VOLUME III OF III

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

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHNNY ELLIS JAMES, JR.
Assistant Attorney General
Attorney General Office
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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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,

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[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 SCRCP 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 SCRCP Rule 59, (a) (2) and (e) Motion. The Honorable Judge Paul Burch filed an Order Denying Motion Pursuant to SCRCP 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 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 comments[2] 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

[2]The 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 Lines18-22

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

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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 (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."

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. Cronic, 466 U.S. 648 (1984),

[3]The 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 United States v. Cronic, 466 U.S. 648 (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.

[4]March 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

Joel F. Stroud, Attorney, PLLC

PO Box 516 Chesterfield, SC 29709

Telephone: 843-623-5757

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,

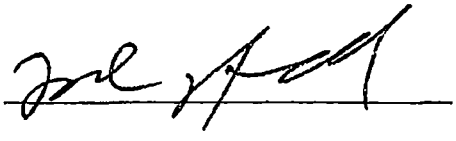
v.

State of South Carolina, Respondent.

PETITIONER OSCAR FORTUNE'S AMENDED BRIEF

The undersigned attorney hereby certifies that true copies of Petitioner Oscar Fortune's Amended Brief have been served upon Opposing Counsel, Ms. Karen C. Ratigan, Attorney for Respondent. Attorney Stroud hand delivered the original Brief May 12, 2014. The Amended Brief was delivered on November 25, 2014 - via USPS.

Respectfully submitted this 25th day of November, 2014.



Joel Stroud, Attorney for Oscar Fortune.

Joel F. Stroud, Attorney, PLLC PO Box 516 Chesterfield, SC 29709

Telephone: 843-623-5757 stroudlaw@shtc.net SC State Bar Number: 73797

Other Counsel of Record: Karen C. Ratigan, Assistant Attorney General

Post Office Box 11549 Columbia, South Carolina 29211-1549

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Oscar James Fortune, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212602

ON WRIT OF CERTIORARI

Appeal From Chesterfield County
John M. Milling, Trial Judge
Paul M. Burch, Post-Conviction Relief Judge

Unpublished Opinion No. 2016-UP-102
Submitted August 1, 2015 – Filed March 2, 2016

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Joel Flake Stroud, of Joel F. Stroud, Attorney, PLLC, of Chesterfield, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Karen Christine Ratigan, both of Columbia, for Respondent.

PER CURIAM: Oscar Fortune appeals the post-conviction relief (PCR) court's dismissal of his PCR application for his convictions for murder and possession of a weapon during the commission of a violent crime. On appeal, Fortune argues the PCR court erred by (1) denying his post-hearing motions and failing to address all issues raised in the motions; (2) failing to rule he was denied a fair trial because the State, in its closing argument, "denigrated the integrity of trial counsel" and impugned the "institutional role of defense lawyers"; (3) failing to rule the State violated his due process rights by inviting the jury to disregard the trial court's charge on reasonable doubt; (4) failing to rule he was denied a fair trial because the State knowingly allowed a witness to commit perjury; (5) failing to find his lead trial counsel[1] ineffective for presenting a "reasonable doubt charge chart" to the jury, challenging the State to disprove each item on the chart, and stating the jury should return a guilty verdict if the State succeeded in doing so; (6) failing to find lead trial counsel ineffective because he gave rambling and incoherent opening and closing arguments due to medical problems he suffered during the trial; (7) failing to find trial counsel ineffective for relying solely on cross-examination to cure the prejudice of a witness's alleged perjury; (8) failing to find trial counsel ineffective for not seeking dismissal when they realized the State indicted two people for the victim's murder; (9) failing to find trial counsel ineffective for not investigating and requesting a jury charge on defense of others; (10) failing to find trial counsel ineffective for not sufficiently consulting with Fortune's original trial counsel and obtaining a witness list from him; and (11) failing to find trial counsel ineffective for not objecting to the State referring to the decedent as the "victim."

