q. --- based on my conversation or anything with
25 Mr. Saleeby discussing her voluntary statement?

1 A. No, because it was understood that she would testify
2 as to what she put on the statement.

3 Q. Okay?

4 A. That's all we looked over was what she had on the
5 statement.

6 Q. All right. So what basically was your reaction when
7 the testimony, her in Court testimony, came out and said
8 that you had shot in the back was with your last shot a
9 crawling man?

10 A. I knew it was a lie.

11 Q. Okay.

12 A. I knew that that wasn't true.

13 Q. Did you have any feelings about how that statement
14 might make you sort of a -- in the eyes of yourself, maybe
15 your wife, that would cast doubt on maybe the truth of
16 your story?

17 A. No, because something that graphic if you've got a
18 hundred people on the scene and something like that
19 happens it's going to be more than one person that tells
20 that that happened.

21 Q. All right. So you still thought Superman could save
22 the day?

23 A. No. I knew he would. I didn't think he would. I
24 knew he would. At that point I know that they're putting
25 up lies, and there is no way that lies can survive, you

1 know, in a Court of truth. So I didn't think he was going
2 to show up. I knew he was going to show up.

3 Q. All right. So are you saying that Mr. -- your
4 defense counsel was effective because you knew they were
5 going to bring it out that that was a lie?

6 A. Well, Mr. Quinn got her to admit that she was lying,
7 but I didn't know the procedures that should have took
8 place; that there are certain procedures. That it
9 shouldn't have been approached on cross. It should have
10 been approached on direct; that it should have objected to
11 because she just committed perjury.

12 So that should have been objected to, and it should
13 have been handled then not on cross. But at that time I
14 don't know that. So it goes back to if you don't know
15 what's going on it may seem as if someone is doing their
16 job. But if you don't know what their job is how can you
17 really tell.

18 Q. So, all right. Are you -- would you say that because
19 you had no criminal record and did not know the justice
20 system that your defense counsel in the meetings prepared
21 you as -- for things that would come up at the trial?

22 A. No. I'm not saying that because to me my job was to
23 pay the fee and their job was to represent me. But I
24 don't know what all represented meant. You know, I mean I
25 just didn't know.

1 Q. Okay, let's move on then to the manner in which you
2 observed some of those medical issues. Was it -- you
3 stated that he was rambling, but did you see any physical
4 signs that because he told the jury that his knees were
5 bothering him, did you see any physical evidence that that
6 maybe affecting his performance at the trial?

7 A. His knees?

8 Q. Yeah, I mean -- right or anything ---

9 A. No.

10 Q. --- about his health?

11 A. Just one day he was absent. Not for the entire day,
12 but he had to go to the doctor. And that at closing for
13 some reason he was sweating real bad. That's about the
14 only thing that I saw.

15 Q. Okay.

16 MR. STROUD: At this point I have further questions,
17 but I do reserve the right to recall.

18 MS. RATIGAN: I have no cross, Your Honor.

19 THE COURT: You may step down.

20 MR. STROUD: I'd like to call Miss Blanche Fortune,
21 the defendant's wife.

22 THE COURT: You will come up and be sworn, Mrs.
23 Fortune.

24 BLANCHE FORTUNE, after being duly sworn, testified as
25 follows:

1 THE COURT: Make yourself comfortable with that
2 microphone.

3 DIRECT EXAMINATION

4 BY MR. STROUD:

5 Q. Good afternoon?

6 A. High.

7 Q. You've been waiting for this day for a long time?

8 A. Yes.

9 Q. Okay, what are -- first of all just go ahead and
10 restate what's your relationship to Mr. Fortune?

11 A. He's my husband.

12 Q. And did you marry him -- when? During or prior to
13 the March 2006 trial or after or what?

14 A. Before.

15 Q. Before, okay. What was your reason, your motivation
16 for wanting to testify today?

17 A. Because life has been hard without my husband and
18 everybody is entitled to a fair trial, and I don't think
19 that we were represented very well. And when was put your
20 life in somebody else's hands you want the best job done
21 from that.

22 Q. When did you determine that -- first of all let me
23 back up. Did you attend -- were you present during the
24 March 6th trial?

25 A. Yes, sir, I was.

- 1 Q. For the entire four days, I think?
- 2 A. No, I left one day.
- 3 Q. One day, okay. What day was that, do you remember?
- 4 A. I think it was that Wednesday.
- 5 Q. That Wednesday, okay. And Thursday was his last day,
- 6 correct?
- 7 A. Yes.
- 8 Q. Okay. All right. Now, what formed or during the
- 9 time you spent at the trial what was the basis for your
- 10 statement that you just made now that you think he didn't
- 11 get a fair trial?
- 12 A. He wasn't represented very well.
- 13 Q. Well, okay, all right. Yeah, he didn't get a fair
- 14 trial because of his poor -- of his ineffective counsel?
- 15 A. Um hum.
- 16 Q. All right. What form -- you just made a statement?
- 17 A. Um hum.
- 18 Q. What form -- what caused you to believe that at the
- 19 trial?
- 20 A. Well, I noticed that he was very sweaty and he was in
- 21 and out of question. Then I noticed he kept turning
- 22 around and looking at me very strangely. And I reminded
- 23 him of his wife, and I'm like is this a game or what, you
- 24 know. It was just things out of the ordinary for an
- 25 attorney that I was watching that made me scared. And

1 that's when I'm like I wasn't satisfied.

2 Q. Okay, what -- was there anything specifically that
3 you, prior to the time that Mr. Fortune [sic] told the
4 jury he had health problems, was there anything that you
5 noticed prior to that that gave you an idea that he was
6 having substantially more problems than just sweating a
7 lot?

8 A. Yeah, he was calling us -- he was calling the wrong
9 name out at people.

10 Q. Okay. What about when he told the jury about his
11 health problems. Did you notice anything about that maybe
12 having a cause and affect relationship to his types of
13 questioning he was doing? I'm trying to understand what
14 your knowledge is at the trial of his health because you
15 claim that it was ineffective. What made -- did you think
16 his health ---

17 A. Well, I was watching. He was fumbling. He wasn't
18 getting his point across very well as far as speaking.

19 Q. All right. Did his knee problem -- what did you
20 observe about his knees? Anything?

21 A. No, I didn't observe his knees. I just knew from
22 what he said about his knees.

23 Q. All right.

24 A. And he was sitting down a lot.

25 Q. Okay. Now, in light of the things you observed what

1 about the opening statement concerned you or did anything
2 in the opening statement concern you?

3 A. Well, he admitted about he was taking some
4 medication. And, you know, later on during the trial I
5 noticed some -- I'm like maybe that's from the medication.

6 Q. Okay. What about the things he -- in his opening
7 statement that he said that would have a bearing on
8 providing a good defense to Mr. -- your husband? Was
9 there anything in his opening that what he would be
10 effect?

11 A. Well, he did mention something about some shots he
12 might have to go and have in his knees and the
13 medications. That's it.

14 Q. All right. What I'm looking at now is sort of the
15 contents of his opening. Is it, if I understand correctly
16 you were married at that time?

17 A. Yes.

18 Q. Did you -- and you knew that your husband had --
19 well, let me phrase it this way. Did you and your husband
20 discuss the preparations that you made -- that Oscar was
21 being given by his defense counsel?

22 A. I don't understand what you're saying.

23 Q. Okay. All right. What I guess I'm asking what
24 knowledge do you have of -- about, prior to the trial, the
25 times that your husband went and saw his defense counsel

1 at that time and received information about this trial?

2 A. Well, the only information I got was what my husband
3 was telling me. Yeah, I was comfortable with everything
4 that he was saying; that he was coming back with. I was
5 comfortable at that time.

6 Q. Okay. So it was at -- was it at the trial then that
7 you began to realize that he was not being effective?

8 A. Yes.

9 Q. Okay, and did -- let's move on to the opening. What
10 about the time that Miss Gaskins, Ms. Douglas Gaskins,
11 made her in-Court testimony. What affect did that have on
12 you?

13 A. It had a lot of affect because once you put in
14 someone's head the first statement that you make, and I
15 feel like that he should have done more as she was
16 testifying as to block some of her testimony out or
17 something. Do something.

18 Q. All right. But did that testimony have any affect on
19 you personally?

20 A. Yes, it did. It did.

21 Q. In what way?

22 A. Because of what she had said because even if
23 somebody, no matter what she said, it made me believe.
24 And I know it probably made everybody else believe that he
25 was a cold blooded killer, her testimony.

1 Q. So that -- all right. What did the defense counsel,
2 in your -- that you saw, what did he do to try to dispel
3 that perception?

4 A. I don't recall nothing happening.

5 Q. All right. Now, in the closing statement, what
6 was -- did you -- what was the length of the closing
7 statement? I mean ---

8 A. I can't really -- I know it wasn't -- it should have
9 been longer than what it was.

10 Q. It should have been longer?

11 A. Yeah.

12 Q. Okay. All right. How did, in the closing argument,
13 how did Mr. Saleeby determine that his -- well, let me
14 rephrase. Do you remember what Mr. Saleeby used in his
15 closing statement to show the jurors some things about
16 this trial?

17 A. A chart.

18 Q. Okay. What was the purpose of this chart?

19 A. It was something you can answer some questions on the
20 chart. Some statement he made about the chart. I know he
21 was telling them if you can answer all these questions on
22 the chart then you got your verdict or something he said
23 about something of that nature. It's been so long ago I'm
24 trying to remember.

25 Q. Okay. Did -- and using that chart what did the --

1 what did he -- did he tell or make the statement about
2 that chart that the defense would -- if they did this that
3 Mr. Fortune should be found guilty?

4 A. Yes.

5 Q. Okay, do you believe that chart helped your husband's
6 defense in this closing statement?

7 A. No, it didn't.

8 Q. Okay. Now, again, in the second opportunity that the
9 State had to end the closing did they respond ---

10 A. Yes.

11 Q. --- to the chart? Okay. How did they respond?

12 A. Cause they said you can't answer all four of the
13 questions.

14 Q. All right. What would happen if they answered them?

15 A. Then you guilty your verdict if you can answer all
16 four of the questions.

17 Q. And what was that verdict? Now, this is the
18 statement. I mean the defense counsel said or to the
19 State and through the State got a chance to respond, to
20 answer the question. So what verdict did Mr. Joyner
21 tell -- say you should find?

22 A. Guilty.

23 Q. Okay. All right. All right. Let me ask just one
24 final question. If Mr. Fortune were to either get his
25 freedom or a new trial, do you believe that he would

1 become a useful member of society?

2 A. Yes.

3 Q. Did he discuss with you during the times that you
4 visited him what he liked about the law librarian job?

5 A. Yeah.

6 Q. What did he say about it?

7 A. That's where he spent most of his time at. He is
8 very smart when it comes to the law.

9 Q. Okay. What do you think that if he got out, what
10 kind of job do you think he would be interested in?

11 A. I would push him into law.

12 Q. All right.

13 MR. STROUD: That's all I have for the witness.

14 MS. RATIGAN: No cross for this witness, Your Honor.

15 THE COURT: Be careful with that step.

16 MR. STROUD: Okay, at this time I would like to
17 recall Mr. Saleeby for a few short questions.

18 THE COURT: You're still under oath.

19 THE WITNESS: Yes, sir.

20 EDWARD SALEEBY, after previously being duly
21 sworn, testified as follows:

22 DIRECT RECALL EXAMINATION

23 BY MR. STROUD:

24 Q. It's been an long day today?

25 A. Not for me it hasn't.

1 Q. Okay. All right. Been a long day for me. You heard
2 a lot of testimony today. Has it had any affect on your
3 prior testimony?

4 A. No, none whatsoever. Well, I have some opinions
5 about what I heard, but you're not asking me that.

6 Q. Okay, are you still claiming then that you all had a
7 list of 20 people?

8 A. I told you earlier, and what I'm saying here now is
9 that I talked to 18, 22 people, something like that. Now,
10 refer for you edification.

11 Q. What? I'm having trouble.

12 A. Further for you edification let me say this in answer
13 to your question. Mr. Fortune is right in that he did not
14 know anybody there. Now, I don't intend to sit here, and
15 I told Mr. Fortune this and tell you, how I find things
16 out whether it be through a private investigator or
17 through me personally. But different lawyers have
18 different techniques of finding things out.

19 Q. Okay, but ---

20 A. What I'm telling you ---

21 Q. Let me just ---

22 A. I did it and a lot of testimony.

23 Q. All right.

24 A. So I think so. If you want a yes or no; no, I didn't
25 change my mind.

1 Q. That's not what I'm asking you. Let me just try to
2 confine your statements to what we already learned. All I
3 asked was are you still claiming that you interviewed 20
4 people, and you found none of those worthy of at least
5 considering them and discussing them -- that with
6 Mr. Fortune.

7 A. I can't say 20. I said somewhere between 18 and 22.

8 Q. Well, okay, 18 and 22.

9 A. And now that I -- I just discussed that I had talked
10 to some people with Mr. Fortune, and the testimony is not
11 good particularly the stuff that was contrary to what he
12 was saying. You know, that would not be good for his case
13 for me to put somebody up. I can't impeach my own witness
14 that would harm his testimony.

15 Q. But if you found these witnesses totally in -- would
16 cause you not to suborn perjury when you put Mr. Fortune
17 on the stand didn't you have a opportunity to let someone
18 know that something was going on if you felt that strongly
19 about these -- this witness's testimony that I have no
20 record of?

21 A. What do you mean by I'll answer your questions? What
22 do you mean by something going on?

23 Q. Well, you indicated that these witnesses would have
24 said at the trial damaging and contradictory statements
25 that conflicted with the voluntary statement Mr. Fortune

1 gave?

2 A. No, sir. Not all of it. Just a few. Some were just
3 non-I didn't really see what happened. It was all in the
4 flash of a moment. I can't tell you exactly what
5 happened. All I know there were shots. That kind of
6 stuff that had no probative value either way.

7 Q. Okay. Then what about your statement that there was
8 no plea bargain made. You still say that to be true?

9 A. I may have been wrong on or misspoke when I talked to
10 you earlier when I answered your question. If there was I
11 didn't remember it.

12 Q. Okay.

13 A. Now, Mr. Quinn has it in his file, but if there was I
14 don't know what I did say. I'm sure we took it to him,
15 but I still say it right now, you know. It's his
16 decision.

17 Q. It's what?

18 A. It's his decision on a plea bargain, and we're saying
19 now it was 25 years. He got 28 and then five concurrent.
20 But he was not interested in a voluntary manslaughter plea
21 at all.

22 Q. Okay, let's ---

23 A. Was not interested in any plea offer.

24 Q. That's good enough. Did you believe the testimony of
25 Mr. Fortune?

1 A. Well, we wouldn't have put him on the stand if we
2 didn't believe he was telling the truth.

3 Q. Okay.

4 A. We -- I did have some problems, and I left them alone
5 about people that were talking about -- the few that I
6 talked to. Like I said most were non-probative value, but
7 the few that were as I ascertained were close or taking
8 sides close to the decedent's side. And, you know, people
9 tell stories.

10 Q. All right?

11 A. They tell stories.

12 Q. Okay. All right. Did you get -- did you give
13 Mr. Fortune an opportunity to explain his side or did you
14 tell him anything about these few people that were saying
15 these bad things about him?

16 A. Yes, sir, I told him. I told him. I said, "Oscar,
17 there are a few people out there that say it differently."
18 I said, "I don't know whether to leave them or not. I
19 don't know what their credibility is or not."

20 Q. Okay.

21 A. But I told him it was contrary to what he testified
22 to.

23 Q. Let me ask you this then. Why did Mr. Fortune have
24 to pay I believe it was \$250, I can't remember, for a
25 polygraph test if you believed him?

- 1 A. Why did he have to pay \$250?
- 2 Q. Well, I think that was it but ---
- 3 A. That's cheap.
- 4 Q. --- well, maybe, \$800, but ---
- 5 A. You want to know why? I'll tell you why.
- 6 Q. I want to know why if you believed him and you were
- 7 willing to put him on the stand why did you make him pay
- 8 for a polygraph test?
- 9 A. Because if had passed it all of my ---
- 10 Q. Well, are you saying he didn't pass it?
- 11 A. I don't remember of him even taking it. Okay, you
- 12 say he did. What I use the polygraph for, and they're not
- 13 admissible in the courts. You know that, period.
- 14 Q. I know that, but ---
- 15 A. Let me finish my answer, please.
- 16 Q. --- this man paid a lot of money.
- 17 A. That's independent costs. Now, the way polygraphs
- 18 are conducted and graded, and there are people -- well,
- 19 they grade from -- start at .0 and take your pulse ---
- 20 Q. But, I'm ---
- 21 A. And your respirator ---
- 22 Q. I'm not interested in -- I'm just trying to know why
- 23 you decided it was necessary to give Oscar a polygraph
- 24 test and make him pay for it. And then say that you're
- 25 perfectly willing to put him on the stand.

1 A. It had nothing to do with putting him on the stand.

2 Q. Well ---

3 A. What it had to do with is, you asked me why, was it
4 had been a strong pass I would take it to the Solicitor
5 and said, "Solicitor, look at how this man did on the
6 polygraph. How about dig into this a little bit more."
7 I've done that before.

8 Q. Okay. All right. Then -- I'm trying to narrow this
9 down and end this. What did you mean when you told us
10 that you were surprised by the verdict? Because I don't
11 understand if you had serious doubts to the extent that
12 you got a poly graph test, the fact that you chose to
13 believe some nameless witnesses over this man and over
14 testimony in the Court that corroborated this then why
15 were you surprised at a guilty verdict?

16 A. Well, I'm not letting you put words in my mouth. I
17 had no doubt of what Oscar was telling me was the truth.
18 Had no doubt about that. I found and still find him to be
19 an honest and truthful man. Now, on the things we're
20 talking about, the nameless witness.

21 Q. All right. Let's not get into that.

22 A. I'll get into the names if you want me to.

23 Q. I don't think it's necessary.

24 A. Well, sir, if you want to get to the truth, if you
25 want to say nameless, I'll give you some names.

1 Q. All right. Let's just forget it. I don't -- If you
2 want to give names give some names then.

3 A. I don't know the full names. Jackson, Stallings.

4 Q. All right. All right. So the names were who?

5 A. I don't know the first name. One was Jackson. A
6 Stallings.

7 Q. And ---

8 A. That's the only two that -- four that had ---

9 Q. All right.

10 A. --- contrary to him I don't know the rest. He would.

11 Q. If you remember the names what did they say that was
12 contradictory? What was the import that was so bad, but
13 yet you also believed Mr. Fortune? You just said he was
14 an honest man, but yet you had a polygraph of the man. So
15 this must have been some damaging evidence of these -- who
16 did you say, Jackson?

17 A. Yeah, one last name was a Jackson, yeah. I don't
18 remember the first name.

19 Q. Well, what was the first name?

20 A. The other one was a Stallings.

21 Q. All I'm asking is what was the damning evidence that
22 they told you?

23 A. That my client -- your client shot the decedent in
24 the back. Now, I don't know whether to believe that or
25 not.

1 Q. All right.

2 A. That's what they say. I don't find it to be
3 truthful.

4 Q. All right?

5 A. But I sure wasn't going to put these people up on the
6 stand.

7 Q. Okay, let's move along. Mr. Fortune wanted me to ask
8 one more question. Mr. Fortune wants know why did you not
9 move for a mistrial based on what the Solicitor said in
10 his closing?

11 A. Well, he said several things. Which particular thing
12 are you talking about?

13 MR. STROUD: Just say it out loud.

14 MR. FORTUNE: The defense attorney's job.

15 THE WITNESS: About the lying and getting you off and
16 what not?

17 MR. FORTUNE: Yeah.

18 THE WITNESS: I thought I objected strongly, and I
19 think the Judge cured it by what he said and sustained my
20 objection. It was a strong cure I thought and him rebutte
21 or upholding my objection.

22 Q. All right. Curative instruction ---

23 A. It was not like an instruction, per se, but the jury
24 heard it. They didn't go out of the presence of us. And
25 they heard it, and they heard what Judge Milling told them

1 about, "your job is not to do such," whatever he said.

2 You want to read it in the record?

3 Q. One final question and we're through with this. Are
4 you aware that everyone used the word on the street was
5 that he had shot this man in the back. That was common
6 knowledge because this -- Anthony Shields' brother was a
7 policeman. Chief Drake was involved, and it was common
8 knowledge people -- I believe or Oscar or someone who I
9 can't recall reserve the right would have told you that;
10 that everyone knew that? Common knowledge?

11 A. Oscar didn't tell me that, and I didn't know it was
12 common knowledge.

13 Q. All right. Did you ask him?

14 A. Did I ask him what?

15 Q. Did you give him an opportunity when you chose to
16 believe those people, not ever tell him, and never
17 inquire, did he know anything about this rumor? You
18 didn't ---

19 A. I told him that I ---

20 Q. Let's just -- that's all I ---

21 A. You going to let me answer?

22 Q. Well, you did answer it. That's it.

23 A. Well, okay.

24 Q. We, if you want to answer it, okay. That's up to
25 you.

1 A. I told him that the testimony was contrary to what he
2 said. I told him I didn't necessarily believe it; that
3 these were incredulous people to me. Nothing for me to
4 monkey with and put up on the stand.

5 Q. All right.

6 MR. STROUD: Let me just recall for one minute
7 Mr. Fortune. No further questions.

8 MS. RATIGAN: I have no cross-examination.

9 MR. STROUD: Okay.

10 MR. SALEEBY: Can I say one thing, Your Honor?

11 THE COURT: Yes.

12 MR. SALEEBY: As to any taking pills or being under
13 the influence or anything if you would like you can call
14 my doctor, and he gave me two cortisone shots in my knee.
15 And he will be happy to talk to you by phone. Call him.
16 Come in and testify at a later date that I was under his
17 treatment and not any narcotics, no mind altering drugs
18 and that I'm the type of person that he would offer pain
19 medicine to from time to time.

20 But I don't like pain medicine, and he never
21 prescribed me any and the records reflect that.

22 Q. Okay, I ---

23 A. I want to be very clear about that.

24 Q. Okay.

25 A. He had me sweating, and His Honor himself has seen me

1 sweat before, and other judges -- sweat rag over my
2 shoulder when I'm giving a two hour closing statement. I
3 apologize. I hold water and sweat.

4 THE COURT: That wouldn't have happened to me cause I
5 wouldn't have let him go two hours. You may step down.

6 MR. SALEEBY: Only an hour and a half. Thank you,
7 sir.

8 MR. STROUD: Your Honor, may I call Oscar.

9 THE COURT: You're still under oath, Mr. Fortune.

10 OSCAR FORTUNE, after previously being duly
11 sworn, testified as follows:

12 DIRECT RECALL EXAMINATION

13 BY MR. STROUD:

14 Q. All right. Mr. Fortune, and again, please don't read
15 from the record there. Okay, were you able to hear and
16 understand what defense counsel just said?

17 A. Yes.

18 Q. Okay. He made some claims regarding both witnesses
19 and that he still believed that credibility of some of
20 these witnesses he believed in. He also made some claims
21 that he believed that you were truthful and all that. Can
22 you just in a very quick, short statement tell me again
23 about these witnesses, and I want to ask you a question
24 about word on the street?

25 A. I don't know anything about the witnesses he's

1 speaking on, but Mr. Saleeby didn't administer my
2 polygraph test. That was Mr. Redmond in 2002.

3 Q. Okay.

4 A. So Mr. -- he's speaking on something that he didn't
5 even know about. He didn't know that Mr. Redmond gave me
6 a polygraph test.

7 Q. But someone -- you did have to pay for it, right?

8 A. Right, but that's when I was represented by Mr.
9 Redmond.

10 Q. All right. But I'm assuming that there had to be
11 communication between the Florence satellite office and
12 Hartsville. Now, what is the -- were you aware that there
13 were rumors going around in 2001, 2002 about the
14 circumstances of Mr. Shields' death?

15 A. Yes.

16 Q. What were some of these rumors?

17 A. I really don't want to base what I'm here today on
18 rumors. The reason I came back on the stand is because he
19 said that the Judge cured when the Solicitor said what he
20 said. What I'm saying is that he should have moved for a
21 curative instruction. He didn't move for curative a
22 instruction.

23 The Judge, when he sustained the objection, said, "I
24 don't think that their job is to defraud the Court or the
25 jurors." I don't think that that is a curative

1 instruction. A curative instruction is when he addresses
2 the jury and admonishes the Solicitor and tells him to
3 refrain from that type of argument. He didn't do that.

4 He could have moved for a curative instruction and/or
5 mistrial and it would have been preserved for appellate
6 review.

7 Q. Okay.

8 A. That's what I wanted him to -- wanted you to ask, why
9 didn't he do that.

10 Q. Okay.

11 A. That's what I want to know. That's what I want
12 preserved.

13 Q. You're going to be a good lawyer. You're absolutely
14 right. Rumors should never have been trusted, but
15 apparently Mr. Saleeby did.

16 MS. RATIGAN: Is there a question or are we going to
17 editorialize, Your Honor?

18 MR. STROUD: All right. Okay. I withdraw that. I'm
19 through with this witness, Your Honor.

20 MS. RATIGAN: I have no cross, Your Honor.

21 THE COURT: Thank you, sir.

22 COLLOQUY

23 MR. STROUD: I have nothing more to add unless the
24 State does.

25 MR. FORTUNE: Excuse me for a second, Your Honor.

1 MS. RATIGAN: Your Honor, first, I'd ask that
2 Mr. Saleeby be relieved from his subpoena if he wishes to
3 go. He's here under my subpoena, and I don't believe that
4 anyone will need him any further. If he would like to
5 leave I'd ask that he can be excused. And the State would
6 call Mr. Quinn.

7 THE COURT: All right. Put him under oath.

8 TERRENCE QUINN, after being duly sworn,
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MS. RATIGAN:

12 Q. State your full name for the record, please?

13 A. Terrence Anthony Quinn.

14 Q. And, Mr. Quinn, you recall representing Mr. Fortune
15 on these charges?

16 A. I do.

17 Q. And were you lead counsel in this case or would you,
18 for lack of a better term, be second chair?

19 A. Second chair.

20 Q. By the time this case came to you and Mr. Saleeby had
21 discovery already been filed? Do you remember?

22 A. Yes.

23 Q. And did you review those materials both independently
24 and with Mr. Saleeby?

25 A. Yes.

1 Q. Did you review those materials with your client?

2 A. Yes.

3 Q. Did Mr. Fortune tell you his version of what had
4 happened at the Huddle House that night?

5 A. He did.

6 Q. Did he provide you any names of witnesses or
7 individuals that he wanted you to contact about his case?

8 A. Well, he, just for clarification, this case came into
9 the office when Mr. Redmond took it in. I didn't start
10 working for the law firm probably two years after that,
11 and didn't touch the case until three years after the
12 incident. So most of the witnesses had already been
13 identified by Mr. Fortune, but I certainly did talk to any
14 witness he brought to my attention.

15 Q. Do you recall off the top of your head who you would
16 have talked to that he would have asked you to contact?

17 A. Well, the obvious witnesses like Sonta McCall,
18 Tonette Cash, Iris Gaskins. I tried to talk to Stephanie
19 Douglas but she was -- Gaskins Douglas but she was not
20 receptive. You know, talked to his family members.
21 Whoever he asked me to talk to.

22 Q. Do you recall whether the State came to you with a
23 plea offer here?

24 A. Yes, 25 years voluntary manslaughter, and I believe
25 that Mr. Fortune was right. That was extended at the time

1 or right before the time of trial.

2 Q. So before that March trial?

3 A. Yes, ma'am.

4 Q. And did you and Mr. Saleeby discuss that offer we
5 Mr. Fortune?

6 A. Yes, ma'am, we did.

7 Q. And what did Mr. Fortune decide to do?

8 A. He decided that he did not want to take that plea
9 offer. He said it wouldn't be a fair plea offer, and i
10 agreed with him. Now, we did -- we did counter once with
11 Mr. Joyner, and it was not met -- it was not met
12 receptively. The negotiations didn't last long, but we
13 ask that he be allowed to plead to involuntary
14 manslaughter, a five year plea.

15 Q. And Mr. Joyner just flat out rejected that?

16 A. Right. Just laughed, basically.

17 Q. Did you review with Mr. Fortune potential defenses in
18 this in the case?

19 A. Yes, ma'am.

20 Q. And what would those have been?

21 A. The only one that I remember talking to him about was
22 self-defense. We talked about him -- obviously, he was
23 there to defend his cousin who was caught in the middle of
24 a fight after being involved in an altercation at the
25 Green Villa, but I don't know that I ever talked to him

1 specifically about advancing a defense of defense of
2 others. I do recall we put up a vigorous defense of
3 self-defense.

4 Q. Would it be fair to say that self-defense was a
5 prominent part of the trial strategy?

6 A. It was the trial strategy.

7 Q. And did you discuss this trial strategy with Mr.
8 Fortune prior to trial?

9 A. Yes, we did.

10 Q. Did you believe you had triable case on the facts and
11 the self-defense argument?

12 A. Absolutely.

13 Q. Now, Mr. Fortune testified that he always believed
14 that himself, his cousin, Ms. McCall and Johnnie Quick
15 were going to testify as defense witnesses?

16 A. Right.

17 Q. Does that sound about right?

18 A. It does. We had identified other witnesses that were
19 on our witness list but they were called by the State.
20 Those witnesses were Tonette Cash, Sonta -- no, not Sonta.
21 I'm sorry. Iris Gaskins. Iris -- what is it, Gaskins?

22 Q. Yeah.

23 A. Okay. There were four or five witnesses that we
24 planned to call that were called by the State. So when it
25 came time for us to present our case only two witnesses

1 remaining. That was Sonta McCall and Mr. Fortune.

2 Q. And can you recall why you did not end up calling
3 Johnnie Quick as a witness at trial?

4 A. From what I remember correctly his testimony was
5 going to be what Vincent Davis removed a .25 caliber
6 weapon from the scene, took it home and kept it for five
7 days until Mr. Quick, I believe, Detective or Lieutenant
8 Quick went out to his residence to retrieve the gun.

9 At the time of trial Mr. Quick did testify at the
10 original Jackson v. Denno hearing at the beginning of the
11 trial. If I remember correctly his wife was ill and
12 wasn't going to be available to testify later in the week
13 unless it was absolutely necessary. And we were able to
14 get the Solicitor to stipulate that Mr. or Lieutenant
15 Quick's testimony would be that the gun was taken from the
16 scene by Vincent Davis and that he retrieved it from his
17 home five days later. And we felt that would be
18 sufficient.

19 Q. In your opinion was the defense case prejudiced by
20 not having Johnnie Quick testify?

21 A. I don't believe so.

22 Q. What -- and this issue was touched on during Mr.
23 Saleeby's testimony, but what was the purpose of having
24 that Jackson v. Denno hearing?

25 A. Well, there were several things, obvious. If you can

1 get a voluntary statement out you're going to do it
2 because it -- that's the kind of stuff that pegs you down.
3 And there were a couple of things in the statement that
4 were bothersome that we wanted out and one of which was
5 Mr. Fortune said in that statement that he had spoken with
6 J.J. Mungo; that they had discussed something. I think
7 what he said in his statement was that Mr. Mungo said he
8 would take care of it.

9 But the part that really bothered me was that we were
10 trying to keep out and why we were trying to keep the
11 statement out was that in that statement he said he went
12 there expecting to get in a fight. And, you know, if the
13 jury believes that he was expecting to get in a fight, and
14 they receive evidence that he got out of the car with a
15 gun I don't believe that that would help Mr. Fortune's
16 case. That's why we were trying to keep the statement
17 out.

18 Q. Even assuming that the statement had been thrown out
19 would that have harmed your overall self-defense argument?

20 A. No.

21 Q. Did you have an opportunity to speak with Sonta
22 McCall prior to trial?

23 A. Yes, ma'am.

24 Q. And were you aware whether or not she was under a
25 murder indictment at the time?

1 A. I believe she was under several indictments. One for
2 murder, one for accessory before the fact, and one for
3 accessory after the fact. But, yes, I did know that she
4 had been indicted for murder.

5 Q. Now, there has been some testimony about a list of 61
6 witnesses that the State had that they did not produce.
7 Do you recall anything about that?

8 A. Yeah, I recall exactly about it. On the ---

9 Q. Tell us about it.

10 A. On the morning of the trial in November we were
11 handed a witness list from the State with names that we
12 were unfamiliar with. And we finally got it out of them
13 that Harold Haney, a police officer in the Chesterfield
14 Sheriff's Office, I believe, had a list of 61 names that
15 were not produced to us. So we asked for a continuance.
16 That list was ordered to be produced to us, and which it
17 was.

18 Unfortunately, much of the information on that list
19 was no good, phone numbers, addresses. It had been five
20 or six years or four or five years. And I do recall that
21 there was a continuance granted in November because of
22 that list. A trial date was again set for January 30th of
23 2006, and shortly before that date we had a motion hearing
24 scheduled for us to make a motion to dismiss the charges
25 based on the withholding of these witnesses.

1 Now, Judge Burch also did direct the Sheriff's
2 Department to find these people and take statements from
3 them, which they never did.

4 Q. When would you say that you got that list of 61
5 names?

6 A. The morning of the trial, November -- whatever date
7 in November of 2005. The morning of the trial.

8 Q. So once you got to trial you -- that's when you found
9 out you had the list, and that's when you got the list?

10 A. That's correct. And that's when we made the motion
11 for continuance that was granted.

12 Q. Were you able -- pardon. Were you able to glean any
13 helpful information from the list once you got it?

14 A. Not really. The one thing we were able to accomplish
15 was the State was not allowed to call any witnesses from
16 the list was the one concession the Court made to us over
17 that list.

18 Q. Did you -- let me back up a little bit. Did you
19 review the pathology and the autopsy report prior to
20 trial?

21 A. Yes, ma'am.

22 Q. Did you review that with your client?

23 A. Yes, ma'am.

24 Q. Did you believe that report was helpful or harmful to
25 the case?

1 A. Well, I don't think it harmed the case. I mean it is
2 what it is. We were claiming self-defense. His injuries
3 were his injuries, and we knew that Mr. Fortune admitted
4 to shooting the man. It was our theory that he did so
5 justifiably in self-defense.

6 Q. There has been some testimony today about a comment
7 that Stephanie Douglas made during her testimony about
8 having seen the victim shot as he was crawling away. Is
9 that something that was in her statement prior to trial
10 that you recall?

11 A. No, know -- I can't remember the exact differences
12 between the two, but I do know that her voluntary
13 statement was not consistent with her in-Court testimony.
14 Her original in-Court testimony under direct examination.

15 Q. Do you remember whether or not those inconsistencies
16 were attacked on cross-examination?

17 A. They were. I asked her if she had given a voluntary
18 statement in which she admitted to it, and I had her read
19 it into the record and publish it to the jury. And after
20 going back and forth for what seemed like three or four
21 minutes I finally got her to admit that she -- her
22 voluntary statement given shortly after the incident was
23 more credible and more accurate than her in-Court
24 testimony.

25 Q. And in your opinion was there anything else that you

1 could have done relative to that statement she made in
2 order to try and cure it or get it struck or anything of
3 that nature?

4 A. Other than not lie or not change her testimony in the
5 first place, no.

6 Q. Was there ever a conversation that you recall between
7 yourself and Mr. Saleeby about whether or not you asked
8 for a formal defense of others charge?

9 A. I don't remember that ever happening. No.

10 Q. Were you prepared for Court when the case came to
11 trial in March?

12 A. Yes.

13 Q. Obviously, it's in the record, but can you think of
14 anything else you could have done that would have been
15 helped defense and changed the outcome of the case?

16 A. I really can't identify anything. If I could I would
17 have done it. The only -- maybe -- we made motions for
18 change of venue, and we made motions regarding what we
19 figured was a very shallow jury pool. Other than being
20 unsuccessful on those motions, no.

21 MS. RATIGAN: That's all I have, Your Honor.

22 COLLOQUY

23 MR. STROUD: I don't have any, I guess, actual cross,
24 but I, just for the record, do want to say that we are not
25 suggesting that Mr. Quinn was ineffective or that maybe

1 with the Douglas Gaskins' statement, what we are saying is
2 that under the third prong of Chronic, which I'll read
3 right here.

4 "Third, the Court identified certain instance when
5 although counsel is unable to assist the accused during
6 cross the likelihood any lawyer, even a fully competent
7 one, could provide effective assistance is so small the
8 presumption or prejudice is appropriate without requiring
9 to the actual conduct of the trial."

10 And what we I guess are alleging is that Mr. Quinn
11 was marginalize in that he, during this trial, the opening
12 and the closing were ineffective. Also I know that Judge
13 Milling in the transcript it said, "You mean you're doing
14 the closing. What is Mr. Quinn doing?" And he then he --
15 he said, "Well, he's got to work on his charge."

16 MS. RATIGAN: Is Mr. Stroud going to ask Mr. Quinn
17 any questions?

18 MR. STROUD: Well, I was ---

19 MS. RATIGAN: He's making arguments out of question.

20 MR. STROUD: Well, no. I'm really trying to clarify
21 our position as to Mr. Quinn. We had said in our
22 complaint that he has done a good job when he did get a
23 chance to perform. But that even the slickest
24 Philadelphia lawyer could not have overcome the
25 impressions that were made during the times he was not

1 active in the thing.

2 So I'm just saying I don't want to tarnish his record
3 or anything like that, and we believe that he did an
4 accurate job. But it wasn't enough to overcome all of the
5 per se prejudice and things like that.

6 THE COURT: Okay. In regards to that let's just,
7 since its been so long of a day, give everybody a chance
8 to regroup rather than do any kind of closing arguments
9 which we rarely do in these hearings. Let me leave it
10 open. If y'all want to do a final brief bring everything
11 together try to get one done in ten days. Exchange it
12 with Ms. Ratigan where she can reply a brief to me.

13 And then I'll take it from there and review
14 everything. I have not had a chance to go through these
15 transcripts so I'm not going to jump at this -- jump that
16 hoop today. I'm going to holds it under advisement for
17 y'all to do that and give me a chance to go through these
18 transcripts cause it's going to take a little while.

19 MR. STROUD: Thank you. Appreciate it.

20 END OF TRANSCRIPT OF RECORD

21

22

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24

25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2009-CP-13-0323
COUNTY OF CHESTERFIELD	)	
	)	
Oscar James Fortune,	)	
S.C.D.C. No. 314269,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	A True Copy Attest.
State of South Carolina,	)	<i>Jay. F. Stroud</i>
	)	CLERK OF COURT C.P. & G.S.
Respondent.	)	CHESTERFIELD COUNTY SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 18, 2009. The Respondent made its return on December 23, 2009. An evidentiary hearing was held on January 11, 2012 at the Darlington County Courthouse. The Applicant was present and represented by Joel F. Stroud, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Blanche Fortune and the Applicant's trial attorneys, Edward E. Saleeby, Jr., Esquire and Terrence A. Quinn, Esquire. The Court had before it the trial transcript, records of the Chesterfield County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, the Respondent's return, the appellate records, and the "Post Conviction Relief Verified Complaint" filed by the Applicant's counsel on January 3, 2012.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Chesterfield County Clerk of Court. The Applicant was indicted at the March 2002 term of the Chesterfield County Grand Jury for murder (2002-GS-13-0137)

and at the November 2005 term for possession of a weapon during commission of a violent crime (2005-GS-13-1222). He was represented by Edward E. Saleeby, Jr., Esquire and Terrence A. Quinn, Esquire.

After the State called the case to trial, the Applicant was found guilty. On March 9, 2006, the Honorable John M. Milling sentenced the Applicant to concurrent terms of thirty-seven (37) years for murder and five (5) years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Fortune, Op. No. 2009-UP-259 (S.C. Ct. App. filed June 1, 2009).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial 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.
2. Prosecutorial misconduct:
 - a. Subordination of perjury.
 - b. Closing argument.

At the PCR hearing, the Applicant proceeded solely upon grounds of ineffective assistance of trial counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the

testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had eight (8) meetings with trial counsel (Saleeby and Quinn) prior to trial. The Applicant stated they visited the crime scene, reviewed the State’s evidence, and discussed potential defenses of self-defense and defense of others. The Applicant stated he rejected a twenty-five (25) year plea offer. The Applicant stated he knew that he, Sonta McCall,

and Johnny Quick would be defense witnesses and that the trial strategy would be self-defense. The Applicant stated that, while the trial was originally set for November 2005, the case was continued because the State had not provided the entire witness list. The Applicant stated trial counsel never told him about a potential witness list of approximately twenty (20) people. The Applicant stated he had not noticed Saleeby had medical problems during their meetings but that he was sweating, incoherent, and repetitive during the trial. The Applicant admitted Saleeby had Stephanie Douglas admit on cross-examination that she was untruthful but argued Saleeby should have objected to her direct examination testimony as perjury. The Applicant argued Saleeby used a reasonable doubt chart during his closing argument and told the jury what the State would have to refute in order to prove guilt. The Applicant argued the State then touched on all of those points in its closing argument. The Applicant argued trial counsel should have objected to prejudicial comments during the State's closing argument and moved for a mistrial.

Blanche Fortune, the Applicant's wife, stated she was present for most of the trial and felt the Applicant was not well-represented. Mrs. Fortune stated Saleeby was "sweaty" and "in and out" during the trial. Mrs. Fortune also stated Saleeby's closing argument was too short and that the reasonable doubt chart he employed was not helpful to the defense case.

Mr. Saleeby testified he assumed representation in his case when the Applicant's original attorney left his law firm. Saleeby testified he associated Mr. Quinn on this case at no extra charge to the Applicant. Saleeby testified he reviewed all of the discovery materials both with Quinn and the Applicant. Saleeby testified they also reviewed the Applicant's version of events, his statement, and the effect his statement would have on the trial. Saleeby stated the Applicant gave them names of witnesses who could be helpful to the defense. Saleeby stated Sonta McCall was a helpful witness but most of the other potential witnesses' stories differed from McCall's.

Saleeby stated that he was aware both the Applicant and McCall were indicted for murder under the theory of "the hand of one is the hand of all." Saleeby stated they reviewed potential defenses and determined their trial strategy would be to (1) argue self-defense and (2) use the State's own witnesses to disprove the State's case. Saleeby testified he believed this was a winnable case and that the Applicant always wanted a trial. Saleeby testified the trial was not able to go forward on the original trial date in November 2005 because the State had not turned over a list of potential witnesses. Saleeby testified he interviewed approximately twenty people before trial (and told the Applicant about those discussions) but that they did not contribute anything of probative value. Saleeby testified that, by the time the case came to trial, he knew who the State witnesses would be. Saleeby testified their trial strategy of self-defense did not conflict with requesting a Jackson v. Denno hearing to exclude the Applicant's statement because they could have still pursued self-defense through McCall's and the Applicant's testimony. Saleeby stated he did not believe there were other defense witnesses who could have helped the defense case. Saleeby stated that, while they had considered calling Johnny Quick to testify about his statement that the Applicant was not guilty beyond a reasonable doubt, the State would have objected to the officer making such an opinion. Saleeby stated that, while he objected to the portion of the State's closing argument that mentioned "the defense attorney's [sic] jobs," he did not believe it was necessary to move for a mistrial because the trial judge cured the error. Saleeby testified there was nothing else they could have done to prepare for trial. Saleeby testified that, while his knees were stiff and uncomfortable at the Applicant's trial, he received only cortisone shots during the trial and not any type of pain medication. Saleeby testified his knee issues did not affect the trial and that he did not believe he needed a continuance on that basis.

Mr. Quinn testified discovery had been filed by the Applicant's first attorney and that he reviewed those materials both with Saleeby and the Applicant. Quinn testified the Applicant told them his version of events and identified potential witnesses. Quinn testified he spoke to Tonette Cash, Iris Gaston, Stephanie Douglas, Sonta McCall, and various family members. Quinn testified they discussed potential defenses with the Applicant and that arguing self-defense would be their trial strategy. Quinn confirmed the Applicant's testimony that he rejected a twenty-five (25) year plea offer for voluntary manslaughter and added that the State rejected their counter-offer for him to plead guilty to involuntary manslaughter in exchange for a five (5) year sentence. Quinn testified the State had not produced the entire witness list, which is why the case was continued in November 2005. Quinn testified, however, that most of the contact information for these individuals was incorrect and the defense received no helpful information from this list. Quinn testified they conducted a Jackson v. Denno hearing because they wanted to suppress some harmful information from the Applicant's statement. Quinn testified it would not have harmed their self-defense argument if the statement had been suppressed. Quinn agreed with the Applicant's testimony that the defense witnesses were to have been the Applicant, Sonta McCall, and Johnny Quick. Quinn testified, however, that Quick had a family emergency during the trial so he could not appear. But Quinn testified the State stipulated to his testimony. Quinn testified the inconsistencies between Stephanie Douglas's testimony and statement were attacked on cross and she admitted her statement was more truthful. Quinn testified they were prepared for trial that day and there was nothing else they could have done that would have changed the outcome of the case.

This Court finds the Applicant's testimony is not credible, while also finding trial counsels' testimony is credible. This Court further finds trial counsel adequately conferred with

the Applicant, conducted a proper investigation, and were thoroughly competent in their representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel were not prepared for trial. The Applicant, Saleeby, and Quinn all testified they had several meetings prior to trial in which they discussed the State's evidence, the Applicant's version of events, potential defenses, possible witnesses, and trial strategy. Saleeby and Quinn testified they visited the crime scene with the Applicant and that he was very helpful in preparing the case for trial. Saleeby and Quinn testified they spoke with potential witnesses named by the Applicant and also looked into the individuals on the witness list provided by the State. Saleeby and Quinn stated most of the witnesses they could locate did not provide information that would have been beneficial to the defense case. This Court finds their testimony is credible. This Court further finds the Applicant has failed to produce any evidence or testimony that the result of the trial would have been different if trial counsel had spoken to certain witnesses or pursued a different method of preparing the case. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds that, to the extent the Applicant argued Saleeby's health or physical condition adversely affected his trial, this Court finds this allegation is without merit. The trial transcript reflects that both Saleeby and Quinn were well prepared and zealous advocates for their client. While Saleeby admitted he needed cortisone shots for his knees during the course of

the trial, the Applicant failed to present any evidence that such medical treatment affected Saleeby's ability to provide adequate representation. This Court also notes it appears from the record that Quinn performed the majority of the examination for the defense case. While Saleeby gave opening and closing statements and performed cross-examination of two (2) witnesses, Quinn cross-examined thirteen (13) witnesses and conducted direct examination of both defense witnesses. This Court finds the Applicant failed to substantiate his allegation that Saleeby was in poor health and thus performed inadequately at trial to the detriment of the defense case.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a jury charge of defense of others. This Court notes the trial judge charged the jury on the law pertaining to murder, voluntary manslaughter, and self-defense. The Applicant argued at the PCR hearing that, as he was engaged in the confrontation with a victim in an attempt to protect his cousin (McCall), trial counsel should have also requested the jury be charged on the law of defense of others. This Court notes, however, that the law to be charged at trial must be determined from the evidence presented. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Based on the evidence presented at trial, a jury charge of defense of others would not have been warranted. See State v. Starnes, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000) ("Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense."). The Applicant left his house to go to the scene and confront the victim. (Trial transcript, pp.440-41; pp.454-56). The Applicant approached the car with his gun and shot the victim several times while he was still in his truck. (Trial transcript, pp.178-79; pp.191-92; pp.456-57). The Applicant crossed to the other

side of the victim's car and shot him again while the victim attempted to crawl away. (Trial transcript, p.192; p.230; pp.349-50). There was no physical evidence the victim shot at the Applicant or McCall. The Applicant testified he shot the victim "[b]ecause at that time I was in fear for my life. . . . I was in fear for my life at this time." (Trial transcript, p.457). The Applicant did not state he shot the victim in order to protect McCall, so he was not entitled to a defense of others charge. *See id.* at 323, 531 S.E.2d at 913 (holding that when the defendant does not testify that he shot the victim in defense of another person, he is not entitled to jury charge on defense of others). As such, this Court finds there was no error from trial counsel's decision not to request this charge. *See Knoten*, 347 S.C. at 302, 555 S.E.2d at 391.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle issues related to witnesses in this case. Saleeby and Quinn testified the Applicant provided the names of several witnesses to contact and that they did contact those individuals. Saleeby and Quinn testified they decided to call the Applicant and McCall as witnesses and cross-examine the majority of the other individuals (as they would be called as State witnesses). While Quick was not called as a defense witness at trial, it is speculative to discuss whether his testimony would have had an impact on the proceedings, as he did not testify at the PCR hearing. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). This Court notes Quinn testified – concerning the State's 61-person list of potential witnesses – that those individuals either did not have valid contact information or were not helpful to the defense. This Court finds it is speculative to discuss whether any of the

individuals from the State's witness list would have had an impact at trial, as they did not testify at the PCR hearing. See id.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for a mistrial during the State's closing argument. During his summation, the assistant solicitor stated:

"And as I said my job is to show the truth. On the other hand the Defense attorney's [sic] jobs are to manipulate the truth. They're [sic] job is do [sic] shroud the truth. They're [sic] job is confuse jurors. They're [sic] job is to do whatever they have to without regard for the truth --."

(Trial transcript, p.529, lines 15-20). Saleeby made a contemporaneous objection. (Trial transcript, p.529, lines 21, 23). The trial judge stated "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.529, line 24 – p.530, line 1). Saleeby testified he did not believe it was necessary to move for a mistrial, as the trial judge had cured any potential error. This Court agrees. This Court also notes that, regardless, trial counsel would have had to prove prejudice in order to have prevailed on a motion for mistrial. See State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court finds the Applicant was unable to show any resulting prejudice in a case where the State presented overwhelming evidence of the Applicant's guilt. See State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995) (holding the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process where there was ample evidence of guilt in the record).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence

that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsels’ performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel were not deficient and the Applicant was not prejudiced by counsels’ representation. Therefore, this PCR application must be denied and dismissed with prejudice.

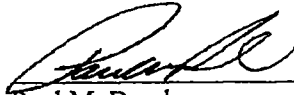
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

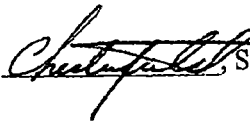
1. That the application for post-conviction relief be denied and dismissed with prejudice; and

2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 16th day of February, 2012.



Paul M. Burch
Presiding Judge
Fourth Judicial Circuit

 South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

Oscar Fortune, #314269,

vs.

State of South Carolina,

Respondent.

Applicant.

) IN THE COURT OF COMMON PLEAS

) OF THE FOURTH JUDICIAL CIRCUIT

C/A No.: 2009-CP-13-0323

**ORDER DENYING MOTION
PURSUANT TO RULES 59(A)(2) AND
59(E), SCRPC**

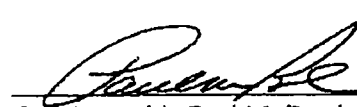
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Attest
J. M. OF COURT C.P. & G.S.
COUNTY, S.C.

This matter is before the Court on Applicant's Motion pursuant to Rules 59(a)(2) and 59(e), SCRPC, dated March 5, 2012, requesting that this Court reconsider its order dismissing with prejudice Applicant's application for post-conviction relief. The State submitted a Return to Applicant's Motion, dated March 9, 2012. On May 2, 2012, Applicant submitted a memorandum in support of his motion. 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 memoranda and other documents submitted to the Court, and the applicable authority, the Court hereby denies Applicant's Motion pursuant to Rules 59(a)(2) and 59(e), SCRPC.

THEREFORE, Applicant's Motion pursuant to Rules 59(a)(2) and 59(e), SCRPC, is hereby DENIED.

IT IS SO ORDERED.


The Honorable Paul M. Burch
Judge, Fourth Judicial Circuit

Pageland, South Carolina
May 7, 2012

2012 JUN 21 PM 12 01

THE HONORABLE
JUDGE
Burch

**PETITION FOR A WRIT OF CERTIORARI
IN POST-CONVICTION RELIEF ACTIONS**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Paul Burch, Circuit Court Judge

Case No. 2009-CP-13-0323

Oscar James Fortune,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

s/ Joel Stroud

Joel F. Stroud, Attorney, PLLC

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QUESTIONS PRESENTED

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

A. The prosecutor's closing argument resulted in the denial of a fair trial because the prosecutor's comments denigrated the integrity of defense counsel, both personally and in the abstract, as well as, impugning, directly or through implication, the integrity or institutional role of defense lawyers.

B. The prosecutor's closing argument responding to defense counsel's reasonable doubt chart and his "challenge to the Solicitor that if he, (Solicitor) can disprove each and every one of those reasonable doubts on this chart, I guess you ought to convict of something. But he'll probability covers it up, turn away, and say he ain't got enough time. Call it the Ed Saleeby Jr. smokescreen."

The prosecutor effectively invited the jury to disregard the trial court's instructions on reasonable doubt. Mr. Fortune asserts that the prosecutor's closing argument regarding the reasonable doubt chart violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal. The remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial."

C. The State procured the conviction of Mr. Fortune by knowingly allowing a key State's witness, Ms. Douglass/Gaston, to commit perjury. The State bolstered and used the perjured testimony to mislead the judge and the jury. The State thereby committed fraud upon the Court and the Jury. Mr. Fortune's defense of self-defense was unduly prejudiced by the prosecutorial misconduct.

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? Mr. Fortune files his Petition, as well as the remedies sought, pursuant to the holdings of United States v. Cronin, 466 U.S. 648 (1984), and Strickland v. Washington, 466 U.S. 668 (1984).

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?

STATEMENT OF THE CASE

Mr. Oscar Fortune, Defendant, and Mr. Anthony Shields, Decedent, were involved in a shooting in the parking lot of the Huddle House in Cheraw, South Carolina, on December 23, 2001.