We affirm the PCR court's order of dismissal to the extent it ruled on the merits of Fortune's claims. However, because the PCR court failed to address all issues Fortune properly raised to it, we vacate the portion of the PCR court's order of

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[1] Fortune was represented at trial by two attorneys (collectively "trial counsel"): Edward Saleeby (lead trial counsel) gave opening and closing statements and questioned two witnesses, while Terrence Quinn (trial co-counsel) questioned the remaining witnesses.

dismissal ruling Fortune waived several of his claims. We also vacate the PCR court's order denying Fortune's Rule 59(e), SCRCP, motion. The case is remanded to the PCR court for a ruling on the merits of Issues 2, 4, and 7.

In its order of dismissal, the PCR court ruled, "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 [o]rder, this [c]ourt finds the Applicant waived such allegations and failed to meet his burden of proof regarding them." However, Fortune presented evidence at the PCR hearing that was relevant to Issues 2, 4, and 7. Accordingly, the PCR court abused its discretion by making the above ruling and failing to rule on the merits of these issues. *See* S.C. Code Ann. § 17-27-80 (2014) ("The [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."); *Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007) ("Pursuant to [section 17-27-80], the PCR [court] must make specific findings of fact and state expressly the conclusions of law relating to each issue presented."); *id.* at 409, 653 S.E.2d at 266-67 (reviewing a PCR order and finding similar language "does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law" and "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" (emphasis added)). We therefore vacate this ruling.

Following the entry of the PCR court's order of dismissal, Fortune filed a Rule 59(a)(2), SCRCP, motion requesting a new PCR hearing, along with a Rule 59(e), SCRCP, motion requesting that the PCR court alter or amend its order of dismissal. Fortune subsequently filed a memorandum in support of the motions in which he argued the merits of Issues 2, 4, and 7, among others. The PCR court found it was unnecessary under Rule 59(f), SCRCP, to hear arguments on Fortune's post-hearing motions, and it summarily denied both motions. As noted above, the PCR court abused its discretion in declining to address Issues 2, 4, and 7. Accordingly, we vacate the PCR court's denial of Fortune's Rule 59(e) motion.[2]

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[2] Fortune's argument that the PCR court erred in denying his motion for a new hearing is abandoned because he failed to present the argument in his appellate brief. *See State v. Lindsey*, 394 S.C. 354, 364, 714 S.E.2d 554, 559 (Ct. App.

Issue 5 is abandoned because Fortune made a conclusory argument and failed to cite to legal authority in his appellate brief in support of the argument. *See Lindsey*, 394 S.C. at 363, 714 S.E.2d at 558 ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *State v. Addison*, 338 S.C. 277, 285, 525 S.E.2d 901, 906 (Ct. App. 1999) ("Conclusory arguments constitute an abandonment of the issue on appeal."), *aff'd as modified*, 343 S.C. 290, 540 S.E.2d 449 (2000).

Issues 3 and 11 are unpreserved because Fortune failed to raise them to the PCR court at his hearing. *See Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (holding an argument must be raised to and ruled upon by the PCR court in order to be preserved for appellate review). Similarly, Issue 8 is unpreserved because the PCR court failed to rule on it in its order of dismissal and Fortune failed to raise it in his Rule 59(e) motion. *See Burgess*, 402 S.C. at 95, 738 S.E.2d at 265 ("[T]o properly preserve an issue for appellate review, it is incumbent upon a party in a PCR action to [raise the issue in] a Rule 59(e) motion in the event the PCR court fails to make specific findings of fact and conclusions of law regarding an issue.").