Ms. Sonta McCall is Mr. Fortune's first cousin.¹ Mr. Fortune and Ms. McCall were raised together. Mr. Fortune thinks of her as a little sister.

Mr. Fortune got out of bed when the phone rang. He talked with Ms. McCall on the phone and learned that she had been assaulted by Mr. Anthony Shields at the party she had attended at Green's Villa. The party and over 60 of the partygoers had moved to the Huddle House. Mr. Fortune told Ms. McCall he would meet her at the Huddle House. He went to the Huddle House, got out of his girlfriend's car, and talked to Ms. McCall about the assault. After talking with her, Mr. Fortune got back in his girlfriend's car. He was about to leave, when Mr. Shields drove into the Huddle House parking lot. Ms. McCall went to Mr. Shield's vehicle and began to talk to him on the driver's side of Mr. Shield's vehicle. Soon, Ms. McCall and Mr. Shields began arguing. Mr. Fortune asked

¹March 2006 Trial Transcripts, on Cross of Ms. McCall, App. p. 570, Lines 01-09.

his girlfriend to pull her car up to Mr. Shield's vehicle saying he expected to have to fight Mr. Shields. Mr. Fortune got out of his girlfriend's car. Mr. Fortune did not know Mr. Shields and knew only a few people who attended the party. Before he got out of the car the second time, Mr. Fortune put his girlfriend's gun in his pocket. Mr. Fortune took the gun with him for his own protection, because he feared that this argument between his first cousin, Sonta, and Mr. Shields could become violent. He also believed that many of the people in the crowd of over 60 people might side with Mr. Shields because they knew Mr. Shields and did not know him. Mr. Fortune believed that if he took his gun with him and violence occurred, he had to defend his first cousin Sonta McCall and himself.² He walked to Mr. Shield's car. Mr. Fortune was standing outside on the driver's side of Mr. Shield's vehicle. Mr. Shields was inside his truck and had the window down. Mr. Fortune spoke to Mr. Shields.³ Mr. Fortune testified at his March 2006 murder trial that right after he said "what was up" to Mr. Shields, that Mr. Shields just shot a gun.⁴ People at the Huddle House heard the gunshots. Mr. Fortune and Ms. McCall were the only eyewitnesses to the first set of shots fired.

In Mr. Shields' Autopsy Report, Dr. Inas Z. Yacoub, M.D., Pathologist, App. p. 897, under the Section Heading, Final Anatomic Diagnosis (Subpart: Cause of Death and Subpart: Interval), stated that the cause of death was exsanguination and that the interval was minutes. State's witness, Mr. Mungo, testified on Direct that Mr. Shields "I guess he jumped over his console seat and jumped out the passenger side of his vehicle."⁵ In the

²March 2006 Trial Transcripts, on Direct of Mr. Fortune, App. p. 576, Lines 01-25, App. p. 577, Lines 01-17, App. p. 581 Lines 16-25, and on Cross at App. p. 584, Lines 02-25, and on App. p. 585, Lines 01-05.

³March 2006 Trial Transcripts, on Direct of Mr. Fortune, App. p. 577, Lines 04-06, and on Cross App. p. 583, Lines 16-25.

⁴March 2006 Trial Transcripts, on Direct of Mr. Fortune, App. p. , Lines 04-08.

⁵March 2006 Trial Transcripts in Volume 02, on Direct of Mr. Mungo, App. p. 311, Lines 14-17.

March 2006 Trial Transcripts, on Direct of State's witness, Ms. Stephanie Douglas/Gaston, App. p. 469, lines 8-25 and App. p. 470, lines 1-10, Ms. Douglas/Gaston testified as follows: Question: So you didn't see gunshots but you heard gunshots? Answer: Yes. Question: What happened next? I got up after there wasn't no more gunshots. I saw Anthony crawling. Question: And what happened as he was crawling? I got up. Me and my friend jumped up, and Oscar came around the truck and he shot him in the back. Question: So he shot him while he was crawling? Yes. Final remark by the Solicitor: I have no more questions. Please answer any questions that the defense has. The Solicitor knew of this Voluntary Statement of State's witness, Ms. Stephanie Douglas/Gaston because Mr. Fortune's defense counsel had obtained a copy of her Voluntary Statement from the Solicitor in its discovery request. This Voluntary Statement contradicted her court testimony.⁶

The Record shows that defense counsel did not object to Ms. Stephanie Douglas/Gaston's court testimony during State's Direct-Examination of Ms. Stephanie Douglas/Gaston. Defense counsel only used cross-examination and re-cross-examination to impeach the credibility of Ms. Douglas/Gaston. In the March 2006 Trial Transcripts, App p. 587 Lines 16-19, during the State's cross-examination of Mr. Fortune, the Solicitor's question to Mr. Fortune was: Okay. You shot him at arm's length and he crawled through the car. Isn't that right that he crawled out of the passenger side? Answer: He came out the passenger side.

In the March 2006 Trial Transcripts App. p. Page 592 Lines 22-25, during

⁶Voluntary Statement of State's Witness, Ms. Stephanie Douglas/Gaston provides in pertinent part: ... Next thing you know the gun started popping off... I heard about 4 or 5 shots. Anthony got out the passenger side trying to run I guess to get help. He was on the ground by a green car... .

Defense Counsel's cross-examination of Mr. Fortune, stated: Because he had just shot at me and he still had the gun and when I went to the other side he still had the gun. Mr. Fortune left the driver's side to go to the passenger's side and he emptied his gun as he fired more shots. Mr. Shields died from his wounds soon thereafter. In the Trial Transcripts of the March 2006 murder trial of Mr. Fortune in Volume 02, on Cross by Defense Counsel Mr. Saleeby of State's Witness, Dr. Inas Z. Yacoub, M.D., Pathologist, App. p. 385, Lines 08-15, her testimony was as follows: "It's my opinion within the reasonable degree of medical certainty that either Gunshot Wound Number One or Number Two happened before Gunshot Wound Number Three or Four because of the appearance of the pallor of Number Three and Number Four and the minimum associated bleeding with those compared to Gunshot Wound One and Number Two, which were the intermediate range and the contact wounds that were associated with the bleeding and did not appear pale."

In Mr. Shields' Autopsy Report, App. p. 900, under the Section Heading, #5 Gunshot Wound, Dr. Inas Z. Yacoub, M.D., Pathologist, wrote the following:

#5 Gunshot Wound entrance is located on the back of the left hand at the knuckle of the index finger. No soot, gunpowder particles or gunpowder tattoos are observed around this wound. After penetrating the skin, the bullet passed distal through the left hand, exited the palm of the hand at the base of the left index finger and grazed the radial aspect of the left middle finger. Minimal bleeding is observed along this wound track.

Evidence and testimony showed that Mr. Shields had a .25-caliber gun, which he fired. Evidence showed that the .25 caliber gun had its safety removed. Testimony and the Pathologist's Report showed that a smaller gunshot sound was heard first and then louder gunshots were heard, indicating that the .25-caliber gun was fired first, followed by the firing of the .38-caliber gun.

Mr. Fortune left the scene, but returned to Cheraw later that day to provide the police with a voluntary statement and to hand over the weapon he used. Mr. Fortune stated to the police that he shot Mr. Shields in self-defense after Mr. Shields fired the first shot.

For 30 minutes after the shooting, the scene was unsecured and people at the crime scene tampered with evidence.⁷ The Police and the State collected evidence, made photographs and determinations of fact based upon evidence at the scene after people had compromised the crime scene. Before the police arrived at the Huddle House to secure the crime scene, Mr. Vincent Davis, State's witness at the murder trial, took Mr. Shields' .25 caliber gun from the scene and kept it. Officer Johnny Quick retrieved Mr. Shield's gun from Mr. Vincent Davis on December 28, 2001, five days after the shooting. This missing gun of the Decedent, Mr. Shields, caused Officer Harold Haney and Officer Johnny Quick to doubt Mr. Fortune's claim that he shot Mr. Shields in self-defense when he turned himself and his .38 caliber gun over to the police and gave the police his voluntary statement.⁸ Police securing the scene found in excess of 60 people remaining. At the March 2006 trial, during the State's Direct-Examination of Officer Wayne Jordon, Defense Counsel Mr. Ed Saleeby told Judge Milling, "We're stipulating to the chain of

⁷March 2006 Trial Transcripts, on Direct of State's Witness Officer/ Sergeant David Lee, police officer at the crime scene who secured the crime scene, App. p. 486, Lines 15-17. "When I arrived it appeared to be between 50 and a hundred people throughout the parking lot. Majority just about everybody was everywhere in kind of a chaos." On Cross-Examination of State's Witness Officer/ Sergeant David Lee, App. p. 488, Lines 15-25: So for about 30 minutes that scene was unsecured with about a hundred people roaming around? Answer: I can't say it was secured until I got there. That was your job to secure the scene? Answer: Being the first one there, yes, sir. So for thirty minutes you don't know what went on there? Answer: No, sir. You don't have any idea what evidence may have been Misplaced? Moved? Taken, whatever? Answer: I wasn't there. I can't recall.

⁸March 2006 Trial Transcripts, on Direct of Mr. Fortune, App. p. 580, Lines 02-12: They asked me what happened and I told them what happened. And they asked me if I would give a statement and I told them yes. I told them what happened. The first, when I told what happened, their first answer was there is no other gun, and I told them, well, if there is not, somebody took it." "And when Johnny Quick told was taking me to put me in custody, he told me that if there was another gun, he'd find it."

custody of the .25 caliber to save 45 minutes.”⁹ During the March 2006 murder trial of Mr. Fortune, in a Colloquy, Solicitor Joyner, and Solicitor Hales, in reference to Mr. Rod Green, the SLED CSI person who collected evidence at the crime scene, stated, “He collected -- he took the photos. He was the courier. As to the chain of custody has been stipulated to we could possibly get by without him.” Solicitor Hales, also in this same Colloquy, in reference to Mr. Rod Green stated, “He found the .25 bullet and casing.” Solicitor Joyner then stated, “All that’s fine now since they’re stipulating to the chain of custody.”¹⁰ During the March 2006 trial, in a Colloquy, Defense Counsel requested and Judge Milling ordered Solicitor Joyner to call Mr. Rod Green to testify for the State as Solicitor Joyner had originally planned to do. Mr. Rod Green is the SLED CSI person who collected evidence at the scene. Defense Counsel Mr. Quinn told both Solicitor Joyner and Judge Milling, “I would like to talk to whoever processed the car.” Solicitor Joyner answered, “Rod Green is who he needs to talk to.”¹¹ Mr. Rod Green never testified and Mr. Fortune’s Defense Counsel never brought the matter up again even when the State rested its Case.

The State’s witnesses offered conflicting testimony about the same events.

For example, in the March 2006 Trial Transcript, App. p. 313, Lines 2-7, Mr. Mungo states that Ms. McCall does not say anything after the shooting. However, at App. p. 420, Line 2, Mr. Barry Davis states that Ms. McCall said, “That’s what the fuck you get.” The State had an active indictment on Ms. Sonta McCall for the murder of Mr. Shields, for possessing a 38-caliber handgun, and for the offense of accessory before the fact of

⁹March 2006 Trial Transcripts in Volume 03, on Direct of State’s Witness Officer Wayne Jordan, at App. p. 491, Lines 09-10.

¹⁰March 2006 Trial Transcripts, App. p. 496, Lines 07-25.

¹¹March 2006 Trial Transcripts, App. p. 617, Lines 01-25 and Page 618, Lines 01-13.

murder. The State had an active indictment on Mr. Oscar Fortune for the murder of Mr. Shields and for possession of a weapon during the commission of a violent crime. The State believed that Ms. McCall independently shot Mr. Shields. The State believed that Mr. Fortune independently shot Mr. Shields. Ms. McCall spent seven weeks in jail before her release on bond. The State never put Ms. McCall on trial for the murder of Mr. Shields. The State dismissed the murder charge and all of the other charges against Ms. McCall after Mr. Fortune's trial. The State dismissed all of the other charges against the State's witnesses after Mr. Fortune's trial.¹² During the March 6-9, 2006 murder trial of Mr. Fortune, Defense Counsel Mr. Saleeby was told by the Solicitor that Mr. Fortune was charged under the theory of the hand of one is the hand of all.¹³ In the Trial Transcripts of the March 6-9, 2006 trial, App. p. , Lines 14-25, during the State's Direct-Examination of Officer Haney, Judge Milling prohibited the Solicitor from talking about and instructing the jury about the theory of the hand of one is the hand of all.

In the PCR Hearing Transcript, App. p. 880, Lines 08-12, Mr. Fortune's defense counsel, Mr. Terrence Quinn, states the following, "Well, he, just for clarification, this case came into the office when Mr. Redmond took it in. I didn't start working for the law firm probably two years after that, and didn't touch the case until three years after the incident." In the PCR Hearing Transcript, App. p. 885, Lines 18-20, Mr. Fortune's Defense Counsel, Mr. Terrence Quinn, states the following, "Unfortunately, much of the information on that list was no good, phone numbers, addresses. It had been five or six years or four or five years."

¹²PCR Hearing Transcript, App. p. 775, Lines 04-25, and p. 776, Lines 01-02.

¹³PCR Hearing Transcript, App. p. 775, Lines 04-25,

PROCEDURAL HISTORY

Officers arrested Mr. Fortune on suspicion of murder on December 23, 2001. The Grand Jury indicted Mr. Fortune for murder on February 28, 2002. Mr. Fortune first had an appointed attorney, Ms. Patricia Rivers. Then he hired Mr. Kernard Redmond of the Saleeby and Cox Law Firm. Magistrate Judge Wilbert S. Motley held a preliminary hearing for Mr. Fortune on February 11, 2002. Mr. Fortune, his Attorney, Mr. Kernard Redmond, and State's witness, Officer Harold Haney attended this preliminary hearing in February 11 2002.¹⁴ At this preliminary hearing, Mr. Kernard Redmond learned from Officer Haney that on the night of the incident, the police had obtained the list with names and phone numbers of 50 or more witnesses that were at the crime scene. The absence of this list led Judge Burch to grant a continuance until January 30, 2006 just as jury selection for Mr. Fortune's trial was about to begin on November 05, 2005. The absence of this list also led Judge Burch to issue a court order for the State to produce this list. This January 30, 2006 trial date was continued until the actual trial was held in Chesterfield County Court of General Sessions on March 6-9, 2006. Mr. Kernard Redmond was Mr. Fortune's attorney until September 02, 2003, at which time he left to work for the Fourth Circuit Office of the Solicitor. Mr. Edward Saleeby, Jr. and Mr. Terrance Quinn represented Mr. Fortune at the March 6-9, 2006 murder trial. Mr. Dan Blake was the first Solicitor for the Fortune case. Mr. Kernard Redmond, in his August 20, 2003 letter of withdrawal to Mr. Fortune told both Mr. Fortune and Mr. Saleeby that he had made an offer of involuntary manslaughter to Solicitor Dan Blake and that he was waiting for a response from Mr. Blake. However, Mr. Franklin Joyner and Mr. Kevin Hales were the Solicitors who prosecuted the case. The Honorable Judge Milling

¹⁴See Cover Letter and Proceedings of the Preliminary Hearing, App. p. 97.

presided at Mr. Fortune's murder trial and sentencing. Mr. Saleeby told the jury in his opening, "Sometimes I'll be here. Sometimes I'll not. I was cursed with bad knees."¹⁵ Mr. Saleeby, in his closing, stated, "I wasn't here when this was said. I was at the doctor getting a shot in that knee and shot in that knee. I have to get them replaced sometime after Easter, hopefully."¹⁶ The jury was ultimately given the verdict options of not guilty, guilty of voluntary manslaughter, or guilty of murder. On March 9, 2006, the jury deliberated less than two hours and returned guilty verdicts on both the murder charge and possession of a weapon during a violent crime. Judge Milling sentenced Mr. Fortune to thirty-seven years imprisonment for murder and five years for possession of a weapon during the commission of a violent crime. Defense Attorneys filed the Notice of Appeal. After the trial, Robert M. Dudek, Esq., of the South Carolina Office of Appellant Defense made the appeal. The Court of Appeals affirmed Fortune's convictions and sentences. State v. Fortune, Op. No. 2009-UP-259 (S.C.Ct.App.), filed June 1, 2009. Mr. Fortune timely filed his PCR Application on August 18, 2009. The State filed its Return on December 23, 2009. Applicant filed and served his Amended PCR Application and his PCR Verified Complaint on January 03, 2012. The Honorable Judge Paul Burch presided over the January 11, 2012 PCR Hearing. The Honorable Judge Paul Burch filed an Order of Dismissal on February 22, 2012.¹⁷ Applicant filed a timely SCRCP Rule 59, (a) (2) and (e) Motion on March 05, 2012. The State filed a timely Return. Applicant, after receipt of the PCR Hearing Transcript filed a timely Amended SCRCP Rule 59, (a) (2) and (e) Motion.¹⁸ The Honorable Judge Paul Burch filed an Order Denying Motion

¹⁵ March 2006 Trial Transcripts, App. p. 266, Lines 23-25.

¹⁶ March 2006 Trial Transcripts, App. p. 632, Lines 16-19.

¹⁷ See Order of Dismissal from the Honorable Judge Paul Burch, App. p. 3.

¹⁸ See Applicant's Amended SCRCP Rule 59, (a) (2) and (e) Motion in App. p. 52.

Pursuant to SCRCP Rule 59, (a) (2) and (e) on May 09, 2012.¹⁹ Both the State and Applicant did not receive notice that this Order was filed until June 19, 2012.²⁰

ARGUMENT

I. Prosecutorial Misconduct at Mr. Oscar Fortune's March 2006 Trial.²¹

A. The prosecutor's closing argument resulted in the denial of a fair trial because the prosecutor's comments denigrated the integrity of defense counsel, both personally and in the abstract, as well as, impugning, directly or through implication the integrity or institutional role of defense lawyers. Mr. Fortune asserts that the prosecutor's closing argument denigrating the integrity of defense counsel violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal because the remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." See: United States v. Wilson, 624 F.3d 640, 656 (4th Cir. 2010). The prosecutor's comments, as well as the objections of defense counsel and the responses to the objections by the trial judge are found in the Trial Transcripts, App. p. 648, on Lines 13-25, p. 649, Lines, 01-25, and p. 650, Lines, 01-03. The referenced comments are as follows: 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

¹⁹See Order of Dismissal from the Honorable Judge Paul Burch, App. p. 3.

²⁰See E-mail from the Honorable Judge Paul Burch in App. p. 16.

²¹The Order of Dismissal, App. p. 4, under the Allegations Section, states, "At The PCR Hearing, the Applicant proceeded solely upon grounds of ineffective assistance of trial counsel." This statement in the Order of Dismissal is incorrect. Petitioner Fortune produced testimony at his PCR Hearing and offered evidence sufficient to carry his burdens of production and proof regarding his allegations of both prosecutorial misconduct and ineffective assistance of trial counsel. Mr. Fortune raised both allegations of prosecutorial misconduct and ineffective assistance of trial counsel in his Original and Amended PCR Application, in his PCR Verified Complaint, and during his PCR Hearing. For example, the PCR Transcript, App. 775, lines 4-24, addresses the issue of prosecutorial misconduct.

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...

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. 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. 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...

Defense Counsel: Objection your Honor: Prosecutor: to get a not guilty verdict. 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. Defense Counsel: Thank you your Honor. No need to go that far. Mr. Fortune asserts that the trial court judge failed to give a proper curative instruction, and that even if properly given, it would not have been effective to eliminate the serious prejudice to Mr. Fortune. Moreover, the judge's routine final instructions

to the jury were far from sufficient to correct the error. Mr. Fortune asserts that the invited reply rule is not applicable here because this rule only provides a prosecutor "some leeway to respond to inflammatory attacks mounted by defense counsel," United States v. Rodriguez-Estrada, 877 F.2d 153, 158 (1st Cir. 1989), or to rebut allegations that a prosecution witness committed perjury. The invited reply rule does not provide a prosecutor "carte blanche to engage in improper tactics" in responding to misrepresentations made by his adversary in closing argument, United States v. Marcucci, 299 F.3d 1156, 1166 (9th Cir. 2002),-- rather, such a circumstance is best addressed by a proper objection.²² Mr. Fortune is alleging in this Petition that his defense counsel offered ineffective assistance of counsel overall and specifically in defense counsel's opening and closing. Mr. Fortune argues that his defense counsel's closing comments in the March 2006 Trial Transcripts, App. p. 626, Lines 05-19²³ and p. 643, Lines 18-22,²⁴ were not the kinds of comments that allow the prosecutor to fall within the ambit of the

²²See United States v. Wilson, 135 F.3d 291, 299 (4th Cir. 1998) (observing that we consider whether prosecutor's comments were invited in determining whether they were prejudicial). In Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958), the Supreme Court recognized that a prosecutor's argument, even when improper, is not prejudicial if it was invited by the improper remarks of defense counsel, and if the prosecutor does no more than "right the scale." Young, 470 U.S. at 12-13, 105 S.Ct. 1038 (applying invited reply rule of Lawn).

²³"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 first before that. We'll get to that in a minute to do justice, but I'll promise you as you can tell Mr. Joyner, [prosecutor], done his best to do with 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 voluntary manslaughter conviction out of y'all. He wants to charge guilty with a gun."

²⁴The Solicitor will give his summation. I promise you, like me, he'll do every dad gum thing he can do to prove him guilty of murder. If he can't do that, he will try to find him guilty of involuntary manslaughter and show that gun charge in there.

invited reply rule as applied in Young. The State objected to other unrelated comments in defense counsel's closing several times.²⁵ (Standard of Review)²⁶

B. The prosecutor's closing argument responding to defense counsel's reasonable doubt chart and his "challenge to the Solicitor that if he, (Solicitor) can disprove each and every one of those reasonable doubts on this chart, I guess you ought to convict of something. But he'll probability covers it up, turn away, and say he ain't got enough time. Call it the Ed Saleeby Jr. smokescreen."²⁷

The prosecutor effectively invited the jury to disregard the trial court's instructions on reasonable doubt. Mr. Fortune asserts that the prosecutor's closing argument regarding the reasonable doubt chart violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal. The remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." See: United States v. Wilson, 624 F.3d 640, 656 (4th Cir. 2010). The prosecutor's closing argument comments are found in

²⁵March 2006 Trial Transcript, App. p. 614, Lines 01-06, p. 619, Lines 24-25 and p. 620, Lines, 01-04

²⁶A trial court is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily its rulings on such matters will not be disturbed. State v. Condrey, 349 S.C. 184, 195-96, 562 S.E.2d 320, 325-26 (Ct.App.2002). This court will not disturb a trial court's ruling regarding closing argument unless the trial court commits an abuse of discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ; State v. Jernigan, 156 S.C. 509, 524, 153 S.E. 480, 486 (1930) . An appellate court must review the argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. Once the trial court has allowed the argument to stand, the defendant has the burden of proving the argument denied him a fair determination of guilt or innocence. State v. Copeland, 278 S.C. 572, 580, 300 S.E.2d 63, 68 (1982). Improper comments on closing do not require reversal if the appellant fails to prove he did not receive a fair trial because of the alleged improper argument. Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) . To warrant reversal, the appellant must prove both abuse of discretion and resulting prejudice. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003) ; State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct.App.2006) cert pending; [375 S.C. 316]State v. Harrison, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct.App.2000) (citing State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000)); State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct.App.1999) .

²⁷March 2006 Trial Transcript, App. p. 645, Lines, 17-23.

the March 2006 Trial Transcripts in Volume 04, at Page 650, Lines 04-25, and at Pages 651 through Page 655, Line 24, and Page 665, Lines 20-25. Some of these comments are as follows.²⁸ Certainly, a prosecutor is entitled to call into question the credibility of a defense. See, e.g., State v. Lunsford, 318 S.C. 241, 246, 456 S.E.2d 918, 922 (Ct.App.1995) ("In telling the jury, 'so don't fall for that,' the solicitor was merely telling the jury that it should not credit defense counsel's argument regarding the absence of fingerprint evidence. A prosecutor may fairly point out 'matters which [the jury] should not consider.'). Likewise, a prosecutor may "legitimately appeal to the jury to do their full duty." State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). Mr. Fortune asserts that during his

²⁸March 2006 Trail Transcript, App. p. 650, Lines 04-16 If you remember, ladies and gentlemen, Mr. Saleeby said I probably wouldn't have time to address all of his points he wrote up here for you. He said if I could address them, if I could explain them that indeed you should find Oscar Fortune guilty. Those were his very words and I'll start by doing so. First of all, anything that Denise Shields said about this incident is not a reasonable doubt. In fact, it doesn't matter because she wasn't at the scene when it happened. She has no idea. So everything she said right here has been addressed. We don't have to spend time individually on showing it because we all know she wasn't there.

App. p. 651, Lines 01-08 know why the first gunshot was lower? You can put something on a gun called a silencer or suppressor. It's something that connects directly to the end of the barrel and it causes the loudness to be muffled. Well, if you stick a gun directly in somebody's back and fire the trigger that shot is going to be muffled. That shot is going to be suppressed, ladies and gentlemen. And that's why she heard a suppressed shot.

Page 651, Lines 09-10 I wouldn't say Mr. Saleeby just put a plain lie up here, but it's certainly not the truth.

Page 655, Lines 03-24 I mean I'm good. I circled it because it shows how ridiculous is it. Investigator David Lee admitted it was his job to secure the scene. It was his job and he got there 30 minutes later. How is that a reasonable doubt? It's not because it's true. It was his job. He's, (Solicitor), just making statements trying to confuse you. Sonta and Iris all have been charged even though this is clear that some or all of them are not guilty as charged. Well guess what? If that's true, guess who is guilty? Oscar Fortune is. He's the one who is guilty if the rest of them aren't. He admitted to it. He pulled the trigger. He said he shot him. That's it. That was pretty easy. It's all been reviewed. Mr. Saleeby said himself that if I could refute all of them you should find him guilty.

Ladies and gentlemen, I ask that you find him guilty because that's what's I've done. And I want to remind you of a few things. If you remember when Mr. Hales, [Solicitor], got up and did his opening statement when he ended, he said I want you to remember three things. He said they're going to put a lot of stuff on you, confuse you, and get you to use something other than your common sense.

Page 665, Lines 20-25 And Mr. Saleeby would have you believe with his so-called reasonable doubt charge chart he had you believe there is a search for reasonable doubt. He believes that so much that he entitled his whole sheet here, reasonable doubt, but it's not. You under no circumstances are you to search for reasonable doubt, ladies and gentlemen.

March 2006 murder trial, the prosecutor's closing argument regarding his defense counsel's use of the reasonable doubt chart went far beyond the outer boundaries of proper closing argument. Mr. Fortune also asserts that his defense counsel's strategy, in issuing this challenge to the prosecutor, was ineffective assistance of counsel for which defense counsel cannot articulate a valid reason when reviewed under an objective standard of reasonableness. Defense counsel did object to a portion of the prosecutor's closing,²⁹ preserving both issues for review.

The presiding judge at Mr. Fortune's March 2006 murder trial responded to defense counsel's objection: "I understand your objection, please keep your remarks to the evidence that's been presented in the case."³⁰ Mr. Fortune asserts that the trial court judge failed to give a proper curative instruction and that even if properly given it would not have been effective to eliminate the serious prejudice to Mr. Fortune. Moreover, the judge's routine final reasonable doubt instructions to the jury were far from sufficient to correct the error.³¹ The objection defense counsel made was to the improper comments of the retreat element of self-defense. The prosecutor, in trying to win defense counsel's "challenge," interjected improper state of mind conjectures as to why Mr. Fortune should have called the police and left Ms. McCall at the crime scene rather than getting out of the car and checking on her as she and the Decedent argued. It is uncontested that Ms. McCall was Mr. Fortune's close relative, whom he grew up with and regarded as his little sister. In the March 2006 Trial Transcripts, App. p. 662, Lines 18-22, the prosecutor stated: I'll leave this place where he is now.

²⁹March 2006 Trial Transcript, App. p. 662, Lines, 23-24.

³⁰March 2006 Trial Transcript, App. p. 662, Line 25 and p. 663, Lines 01-02.

³¹March 2006 Trial Transcript, App. p. 679, Lines 04-25, and p. 680-682.

That would have been the prudent thing to do. But he, [Mr. Fortune], didn't do it. Instead, he said, Hum, I'll go over there. I'm twice his, [Decedent], size and I'm carrying a gun. These so-called statements depicting the state of mind and mental calculations of Mr. Fortune had no basis in fact and were contrary to the evidence presented during the trial. As Defense Counsel correctly said in the objection, Mr. Fortune did not know the Decedent and had never laid an eye on him. Mr. Fortune asserts that Judge Milling's instruction did nothing to eliminate the prejudice from the prosecutor's reasonable-doubt closing argument. Moreover, the prosecutor's argument effectively invited the jury to disregard the trial court's instructions on reasonable doubt. Thus, the court's instruction to the jury in no way cured the prejudice resulting from the prosecutor's improper argument. Solicitors are bound to rules of fairness in their closing arguments as explained in State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The argument cannot appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice and therefore must be carefully tailored. Mr. Fortune asserts that both the defense counsel's challenge and the manner in which the prosecutor responded to this challenge insinuated that the reasonable doubt standard is a form of evidence or a defense rather than a standard of proof. The purpose of the standard is to reduce the margin of error inherent in human judgments when the liberty of a defendant is at stake.³² The reasonable doubt standard plays a vital role in the American scheme of criminal

³²In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."³³ The prosecutor's closing statements to the jury are improper because they inject an arbitrary factor into jury deliberations. The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts. 75 Am.Jur.2d, Trial, Section 261, p. 338. "Jurors are simply not to consider the opinions of neighbors, officials or even other juries."³⁴ Mr. Fortune asserts that the prosecutor's closing argument regarding the reasonable doubt chart violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal.

C. The State procured the conviction of Mr. Fortune by knowingly allowing a key State's Witness, Ms. Douglass/Gaston, to commit perjury. The State bolstered and used the perjured testimony to mislead the judge and the jury. The State thereby committed fraud upon the Court and the Jury. (Standard of Review)³⁵

This prosecutorial misconduct violated Mr. Fortune's Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal

³³ Id.

³⁴ State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686 (1982).

³⁵ United States v. McDonald, 61 F.3d 248 (4th Cir. 1995) When faced with a claim of prosecutorial misconduct, we review a district court's factual findings for clear error; if, as here, no factual findings exist, our review is plenary. United States v. McDonald, 61 F.3d 248, 253 (4th Cir.1995). Remarks made by a prosecutor in his closing argument must not only have been improper, but must have also "so infected the trial with unfairness as to make the resulting conviction a denial of due process." In considering whether such remarks prejudiced the defendant, we consider the following: (1) whether the prosecutor's remarks had a tendency to mislead the jury and prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the weight of the evidence against the accused; and (4) whether the prosecutor's remarks were deliberate. Id. at 262.

See Jean v. Collins, 107 F.3d 1111, 1119 (4th Cir.1997).

because the prosecutorial misconduct "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." See: United States v. Wilson, 624 F.3d 640, 656 (4th Cir. 2010). Mr. Fortune's defense of self-defense was unduly prejudiced by the prosecutorial misconduct. Ms. Douglass/Gaston's March 2006 court testimony stating that Mr. Shields crawled away and was shot in the back contradicts her voluntary statement given the morning after the shooting which states that Mr. Shields "was trying to run, but he couldn't make it." Ms. Douglass/Gaston's Voluntary Statement also says that she heard four of five shots, but does not mention seeing any shot.

The March 2006 Trial Transcript, App. p. 311, Lines 14-17, on direct by the State of Mr. Mungo, provides that: "He (Mr. Fortune), shot him like two or three times, and that Mr. Anthony Shields he I guess he jumped over his console seat and jumped out the passenger side of the truck, and he (Mr. Fortune), met him (Mr. Shields), over there and shoot him at least two or three more times." In the March 2006 Trial Transcript, App. p. 477, lines 1-4, on redirect by the State, the State asked Ms. Douglas/Gaston if she had been truthful in her court testimony and in her voluntary statement. She answered, "Yes." Rather than correcting the perjured testimony, the State then said, No further questions. In the March 2006 Trial Transcript, App. p. 663 lines 15-18, Mr. Joyner, in closing, relies on the perjured testimony when he tells the jury that Mr. Shields fell out of the SUV, and crawled on the ground. This prosecutorial misconduct by the State was damning to Mr. Fortune in the minds of the jury. During the January 11, 2012 PCR Hearing, jury members from his March 06-09 murder trial were present as witnesses on his behalf. In a side bar, Judge Burch, Ms. Ratigan, and Attorney Stroud discussed

whether the jury members could testify. Attorney Stroud said yes, Ms. Ratigan said no, and the Honorable Paul Burch thought that if they did testify, it would result in an immediate appeal. Attorney Stroud told the Judge and Ms. Ratigan that the jury members would testify about Ms. Douglass/Gaston's March 2006 court testimony stating Mr. Shields crawled away and was shot in the back. After discussing the matter with Mr. Fortune, Attorney Stroud decided to forego putting the jury members on the stand because of the possible delay if an immediate appeal resulted. Attorney Stroud, by presenting evidence of the jury members intended testimony, preserved Mr. Fortune's rights to present an affidavit of the jury members in any future proceedings involving Mr. Fortune's PCR litigation. The PCR Order of Dismissal did not address the jury issue. Mr. Fortune, in his Memorandum in Support of SCRCP Rule 59, (a) (2) and (e) Motion again preserved the jury issue for appellate review.³⁶ In the March, 2006 Trial Transcript, App. p. 640, lines 2-21, the impact of Ms. Douglas/Gaston falsely stating that Mr. Fortune shot Mr. Shields in the back as Mr. Shields crawled on the ground is so damning that even Mr. Saleeby deprives Mr. Fortune of his presumption of innocence. Mr. Saleeby, in his closing, in the March, 2006 Trial Transcript, App. p. 640, line 18; tells the jury that he (Mr. Shields) is crawling with the gun in his hand. Ms. Douglas/Gaston's false testimony is so damning that Ms. Blanche Fortune, in the January

³⁶ Memorandum in Support of SCRCP Rule 59, (a) (2) and (e), App. p. 75, on the issue of jury testimony, Mr. Fortune provided that: In State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (S.C. 2003), the Court held, "The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." The Court in State v. Cameron, 311 S.C. 204, 207, 428, S.E. 2d 10, 12 (Ct. App. 1993), held that: In order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature. In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. In Shumpert v. State of South Carolina, 378 S.C. 62, 661 S.E. 2d 369, (S.C. 2008), the Court held that Rule 606(b) of the South Carolina Rules of Evidence allows a juror to offer testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

11, 2012 PCR Transcript, App. p. 862, lines 22-25, stated that she believed that he (Mr. Fortune), was a cold blooded killer upon hearing Ms. Douglas/Gaston's in-court testimony. Ms. Blanche Fortune, App. p. 863, line 1-4, goes on to state that defense counsel did nothing to dispel this perception. In the January 11, 2012 PCR Transcript, App. p. 802, lines 18-25, and p. 803, lines 1-25, Mr. Saleeby provides that the State never told defense counsel that Ms. Douglas/Gaston's court testimony would contradict her voluntary statement. In the January 11, 2012 PCR Transcript, App. p. 804, lines 22-25, and p. 805, lines 1-25, p. 806, lines 1-25, and p. 807, lines 12-17, Mr. Saleeby states that: Defense Counsel could have brought an allegation of prosecutorial misconduct but did not because it did not enter the minds of defense counsel. In the March, 2006 Trial Transcript, App. p. 658, lines 6- 20, in the State's closing, Mr. Joyner misstates the testimony of Mr. Barry Davis and misleads the jury. Mr. Joyner tells the jury that the testimony of Mr. Barry Davis is that he saw those first shots. In the March, 2006 Trial Transcript, App. p. 415, lines 5-6, in the State's Direct of Mr. Barry Davis, Barry states that he just heard the first set of shots. Mr. Joyner tells the jury that Mr. Shields was crawling through his car and as he came through, he broke the center console, even though the State had never laid a proper foundation for this theory, and no proof was offered to show how and when the console was broken. Mr. Joyner told the jury in this part of his closing on Lines 17-20, that: And Stephanie Gaston, when she testified he saw the same shots that Barry Davis saw. She saw him walk around and shoot him just as the Defendant testified himself. Mr. Joyner's final comment to the jury in this part of his closing at Line 20 was: That's all true. The State not only suborned perjury; it also bolstered the in-court falsehoods of Ms. Douglas/Gaston by intentionally misleading the

jury. In the March 2006 Trial Transcript, App. p. 665, lines 8-13 and p. 666, lines 1-5, in his closing, Mr. Joyner misinforms and misleads the jury when he tells them that: The truth is that 3 of the 5 shots fired by Mr. Fortune were located in Mr. Shields' back. This is an outright misstatement of the evidence presented in the Autopsy Report. The State intentionally and knowingly used this misstatement to purposefully mislead the judge and the jury in order to obtain a conviction rather than to seek justice or to find the truth. In the March, 2006 Trial Transcript, App. p. 665, lines 8-13, and p. 666, lines 1-5, Mr. Joyner tells the jury that Mr. Fortune shot Mr. Shields 3 times in the back even though the autopsy report states that only one shot was located in Mr. Shield's back. In Mr. Shields' Autopsy Report, Dr. Inas Z. Yacoub, M.D., Pathologist, App. p. 897, under the Section Heading, Final Anatomic Diagnosis, stated that of the 5 gunshot wounds, only 1 was to Mr. Shields' back. The Autopsy Report, App. p. 899-900, describes each of the 5 gunshot wounds, and again only 1 gunshot wound was located in Mr. Shields' back. Dr. Yacoub described this gunshot wound to Mr. Shields' back as, "#1 Gunshot Wound entrance is located in the left side of the back 15.5 inches below the top of the head and 6.5 inches to the left of the posterior midline plane." The Fourth Circuit, in Boyd v. French, 147 F.3d 319 (4th Cir. 1998), outlined the standard for examining perjured testimony. A conviction acquired through the knowing use of perjured testimony by the prosecution violates due process. See Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959). This is true regardless of whether the prosecution solicited testimony it knew to be false or simply allowed such testimony to pass uncorrected. See Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); Napue, 360 U.S. at 269, 79 S. Ct. 1173. The knowing use of perjured

testimony constitutes a due process violation when there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. See Kyles v. Whitley, 514 U.S. 419, 433 n. 7, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). In United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987), the Court held that: A defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured. Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony. In U.S. v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), the Court held: A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. The Court held that the knowing use of perjured testimony is subject to the materiality standard of review: evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In the case at bar, Defense Counsel and the State knew that Ms. Douglas/Gaston's testimony was perjured because they each had the voluntary statement of Ms. Douglas/Gaston which differed factually from her court testimony. They also each knew that Ms. Douglas/Gaston's voluntary statement was true and verified by the testimony of Mr. Mungo, as well as, the findings of the Autopsy Report. The State also knew that Ms. Douglas/Gaston's testimony was perjured because the State had to prepare Ms. Douglas/Gaston for her testimony at the March 2006 murder trial of Mr. Fortune. The State failed to correct the perjury and instead used it to convict Mr. Fortune. If the State had disclosed to Mr. Fortune's Defense Counsel that Ms. Douglas/Gaston's testimony would contradict her voluntary statement, then it is more

likely that Defense Counsel, rather than only using cross-examination to oust the perjured testimony from the minds of the jury, may have instead requested a suppression hearing to prevent the jury from ever hearing the perjured testimony. Because the State did not disclose, and Defense Counsel used only cross-examination, Mr. Fortune was seen by the jury as a cold-blooded killer who fired his last shot in Mr. Shields' back as Mr. Shields crawled on ground. The State's non-disclosure meets the Materiality Standard set forth in Bagley in that the result of the proceeding in the March 2006 Murder Trial of Mr. Fortune would have been different had the State disclosed to Mr. Fortune's Defense Counsel this material evidence. The State committed prosecutorial misconduct by using this perjured testimony and misleading the Court and the Jury. The jury had no choice but to find Mr. Fortune guilty of murder.³⁷ The way the State obtained Mr. Fortune's conviction is fundamentally unfair and must be set aside. The Record provides the evidence to conclude that the perjured testimony, the State's bolstering of tainted evidence, the State's subornation of perjury, and the State's intentional misleading of the judge and jury, affected the jury's judgment and its ability to function in SCRCP Rule 59 (a) (2) and (e) Motion an impartial manner. The Record establishes that Mr. Fortune's Defense Counsel had other options rather than just the use of cross-examination to react to the State's prosecutorial misconduct. The Defense did not effectively remedy the effect of the perjured testimony for the jury, and the State used the perjured testimony in its reply to the Appeal. Statement of the Case, the State used the perjured testimony of Ms. Stephanie Douglas/Gaston. App. p. 947-948.

³⁷See Affidavit of member of the jury for the March 2006 murder trial and who is one of 4 Jurors who came to Mr. Fortune's January 11, 2012 PCR Hearing as witnesses for Mr. Fortune.

II. Ineffective Assistance of Defense Counsel:³⁸ (Standard Of Review)³⁹

Mr. Fortune files his Petition, as well as the remedies sought, pursuant to the holdings of United States v. Cronin, 466 U.S. 648 (1984), and Strickland v. Washington, 466 U.S. 668 (1984). Per se prejudice, under the Cronic Standard, is appropriate because defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making the "adversary process itself presumptively unreliable." While Defense Counsel Mr. Quinn did perform better than did Lead Counsel Mr. Saleeby. Mr. Fortune's Defense Counsel is per se prejudice under the Cronic Standard, because "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." The Court, in Mincey v. State, 314 S.C. 355, 444 S.E. 2d 510, (1994), held that only in a case of overwhelming evidence of guilt, will deficient performance not result in prejudice. The State's evidence produced at Mr. Fortune's trial is per se prejudice and

³⁸The Order of Dismissal did not address all of Applicant's issues raised in his Original and his Amended PCR Application. Applicant filed a timely SCRCP Rule 59 (a) (2) and (e) Motion. The Honorable Judge Paul Burch issued an Order Denying Applicant's SCRCP Rule 59 (a) (2) and (e) Motion.

³⁹Lounds v. State, 670 S.E.2d 646, 380 S.C. 454 (S.C. 2008), In order to prove counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Moreover, "when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting Strickland v. Washington, 466 U.S. at 695, 104 S.Ct. 2052). [380 S.C. 460]

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. E.g., Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court will uphold the findings of the PCR court if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, if no probative evidence supports these findings, the Court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). Furthermore, this Court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

merits discharge because the evidence and testimony against Mr. Fortune is anything but overwhelming. Lead counsel, Mr. Ed Saleeby, was suffering from medical problems at the time of the trial. Defense Counsel Saleeby's opening and closing statements were rambling and incoherent by any standard and could have only served to frustrate and perplex the jury. Mr. Quinn was ineffective per the Cronic Standard in overcoming the testimony of Ms. Douglas/Gaston in that he relied solely on cross-examination of Ms. Douglas/Gaston rather than objecting to her "crawling" testimony on direct examination. The impact of Ms. Douglas/Gaston's testimony on the jury that Mr. Fortune fired the last shot into Mr. Shields' back, as he was crawling, was so damaging that cross-examination could not refute or contain the damage. Mr. Saleeby, as Lead Counsel, was ineffective per the Cronic Standard in refuting the testimony of Ms. Douglas/Gaston in that he failed to act as an effective Lead Counsel to assist Mr. Quinn in any meaningful manner. He did not intervene and go to Judge Milling for an in chambers meeting. Objecting to the questioning and to the testimony of the witness offers the only way to effectively defend Mr. Fortune or to attempt to correct the jury's impression that Mr. Fortune was a cold blooded murderer rather than a person who was forced to shoot his assailant when he jumped out and ran from the car. The action of jumping and running from the car made Mr. Shields a continuing threat to Mr. Fortune and Ms. McCall. Had Mr. Quinn objected, he should have requested a meeting with the Judge, the Solicitor, and himself in Chambers to explain that the State had failed to inform the Defense that Ms. Douglas/Gaston's testimony would contradict her voluntary statement. In addition, the Defense should have argued that the testimony of this witness may have qualified as perjury. Then the Defense Counsel should have also argued that a curative instruction to

the jury would not overcome the jury's impression of Mr. Fortune. At this point in the trial, the Defense should have requested dismissal of the charges. Defense counsel was ineffective for failing to move for dismissal when they realized that the State had active indictments against two individuals for the same crime. Ms. Sonta McCall had an active indictment on her for independently, with malice aforethought, causing the death of Anthony Shields by shooting him in the chest. Defense counsel failed to investigate and bring to the Court's attention the legal absurdness of trying Mr. Fortune for murder while the State also believed that Ms. McCall was guilty of the same crime.⁴⁰ How can one person be tried for a crime when another is charged with that same crime when both are charged such that each one acted individually and independently of each other? The State misled Judge Milling and defense counsel on this issue, resulting in per se ineffective assistance of counsel. The unsecured crime scene, conflicting statements made by those at the scene, and the fact that there were no independent witnesses who actually saw the shooting, leave insufficient evidence to support the charge of murder against either Mr. Fortune or Ms. McCall. The Record indicates that the only consistent and non-contradictory statements were made by the only two eyewitnesses, Mr. Fortune and Ms. McCall. The voluntary statement of Ms. Douglas/Gaston and the testimony of Mr. Mungo support the testimony and statements made by Mr. Fortune and Ms. McCall. In addition, the pathologist's testimony and her report support the testimony of both Mr. Fortune and Ms. McCall. Defense Counsel for Mr. Fortune failed to consider and investigate defense of others. Using defense of others requires that you properly inform

⁴⁰March 2006 Trial Transcript, App. p. 238, Lines 17-18 in which Mr. Quinn tells Judge Milling that Ms. McCall is a co-defendant in the death of Mr. Shields. Solicitors Joyner and Hales do not inform either Judge Milling or Mr. Quinn that Ms. McCall is independently charged as the person who pulled the trigger and shot Mr. Shields.

the jury and the judge of the circumstances of the party in need of defense and the reasons that individual independently had the right to kill based upon self-defense.⁴¹ Defense Counsel did not do this and as a result, Mr. Fortune did not get a jury instruction on the defense of Defense of Others.⁴² Defense Counsel failed to consider the impact that the defendant's ethnicity, culture, and family structure have on understanding the reasonableness of the defendant's actions.

Defense Counsel failed to properly consult with Defense Counsel Mr. Kernard Redmond when he was employed with the Saleeby and Cox Law Firm. For example, because Mr. Redmond knew that the Police had obtained a list of 61 witnesses who were at the crime scene at the time of the incident, proper communication would have led Defense Counsel to obtain this list in 2002. It is more likely that the names and contact information would not have been outdated in 2002. Moreover, Mr. Fortune's murder trial scheduled for November 05, 2005 could have proceeded as planned with plenty of qualified jurors present for jury duty rather than being stopped and continued just as the selection of the jury was about to begin.

The State's evidence showed that the .25-caliber bullet was retrieved from the passenger side floorboard of Mr. Shield's vehicle. The State used this information to suggest that Mr. Shields did not hit Mr. Fortune when he fired. The State also downplayed that Mr. Shields fired first, and thus, regardless of where the bullet went, Mr. Fortune and Ms. McCall were in fear for their lives. Mr. Saleeby's and Mr. Quinn's failure to provide any

⁴¹PCR Hearing Transcript, App. p. 823, Lines 09-13, Mr. Saleeby states that: In my years of experience if I said it and a jury heard it, in all due respect to the Court, the Court doesn't need to say it.

⁴²PCR Hearing Transcript, App. p. 881, Lines 21-25, and p. 882, Lines 01-03, Mr. Quinn states that: The only thing I remember talking to him about was self-defense. We talked about he was there to defend his cousin who was caught in the middle of a fight after being involved in an altercation at the Green Villa, but I don't know that I ever talked to him specifically about advancing a defense of Defense of Others. I do recall we put up a vigorous defense of self-defense.

reasonable answer as to why the bullet was in the floorboard was ineffective assistance of counsel. Effective assistance of counsel would offer a plausible explanation to the Judge and Jury.

During trial, the Prosecution repeatedly refers to the Decedent, Anthony Shields, as the "victim." Attorneys are not allowed to testify at trial. Referencing Mr. Shields as the "victim" was not harmless commentary but was testimony as to the ultimate fact of the case that prejudiced the Jury. Defense Counsel failed to raise any objection. In the PCR Transcript, App. p. 802, lines 18-25, and p. 803, lines 1-25, Mr. Saleeby provides that the State never told defense counsel that Ms. Douglas/Gaston's court testimony would contradict her voluntary statement. In the PCR Transcript, App. p. 803, lines 22-25, and p. 806, lines 1-25, p. 805, lines 1-25, and p. 807, lines 12-17, Mr. Saleeby states that: Defense Counsel could have brought an allegation of prosecutorial misconduct but did not because it did not enter the minds of defense counsel. The strategy in no way meets the criteria of an objective standard of reasonableness. The strategic choices of his defense attorneys made incomplete investigations of facts and law, are not reasonable in that no "reasonable professional judgment supports the limitations on the investigation." These failures meet the Cronic and the Strickland Standards for prejudice, and had a significant impact on the judge's jury instructions and on the jury's deliberations in Mr. Fortune's trial.

III. The PCR Judge erred in denying the SCRCP Rule 59 (a) (2) (e) Motion,⁴³ and in dismissing Mr. Fortune's PCR Application and not granting the Remedy of Discharge.⁴⁴ (Standard Of Review)⁴⁵

⁴³(Standard of Review) On appeal, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion. State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998).

Mr. Fortune asserts that the PCR Judge abused his discretion and did not conform to the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 and case law mandating a PCR Order of Dismissal be specific and complete on the issues and that the drafter and the Judge must be meticulous in preparing and reviewing its proposed order so that the final order would set forth the required findings and reasons for those findings.⁴⁶ It is uncontested in the Record that the Honorable Judge Burch was the Presiding Judge who continued Mr. Fortune's November 05, 2005 murder trial. He was the Judge who issued the court order on November 05, 2005 for the State to produce the list of 61 witnesses to the Defense. This list contained the names and contact information of people who were at the crime scene and were available to the State. This list was not given to the Defense in the Discovery requested in 2002 by Mr. Kernard Redmond. Mr. Redmond was made aware of the existence of this witness list at the Preliminary Hearing in 2002. The Solicitors Office failed to timely comply with Judge Burch's Court Order.⁴⁷ Defense Counsel produced, but failed to file, its Motion to Dismiss the charges against Mr. Fortune based upon the State's failure to timely produce this list. Mr. Saleeby stated that he did not file this Motion because he had no idea realistically that Judge Burch or any other circuit court judge on a case such as serious as murder would dismiss the case

⁴⁴§ 17-27-80. Hearing on application; final judgment: In part: If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper.

⁴⁵In a case raising a novel issue of law, the appellate court is free to decide the question of law with no particular deference to the trial court. Osprey v. Cabana Ltd. Partn., 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000);

⁴⁶See McCullough, v. State of SC, 320 S.C. 270, 464 S.E. 2d 340, (S.C. 1995), and McCray v. State of SC, 305 S.C. 329, 408 S. E.2d 241, (S.C. 1991), and Applicant's Memorandum In Support of SCRCP Rule 59 (a) (2) and (e).

⁴⁷PCR Hearing Transcript, App. p. 766, Lines 14-21, and p. 769, Lines 10-20, and p. 885, Lines 5-25 and p. 886, Lines 01-17.

with prejudice.⁴⁸ The PCR Order of Dismissal, App. p. 11, provides that: This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle issues related to witnesses in this case. (Standard of Review)⁴⁹ The Standard of Review on this issue is de novo because this is an issue of whether specific facts constitute ineffective assistance of counsel. Mr. Fortune asserts that the reason he was prejudiced was that the existence of this list of 61 witnesses was known by Defense Counsel in 2002. If Mr. Saleeby had properly communicated with Mr. Kernard Redmond in 2002, then the impact this list of 61 witnesses had on delaying his trial would not have occurred. Judge Burch, in relying upon Bannister v. State, 33 S.C. 298, 303, 509 S.E.2d 807, 809, (1998), in the PCR Order of Dismissal, App. p. 10-11, in which he states: That this Court finds it speculative to discuss whether any of the State's witness list would have had an impact at trial, as they did not testify at the PCR Hearing is an incorrect application of Bannister. The issue is that Defense Counsel offered ineffective assistance of counsel. Mr. Fortune asserts that Discharge, as opposed to the granting of a new trial, again pre-supposes that the death of Mr. Shields was a murder, rather than an act of self-defense and an act of defense of others. The evidence the State used to determine that the death of Mr. Shields was a murder conflicts with SC Rules of Evidence Rule 102 and Rule 401. Rule 403 may exclude this evidence. A new trial for Mr. Fortune would also conflict with SC Rules of Professional Conduct Rule 3.8 and Comment [1]. The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; ... and a prosecutor has the

⁴⁸PCR Hearing Transcript, App. p. 769, Lines 07-09.

⁴⁹United States v. Witherspoon, 231 F.3d 923 (4th Cir. 2000), We decide de novo an issue of whether specific facts constitute ineffective assistance of counsel. See Becton v. Barnett, 920 F.2d 1190, 1192 (4th Cir. 1990).

responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the is accorded procedural justice, and that guilt is decided upon the basis of sufficient evidence. Some of the problems of a new trial are burdens to both Solicitor and Defense.