The PCR court's rulings on the merits of Issues 6, 9, and 10 are affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (stating the PCR court's factual findings will be upheld if supported in the appendix by any evidence of probative value); *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 102 (2013) ("[C]ourts evaluate allegations of ineffective assistance of counsel using a two-pronged test."); *id.* ("First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness."); *id.* ("Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different."); *id.* ("A

2011) (stating an issue is abandoned on appeal if listed in the statement of issues but not addressed in the brief).

reasonable probability is a probability sufficient to undermine confidence in the outcome." (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.[3]

HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

State of South Carolina)
)
County of Chesterfield)

In the Court of Common Pleas
Fourth Judicial Circuit
2009-CP-13-00323

Oscar James Fortune

Plaintiff,

vs.

The State

Defendant.

Transcript of Record

Darlington, South Carolina
August 2, 2016

B E F O R E:

The Honorable Paul Burch

A P P E A R A N C E S:

Mr. Joel Stroud, Esquire
Attorney for Plaintiff

Ms. Jessica Kinard, Esquire
Attorney for Defendant

Hattie O. Gordon
Circuit Court Reporter

Typed by: Lisa S. Carter
Circuit Court Reporter

I N D E X

WITNESSES	PAGE

(NO WITNESSES INTRODUCED DURING HEARING)

EXHIBITS

NO.	DESCRIPTION	EV.

(NO EXHIBITS INTRODUCED DURING HEARING)

THE COURT: This Oscar James Fortune, appellate, versus the State of South Carolina, counsel, y'all correct me if I'm wrong about this, but to just sort of lay the ground work, this matter was before the Supreme Court and they've remanded it back for a further hearing on some issues that I didn't address in the order that was brought up on reconsideration and they wanted more clarification on that so, basically, we can say we're not retrying the case. The only thing we're here before the Court on is for those particular issues that the Supreme Court is concerned about. So I would appreciate it if both of you, however, you want to do it, would outline to me exactly what those issues are and so we can address those and take it from there. Mr. Stroud felt like it may could've been handled by briefs. The, attorney general, as I understand from my clerk, felt like we probably needed a hearing so here we are. So who wants to - - -

MS. KINARD: Your Honor - - -

THE COURT: - - - get the ground work laid here.

MS. KINARD: Thank you for having us and for agreeing for us to have the argument. I did feel out of abundance of caution that it was perhaps the best course of action just to have a group hearing on the matter. I can lay out some past procedural history if you'd like, more in depth than that, or we can jump right in to the issues.

THE COURT: Since so much time has gone by let's get the ground work laid so everybody will understand what we're doing.

MS. KINARD: Yes, sir. The case number that we are here on was originally and still is because it's a remand, 2009-CP-13-0323. This is by way of an application of post conviction relief that was filed August 18, 2009. The respondents made its return, December 23, 2009. An evidentiary hearing was held here, January 11, 2012. The applicant was present and represented by Mr. Joel F. Stroud and Karen Ratigan of the Attorney General's Office, represented the State. Testifying at that hearing were the applicant, Mr. Fortune, Blanche Fortune and the applicant trial attorneys who were Edward Saleeby, Jr. and Terrence Quinn. The Court had the trial transcript, clerk's records, SCDC records, and relevant filings in this matter.

This is a Chesterfield County case. The applicant was indicted after the March 2002 term of the Chesterfield County Grand Jury for murder and at the November 2005 term, for possession of a weapon during the commission of a violent crime. At trial the applicant was found guilty before the Honorable John milling. On March 9, 2006, he was sentenced to concurrent terms of thirty-seven years for murder and five years for possession of a weapon. He appealed this. Robert Dudek of the South Carolina Office

of Appellate Defense perfected the appeal. The Court of Appeals confirmed the applicant convictions and sentences.

After this PCR hearing was held to go back, it was held January 11, 2012, an appeal was filed and perfected. This went through the briefing process before the South Carolina Supreme Court and eventually an order was issued filed March 2, 2015, that the firm impart vacated a part and remanded this issue. It's the State's position that before the Court today is only the issues outlined by the Supreme Court, which are specifically that three issues that were presented on appeal, we're not ruled upon by this Court in the underline hearing. Those were labeled as issues two, four, seven and to just put those on the record; number (2), is a failure to rule that Mr. Fortune was denied a fair trial because the State, in it's closing argument, "denigrated the integrity of trial counsel" and impugned the "institutional role of defense lawyers"; issue (4), was a failure to rule that Mr. Fortune was denied a fair trial because the State knowingly allowed a witness to commit perjury; and issue (7), was failing to find trial counsel ineffective for relying solely on cross-examination to cure the prejudiced of witness's alleged perjury.