The question is whether these burdens can be resolved to ensure a fair trial and due process in a new trial. Mr. Fortune asserts they cannot. Practicality and economic reasons support discharge rather than a new trial for Mr. Fortune. A new trial will reopen an event that occurred in 2001, and will only rekindle heartbreak. Mr. Shields and Mr. Fortune have children and a new trial would force these children to relive the tragic events of 2001. The lack of credible evidence creates its own practical challenges in a new trial for Mr. Fortune. A new trial, rather than a discharge, will be costly and may not ensure a fair trial or due process. The State must find the State's witnesses and again produce its expert witnesses. The Sixth Amendment right to confront witnesses may become an issue if the State cannot produce the same witnesses and experts. Considering his six years served, it would seem that a discharge is the proper use of the Court's resources. Attorney Stroud is requesting bail pending appellate review, because it is the right thing to do. The amount of prejudice in this case cannot support denial of the PCR and returning Mr. Fortune to prison. Mr. Fortune's remedy of discharge is thus supported by case law and statutory law, as well as any maxim of equity.⁵⁰ Mr. Fortune has a right

⁵⁰In Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir.1988). 564 (1981), the Court held that remedies for ineffective assistance of counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."

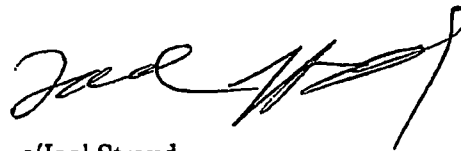
The Court, in Scott v. State, 513 S.E.2d 100 (S.C. 1999), holds that "In the interpretation of statutes, our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute. A basic presumption exists that the legislature has knowledge of previous legislation when

to due process. This due process right encompasses both the right to counsel and the right to a fair trial. The right to counsel means the right to effective assistance of counsel. The right extends from the initial arrest to the termination of the matter. Accordingly, Plaintiff Fortune believes that enough evidence exists to prove a prima facie case of a violation of Defendant's due process rights to counsel and a fair trial. Mr. Fortune had no criminal record prior to this conviction. Mr. Fortune has been a model inmate and is the law librarian. Mr. Fortune has five children, including a daughter that cannot visit him in prison because of her age. Mr. Fortune is married to Ms. Blanche Fortune. Law enforcement and the Solicitor's Office incorrectly determined that Mr. Shields' death was a murder. The act of putting Mr. Fortune on trial for a nonexistent crime is unconscionable.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant his Petition for a Writ of Certiorari.

July 19, 2012



s/Joel Stroud

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Attorney for Mr. Fortune

later statutes are passed on a related subject." Furthermore, penal statutes must be construed strictly against the State in favor of the defendant.

The Court, in Boan v. State, 071210 SC 26832, holds post-conviction relief may be tailored to remedy the precise prejudice resulting from trial counsel's deficient performance.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Paul Burch, Circuit Court Judge

Case No. 2009-CP-13-0323

Oscar James Fortune,

Petitioner,

v.

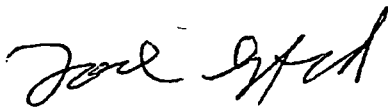
State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the Petition for Writ of Certiorari and the Appendix in the above-referenced case by depositing a copy of it in the United States Mail, postage prepaid, on July 19, 2012, addressed to Karen C. Ratigan, Post Office Box 11549, Columbia, South Carolina 29211-1549.

July 19, 2012



s/ Joel Stroud

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Attorney for Oscar Fortune

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Paul Burch, Circuit Court Judge

PCR Case No. 2009-CP-13-0323

Oscar James Fortune,

Petitioner,

v.

State of South Carolina,

Respondent.

REQUEST TO EXCEED THE PAGE LIMIT

For the PCR Petition for Writ of Certiorari, it is necessary to exceed the 25-page limit imposed by SCACR Rule 243 (e) (3) by 10 pages. This Petition for review of a murder conviction implicates prosecutorial misconduct and the Cronic Standard of ineffective assistance of counsel. The incident occurred in December 2001, and in March of 2006, a jury convicted Mr. Fortune. The reasons for the delay are relevant and required more analysis. Petitioner had an all-day PCR Hearing that included significant issues with a range of standards of review. Mr. Fortune's SCRCP Rule 59 Motion preserved a number of issues for review. Petitioner respectfully requests an exception to SCACR Rule 243 (e) (3).

July 19, 2012


s/ Joel Stroud
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2012-212602

Oscar James Fortune, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR
WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the PCR Hearing Judge commit reversible error by ruling that no prosecutorial misconduct occurred in his murder trial?
2. 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?
3. Did the PCR Hearing Judge commit reversible error by denying the SCRCF 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?

STATEMENT OF THE CASE

The Chesterfield County Grand Jury indicted Petitioner at the March 2002 term of General Sessions for murder (2002-GS-13-0137) and at the November 2005 term for possession of a weapon during commission of a violent crime (2005-GS-13-1222). Edward E. Saleeby, Jr., Esquire and Terrence A. Quinn, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On March 9, 2006, the Honorable John M. Milling sentenced Petitioner to concurrent terms of thirty-seven (37) years for murder and five (5) years for possession of a weapon during commission of a violent crime. (App.pp.982-83).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. (App.pp.915-39). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Fortune, Op. No. 2009-UP-259 (S.C. Ct. App. filed June 1, 2009). (App.pp.966-68).

Petitioner filed an application for post-conviction relief (PCR) on August 18, 2009 (2009-CP-13-0323) and PCR counsel filed a "Verified Complaint" in the matter on January 3, 2012. (App.pp.18-53; pp.969-74). A hearing was held at the Darlington County Courthouse on January 11, 2012. (App.pp.732-890). Petitioner was present and represented by Joel F. Stroud, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Paul M. Burch denied relief in an order filed February 22, 2012. (App.pp.3-12). Judge Burch denied Petitioner's subsequent post-trial motion pursuant to Rule 59(a)(2) and (e), SCRPC, by

order filed May 9, 2012. (App.p.17).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. Petitioner's issue regarding prosecutorial misconduct is not preserved for appellate review.

In his Petition for Writ of Certiorari, Petitioner argues he suffered prosecutorial misconduct at his trial because: (1) the solicitor's closing argument resulted in the denial of a fair trial, (2) the solicitor's closing argument violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel because it invited the jury to disregard the trial judge's instructions on reasonable doubt, and (3) the State procured a conviction by allowing perjured testimony and then bolstered this testimony – which perpetuated a fraud upon the trial court. The issue of prosecutorial misconduct is not preserved for appellate review.

While Petitioner may have noted a potential issue relating to prosecutorial misconduct in his PCR application, he did not raise the issue as such at his PCR hearing. Rather, he focused upon allegations that trial counsel were ineffective in handling issues such as the solicitor's closing argument and presentation of witness testimony. As such,

the issue of prosecutorial misconduct as presented in the Petition for Writ of Certiorari was not raised to and ruled upon by the PCR judge. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Petitioner first raised the issue of prosecutorial misconduct – as set alleged in his Petition for Writ of Certiorari – in the memorandum associated with his post-trial motion pursuant to Rule 59(e), SCRCP. It is abundantly clear that a party cannot raise an issue for the first time in a post-trial motion. See South Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); see also State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) (holding "it is improper to argue new matter in a motion for reconsideration"). Accordingly, the issue of prosecutorial misconduct is not preserved for review by this Court.

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel were ineffective.

Petitioner makes several rambling allegations of ineffective assistance of trial counsel. Petitioner, however, merely makes a series of declarative statements about alleged deficiencies of counsel and does not cite to the record or precedent or make any legal arguments related to these statements. As such, this entire issue should be deemed conclusory and unpreserved for appellate review. See Muir v. C.R. Bard, Inc., 336 S.C. 266, 298-99, 519 S.E.2d 583, 600 (Ct. App. 1999) (holding issue is deemed abandoned

on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (holding a "one-sentence argument is too conclusory to present any issue on appeal"). Regardless, Petitioner's scattered allegations of ineffective assistance of counsel do not succeed on the merits.

A.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

B.

Petitioner argues one of his trial attorneys (Saleeby) suffered from health problems that resulted in an ineffective performance at trial.

The PCR judge found both Saleeby and co-counsel Quinn properly investigated the case and were prepared for trial. (App.pp.8-9). The PCR judge found Petitioner

"failed to substantiate his allegation that Saleeby was in poor health and thus performed inadequately at trial to the detriment of the defense case." (App.pp.9-10).

As noted in the final order of dismissal, Saleeby admitted he needed cortisone injections for his knees throughout the course of the trial. (App.pp.9-10). Saleeby also testified he did not take any kind of pain medication during the trial. (App.p.875). While at the PCR hearing Petitioner raised the issue of Saleeby's health during the trial, he did not provide any evidence to corroborate this claim – even though Saleeby offered to allow Petitioner's counsel to telephone his physician. (App.p.875). The PCR judge rejected this allegation, noting a review of the record indicated both trial counsel "were well prepared and zealous advocates." (App.p.9). Further, Saleeby's role in this trial was limited to opening and closing statements and the cross-examination of two witnesses while Quinn cross-examined the remaining thirteen State witnesses and conducted direct examination of the two defense witnesses. Petitioner has failed to meet his burden of proving either that Saleeby was in such ill health at his trial that he provided deficient representation or that his case suffered any prejudice as a result. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

C.

Petitioner argues one of his trial attorneys (Quinn) was ineffective in not "overcoming" testimony from witness Stephanie Gaston.¹ Petitioner argues Quinn should have objected to Gaston's testimony about the victim crawling away from

¹ While the witness stated her name was Stephanie Gaston, the court reporter listed it as Stephanie Douglas during her trial testimony.

Petitioner during the shooting because it was contrary to her statement. Petitioner argues Quinn should have argued Gaston's testimony constituted perjury.

Initially, it should be noted this issue was not addressed in the final order of dismissal and a merely conclusory argument was made in Petitioner's post-trial motion. See Staubes v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546; Muir v. C.R. Bard, Inc., 336 S.C. at 298-99, 519 S.E.2d at 600. Regardless, the issue is without merit. There was no basis for Quinn to have objected when Gaston's direct examination testimony deviated from details in her written statement. Rather, that is merely an issue Quinn could – and did – use to impeach Gaston on cross-examination. (App.pp.470-75). Quinn even had Gaston concede her statement – which did not mention the victim was crawling away from Petitioner – was the correct version of what happened. (App.p.475). In any event, Gaston's testimony about Petitioner shooting the victim while he attempted to get away was merely cumulative to the previous testimony from Arthur Mungo and Vincent Davis. (App.p.311; p.349). As such, it cannot be viewed as prejudicing Petitioner's case. See, e.g., State v. Weston, 367 S.C. 279, 289, 625 S.E.2d 641, 646 (2006); State v. Griffin, 339 S.C. 74, 78, 528 S.E.2d 668, 670 (2000). As to whether or not trial counsel should have argued Gaston committed perjury at trial, this is not a compelling argument. Gaston admitted inconsistencies between her statement and trial testimony and trial counsel was able to highlight her resulting lack of credibility during cross-examination. (App.pp.470-75; p.x). Petitioner cannot prove any prejudice.

D.

Petitioner argues the victim was a direct threat to Petitioner and his cousin

(McCall) because he jumped out of the car and ran. Petitioner argues trial counsel should have investigated the defense of others as a defense and asked for a jury instruction.

The PCR judge found that "[b]ased upon the evidence presented at trial, a jury charge of defense of others would not have been warranted." The PCR judge noted Petitioner's own trial testimony contradicted the viability of arguing defense of others. (App.pp.10-11).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel were ineffective in not pursuing a defense of others strategy. After McCall contacted him about an earlier argument, Petitioner left his house to go to the scene and confront the victim. (App.pp.560-61; pp.574-76). Petitioner took his girlfriend's gun, walked across the parking lot, and shot the victim several times while he was still in his truck. (App.pp.297-98; pp.310-11; pp.576-77). Petitioner then crossed to the other side of the victim's car and shot him again while the victim attempted to crawl away. (App.p.311; p.349; pp.469-70). Petitioner testified at trial that he shot the victim "[b]ecause at that time I was in fear for my life. . . . I was in fear for my life at this time." (App.p.577). There was no credible evidence presented at trial that the victim threatened McCall in the parking lot such that she believed she could suffer great bodily injury or death. Without a showing of such, the strategy of defense of others is not sustainable. See State v. Starnes, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000) ("Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense."); see also State v. Bixby, 388

S.C. 528, 553-54, 698 S.E.2d 572, 585-86 (2010) (listing the elements of self-defense); Further, as Petitioner testified he shot the victim because he was afraid for his own life, trial counsel could not have requested a jury instruction on defense of others. See Starnes, at 323, 531 S.E.2d at 913 (holding that when the defendant does not testify that he shot the victim in defense of another person, he is not entitled to jury charge on defense of others); see also State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (holding the law to be charged at trial must be determined from the evidence presented). As such, Petitioner failed to meet his burden of proving trial counsel should have pursued the theory of defense of others at trial.

E.

Petitioner argues trial counsel should have moved for dismissal of Petitioner's charges because McCall was also indicted for murder in this case.

Initially, it should be noted this issue was not addressed in the final order of dismissal and a merely conclusory argument was made in Petitioner's post-trial motion. See Stauber v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546; Muir v. C.R. Bard, Inc., 336 S.C. at 298-99, 519 S.E.2d at 600. Regardless, the issue is without merit. Petitioner has failed to articulate why it is a legal impossibility for more than one person to be indicted for the same crime. The facts of this case indicate McCall summoned him to the scene in order to settle a disagreement with the victim. McCall encouraged the confrontation and was present when Petitioner shot the victim. Under the theory of accomplice liability, McCall was properly indicted for murder. See State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (finding that "one who joins with another to accomplish

an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose"); State v. Kelsey, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76 (1998), (concluding that "if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both"). Petitioner failed to demonstrate why, given both precedent and the underlying facts, trial counsel erred in not moving to dismiss Petitioner's murder charge merely because McCall was also charged with the same offense.

F.

Petitioner argues trial counsel should have investigated potential ballistics evidence in this case.

Initially, it should be noted this issue was not addressed in the final order of dismissal and a merely conclusory argument was made on this point in Petitioner's post-trial motion. See Staubes v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546; Muir v. C.R. Bard, Inc., 336 S.C. at 298-99, 519 S.E.2d at 600. Regardless, the issue is without merit. Petitioner's counsel made some vague allegations at the PCR hearing concerning the potential importance of a bullet casing from the victim's vehicle. Petitioner, however, failed to present any evidence in the form of a ballistics report or expert testimony to corroborate his assertion that counsel were ineffective in not investigating this allegedly critical evidence. As such, the Court cannot speculate as to the impact such an investigation would have had upon the trial. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely

speculative”); cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

G.

Petitioner argues trial counsel failed to properly investigate the individuals on the State’s witness list.

The PCR judge found trial counsel investigated the State’s witness list. The PCR judge noted counsels’ testimony that “most of the witnesses they could locate did not provide information that would have been beneficial to the defense case.” The PCR judge further noted that none of the individuals from the State’s 61-person witness list testified at the PCR hearing. (App.p.9; pp.11-12).

The PCR judge did not err in finding Petitioner failed to meet his burden of proof on this issue. As noted in the order of dismissal, trial counsel testified they were not able to locate some of the individuals on the State’s witness list. Counsel explained that most of the individuals they could find did not provide any helpful information to the defense. The PCR judge found trial counsel to be credible witnesses on this point. (App.pp.8-9). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge’s findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners’ Ass’n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (“Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of

credibility are involved.”). Regardless, Petitioner failed to present any evidence or testimony that he was prejudiced by the lack of a more thorough investigation into the State’s witness list. Without such, the Court cannot speculate about whether or not trial counsel erred and he suffered prejudice as a result. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

H.

Petitioner argues trial counsel failed to object to the State referring to Anthony Shields as “the victim.”

Initially, it should be noted this issue was not addressed in the final order of dismissal and a merely conclusory argument was made in Petitioner’s post-trial motion. See Staubes v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546; Muir v. C.R. Bard, Inc., 336 S.C. at 298-99, 519 S.E.2d at 600. Regardless, the issue is without merit. Petitioner has failed to point to any legal authority to support his contention that referring to the decedent in a murder case as “the victim” is the basis for a valid objection. The victim was shot five times and two of those injuries were fatal. (App.pp.368-71). It is undisputed the victim died as the result of a homicide. Petitioner failed to meet his

burden of proving it was incumbent upon trial counsel to object to the use of the word "victim" during this murder trial. Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

I.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsels' performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

III. The PCR judge did not err in denying Petitioner's post-trial motion.

Petitioner argues the PCR judge erred in: denying his post-trial motion pursuant to Rule 59(a)(2) and (e), SCRPC, denying post-conviction relief, and not granting a remedy of discharge pursuant to S.C. Code Ann. § 17-27-80 (Supp. 2003). This issue is without merit.

Petitioner's argument that the PCR judge erred in denying his post-trial motion is without merit. The PCR judge properly denied Petitioner's post-trial motion pursuant to Rule 59(a)(2) and (e), SCRPC. The Rule 59 motion and supporting memorandum sought a new trial under subsection (a)(2) of that Rule. The grant or denial of new trial motions rests within the discretion of the trial judge. Brinkley v. South Carolina Dep't of Corrs.

386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). Such rulings "will not be reversed on appeal unless [the trial judge's] findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). In reviewing whether the trial judge erred in denying a motion for a new trial, this Court must "consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Id. Based upon the record before the PCR judge, there was no abuse in discretion in the decision to deny the motion for a new trial. In addition to the overwhelming evidence of Petitioner's guilt presented by the State at trial, Petitioner failed to meet his burden under Strickland v. Washington of proving both that trial counsel erred and that he was prejudiced as a result. The Rule 59 motion and supporting memorandum also sought alteration or amendment of the final order under subsection (e) of that Rule. The language of Petitioner's motion, however, was clearly intended for the PCR judge to reconsider his ruling and grant post-conviction relief. This is contrary to the purpose of a Rule 59(e) motion. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court). As such, the PCR judge did not err in denying Petitioner's motion pursuant to Rule 59(a)(2), (e), SCRCP.

Petitioner's argument that he was entitled to either post-conviction relief or a remedy of discharge pursuant to S.C. Code Ann. § 17-27-80 is without merit. As discussed supra, however, Petitioner failed to meet his burden of proving either that trial counsel were ineffective or that he suffered prejudice in light of the overwhelming

evidence of guilt presented by the State. Petitioner appears to be arguing that the proper remedy in his case would have been for the PCR judge to have granted relief and discharged his indictments with prejudice. Yet Petitioner has failed to demonstrate -- through either case law or compelling analysis -- that the word "discharge" as used in 17-27-80 should be interpreted to mean the dismissal of his charges with prejudice.²

Accordingly, Petitioner failed to meet his burden of proving he is entitled to his relief on this issue.

CONCLUSION

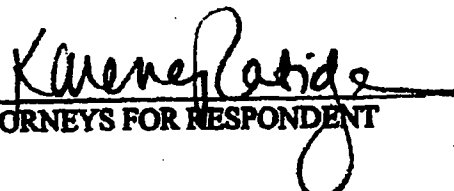
For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

January 7, 2013

² "Discharge" could merely indicate an individual's discharge from the custody of the South Carolina Department of Corrections, for example.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2012-212602

Oscar James Fortune, ...Petitioner,

v.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Joel F. Stroud, Esquire
Post Office Box 516
Chesterfield, South Carolina 29709

I further certify that all parties required by Rule to be served have been served.
This 7th day of January, 2013.


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ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

Oscar James Fortune, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212602

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

B. B. W. J.

U. K. J.

James C. [Signature] J.

Columbia, South Carolina

cc: Joe Flake Stroud
Karen Christine Ratigan

Filed
April 10, 2014

THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY

Paul Burch, Circuit Court Judge

Appellate Case No. 2012-212602

Oscar James Fortune,

Petitioner,

v.

State of South Carolina,

Respondent.

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SC Court of Appeals

PETITIONER'S BRIEF

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Case No. 2012-212602

Oscar James Fortune, Petitioner,

v.

State of South Carolina, Respondent.

PETITIONER OSCAR FORTUNE'S RULE 243 (j) SCACR BRIEF

AND

SCACR RULE 243(k) REQUEST FOR EXPEDITED BAIL

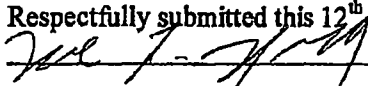
PENDING APPELLATE REVIEW

AND

AMENDED APPENDIX

The undersigned attorney hereby certifies that true copies of Petitioner Oscar Fortune's Rule 243 (j) SCACR Brief, the SCACR Rule 243(k) Request for Bail Pending Appellate Review, and the Amended Appendix have been served upon Opposing Counsel, Ms. Karen C. Ratigan, Attorney for Respondent. Attorney Stroud hand delivered the documents this 12th Day of May 2014.

Respectfully submitted this 12th Day of May 2014.

 , Attorney for Oscar Fortune

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SC Court of Appeals

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Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)

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Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)

Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003)

Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000)

Mincey v. State, 314 S.C. 355, 444 S.E. 2d 510, (1994)

State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949)

State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997)

State v. Bostick, 708 S.E.2d 774, 392 S.C. 134 (S.C. 2011)

Mooney v. Holohan, 294 U.S. 103 (1935)

State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998)

Osprey v. Cabana Ltd. Partn. 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000)

McCullough v. State of SC, 320 S.C. 270, 464 S.E. 2d 340, (S.C. 1995)

McCray v. State of SC, 305 S.C. 329, 408 S. E.2d 241, (S.C. 1991)

State v. Rocheville, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993)

Cartrette, 323 S.C., 15, at 18, 448 S.E.2d at 555

Marlar v. State, 653 S.E.2d 266, 375 S.C. 407 (S.C. 2007)

United States v. Childress, 104 F. 3d 47, 49 (4th Cir.1996)

State v. Elwell, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013)

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007)

Scott v. State, 513 S.E.2d 100, 334 S.C. 248 (S.C. 1999)

Boan v. State, 695 S.E.2d 850, 388 S.C. 272 (S.C.2010)

Rofen v. State, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (citing United States v.

Morrison, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L.Ed.2d 564 (1981)

Payne v. State, 658 N.E.2d 635 (Ind. App. 1995)

RULES

SCRCP Rule 59 (a) (2) (e)

SC Rules of Evidence Rule 102, Rule 401, Rule 403.

SC Rules of Professional Conduct Rule 3.8 and Comment [1]

MISCELLANEOUS

75 Am.Jur.2d, Trial, Section 748

Black's Law Dictionary, 6th Edition, Page 463

QUESTIONS PRESENTED

I. Did The PCR Hearing Judge Commit Reversible Error By Ruling That No Prosecutorial Misconduct Occurred In His Murder Trial?

A. The prosecutor's closing argument resulted in the denial of a fair trial because the prosecutor's comments denigrated the integrity of defense counsel, both personally and in the abstract, as well as impugning, directly or through implication, the integrity or institutional role of defense lawyers. See: United States v. Ollivierre, 378 F.3d 412 (4th Cir. 2004) and United States v. Vaccaro, 115 F.3d 1211 (5th Cir. 1997)

B. The prosecutor effectively invited the jury to disregard the trial court's instructions on reasonable doubt. This occurred when the prosecutor decided to accept Defense Counsel's closing argument challenge regarding the reasonable doubt chart.

...Challenge to the Solicitor was that if he, (Solicitor) can disprove each and every one of those reasonable doubts on this chart, I guess you ought to convict of something. But he'll probability covers it up, turn away, and say he ain't got enough time.

C. The State procured the conviction of Mr. Fortune by knowingly allowing a State's key witness, Ms. Douglass/Gaston, to commit perjury. The State bolstered and used the perjured testimony to mislead the judge and the jury. The State thereby committed fraud upon the Court and the Jury. Mr. Fortune's defense of self-defense was unduly prejudiced by the prosecutorial misconduct.

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?

Mr. Fortune files his Brief, as well as the remedies sought, pursuant to the holdings of United States v. Cronic, 466 U.S. 648 (1984), and Strickland v. Washington, 466 U.S. 668 (1984).

III. Did the PCR Hearing Judge commit reversible error by:

(A) Denying the SCRCP Rule 59 (a) (2) and (e) Motion, and by dismissing Mr. Fortune's PCR Application, and

(B) By not granting the Remedy of Discharge, that is provided under § 17-27-80?

STATEMENT OF THE CASE

Mr. Oscar Fortune, Defendant, and Mr. Anthony Shields, Decedent, were involved in a shooting in the parking lot of the Huddle House in Cheraw, South Carolina, on December 23, 2001.

Ms. Sonta McCall is Mr. Fortune's first cousin, and they grew up together in the same household. App. p. 552, Lines 01-04. Mr. Fortune got out of bed when the phone rang. He talked with Ms. McCall on the phone, and learned that she had been assaulted by Mr. Anthony Shields at the party she had attended at Green's Villa. The party and over 60 of the partygoers had moved to the Huddle House. Mr. Fortune told Ms. McCall he would meet her at the Huddle House.

He went to the Huddle House, got out of his girlfriend's car, and talked to Ms. McCall about the assault. After talking with her, Mr. Fortune got back in his girlfriend's car. He was about to leave, when Mr. Shields drove into the Huddle House parking lot. Ms. McCall went to Mr. Shield's vehicle and began to talk to him on the driver's side of Mr. Shield's vehicle. Soon, Ms. McCall and Mr. Shields began arguing. Mr. Fortune asked his girlfriend to pull her car up to Mr. Shield's vehicle saying he expected to have to fight Mr. Shields. Mr. Fortune got out of his girlfriend's car. Mr. Fortune did not know Mr. Shields and knew only a few people who attended the party. Before he got out of the car the second time, Mr. Fortune put his girlfriend's gun in his pocket. Mr. Fortune took the gun with him for his own protection, because he feared that this argument between his first cousin, Sonta, and Mr. Shields could once again become violent. Mr. Fortune believed that if he took his gun with him and violence occurred, he had to defend his first cousin, Sonta McCall, and himself. App. p. 558, Lines 01-25, App.

p. 559, Lines 01-17, App. p. 563 Lines 16-25, App. p. 566, Lines 02-25, and on App. p. 567, Lines 01-05.

He walked to Mr. Shield's car. Mr. Fortune was standing outside on the driver's side of Mr. Shield's vehicle. Mr. Shields was inside his truck and had the window down. Mr. Fortune spoke to Mr. Shields. App. p. 559, Lines 04-06, and on Cross App. p. 565, Lines 16-25. Mr. Fortune testified that right after he said, "What's up?" to Mr. Shields, that Mr. Shields just shot a gun. App. p. 559, Lines 04-06 People at the Huddle House heard the gunshots, but Mr. Fortune and Ms. McCall were the only eyewitnesses to the first set of shots fired.

In the trial, State's witnesses, Mr. Mungo and Ms. Douglas/Gaston, presented contradictory testimony.

Mr. Mungo testified on Direct:

"Mr. Shields, I guess he jumped over his console seat and jumped out the passenger side of his vehicle.", App. p. 311, Lines 14-17.

Ms. Douglas/Gaston testified on Direct:

Question: So you didn't see gunshots but you heard gunshots?

Answer: Yes.

Question: What happened next?

Answer: I got up after there wasn't no more gunshots. I saw Anthony crawling.

Question: And what happened as he was crawling?

Answer: I got up. Me and my friend jumped up, and Oscar came around the truck and he shot him in the back.

Question: So he shot him while he was crawling?

Answer: Yes.

Final remark by the Solicitor: I have no more questions. Please answer any questions that the defense has. App. p. 451, lines 8-25 and App. p. 452, lines 1-10

Defense counsel obtained a copy of Ms. Douglas/Gaston's Voluntary Statement from the Solicitor in discovery. This Statement contradicted her Court Testimony.¹ The Record shows that defense counsel did not object to Ms. Douglas/Gaston's court testimony during State's Direct-Examination. Defense counsel only used cross-examination and re-cross-examination to impeach the credibility of Ms. Douglas/Gaston.

In the Trial, during the State's cross-examination of Mr. Fortune, the Solicitor's question to Mr. Fortune was as follows:

Solicitor: Okay. You shot him at arm's length and he crawled through the car. Isn't that right that he crawled out of the passenger side?

Fortune: He came out the passenger side. He had just shot at me and he still had the gun and when I went to the other side he still had the gun.
App. p. Page 574 Lines 22-25

Mr. Fortune left the driver's side to go to the passenger's side and he emptied his gun as he fired more shots. Mr. Shields died from his wounds soon thereafter. App p. 587 Lines 16-19

In the March 2006 Murder Trial, Dr. Inas Z. Yacoub, M.D., Pathologist, stated that Mr. Shield's Autopsy concluded that the cause of his death was exsanguination and that the interval was minutes. On Cross by Defense Counsel Mr. Saleeby, Dr. Yacoub's testimony was as follows:

It's my opinion within the reasonable degree of medical certainty that either Gunshot Wound Number One or Number Two happened before Gunshot Wound Number Three or Four because of the appearance of the pallor of Number Three and Number Four and the minimum associated bleeding with those compared to Gunshot Wound One and Number Two,

¹ Voluntary Statement of State's Witness, Ms. Stephanie Douglas/Gaston provides in pertinent part: ... Next thing you know the gun started popping off... I heard about 4 or 5 shots. Anthony got out the passenger side trying to run I guess to get help. He was on the ground by a green car...

which were the intermediate range and the contact wounds that were associated with the bleeding and did not appear pale. App. p.368 L.08-15

In Mr. Shields' Autopsy Report, App. p.879, under the Section Heading, #5 Gunshot Wound, Dr. Inas Z. Yacoub, M.D., Pathologist, wrote the following:

#5 Gunshot Wound entrance is located on the back of the left hand at the knuckle of the index finger. No soot, gunpowder particles or gunpowder tattoos are observed around this wound. After penetrating the skin, the bullet passed distal through the left hand, exited the palm of the hand at the base of the left index finger and grazed the radial aspect of the left middle finger. Minimal bleeding is observed along this wound track.

Evidence and testimony showed that Mr. Shields had a .25-caliber gun, which he fired. Evidence showed that the .25 caliber gun had its safety removed. Both Testimony and the Pathologist's Report showed that a smaller gunshot sound was heard first and then louder gunshots were heard, indicating that the .25-caliber gun was fired first, followed by the firing of the .38-caliber gun. Mr. Fortune left the scene, but returned later that day to provide the police with a voluntary statement and to hand over the weapon he used. Mr. Fortune stated to the police that he shot Mr. Shields in self-defense after Shields fired the first shot.

For 30 minutes after the shooting, the scene was unsecured and people at the crime scene tampered with evidence.

On Direct of State's Witness Officer/ Sergeant David Lee, police officer who secured the crime scene, App. p. 468, Lines 15-17:

Lee: "When I arrived it appeared to be between 50 and a hundred people throughout the parking lot. Majority just about everybody was everywhere in kind of a chaos."

On Cross-Examination Officer/ Sergeant David Lee, App. p. 470, Lines 15-25:

Defense: So for about 30 minutes that scene was unsecured with about a hundred people roaming around?

Lee: I can't say it was secured until I got there.

Defense: That was your job to secure the scene?

Lee: Being the first one there, yes, sir.

Defense: So for thirty minutes you don't know what went on there?

Lee: No, sir.

Defense: You don't have any idea what evidence may have been Misplaced? Moved? Taken, whatever?

Lee: I wasn't there. I can't recall.

The Police and the State collected evidence, made photographs and determinations of fact based upon evidence at the scene after people had compromised the crime scene. Before the police arrived at the Huddle House to secure the crime scene, Mr. Vincent Davis, State's witness at the murder trial, took Mr. Shields' .25 caliber gun from the scene and kept it. Officer Johnny Quick retrieved Mr. Shield's gun from Mr. Vincent Davis on December 28, 2001, five days after the shooting.

This missing gun of the Decedent, Mr. Shields, caused Officer Harold Haney and Officer Johnny Quick to doubt Mr. Fortune's claim that he shot Mr. Shields in self-defense when he turned himself and his .38 caliber gun over to the police and gave the police his voluntary statement. On Direct of Mr. Fortune, App. p. 562, Lines 02-12:

Fortune: They asked me if I would give a statement and I told them yes. I told them what happened. The first--- when I told them what happened, their first answer was there is no other gun, and I told them, 'Well, if there is not, somebody took it.' And when Johnny Quick told--- was taking me to put me in custody, he told me that if there was another gun, he'd find it.

During the State's Direct-Examination of Officer Wayne Jordon, Defense Counsel Mr. Ed Saleeby told Judge Milling, "We're stipulating to the chain of custody of the .25 caliber to save 45 minutes." App. p. 473, Lines 09-10 In a Colloquy, Solicitor Joyner and Solicitor Hales, in reference to Mr. Rod Green, the SLED CSI person who collected evidence at the crime scene, stated, "He collected -- he took the photos. He was the courier. As to the chain of custody has been stipulated to we could possibly get by

without him.” Solicitor Hales, also in this same Colloquy, in reference to Mr. Rod Green stated, “He found the .25 bullet and casing.” Solicitor Joyner then stated, “All that’s fine now since they’re stipulating to the chain of custody.” App. p. 478, Lines 15-25.

Also, in the Colloquy, Defense Counsel requested and Judge Milling ordered Solicitor Joyner to call Mr. Rod Green to testify as Solicitor Joyner had originally planned to do. Mr. Rod Green is the SLED CSI person who collected evidence at the scene. Defense Counsel Mr. Quinn told both Solicitor Joyner and Judge Milling, “I would like to talk to whoever processed the car.” Solicitor Joyner answered, “Rod Green is who he needs to talk to.” Mr. Rod Green never testified and Mr. Fortune’s Defense Counsel never brought the matter up again even when the State rested its Case.

The State had an active indictment on Ms. Sonta McCall for the murder of Mr. Shields, for possessing a 38-caliber handgun, and for the offense of accessory before the fact of murder. The State had an active indictment on Mr. Oscar Fortune for the murder of Mr. Shields and for possession of a weapon during the commission of a violent crime. The State believed that Ms. McCall independently shot Mr. Shields. The State believed that Mr. Fortune independently shot Mr. Shields. Ms. McCall spent seven weeks in jail before her release on bond. The State never put Ms. McCall on trial for the murder of Mr. Shields. The State dismissed the murder charge and all of the other charges against Ms. McCall after Mr. Fortune’s trial. App. p. 758, Lines 01-02

Defense Counsel Mr. Saleeby was told by the Solicitor that Mr. Fortune was charged under the theory of the hand of one is the hand of all. During the State’s Direct-Examination of Officer Haney, Judge Milling prohibited the Solicitor from talking about and instructing the jury about the theory of the hand of one is the hand of all.

PROCEDURAL HISTORY

Officers arrested Mr. Fortune on suspicion of murder on December 23, 2001. The Grand Jury indicted Mr. Fortune for murder on February 28, 2002. Mr. Fortune first had an appointed attorney, Ms. Patricia Rivers. Then he hired Mr. Kernard Redmond of the Saleeby and Cox Law Firm.

Magistrate Judge Wilbert S. Motley held a preliminary hearing for Mr. Fortune on February 11, 2002. Mr. Fortune, Attorney Redmond, and State's witness, Officer Harold Haney, attended this preliminary hearing in February 11 2002. At this preliminary hearing, Attorney Redmond learned from Officer Haney that on the night of the incident, the police had obtained a list with names and phone numbers of 50 or more witnesses that were at the crime scene. Four years later, the continued absence of this list led Judge Burch to grant a continuance until January 30, 2006 just as jury selection for Mr. Fortune's trial was about to begin on November 05, 2005. The absence of this list also led Judge Burch to issue a court order for the State to produce this list. This January 30, 2006 trial date was continued until the actual trial was held in Chesterfield County Court of General Sessions on March 6-9, 2006.

Mr. Kernard Redmond was Mr. Fortune's attorney until September 02, 2003, at which time he left to work for the Fourth Circuit Office of the Solicitor. Mr. Edward Saleeby, Jr. and Mr. Terrance Quinn represented Mr. Fortune at the March 6-9, 2006 murder trial. Mr. Dan Blake was the first Solicitor for the Fortune case. Mr. Kernard Redmond, in his August 20, 2003 letter of withdrawal to Mr. Fortune told both Mr. Fortune and Mr. Saleeby that he had made an offer of involuntary manslaughter to Solicitor Dan Blake, and that he was waiting for a response from Mr. Blake. However,

Mr. Franklin Joyner and Mr. Kevin Hales were the Solicitors who prosecuted the case. The Honorable Judge Milling presided at Mr. Fortune's murder trial and sentencing.

On March 9, 2006, the jury deliberated less than two hours and returned guilty verdicts on both the murder charge and possession of a weapon during a violent crime. Judge Milling sentenced Mr. Fortune to thirty-seven years imprisonment for murder and five years, concurrent, for possession of a weapon during the commission of a violent crime.

Defense Attorneys filed the Notice of Appeal. Robert M. Dudek, Esq., of the Office of Appellant Defense made the appeal. The Court of Appeals affirmed Fortune's convictions and sentences. State v. Fortune, Op. No. 2009-UP-259 (S.C.Ct.App.), filed June 1, 2009. Mr. Fortune filed his PCR Application on August 18, 2009. The State filed its Return on December 23, 2009. Applicant filed and served his Amended PCR Application and PCR Verified Complaint on January 03, 2012. The Honorable Judge Paul Burch presided over the January 11, 2012 PCR Hearing. The Honorable Judge Paul Burch filed an Order of Dismissal on February 22, 2012. Applicant filed a SCRPC Rule 59, (a) (2) and (e) Motion on March 05, 2012. The State filed a Return. After receipt of the PCR Hearing Transcript, Applicant filed an Amended SCRPC Rule 59, (a) (2) and (e) Motion. The Honorable Judge Paul Burch filed an Order Denying Motion Pursuant to SCRPC Rule 59, (a) (2) and (e) on May 09, 2012. Notice that this Order was filed was received on June 19, 2012. Mr. Fortune's Petition for a Writ of Certiorari was filed 07-19-2012. The State filed its Return 01-07-2013. Then, Petitioner's Reply to the State's Return for a Writ of Certiorari was filed 01-28-2013. On April 10, 2014, the Court of Appeals granted Mr. Fortune's Petition for a Writ of Certiorari on all questions presented.

ARGUMENT

I. Prosecutorial Misconduct at Mr. Oscar Fortune's March 2006 Trial.

Previously, the State has incorrectly asserted that there was no prosecutorial misconduct. The PCR Order of Dismissal, states, "At the PCR Hearing, the Applicant proceeded solely upon grounds of ineffective assistance of trial counsel." App. p. 4 This statement in the Order of Dismissal is incorrect, because Petitioner Fortune produced testimony at his PCR Hearing and offered evidence sufficient to carry his burdens of production and proof regarding his allegations of both prosecutorial misconduct and ineffective assistance of trial counsel. Mr. Fortune raised both allegations in his Original and Amended PCR Application, in his PCR Verified Complaint, and during his PCR Hearing. For example, in the PCR Hearing, Mr. Fortune addresses prosecutorial misconduct:

Well, not only do I want to frame this argument as an ineffective counsel, I also want to bring force {forth} that same argument as a due process violation on prosecutorial misconduct. That's in my initial application. So I want it looked at both ways so if it's fine {found} that I did not meet the two prong of Strickland, then I want it looked at as a due process with his misconduct because he affected my trial in fairness when he did that. When he told the jury that their job was to lie, and his job was to tell the truth. He's bolstering not only himself, but every witness, he put on the stand. App. p 813 Lines 24-25 and p. 814 Lines 01-09.

Moreover, Mr. Fortune alleged prosecutorial misconduct in his Verified PCR Complaint which amended his original PCR application. Even as far back as 1916, the Court in the case of State v. Bethune, realized that prosecutorial misconduct can have a devastating impact on the fairness of a trial. Quoting this case in his Amended PCR Application evidences his reliance on prosecutorial misconduct:

The theory of the law is that the duties of solicitor are quasi-judicial, and that, while it is more especially made his duty to conduct the prosecution

so as to present the facts upon which the state seeks a conviction, nevertheless the duty rests upon him to see that no act on his part shall prevent the prisoner from having a fair [104 S.C. 357] and impartial trial. The State does not desire a conviction in any case unless the prisoner has been accorded those rights that entitle him to a fair trial.

It is because of the quasi-judicial nature of the duties imposed upon the solicitor that he should be most careful to retain control of the conduct of the case, as it is but reasonable to suppose that those employed to assist in the prosecution would not keep before them the quasi judicial duties of office as vividly as the solicitor. This is not said by way of criticism in the present case, but to show that the zeal that may be displayed by able attorneys assisting in the prosecution requires the court to scrutinize his acts as carefully as those of the solicitor himself. Quoting State v. Bethune 104.S.C. 353, 89 S.E. 153, (S.C. 1916) App. p. 23.

A. The prosecutor's closing argument resulted in the denial of a fair trial because the prosecutor's comments denigrated the integrity of defense counsel, personally and in the abstract, as well as impugning, directly or through implication, the integrity or institutional role of defense lawyers. See: United States v. Ollivierre, 378 F.3d 412 (4th Cir. 2004) and United States v. Vaccaro, 115 F.3d 1211 (5th Cir. 1997)

Mr. Fortune asserts that the prosecutor's closing argument denigrating the integrity of defense counsel violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal because the remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." See: United States v. Wilson, 624 F.3d 640, 656 (4th Cir. 2010).

The prosecutor's comments, as well as the objections of defense counsel and the responses to the objections by the trial judge 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 p. 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

Defense Counsel: Object, your Honor: App. p. 631 Line 23

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 Lines 24-25 – p. 632 Line 1.

Defense Counsel: Thank you your Honor. No need to go that far. App. P. 631 Lines 2-3.

Mr. Fortune asserts that the Invited Reply Rule is not applicable here because this Rule only provides a prosecutor "some leeway to respond to inflammatory attacks mounted by defense counsel," United States v. Rodriguez-Estrada, 877 F.2d 153, 158 (1st Cir. 1989), or to rebut allegations that a prosecution witness committed perjury.

(Standard of Review) A trial court is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily its rulings on such matters will not be disturbed. State v. Condrey, 349 S.C. 184, 195-96, 562 S.E.2d 320, 325-26 (Ct.App.2002). This court will not disturb a trial court's ruling regarding closing argument unless the trial court commits an abuse of discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ; State v. Jernigan, 156 S.C. 509, 524, 153 S.E. 480, 486 (1930) . An appellate court must review the argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

The relevant question is whether the prosecutor's comments, so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. Once the trial court has allowed the argument to stand, the defendant has the burden of proving the argument denied him a fair determination of guilt or innocence. State v. Copeland, 278 S.C. 572, 580, 300 S.E.2d 63, 68 (1982). Improper comments on closing do not require reversal if the appellant fails to prove he did not receive a fair trial because of the alleged improper argument. Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004).

To warrant reversal, the appellant must prove both abuse of discretion and resulting prejudice. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003) ; State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct.App.2006)

The Invited Reply Rule does not provide a prosecutor "carte blanche to engage in improper tactics" in responding to misrepresentations made by his adversary in closing argument, United States v. Marcucci, 299 F.3d 1156, 1166 (9th Cir. 2002),--rather, such a circumstance is best addressed by a proper objection. See United States v. Wilson, 135 F.3d 291, 299 (4th Cir. 1998) (observing that we consider whether prosecutor's comments were invited in determining whether they were prejudicial). In Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958), the Supreme Court recognized that a prosecutor's argument, even when improper, is not prejudicial if it was invited by the improper remarks of defense counsel, and if the prosecutor does no more than "right the scale." United States v. Young, 470 U.S. at 12-13, 105 S.Ct. 1038 (applying invited reply rule of Lawn).

Mr. Fortune argues that his defense counsel's closing comments² were not the kinds of comments that allow the prosecutor to fall within the ambit of the Invited Reply Rule as applied in Young.

B. The prosecutor effectively invited the jury to disregard the trial court's instructions on reasonable doubt. This occurred when the prosecutor decided to accept Defense Counsel's closing argument challenge regarding the reasonable doubt chart.

The "challenge to the Solicitor was that if he, (Solicitor) can disprove each and every one of those reasonable doubts on this chart, I guess you ought to convict of something. But he'll probability covers it up, turn away, and say he ain't got enough time." App. p. 627, Lines, 17-22.

Mr. Fortune asserts that the prosecutor's closing argument regarding the reasonable doubt chart violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal. The remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." See: United States v. Wilson, 624 F.3d 640, 656 (4th Cir. 2010).

Some of the prosecutor's closing argument comments are as follows:

If you remember, ladies and gentlemen, Mr. Saleeby said I probably wouldn't have time to address all of his points he wrote up here for you. He said if I could address them, if I could explain them that Indeed you should find Oscar Fortune guilty. Those were his very words and I'll start by doing so. First of all, anything that Denise Shields said

²The Solicitor will give his summation. I promise you, like me, he'll do every dad gum thing he can do to prove him guilty of murder. If he can't do that, he will try to find him guilty of involuntary manslaughter and show that gun charge in there. App. p. 628 Lines 18-22

about this incident is not a reasonable doubt. In fact, it doesn't matter because she wasn't at the scene when it happened. She has no idea. So everything she said right here has been addressed. We don't have to spend time individually on showing it because we all know she wasn't there. App.p 632 Lines 04-16

know why the first gunshot was lower? You can put something on a gun called a silencer or suppressor. It's something that connects directly to the end of the barrel and it causes the loudness to be muffled. Well, if you stick a gun directly in somebody's back and fire the trigger that shot is going to be muffled. That shot is going to be suppressed, ladies and gentlemen. And that's why she heard a suppressed shot. App. p 633 Lines 01-08

I wouldn't say Mr. Saleeby just put a plain lie up here, but it's certainly not the truth. Page 633, Lines 09-10

I mean I'm good. I circled it because it shows how ridiculous is it. Investigator David Lee admitted it was his job to secure the scene. It was his job and he got there 30 minutes later. How is that a reasonable doubt? It's not because it's true. It was his job. He's (Defense Counsel) just making statements trying to confuse you. Sonta and Iris all have been charged even though this is clear that some or all of them are not guilty as charged. Well guess what? If that's true, guess who is guilty? Oscar Fortune is. He's the one who is guilty if the rest of them aren't. He admitted to it. He pulled the trigger. He said he shot him. App. p. 637, lines 3-14

That's it. That was pretty easy. It's all been reviewed. Mr. Saleeby said himself that if I could refute all of them you should find him guilty. Ladies and gentlemen, I ask that you find him guilty because that's what's I've done. App. p. 637, Lines 14-19

And I want to remind you of a few things. If you remember when Mr. Hales, [Solicitor], got up and did his opening statement when he ended, he said I want you to remember three things. He said they're going to put a lot of stuff on you, confuse you, and get you to use something other than your common sense. Page 637, Lines 19-24

And Mr. Saleeby would have you believe with his so-called reasonable doubt charge chart he had you believe there is a search for reasonable doubt. He believes that so much that he entitled his whole sheet here, reasonable doubt, but it's not. You under no circumstances are you to search for reasonable doubt, ladies and gentlemen. Page 647, Lines 20-25

Certainly, a prosecutor is entitled to call into question the credibility of a defense. See, e.g., State v. Lunsford, 318 S.C. 241, 246, 456 S.E.2d 918, 922 (Ct.App.1995) ("In telling the jury, 'so don't fall for that,' the solicitor was merely telling the jury that it should not credit defense counsel's argument regarding the absence of fingerprint evidence. A prosecutor may fairly point out 'matters which [the jury] should not consider.'). Likewise, a prosecutor may "legitimately appeal to the jury to do their full duty." State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990).

Mr. Fortune asserts that during the murder trial, the prosecutor's closing argument regarding his defense counsel's use of the reasonable doubt chart went far beyond the outer boundaries of proper closing argument.

Mr. Fortune also asserts that his defense counsel's strategy, in issuing this challenge to the prosecutor, was ineffective assistance of counsel for which defense counsel cannot articulate a valid reason when reviewed under an objective standard of reasonableness.

The presiding judge at Mr. Fortune's murder trial responded to defense counsel's objection. "I understand your objection, please keep your remarks to the evidence that's been presented in the case." App. p. 644, line 25 and p. 645, lines 01-02.

Mr. Fortune asserts that the trial court judge failed to give a proper curative instruction and that even if properly given it would not have been effective to eliminate the serious prejudice to Mr. Fortune. Moreover, the judge's routine final reasonable doubt instructions to the jury were far from sufficient to correct the error. The objection defense counsel made was to the improper comments of the retreat element of self-defense. App. p. 661, Lines 04-25, and p. 662-663.

The prosecutor, in trying to win defense counsel's "challenge," interjected improper state of mind conjectures as to why Mr. Fortune should have called the police and left Ms. McCall at the crime scene, rather than getting out of the car and checking on her as she and the Decedent argued. It is uncontested that Ms. McCall was Mr. Fortune's close relative, whom he grew up with and regarded as his little sister.

In the Trial, the prosecutor speculated as to how Mr. Fortune could have thought or acted:

I'll leave this place where he is now. That would have been the prudent thing to do. But he, [Mr. Fortune], didn't do it. Instead, he said, Hum, I'll go over there. I'm twice his, [Decedent's], size and I'm carrying a gun.
App. p. 644, Lines 18-22

These statements depicting the state of mind and mental calculations of Mr. Fortune had no basis in fact and were contrary to the evidence presented during the trial. As Defense Counsel correctly said in the objection, Mr. Fortune did not know the Decedent and had never laid an eye on him.

Mr. Fortune asserts that Judge Milling's instruction did nothing to eliminate the prejudice from the prosecutor's reasonable-doubt closing argument. Moreover, the prosecutor's argument effectively invited the jury to disregard the trial court's instructions on reasonable doubt. Thus, the court's instruction to the jury in no way cured the prejudice resulting from the prosecutor's improper argument. Solicitors are bound to rules of fairness in their closing arguments as explained in State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). While the solicitor should prosecute vigorously, his duty is not to convict a defendant, but to see justice done. The argument cannot appeal to

the personal bias of the juror, nor be calculated to arouse his passion or prejudice, and therefore must be carefully tailored.

Mr. Fortune asserts that both the defense counsel's challenge and the manner in which the prosecutor responded to this challenge insinuated that the reasonable doubt standard is a form of evidence or a defense rather than a standard of proof.

The purpose of the standard is to reduce the margin of error inherent in human judgments when the liberty of a defendant is at stake. The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Citing In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)

The prosecutor's closing statements to the jury are improper because they inject an arbitrary factor into jury deliberations. The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts. 75 Am.Jur.2d, Trial, Section 261, p. 338. "Jurors are simply not to consider the opinions of neighbors, officials or even other juries." State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686 (1982).

C. The State procured the conviction of Mr. Fortune by knowingly allowing a key State's Witness, Ms. Douglass/Gaston, to commit perjury. The State bolstered and used the perjured testimony to mislead the judge and the jury. The State thereby committed fraud upon the Court and the Jury.

(Standard of Review)

When faced with a claim of prosecutorial misconduct, we review a district court's factual findings for clear error; if, as here, no factual findings exist, our review is plenary. Remarks made by a prosecutor in his closing argument must not only have been improper, but must have also "so

infected the trial with unfairness as to make the resulting conviction a denial of due process." In considering whether such remarks prejudiced the defendant, we consider the following: (1) whether the prosecutor's remarks had a tendency to mislead the jury and prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the weight of the evidence against the accused; and (4) whether the prosecutor's remarks were deliberate. See Jean v. Collins, 107 F.3d 1111, 1119 (4th Cir.1997) Citing United States v. McDonald, 61 F.3d 248 (4th Cir. 1995)

This prosecutorial misconduct of using perjured testimony violated Mr. Fortune's Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal because the prosecutorial misconduct "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." See: United States v. Wilson, 624 F.3d 640, 656 (4th Cir. 2010). Mr. Fortune's defense of self-defense was unduly prejudiced by the prosecutorial misconduct.

Ms. Douglass/Gaston's court testimony stating that Mr. Shields crawled away and was shot in the back, contradicts her voluntary statement given the morning after the shooting which states that Mr. Shields "was trying to run, but he couldn't make it." Ms. Douglass/Gaston's Voluntary Statement also says that she heard four of five shots, but **does not mention seeing any shot.**

State's Witness, Mr. Mungo, provides that: "He (Mr. Fortune), shot him like two or three times, and that Mr. Anthony Shields he I guess he jumped over his console seat and jumped out the passenger side of the truck, and he (Mr. Fortune), met him (Mr. Shields), over there and shoot him at least two or three more times." App. p. 294, Lines 14-17.

In the March 2006 Trial Transcript, App. p. 459, lines 1-4, on redirect by the State, the State asked Ms. Douglas/Gaston if she had been truthful in her court testimony

and in her voluntary statement. She answered, "Yes." Rather than correcting the perjured testimony, the State then said, No further questions.

In the March 2006 Trial Transcript, App. p. 645 Lines 15-18, Mr. Joyner, in closing, relies on the perjured testimony when he tells the jury that Mr. Shields fell out of the SUV, and crawled on the ground.

In the PCR hearing, Mr. Saleeby provides that the State never told defense counsel that Ms. Douglas/Gaston's court testimony would contradict her voluntary statement. App. p. 784, Line 25, and p. 785, Lines 1-7

In the PCR hearing, Mr. Saleeby states that Defense Counsel could have brought an allegation of prosecutorial misconduct but did not because, "It just did not enter my mind to do that." App. 787 Lines 1-3.

This prosecutorial misconduct by the State was damning to Mr. Fortune in the minds of the jury. During the January 11, 2012 PCR Hearing, jury members from his March 06-09 murder trial were present as witnesses on his behalf. In a side bar, Attorney Stroud told the Judge and Ms. Ratigan that the jury members would testify about Ms. Douglass/Gaston's March 2006 court testimony stating Mr. Shields' crawled away and was shot in the back. Judge Burch, Ms. Ratigan, and Attorney Stroud discussed whether the jury members could testify. Attorney Stroud said yes, Ms. Ratigan said no, and the Honorable Paul Burch thought that if they did testify, it would result in an immediate appeal.