The State's position is that simply we just need a ruling from this Court on those issues. The State relies primarily on the transcript of the PCR hearing that was

held before Your Honor. We do not have the benefit of the testimony, particular Mr. Saleeby's, as he is no longer with us but the State is happy to argue those three issues. We do still maintain that Mr. Fortune and Mr. Stroud have the burden of proving any deficiency or prejudiced based on the performance by Mr. Saleeby or Mr. Quinn as pertain to these three issues.

THE COURT: Mr. Stroud, are y'all in an agreement that those are the three issues on remand?

MR. STROUD: I am and I guess the only contention I would have is that the burden of proof has been settled. The Court granted the petitioner's concerning all three raised issues and we are at the stage now where we just need you to make the decision, no further arguments should be made. The petition, the order of dismissal that was talked about in the opinion was, part of what was vacated, the other issue, I guess, that might be contentious is that the Rule 59 was denied in its entirety. So, in the finding of the fact that you need to address, it would also be in the Rule 59 motion. Those issues are pretty much incorporated and they were never addressed. So we have to address the un, I guess, unexplained or un, ah, delineated positions that also were in that Rule 59 because the order clearly stated that the Rule 59 motion was vacated.

MS. KINARD: Our position on that, Your Honor, is

looking at the third page of the order, it says, the State's reading is that because it found that this Court use its discretion and declining to address those issues that is why they vacated the denial of his 59(e). So my interpretation of that is they vacated the 59(e) simply to allow this Court to go back and address those three issues. And as to how the 59(e) pertain to those, certainly those are wrapped up together but solely it still issues two, four, and seven of this order.

MR. STROUD: On page three - - -

MS. KINARD: Above footnote 2 - - -

MR. STROUD: Yep.

MS. KINARD: The last two?

MR. STROUD: But it also says on Page 1 of the that he had - - -

COURT REPORTER: Is this on the record?

MR. STROUD: - - - other issues on the merit of - - -

MS. KINARD: I believe you're referring to the second paragraph where, "we affirm the dismissal and so forth" and it specifically ends, "the case is remanded to the PCR court for a ruling on the merits of issues two, four, and seven.

MR. STROUD: What page is that? And so there were other - - it's clearly saying, there were other notorious

motions that were in the, this document - - -

THE COURT: Mr. Stroud, you need to speak up. She's having a hard time hearing you.

MR. STROUD: There were clearly other claims that were not waived in the file memorandum of law that was filed on 2012 - - anyway, it' clearly filed in the 2012, memorandum of law. So there are issues in here, in addition, to two, four, and seven, where the finding of facts go back - - what the Court, basically, is asking is it would go back in time and we would look at this entire document, is our position. But we don't do it, it's - - Your Honor does it, because we have, there's no new evidence to present, we are in agreement with her basic opposition to have, our duties are over with, it's your duty now to understand what this case was about and that's why we're here is to get a complete finding of facts this time on all of the issues and, I guess, you know, I can argue or say what we believe is that this was a case of self-defense because Judge Milling gave a self-defense instructions, something happened that prevented the Court or the jury from finding that and it was issues two, four, and seven.

THE COURT: Okay. Anything else?

MR. STROUD: That's it, unless, she has something.

MS. KINARD: I certainly disagree with his

interpretation of that paragraph and I would just suggest that if we can be of any help to the Court's understanding as far as guiding case law or maybe citations to the transcript regarding those three issues that would be our duty here today.