After discussing the matter with Mr. Fortune, Attorney Stroud decided to forego putting the jury members on the stand because of the possible delay if an immediate appeal resulted. Attorney Stroud, by presenting evidence of the jury members intended

testimony, preserved Mr. Fortune's rights to present an affidavit of the jury members in any future proceedings involving Mr. Fortune's PCR litigation

**Affidavit of Caroline King Miles, Member of the March 2006 Jury
for Oscar Fortune's Murder Trial**

I remember details about Stephanie Gaston's testimony. I remember her testimony in court being different from the statement she wrote. I remember that she was asked to read her statement, and her testimony and the statement were not alike. She said in her testimony that Mr. Shields *crawled* out of the passenger side of the car, and that Mr. Fortune walked to the other side of the car and shot him in the back from behind. When she read her statement in court, she said that Mr. Shields *ran* out of the passenger side. I remember when Mr. Quinn asked her which statement was correct, she said they both were, and that was the end of that. The vision I had when I went into the room where we were to find the verdict was of Mr. Shields being shot in the back after he *crawled* out of the car. I remember thinking that could never be self-defense.

Sworn to and Subscribed before me	}	Caroline K. Miles
<u>16th</u> day of <u>July</u> , 20 <u>12</u>		
<u>Leather O. Stancel</u>		
Notary Public for South Carolina		Signature of Affiant
My Commission expires <u>12/21/2014</u>	)	

The PCR Order of Dismissal did not address the jury issue. Mr. Fortune, in his Memorandum in Support of SCRCP Rule 59, (a) (2) and (e) Motion again preserved the jury issue for appellate review. Memorandum in Support of SCRCP Rule 59, (a) (2) and (e), App. p. 75, on the issue of jury testimony, Mr. Fortune provided that: In State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (S.C. 2003), the Court held, "The Sixth and

Fourteenth Amendments to the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." The Court in State v. Cameron, 311 S.C. 204, 207, 428, S.E. 2d 10, 12 (Cl. App.1993), held that: In order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature. In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. In Shumpert v. State of South Carolina, 378 S.C. 62, 661 S.E. 2d 369, (S.C. 2008), the Court held that Rule 606(b) of the South Carolina Rules of Evidence allows a juror to offer testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

In the March, 2006 Trial Transcript, App. p. 622, lines 2-21, the impact of Ms. Douglas/Gaston falsely stating that Mr. Fortune shot Mr. Shields in the back as Mr. Shields crawled on the ground is so damning that even Mr. Saleeby deprives Mr. Fortune of his presumption of innocence. Mr. Saleeby, in his closing, in the March, 2006 Trial Transcript, App. p. 622, line 18, tells the jury that he (Mr. Shields) is crawling with the gun in his hand.

Ms. Douglas/Gaston's false testimony is so damning that Ms. Blanche Fortune, in PCR hearing, stated that she believed that he (Mr. Fortune), was a cold blooded killer upon hearing Ms. Douglas/Gaston's in-court testimony. App. p. 844, Lines 22-25 Ms. Blanche Fortune goes on to state that defense counsel did nothing to dispel this perception. App. p. 845, Line 1-4

In the March 2006 Trial Transcript, App. p. 640, Lines 6- 20, in the State's closing, Mr. Joyner misstates the testimony of Mr. Barry Davis and misleads the jury.

Mr. Joyner tells the jury that Davis' testimony is that he saw those first shots. In the Transcript, App. p. 397, Lines 5-6, in the State's Direct, Davis states that he just heard the first set of shots.

Mr. Joyner tells the jury that Mr. Shields was crawling through his car and as he came through, he broke the center console, even though the State had never laid a proper foundation for this theory, and no proof was offered to show how and when the console was broken.

Mr. Joyner told the jury in this part of his closing on App. p. 640 Lines 17-20, that: And Stephanie Gaston, when she testified she saw the same shots that Barry Davis saw. She saw him walk around and shoot him just as the Defendant testified himself. Mr. Joyner's final comment to the jury in this part of his closing at Line 20 was: "That's all true."

The State not only suborned perjury; it also bolstered the in-court falsehoods of Ms. Douglas/Gaston by intentionally misleading the jury.

In his closing, Mr. Joyner misinforms and misleads the jury when he tells them, "The truth is that 3 of the 5 shots fired by Mr. Fortune were located in Mr. Shields' back." App. p. 647, Lines 8-13 and p. 648, lines 1-5 This is an outright misstatement of the evidence presented in the Autopsy Report. The State intentionally and knowingly used this misstatement to purposefully mislead the judge and the jury in order to obtain a conviction rather than to seek justice or to find the truth.

Mr. Joyner tells the jury that Mr. Fortune shot Mr. Shields 3 times in the back even though the autopsy report states that only one shot was located in Mr. Shield's back. In Mr. Shields' Autopsy Report, Dr. Inas Z. Yacoub, M.D., Pathologist, App. p. 876, stated that of the 5 gunshot wounds, only 1 was to Mr. Shields' back. The Autopsy Report, App. p. 878-879, describes each of the 5 gunshot wounds, and again only 1 gunshot wound was located in Mr. Shields' back. Dr. Yacoub described this gunshot wound to Mr. Shields' back as, "#1 Gunshot Wound entrance is located in the left side of the back 15.5 inches below the top of the head and 6.5 inches to the left of the posterior midline plane."

The Fourth Circuit, in Boyd v. French, 147 F.3d 319 (4th Cir. 1998), outlined the standard for examining perjured testimony. A conviction acquired through the knowing use of perjured testimony by the prosecution violates due process. See Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959). This is true regardless of whether the prosecution solicited testimony it knew to be false or simply allowed such testimony to pass uncorrected. See Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); Napue, 360 U.S. at 269, 79 S. Ct. 1173.

The knowing use of perjured testimony constitutes a due process violation when there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. See Kyles v. Whitley, 514 U.S. 419, 433 n. 7, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). In United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987), the Court held that: A defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured. Mere inconsistencies in testimony

by government witnesses do not establish the government's knowing use of false testimony.

In U.S. v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), the Court held: A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. The Court held that the knowing use of perjured testimony is subject to the materiality standard of review: evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

In the case at bar, Defense Counsel and the State knew that Ms. Douglas/Gaston's testimony was perjured because they each had the voluntary statement of Ms. Douglas/Gaston which differed factually from her court testimony. They also each knew that Ms. Douglas/Gaston's voluntary statement was true and verified by the testimony of Mr. Mungo, as well as the findings of the Autopsy Report. The State also knew that Ms. Douglas/Gaston's testimony was perjured, because the State had to prepare her for testimony at the trial, and this preparation would have brought to light any differences between her written statement and her testimony. The State failed to correct the perjury and instead used it to convict Mr. Fortune.

If the State had disclosed to Mr. Fortune's Defense Counsel that Ms. Douglas/Gaston's testimony would contradict her voluntary statement, then it is more likely that Defense Counsel, rather than only using cross-examination to oust the perjured testimony from the minds of the jury, may have instead requested a suppression hearing to prevent the jury from ever hearing the perjured testimony. Mr. Fortune was seen by the

jury as a cold-blooded killer who fired his last shot in Mr. Shields' back as he crawled on ground.

The State's non-disclosure meets the Materiality Standard set forth in Bagley in that the result of the proceeding in the March 2006 Murder Trial of Mr. Fortune would have been different had the State disclosed to Mr. Fortune's Defense Counsel this material evidence. The State committed prosecutorial misconduct by using this perjured testimony and misleading the Court and the Jury.

The way the State obtained Mr. Fortune's conviction is fundamentally unfair and must be set aside. The Record provides the evidence to conclude that the perjured testimony, the State's bolstering of tainted evidence, the State's subornation of perjury, and the State's intentional misleading of the judge and jury, affected the jury's judgment and its ability to function in an impartial manner.

The Record establishes that Mr. Fortune's Defense Counsel had other options rather than just the use of cross-examination to react to the State's prosecutorial misconduct. The Defense did not effectively remedy the effect of the perjured testimony for the jury, as well as for the Court of Appeals during Mr. Fortune's direct appeal. Please see the Appendix, on pages 926-927, to verify that the State was still using Ms. Stephanie Douglas/Gaston's perjured testimony in its Final Brief, produced during Mr. Fortune's Direct Appeal. The State, in its appeal brief, included the following synopsis regarding the perjured testimony of Ms. Stephanie Douglas/Gaston:

After some words were exchanged between the men, Stephanie heard gunshots and hit the floor. She saw Anthony trying to crawl away on the passenger side when Appellant came around the vehicle and shot Anthony in the back.

The State also included the following synopsis of State's Witness, Jessie Ellison:

Jessie Ellison also heard shots, saw Anthony attempt to crawl out the passenger side, and the shooter walk around the back of the vehicle to shoot again.

The actual testimony of Jessie Ellison regarding Mr. Anthony Shields's exit from the vehicle on the passenger side, is as follows:

The man went around the back of the Bronco/the Ford Explorer and went, and I guess Anthony got out on the passenger's side. App. p. 463 Lines 22-24

II. Ineffective Assistance of Defense Counsel:³

(Standard Of Review) Lounds v. State, 670 S.E.2d 646, 380 S.C. 454 (S.C. 2008). In order to prove counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Moreover, "when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting Strickland v. Washington, 466 U.S. at 695, 104 S.Ct. 2052). [380 S.C. 460]

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. E.g., Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court will uphold the findings of the PCR court if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, if no probative evidence supports these findings, the Court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). Furthermore, this Court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

Mr. Fortune asserts that his Ineffective Assistance of Counsel Claim and the remedies sought, are under the holdings of United States v. Cronin, 466 U.S. 648 (1984),

³The Order of Dismissal did not address all of Applicant's issues raised in his Original and his Amended PCR Application. Applicant filed a timely SCRCP Rule 59 (a) (2) and (e) Motion. The Honorable Judge Paul Burch issued an Order Denying Applicant's SCRCP Rule 59 (a) (2) and (e) Motion.

and Strickland v. Washington, 466 U.S. 668 (1984). Per se prejudice, under the Cronic Standard, is appropriate because defense counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” thus making the “adversary process itself presumptively unreliable.”

Mr. Fortune’s Defense Counsel is per se prejudice under the Cronic Standard, because “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.”

The Court, in Mincey v. State, 314 S.C. 355, 444 S.E. 2d 510, (1994), held that only in a case of overwhelming evidence of guilt, will deficient performance not result in prejudice. The State’s evidence produced at Mr. Fortune’s trial is per se prejudice and merits discharge because the evidence and testimony against Mr. Fortune is anything but overwhelming.

There are two types of evidence which are generally presented during a trial-- direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. See: State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452, citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949). See: State v. Bostick, 708 S.E.2d 774, 392 S.C. 134 (S.C. 2011).

The unsecured crime scene, conflicting statements made by those at the scene, and the fact that there were no independent witnesses who actually saw the shooting, leave insufficient evidence to support the charge of murder against Mr. Fortune. The Record indicates that the only consistent and non-contradictory statements were made by the only two eyewitnesses, Mr. Fortune and Ms. McCall. The voluntary statement of Ms. Douglas/Gaston and the testimony of Mr. Mungo support the testimony and statements made by Mr. Fortune and Ms. McCall. In addition, the pathologist's testimony and her report support the testimony of both Mr. Fortune and Ms. McCall.

Lead counsel, Mr. Ed Saleeby, was suffering from medical problems at the time of the trial. Defense Counsel Saleeby's opening and closing statements were rambling and incoherent by any standard and could have only served to frustrate and perplex the jury. Mr. Quinn was ineffective per the Cronic Standard in overcoming the testimony of Ms. Douglas/Gaston in that he relied solely on cross-examination of Ms. Douglas/Gaston rather than objecting to her "crawling" testimony on direct examination. The impact of Ms. Douglas/Gaston's testimony on the jury that Mr. Fortune fired the last shot into Mr. Shields' back, as he was crawling, was so damaging that cross-examination could not refute or contain the damage.

Mr. Saleeby, as Lead Counsel, was ineffective per the Cronic Standard in refuting the testimony of Ms. Douglas/Gaston in that he failed to act as an effective Lead Counsel to assist Mr. Quinn in any meaningful manner. He did not intervene and go to Judge Milling for an in chambers meeting. Objecting to the questioning and to the testimony of the witness offers the only way to effectively defend Mr. Fortune or to attempt to correct the jury's impression that Mr. Fortune was a cold blooded murderer rather than a person

who was forced to shoot his assailant when he jumped out and ran from the car. The action of jumping and running from the car made Mr. Shields a continuing threat to Mr. Fortune and Ms. McCall. Had Mr. Quinn objected, he should have requested a meeting with the Judge, the Solicitor, and himself in Chambers to explain that the State had failed to inform the Defense that Ms. Douglas/Gaston's testimony would contradict her voluntary statement. In addition, the Defense should have argued that the testimony of this witness might have qualified as perjury.

Then the Defense Counsel should have also argued that a curative instruction to the jury would not overcome the jury's impression of Mr. Fortune. At this point in the trial, the Defense should have requested dismissal of the charges. Defense counsel was ineffective for failing to move for dismissal when they realized that the State had active indictments against two individuals for the same crime. Ms. Sonta McCall had an active indictment on her for independently, with malice aforethought, causing the death of Anthony Shields by shooting him in the chest. Defense counsel failed to investigate and bring to the Court's attention the legal absurdness of trying Mr. Fortune for murder while the State also believed that Ms. McCall was guilty of the same crime.⁴ How can one person be tried for a crime when another is charged with that same crime when both are charged such that each one acted individually and independently of each other? The State misled Judge Milling and defense counsel on this issue, resulting in per se ineffective assistance of counsel.

⁴March 2006 Trial Transcript, App. p 220, Lines 17-18 in which Mr. Quinn tells Judge Milling that Ms. McCall is a co-defendant in the death of Mr. Shields. Solicitors Joyner and Hales do not inform either Judge Milling or Mr. Quinn that Ms. McCall is independently charged as the person who pulled the trigger and shot Mr. Shields.

Defense Counsel for Mr. Fortune failed to consider and investigate defense of others. Using defense of others requires that you properly inform the jury and the judge of the circumstances of the party in need of defense and the reasons that individual independently had the right to kill based upon self-defense. In the PCR Hearing, Mr. Saleeby states, "In my years of experience if I said it and a jury heard it, in all due respect to the Court, the Court doesn't need to say it." App. p. 805, Lines 11-13. Defense Counsel did not properly inform the Court of the circumstances regarding defense of others, and as a result, Mr. Fortune did not get a jury instruction on the Defense of Others.

Also in the PCR Hearing, Mr. Quinn states, "The only thing I remember talking to him about was self-defense. We talked about he was there to defend his cousin who was caught in the middle of a fight after being involved in an altercation at the Green Villa, but I don't know that I ever talked to him specifically about advancing a defense of Defense of Others. I do recall we put up a vigorous defense of self-defense." App. p. 863, Lines 21-25, and p. 864, Lines 01-03.

Defense Counsel did not adequately consult with previous Defense Counsel Mr. Kernard Redmond when Redmond was employed with the Saleeby and Cox Law Firm. For example, Mr. Redmond knew that the Police had obtained a list of 61 witnesses who were at the crime scene at the time of the incident. Mr. Redmond was made aware of the existence of this witness list at the Preliminary Hearing in 2002, but this list was not given to the Defense in the Discovery requested in 2002 by Attorney Redmond. Proper communication would have led Defense Counsel to obtain this list in 2002 or at the time Attorney Redmond turned the case over to Attorney Saleeby. In the PCR Hearing, Mr.

Fortune's Defense Counsel, Mr. Terrence Quinn, states the following, "Unfortunately, much of the information on that list was no good, phone numbers, addresses. It had been five or six years or four or five years." App. p. 867, Lines 18-20. It is more likely that the names and contact information would not have been outdated in 2002.

It is uncontested in the Record that the Honorable Judge Burch was the Presiding Judge who continued Mr. Fortune's November 05, 2005 murder trial. He was the Judge who issued the court order on November 05, 2005 for the State to produce the list of 61 witnesses to the Defense. This list contained the names and contact information of people who were at the crime scene and were available to the State. Moreover, Mr. Fortune's murder trial scheduled for November 05, 2005 could have proceeded as planned with plenty of qualified jurors present for jury duty rather than being stopped and continued just as the selection of the jury was about to begin.

The Solicitor's Office failed to timely comply with Judge Burch's Court Order. Defense Counsel produced, but failed to file, its Motion to Dismiss the charges against Mr. Fortune based upon the State's failure to timely produce this list. Mr. Saleeby stated that he did not file this Motion because he had no idea realistically that Judge Burch or any other circuit court judge on a case such as serious as murder would dismiss the case with prejudice. App. p. 751, Lines 03-09.

The State's evidence showed that the .25-caliber bullet was retrieved from the passenger-side floorboard of Mr. Shield's vehicle. The State used this information to suggest that Mr. Shields did not hit Mr. Fortune when he fired. The State also downplayed that Mr. Shields fired first, and thus, regardless of where the bullet went, Mr. Fortune and Ms. McCall were in fear for their lives.

During trial, the Prosecution repeatedly refers to the Decedent, Anthony Shields, as the "victim." Attorneys are not allowed to testify at trial. Referencing Mr. Shields as the "victim" was not harmless commentary but was testimony as to the ultimate fact of the case that prejudiced the Jury. Defense Counsel failed to raise any objection.

The strategy in no way meets the criteria of an objective standard of reasonableness. The strategic choice to make incomplete investigations of facts and law, are not reasonable in that no "reasonable professional judgment supports the limitations on the investigation." These failures meet the Cronic and the Strickland Standards for prejudice, and had a significant impact on the judge's jury instructions, and on the jury's deliberations in Mr. Fortune's trial.

III. The PCR Judge Erred In:

(A) Denying Mr. Fortune's SCRCP Rule 59 (a) (2) and (e) Motion, and Dismissing Mr. Fortune's PCR Application.

(Standard of Review) On appeal, the denial of a trial motion will be disturbed only upon a showing of an abuse of discretion. See: State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d99, 106 (1998).

AND

(B) Not granting the Remedy of Discharge as is provided in S.C. Code § 17-27-80 of the Uniform Post-Conviction Procedure Act, S.C. Code § 17-27-10. (UPCRA).

§ 17-27-80. Hearing on application; final judgment: In part: If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, **discharge**, **(Emphasis Added)**, correction of sentence or other matters that may be necessary and proper.

Standard of Review: In a case raising a novel issue of law, the appellate court is free to decide the question of law with no particular deference to the trial court. Osprey v. Cabana Ltd. Partn., 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000);

(A) Mr. Fortune asserts that the PCR Judge abused his discretion and did not conform to the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 and case law mandating a PCR Order of Dismissal be specific and complete on the issues and that the drafter and the Judge must be meticulous in preparing and reviewing its proposed order so that the final order would set forth the required findings and reasons for those findings. See: McCullough v. State of SC, 320 S.C. 270, 464 S.E. 2d 340, (S.C. 1995), and McCray v. State of SC, 305 S.C. 329, 408 S. E.2d 241, (S.C. 1991), and Applicant's Memorandum in Support of SCRCP Rule 59 (a) (2) and (e).

Mr. Fortune's legal challenge to the Order of Dismissal, primarily, questions the validity, truthfulness and the reliability of the Order's Findings of Fact and Conclusions of Law. In Mooney v. Holohan, 294 U.S. 103 (1935), the Court held, "It is the duty of every State to provide corrective judicial process for the relief of persons convicted and imprisoned for crime without due process of law; and it is to be presumed that this duty has been complied with." Rule 59, SCRCP, is designed to give courts an opportunity to restore reputation, reliability, and confidence when a court makes a mistake that impugns the court's reputation and tarnishes the public's perception of the validity of the court's actions and decisions.

In State v. Rocheville, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993), the Court held that post conviction relief proceedings are provided and are to be conducted in a manner where the facts surrounding the trial can be fully explored. In Cartrette v. State, 448

S.E.2d 553, 323 S.C. 15 (S.C. 1994), the Court held that the post-conviction relief process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights.

In the case at bar, the Order of Dismissal does not bear witness to the facts and conclusions of law reviewed and brought up during Mr. Fortune's PCR Hearing. Mr. Fortune also wants this Court to be aware that the PCR Hearing Judge's PCR Order of Dismissal is in violation of Marlar v. State, 653 S.E.2d 266, 375 S.C. 407 (S.C. 2007).

This Order has the prohibited statement:

As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed. App. p. 1.

This paragraph does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law. This language should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented. See Marlar v. State, 653 S.E.2d 266, 375 S.C. 407 (S.C. 2007). Mr. Fortune states that there are NO allegations about which absolutely no evidence is presented.

(B) The PCR Judge Erred In Not Granting the Remedy of Discharge As Is Provided In S.C. Code § 17-27-80 of the Uniform Post-Conviction Procedure Act, S.C. Code § 17-27-10, (UPCRA).

(Standard of Review) Issues of Statutory Construction are Reviewed De Novo. See: United States v. Childress, 104 F. 3d 47, 49 (4th Cir.1996).

The Remedy of Discharge as provided under § 17-27-80 of the Uniform Post-Conviction Procedure Act, S.C. Code § 17-27-10, (UPCRA). S.C. Code § 17-27-80, provides in pertinent part that:

If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, **discharge**, [Emphases Added], correction of sentence or other matters that may be necessary and proper.

Mr. Fortune asserts that the remedy of discharge is a remedy that should be limited to wrongful conviction situations. Defendants wrongfully convicted wait in prison needlessly. Discharge would save time and money that the State is currently wasting in having an almost universal policy of opposing and ultimately retrying cases involving wrongful convictions.

One state that is implementing programs to combat wrongful convictions is New York. The New York Office of Attorney General is providing protocols on the front end to identify and correct wrongful convictions for murder based upon extreme prosecutorial misconduct. The Attorney General of New York created the Conviction Review Bureau in April, 2012. Attorney General Eric T. Schneiderman established the Conviction Review Bureau in the New York Office of Attorney General, a first-of-its-kind statewide initiative to address issues related to wrongful convictions across New York State.

The criminal justice system must maximize its ability to convict the real perpetrators of crimes, while preventing innocent people from being penalized for crimes they did not commit.

The Court in giving application to the remedy of discharge must focus on the following rules of statutory construction:

The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Elwell, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Id. (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. (first alteration by court) (internal quotation marks omitted); see also State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used.")

The Court in Scott v. State, 513 S.E.2d 100, 334 S.C. 248 (S.C. 1999), holds that "

In the interpretation of statutes, our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute..... A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject." Furthermore, penal statutes must be construed strictly against the State in favor of the defendant.

The Court in Boan v. State, 695 S.E.2d 850, 388 S.C. 272 (S.C. 2010) held that, "This Court has previously held that post-conviction relief may be tailored to remedy the precise prejudice resulting from trial counsel's deficient performance. See Rolen v. State, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (citing United States v. Morrison, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L.Ed.2d 564 (1981) (recognizing that the remedy for a violation of the Sixth Amendment right to counsel "should be tailored to the injury suffered from the constitutional violation")."

The Court in Payne v. State, 658 N.E.2d 635 (Ind. App. 1995) considered whether Mr. Payne was entitled to discharge because the State violated his right to an early trial; Payne argued that he was denied his right to an early trial. The right to an early trial is

expressed in Crim.R. 4(B)(1), which provides in relevant part as follows, "If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion." The Court held that Mr. Payne was not eligible to request discharge because he had pled guilty. What is instructive about this case is that the remedy of discharge is available and that the word discharge has its plain meaning definition.

Black's Law Dictionary defines discharge to mean to release from prison, confinement, or military service. See Black's Law Dictionary 6th Edition, Page 463.

The Remedy of Discharge provided in S.C. Code § 17-27-80 stands for the plain meaning of release from prison.

In defining the word discharge as it is used in S.C. Code § 17-27-80, it is helpful to apply the noscitur a sociis canon that words in close proximity are known by their neighbors. S.C. Code § 17-27-80 lists other remedies such as retrial, custody, bail, and correction of sentence that have plain meanings. The drafters of the statute would not have meant discharge to be a redundant word that had the same meaning as one of the already listed options. The statute lists discharge because the drafters of the statute meant to provide a way to promote justice by releasing from prison wrongfully convicted defendants.

Mr. Fortune asserts that the remedy of granting of a new trial pre-supposes that the death of Mr. Shields was a murder, rather than an act of self-defense and an act of defense of others. The evidence the State used to determine that the death of Mr. Shields was a murder conflicts with SC Rules of Evidence Rule 102 and Rule 401. Moreover, SC Rules of Evidence Rule 403 may exclude this evidence.

A new trial for Mr. Fortune would also conflict with SC Rules of Professional Conduct Rule 3.8 and Comment [1]. The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; ... and a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, and that guilt is decided upon the basis of sufficient evidence.

Some of the problems of a new trial are burdens to both Solicitor and Defense. The question is whether these burdens can be resolved to ensure a fair trial and due process in a new trial. Mr. Fortune asserts that these burdens cannot be resolved to ensure a fair trial and due process in a new trial. Practicality and economic reasons also support the remedy of discharge rather than the remedy of a new trial for Mr. Fortune. A new trial will reopen an event that occurred in 2001, and will only rekindle heartbreak. Mr. Shields and Mr. Fortune have children and a new trial would force these children to relive the tragic events of 2001.

The lack of credible evidence creates its own practical challenges in a new trial for Mr. Fortune. A new trial, rather than a discharge, will be costly and may not ensure a fair trial or due process. The State must find the State's witnesses and again produce its expert witnesses. The Sixth Amendment right to confront witnesses may become an issue if the State cannot produce the same witnesses and experts. Considering that Mr. Fortune has served over eight years in prison, it would seem that the remedy of discharge is the proper use of the Court's resources.

Mr. Fortune's remedy of discharge is supported by case law and statutory law, as well as any maxim of equity. Mr. Fortune has a right to due process. This due process right encompasses both the right to counsel and the right to a fair trial. The right to counsel means the right to effective assistance of counsel. The right extends from the initial arrest to the termination of the matter. Accordingly, Mr. Fortune believes that enough evidence exists to prove a prima facie case of a violation of his due process rights to counsel and a fair trial.

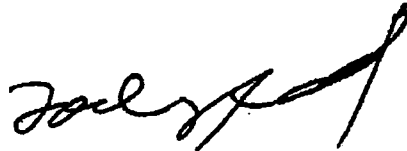
Mr. Fortune had no criminal record prior to this conviction. He was self-employed as a truck driver before his arrest in the death of Mr. Shields in 2001. Mr. Fortune was out on bail for four and one-half years from the time of his arrest in 2001 until his conviction in March of 2006. Mr. Fortune has been and continues to be a model inmate, and he is the law librarian at Broad River Prison.

Law enforcement and the solicitor's office incorrectly determined that Mr. Shields' death was a murder. The act of putting Mr. Fortune on trial for a nonexistent crime is unconscionable. Moreover, as Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will, at some point, be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error, but rather on whether the prisoner can be restored to a useful place in the community." With the remedy of discharge as provided pursuant to UPCRA S.C. Code § 17-27-80, Mr. Fortune, can be restored to a useful place in the community.

CONCLUSION

For the reasons stated herein, as well as in all of Mr. Fortune's previously filed documents, Mr. Fortune respectfully requests this Court to grant the remedy of discharge. Mr. Fortune's murder conviction was fundamentally unfair and without due process. Mr. Fortune must be exonerated and his record of conviction expunged. Mr. Fortune's conviction and his sentence must be vacated, set aside, and rendered void. Mr. Fortune requests that the Court grant a Rule nisi, directing that the State cannot subject Mr. Fortune to a new trial on this matter. Mr. Fortune requests that the Court direct the circuit court to have the Record reflect that Mr. Fortune acted in self-defense.

May 12, 2014



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Attorney for Mr. Fortune

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA**IN THE COURT OF APPEALS****Case No. 2012-212602**

Oscar James Fortune, Petitioner,**v.****State of South Carolina, Respondent.**

PETITIONER OSCAR FORTUNE'S RULE 243 (j) SCACR BRIEF**AND****SCACR RULE 243(k) REQUEST FOR EXPEDITED BAIL****PENDING APPELLATE REVIEW****AND****AMENDED APPENDIX**

The undersigned attorney hereby certifies that true copies of Petitioner Oscar Fortune's Rule 243 (j) SCACR Brief, the SCACR Rule 243(k) Request for Bail Pending Appellate Review, and the Amended Appendix have been served upon Opposing Counsel, Ms. Karen C. Ratigan, Attorney for Respondent. Attorney Stroud hand delivered the documents this 12th Day of May 2014.

Respectfully submitted this 12th Day of May 2014.

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**STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas**

**The Honorable John M. Milling, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge**

Appellate Case No. 2012-212602

Oscar James Fortune, ... Petitioner,

v.

State of South Carolina, ... Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. The PCR judge did not err in ruling no prosecutorial misconduct occurred during Petitioner's trial.
2. The PCR judge did not err in ruling trial counsel offered effective assistance of counsel during Petitioner's trial.
3. The PCR judge did not err in denying Petitioner's motion to dismiss pursuant to Rule 59(a)(2)(e), SCRCP and by not granting a remedy of discharge.

STATEMENT OF THE CASE

The Chesterfield County Grand Jury indicted Petitioner at the March 2002 term of General Sessions for murder (2002-GS-13-0137) and at the November 2005 term for possession of a weapon during commission of a violent crime (2005-GS-13-1222). Edward E. Saleeby, Jr., Esquire and Terrence A. Quinn, Esquire represented Petitioner.

After the State brought the case to trial, Petitioner was found guilty. On March 9, 2006, the Honorable John M. Milling sentenced Petitioner to concurrent terms of thirty-seven years for murder and five years for possession of a weapon during commission of a violent crime. (App.pp.982-83).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. (App.pp.915-39). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Fortune, Op. No. 2009-UP-259 (S.C. Ct. App. filed June 1, 2009). (App.pp.966-68).

Petitioner filed an application for post-conviction relief (PCR) on August 18, 2009 (2009-CP-13-0323) and counsel filed a "Verified Complaint" on January 3, 2012. (App.pp.18-53; pp.969-74). A hearing was held at the Darlington County Courthouse on January 11, 2012. (App.pp.732-890). Petitioner was present and represented by Joel F. Stroud, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Paul M. Burch denied relief in an order filed February 22, 2012. (App.pp.3-12). On May 9, 2012, Judge Burch denied Petitioner's post-trial motion pursuant to Rule 59(a)(2) and (e), SCRCF. (App.p.17).

STATEMENT OF FACTS

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. (App.pp.253-55). The victim and his wife left the party and returned home. (App.p.256). The victim subsequently left to purchase cigarettes and Petitioner shot and killed him in the Huddle House parking lot later that night.¹ (App.pp.256-59).

Iris Gaston witnessed the fight at the party and later went to the Huddle House with Sonta. (App.pp.266-67). Gaston testified they met Petitioner at the Huddle House. (268). Gaston testified Sonta and Petitioner approached the victim's car, words were exchanged, and she heard gunshots. (App.pp.268-69; p.274).

Tonnette Cash and Petitioner were asleep when Sonta called. (App.p.277). Cash testified she drove Petitioner to the Huddle House "to see what was going on with Sonta." (App.p.277). Cash testified Petitioner took her gun when he went to talk to the victim. (App.pp.279-80). Cash testified she heard gunshots after Petitioner went over to the victim's vehicle. (App.p.281).

Jay Jay Mungo spoke to Sonta and Petitioner at the Huddle House. (App.pp.291-92). Mungo testified Petitioner said he would handle the situation and walked to the victim's vehicle. (App.pp.292-93). 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. (App.pp.293-94). Mungo testified Petitioner walked around the vehicle and

¹ The medical examiner testified the victim had five gunshot wounds – two of which were fired from close proximity (App pp 352-53) The trace evidence expert testified that, while the victim had gunshot residue on his left hand, he also had a gunshot wound on that hand. (App.pp.511-12).

shot the victim several more times. (App.p.294). Mungo testified he did not see the victim fire a weapon. (App.p.314).

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." (App.pp.330-31). 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." (App.pp.331-32). Davis stated he removed a .25 handgun from the cup holder of the victim's vehicle after the shooter fled the scene.² (App.p.333).

Barry Davis saw a man and woman approach the victim's vehicle at the Huddle House. (App.pp.395-96). Davis testified the woman exchanged words with the victim and the man shot the victim. (App.p.396). Davis testified the man fired three shots into the vehicle and then walked around and fired two more shots. (App.pp.396-98). Davis testified the woman said "[t]hat's what the fuck you get!" after the shooting. (App.p.402). Davis testified he did not see the victim fire a gun. (App.pp.403-04).

Stephanie Gaston³ witnessed the fight at the party and saw Petitioner and Sonta approach the victim's vehicle at the Huddle House later. (App.pp.447-50). Gaston testified words were exchanged between Petitioner and the victim and then she heard gunshots. (App.p.451). Gaston testified the victim attempted to exit through the passenger door but Petitioner came around the vehicle and shot him. (App.pp.451-53).

¹

² This weapon was subsequently found to match a bullet and casing from the victim's vehicle. (App.p.490)

³ While the witness stated her name was Stephanie Gaston, the court reporter listed it as Stephanie Douglas in the trial transcript.

Gaston testified she did not see the victim with a gun. (App.p.452).

Jessie Ellison was at the Huddle House when he saw a man approach the victim's car. (App.pp.461-63). Ellison testified the two men had words and then he heard gunshots. (App.p.463). Ellison testified he did not see the shots but did see the man walk around the victim's car and then heard another shot. (App.pp.463-64). Ellison testified he did not see who fired. (App.p.466).

Sonta stated she called Petitioner to ask for his assistance in "tak[ing] a warrant out on [the victim]." (App.p.542). Sonta said she and Petitioner individually approached the victim and that the victim fired first. (App.p.543; p.555).

Petitioner gave a statement in which he stated he went to the Huddle House "expecting to fight the guy." (App.p.424). Petitioner's statement noted his assertion that he heard a shot and saw a flash and returned fire. (App.p.424). Petitioner's statement also indicated the victim had a gun in his hand when he climbed out of the passenger side of his vehicle. (App.p.424). Petitioner's trial testimony was basically consistent with his statement. (App.pp.556-59).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. Petitioner’s issue regarding prosecutorial misconduct is not preserved for appellate review.

Petitioner argues he suffered prosecutorial misconduct at his trial because: (1) the assistant solicitor’s closing argument resulted in the denial of a fair trial, (2) the assistant solicitor’s closing argument violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel because it invited the jury to disregard the trial judge’s instructions on reasonable doubt, and (3) the State procured a conviction by allowing perjured testimony and then bolstered this testimony – which perpetuated a fraud upon the trial court. The issue of prosecutorial misconduct is not preserved for appellate review.

While Petitioner may have noted a potential issue relating to prosecutorial misconduct in his PCR application, he did not raise the issue as such at his PCR hearing. Rather, he focused upon allegations that trial counsel were ineffective in handling issues such as the solicitor’s closing argument and presentation of witness testimony. As such, the issue of prosecutorial misconduct as presented in the Brief of Petitioner was not raised

to and ruled upon by the PCR judge. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”). Petitioner first raised the issue of prosecutorial misconduct – as set alleged in his Brief of Petitioner – in the memorandum associated with his post-trial motion pursuant to Rule 59(e), SCRCP. It is abundantly clear that a party cannot raise an issue for the first time in a post-trial motion. See South Carolina Dep’t of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (“It is well settled that an issue may not be raised for the first time in a post-trial motion.”); see also State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) (holding “it is improper to argue new matter in a motion for reconsideration”). The issue of prosecutorial misconduct is not preserved for review by this Court.

Regardless, Petitioner failed to meet his burden of proving prosecutorial misconduct. “[T]he test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor’s remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant’s substantial rights so as to deprive the defendant of a fair trial.” United States v. Chorman, 910 F.2d 102, 103 (4th Cir. 1990) (emphasis added). In order to establish prejudicial misconduct on the part of the prosecutor the alleged misconduct must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 180-81, 106 S. Ct. 2464, 2471 (1986) (quotation omitted). Petitioner failed to establish either that the assistant solicitor acted

improperly or that there was a prejudicial effect.

First, the assistant solicitor did not make a comment in closing argument that denied Petitioner his right to a fair trial. Petitioner argues his rights were violated because the assistant solicitor's "closing argument denigrat[ed] the integrity of defense counsel." (Brief of Petitioner, p.12). During closing argument, the assistant solicitor stated trial counsels' job was "to manipulate the truth" and "to confuse jurors" and to "do whatever they have to without regard for the truth." This comment was objected to and sustained. (App.p.631). This comment was not improper, as it amounted to a comment on the adversarial nature of a criminal trial and invited the jury to find the defense argument was not credible. See, e.g., State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (noting a prosecutor may question the credibility of a defense and may fairly point out matters the jury should not consider). Regardless, Petitioner cannot prove prejudice because the trial judge stated "I don't think their job is to defraud the Court or the jury and to that extent, I sustain the objection." (App.pp.631-32). The trial judge's comment and ruling prevented the assistant solicitor from continuing further in his argument and conveyed to the jury the comment was improper. Petitioner also cannot meet his burden of proving prejudice because of the overwhelming evidence of his guilt that was presented to the jury. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding an insubstantial error not affecting the result of the trial is harmless when guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached) (quotation omitted). As such, the comment did not satisfy the test for prosecutorial misconduct. See United States v. Chorman, 910 F.2d at 103.

Second, the assistant solicitor did not violate Petitioner's Fifth and Sixth Amendment rights because he "invited the jury to disregard the trial court's instructions on reasonable doubt." (Brief of Petitioner, p.15). Petitioner argues the assistant solicitor made comments in closing argument that challenged trial counsel's argument that the State had not proven reasonable doubt. (App.p.632; p.633; p.637; p.647). The comments were not improper and did not instruct the jury to disregard the subsequent jury charge for reasonable doubt. It is axiomatic that an attorney's arguments to the jury do not constitute evidence. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."); State v. Charping, 333 S.C. 124, 133 n. 7, 508 S.E.2d 851, 856 n. 7 (1998) ("A solicitor's closing argument is not evidence."). During the jury charge, the trial judge advised the jury that they must accept and apply the law as he gave it to them. (App.p.652; pp.658-59). The trial judge then gave a proper reasonable doubt instruction. (App.pp.661-64). The assistant solicitor's comments in closing argument were not improper and did not imply the jury should disregard the jury charge for reasonable doubt. Further, the comments cannot be viewed as prejudicial because the trial judge instructed the jury on the proper law to apply in their deliberations. As such, these comments did not satisfy the test for prosecutorial misconduct. See United States v. Chorman, 910 F.2d at 103.

Third, the assistant solicitor did not allow perjured testimony from a witness or bolster her testimony. Petitioner argues the assistant solicitor "knowingly allow[ed]" Stephanie Gaston to commit perjury. As more fully discussed infra on pages 16-17,

Gaston's trial testimony differed from the facts in her statement, trial counsel impeached her with this discrepancy, and she admitted the facts in her statement were correct. (App.pp.470-75). The assistant solicitor was not involved in the subornation of perjury. See Burns v. Clayton, 237 S.C. 316, 332, 117 S.E.2d 300, 308 (1960) (noting subornation of perjury consists of two elements: (1) procuring or inducing one to commit perjury and (2) that individual's commission of perjury). Petitioner did not present any evidence or compelling argument either that the assistant solicitor knew Gaston's trial testimony would diverge from that in her written statement or that this testimony was bolstered. See, e.g., Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity. . . ."). Petitioner also cannot prove prejudice because numerous other witnesses saw Petitioner shoot the victim as he exited the passenger side of his vehicle. As such, the manner in which the assistant solicitor handled Gaston as a witness did not satisfy the test for prosecutorial misconduct. See United States v. Chorman, 910 F.2d at 103.

Accordingly, Petitioner failed to meet his burden of proving the existence of prosecutorial misconduct in this case. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel were ineffective.

Petitioner makes several rambling allegations of ineffective assistance of trial

counsel. Petitioner, however, merely makes a series of declarative statements about alleged deficiencies of counsel and does not cite to the record or precedent or make any legal arguments related to these statements. As such, this entire issue should be deemed conclusory and unpreserved for appellate review. See Muir v. C.R. Bard, Inc., 336 S.C. 266, 298-99, 519 S.E.2d 583, 600 (Ct. App. 1999) (holding issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (holding a “one-sentence argument is too conclusory to present any issue on appeal”). Regardless, Petitioner’s scattered allegations of ineffective assistance of counsel do not succeed on the merits.

A.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

B.

Petitioner argues one of his trial attorneys (Saleeby) suffered from health problems that resulted in an ineffective performance at trial.

The PCR judge found both Saleeby and co-counsel Quinn properly investigated the case and were prepared for trial. (App.pp.8-9). The PCR judge found Petitioner “failed to substantiate his allegation that Saleeby was in poor health and thus performed inadequately at trial to the detriment of the defense case.” (App.pp.9-10).

As noted in the final order of dismissal, Saleeby admitted he needed cortisone injections for his knees throughout the course of the trial. (App.pp.9-10). Saleeby also testified he did not take any kind of pain medication during the trial. (App.p.875). While at the PCR hearing Petitioner raised the issue of Saleeby’s health during the trial, he did not provide any evidence to corroborate this claim – even though Saleeby offered to allow Petitioner’s counsel to telephone his physician. (App.p.875). The PCR judge rejected this allegation, noting a review of the record indicated both trial counsel “were well prepared and zealous advocates.” (App.p.9). Further, Saleeby’s role in this trial was limited to opening and closing statements and the cross-examination of two witnesses while Quinn cross-examined the remaining thirteen State witnesses and conducted direct examination of the two defense witnesses. Petitioner has failed to meet his burden of proving either that Saleeby was in such ill health at his trial that he provided deficient representation or that his case suffered any prejudice as a result. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

C.

Petitioner argues one of his trial attorneys (Quinn) was ineffective in not “overcoming” testimony from witness Stephanie Gaston. Petitioner argues Quinn should have objected to Gaston’s testimony about the victim crawling away from Petitioner during the shooting because it was contrary to her statement. Petitioner argues Quinn should have argued Gaston’s testimony constituted perjury.

Initially, it should be noted this issue was not addressed in the final order of dismissal and a merely conclusory argument was made in Petitioner’s post-trial motion. See Staubes v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546; Muir v. C.R. Bard, Inc., 336 S.C. at 298-99, 519 S.E.2d at 600. Regardless, the issue is without merit. There was no basis for Quinn to have objected when Gaston’s direct examination testimony deviated from details in her written statement. Rather, that is merely an issue Quinn could – and did – use to impeach Gaston on cross-examination. (App.pp.470-75). Quinn even had Gaston concede her statement – which did not mention the victim was crawling away from Petitioner – was the correct version of what happened. (App.p.475). In any event, Gaston’s testimony about Petitioner walking around the victim’s vehicle and shooting him again was merely cumulative to previous testimony from Jay Jay Mungo, Vincent Davis, and Barry Davis. (App.p.294; pp.331-32; pp.396-98). As such, it cannot be viewed as prejudicing Petitioner’s case. See, e.g., State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998) (“In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness’s testimony to the prosecution’s case, whether the witness’s testimony was cumulative, whether other

evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case). As to whether or not trial counsel should have argued Gaston committed perjury at trial, this is not a compelling argument. Gaston admitted inconsistencies between her statement and trial testimony and trial counsel was able to highlight her resulting lack of credibility during cross-examination. (App.pp.470-75). "The credibility of witnesses is for the triers of fact." Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired). Petitioner cannot prove any prejudice.

D.

Petitioner argues the victim was a direct threat to Petitioner and his cousin (McCall) because he jumped out of the car and ran. Petitioner argues trial counsel should have investigated the defense of others as a defense and asked for a jury instruction.

The PCR judge found that "[b]ased upon the evidence presented at trial, a jury charge of defense of others would not have been warranted." The PCR judge noted Petitioner's own trial testimony contradicted the viability of arguing defense of others. (App.pp.10-11).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel were ineffective in not pursuing a defense of others strategy. After McCall contacted him about an earlier argument, Petitioner left his house to go to the scene and confront the victim. (App.pp.560-61; pp.574-76). Petitioner took his

girlfriend's gun, walked across the parking lot, and shot the victim several times while he was still in his truck. (App.pp.297-98; pp.310-11; pp.576-77). Petitioner then crossed to the other side of the victim's car and shot him again while the victim attempted to crawl away. (App.p.311; p.349; pp.469-70). Petitioner testified at trial that he shot the victim "[b]ecause at that time I was in fear for my life. . . . I was in fear for my life at this time." (App.p.577). There was no credible evidence presented at trial that the victim threatened McCall in the parking lot such that she believed she could suffer great bodily injury or death. Without a showing of such, the strategy of defense of others is not sustainable. See State v. Starnes, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000) ("Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense."); see also State v. Bixby, 388 S.C. 528, 553-54, 698 S.E.2d 572, 585-86 (2010) (listing the elements of self-defense). Further, as Petitioner testified he shot the victim because he was afraid for his own life, trial counsel could not have requested a jury instruction on defense of others. See Starnes, at 323, 531 S.E.2d at 913 (holding that when the defendant does not testify that he shot the victim in defense of another person, he is not entitled to jury charge on defense of others); see also State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (holding the law to be charged at trial must be determined from the evidence presented). As such, Petitioner failed to meet his burden of proving trial counsel should have pursued the theory of defense of others at trial.

E.

Petitioner argues trial counsel should have moved for dismissal of Petitioner's charges because McCall was also indicted for murder in this case.

Initially, it should be noted this issue was not addressed in the final order of dismissal and a merely conclusory argument was made in Petitioner's post-trial motion. See Staubes v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546; Muir v. C.R. Bard, Inc., 336 S.C. at 298-99, 519 S.E.2d at 600. Regardless, the issue is without merit. Petitioner has failed to articulate why it is a legal impossibility for more than one person to be indicted for the same crime. The facts of this case indicate McCall summoned him to the scene in order to settle a disagreement with the victim. McCall encouraged the confrontation and was present when Petitioner shot the victim. Under the theory of accomplice liability, McCall was properly indicted for murder. See State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (finding that "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose"); State v. Kelsey, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76 (1998), (concluding that "if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both"). Petitioner failed to demonstrate why, given both precedent and the underlying facts of this case, trial counsel erred in not moving to dismiss Petitioner's murder charge merely because McCall was also charged with the same offense.

F.

Petitioner argues trial counsel should have investigated potential ballistics

evidence in this case.

Initially, it should be noted this issue was not addressed in the final order of dismissal and a merely conclusory argument was made on this point in Petitioner's post-trial motion. See Staubes v. City of Folly Beach, 339 S.C. at 412, 529 S.E.2d at 546; Muir v. C.R. Bard, Inc., 336 S.C. at 298-99, 519 S.E.2d at 600. Regardless, the issue is without merit. Petitioner's counsel made some vague allegations at the PCR hearing concerning the potential importance of a bullet casing from the victim's vehicle. Petitioner, however, failed to present any evidence in the form of a ballistics report or expert testimony to corroborate his assertion that counsel were ineffective in not investigating this allegedly critical evidence. As such, the Court cannot speculate as to the impact such an investigation would have had upon the trial. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"); cf. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

G.

Petitioner argues trial counsel failed to properly investigate the individuals on the State's witness list.

The PCR judge found trial counsel investigated the State's witness list. The PCR judge noted counsels' testimony that "most of the witnesses they could locate did not

provide information that would have been beneficial to the defense case.” The PCR judge further noted that none of the individuals from the State’s 61-person witness list testified at the PCR hearing. (App.p.9; pp.11-12).

The PCR judge did not err in finding Petitioner failed to meet his burden of proof on this issue. As noted in the order of dismissal, trial counsel testified they were not able to locate some of the individuals on the State’s witness list. Saleeby explained that most of the individuals they could locate did not provide any helpful information to the defense. (App.p.795). The PCR judge found trial counsel to be credible witnesses on this point. (App.pp.8-9). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge’s findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners’ Ass’n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (“Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.”). Regardless, Petitioner failed to present any evidence or testimony that he was prejudiced by the lack of a more thorough investigation into the State’s witness list. Without such, the Court cannot speculate about whether or not trial counsel erred and he suffered prejudice as a result. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the

murder. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

III. The PCR judge did not err in denying Petitioner's post-trial motion.

Petitioner argues the PCR judge erred in: denying his post-trial motion pursuant to Rule 59(a)(2) and (e), SCRCP, denying post-conviction relief, and not granting a remedy of discharge pursuant to S.C. Code Ann. § 17-27-80 (Supp. 2003). This issue is without merit.

Petitioner's argument that the PCR judge erred in denying his post-trial motion is without merit. The PCR judge properly denied Petitioner's post-trial motion pursuant to Rule 59(a)(2) and (e), SCRCP. The Rule 59 motion and supporting memorandum sought a new trial under subsection (a)(2) of that Rule. The grant or denial of new trial motions rests within the discretion of the trial judge. Brinkley v. South Carolina Dep't of Corrs., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). Such rulings "will not be reversed on appeal unless [the trial judge's] findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Vinson v. Hartley, 324 S.C. 389,

405, 477 S.E.2d 715, 723 (Ct. App. 1996). In reviewing whether the trial judge erred in denying a motion for a new trial, this Court must “consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.” Id. Based upon the record before the PCR judge, there was no abuse in discretion in the decision to deny the motion for a new trial. In addition to the overwhelming evidence of Petitioner’s guilt presented by the State at trial, Petitioner failed to meet his burden under Strickland v. Washington of proving both that trial counsel erred and that he was prejudiced as a result.

The Rule 59 motion and supporting memorandum also sought alteration or amendment of the final order under subsection (e) of that Rule. The language of Petitioner’s motion, however, was clearly intended for the PCR judge to reconsider his ruling and grant post-conviction relief. This is contrary to the purpose of a Rule 59(e) motion. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e), SCRCF motion is to preserve issues raised to but not ruled upon by the trial court). As such, the PCR judge did not err in denying Petitioner’s motion pursuant to Rule 59(a)(2), (e), SCRCF.

Petitioner’s argument that he was entitled to either post-conviction relief or a remedy of discharge pursuant to S.C. Code Ann. § 17-27-80 is without merit. As discussed supra, Petitioner failed to meet his burden of proving either that trial counsel were ineffective or that he suffered prejudice in light of the overwhelming evidence of guilt presented by the State. Petitioner appears to be arguing that the proper remedy in his case would have been for the PCR judge to have granted relief and discharged his

indictments with prejudice. Yet Petitioner has failed to demonstrate – through either case law or compelling analysis – that the word “discharge” as used in 17-27-80 should be interpreted to mean the dismissal of his charges with prejudice.⁴ As such, the PCR judge did not err in denying Petitioner’s request for “discharge.”

Accordingly, Petitioner failed to meet his burden of proving he is entitled to relief on this issue. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

⁴ “Discharge” could merely indicate an individual’s discharge from the custody of the South Carolina Department of Corrections, for example.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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August 7, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable John M. Milling, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2012-212602

Oscar James Fortune, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Joel F. Stroud, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 7th day of August, 2014.


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THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY

Paul Burch, Circuit Court Judge

Appellate Case No. 2012-212602

Oscar James Fortune,

Petitioner.

v.

State of South Carolina,

Respondent

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SC Court of Appeals

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State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997)

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Cartrette, 323 S.C., 15, at 18, 448 S.E.2d at 555

Marlar v. State, 653 S.E.2d 266, 375 S.C. 407 (S.C. 2007)

United States v. Childress, 104 F. 3d 47, 49 (4th Cir.1996)

State v. Elwell, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013)

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007)

Scott v. State, 513 S.E.2d 100, 334 S.C. 248 (S.C. 1999)

Boan v. State, 695 S.E.2d 850, 388 S.C. 272 (S.C. 2010)

Rolen v. State, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (citing United States v.

Morrison, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L.Ed.2d 564 (1981)

Payne v. State, 658 N.E.2d 635 (Ind. App. 1995)

RULES

SCRCP Rule 59 (a) (2) (e)

SC Rules of Evidence Rule 102, Rule 401, Rule 403

SC Rules of Professional Conduct Rule 3.8 and Comment [1]

MISCELLANEOUS

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QUESTIONS PRESENTED

I. Did The PCR Hearing Judge Commit Reversible Error By Ruling That No Prosecutorial Misconduct Occurred In His Murder Trial?

A. The prosecutor's closing argument resulted in the denial of a fair trial because the prosecutor's comments denigrated the integrity of defense counsel, both personally and in the abstract, as well as impugning, directly or through implication, the integrity or institutional role of defense lawyers. See: United States v. Ollivierre, 378 F.3d 412 (4th Cir. 2004) and United States v. Vaccaro, 115 F.3d 1211 (5th Cir. 1997)

B. The prosecutor effectively invited the jury to disregard the trial court's instructions on reasonable doubt. This occurred when the prosecutor decided to accept Defense Counsel's closing argument challenge regarding the reasonable doubt chart.

...Challenge to the Solicitor was that if he. (Solicitor) can disprove each and every one of those reasonable doubts on this chart, I guess you ought to convict of something. But he'll probability covers it up, turn away, and say he ain't got enough time.

C. The State procured the conviction of Mr. Fortune by knowingly allowing a State's key witness, Ms. Douglass/Gaston, to commit perjury. The State bolstered and used the perjured testimony to mislead the judge and the jury. The State thereby committed fraud upon the Court and the Jury. Mr. Fortune's defense of self-defense was unduly prejudiced by the prosecutorial misconduct.