THE COURT: All right. I'm going to take it under advisement. Y'all try to get me any briefs that you would like to send for Bryan and I to review. We're going to have to go back through this and try to piece it together so any help y'all can give us as far as brief, try to get them in as soon as possible.

MR. STROUD: All right. Can you give us some guidelines at - - our simply position is that there's no need for briefs. This hearing - - the Court remanded it back for a decision and there's nothing we need to provide to you.

THE COURT: That's fine. I'm just saying if there something that you overlooked or you want me to look at give it to me.

MR. STROUD: Well, the only thing we would like for you to look at is the existing materials. No new briefs.

THE COURT: Okay.

MR. STROUD: And I don't want the State to provide any new briefs.

THE COURT: No, sir. You're not going to sit here

and tell me what I can ask for now, sir. Do you understand what I'm saying? I said if you would like to send briefs you can do it. You're not going to sit here and dictate to me what I'm going to do.

MR. STROUD: Sir, I didn't know I was dictating. I was just was - - -

THE COURT: No, sir. You sat right there and you told me what I was going to do. Now, if you want to send a brief to try to condense all this for me to try to come up with an in order that's fine. If you don't want to do it then sit there and be quiet. But don't you come in my court and telling me what I'm going to do.

MR. STROUD: I apologize. I certainly didn't think that I did.

THE COURT: This hearing is over with.

(CONCLUSION OF THE HEARING ON AUGUST 2, 2016)

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court for Chesterfield County, South Carolina, on the 2nd day of August, 2016.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Lisa S. Carter

Lisa S. Carter
Circuit Court Reporter

December 10, 2016

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	OF THE FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	
	Case No.: 2009-CP-13-0323
Oscar Fortune, #314269,	2016 SEP 12 PM 1 12
Applicant,	FAYE [illegible] CLER[illegible] CHESTER
v.	
	ORDER
State of South Carolina,	
Defendant.	

This matter is before the Court on remittitur from the South Carolina Court of Appeals. Before the Court are three issues as outlined by the Court of Appeals. Fortune v. State of South Carolina, 2016-UP-102, filed March 2, 2016. This order affirmed in part, vacated in part[1], and remanded to this Court three issues that the Court of Appeals held were not adjudicated during the initial post-conviction relief ("PCR") hearing. Specifically, these issues are (1) whether Applicant was denied a fair trial because "the State, in its closing argument 'denigrated the integrity of trial counsel' and impugned the 'institutional role of defense lawyers;'" (2) whether Applicant was "denied a fair trial because the State knowingly allowed a witness to commit perjury;" and (3) whether "trial counsel was ineffective for relying solely on cross-examination to cure the prejudice of a witness's alleged perjury." Id. A hearing was held on August 2, 2016, at the Darlington County Courthouse to present these issues, after which the parties submitted briefs regarding the matter.

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

PMB

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

The exact statements made during the closing argument are:

> **Prosecutor:** I want to start by telling you that we both have jobs here. My job is to present the truth. In fact, if you look at the SC Code of Laws which mandates what a Solicitor's job is, we can't be like a normal attorney is. A normal lawyer has to advocate on behalf of his client. But on the other hand, the Solicitor can't. We have to say what the truth is and it's... App. p. 630 Lines 13-20
>
> **Defense Counsel:** Your Honor I normally don't object. He started out with his job is presenting the facts in the light most favorable to his case. The jury are the finders of the truth. App. p. 630 Lines 21-24
>
> **The Court:** The jury is the finders of the truth. I think what he was referring to was there is also an obligation on the Solicitor's Office beyond simply that of presentation, but the jury does have the burden of deciding what is the truth in this matter. App. p. 630 Line 25 – p. 631 Lines 1-4
>
> **Prosecutor:** And what that means is that we have something in the law that called nolle pros, and a nolle pros a person that has been indicted for a crime or charged with a crime. After further investigation somebody did the crime where you can dismiss it and nolle pros is the notify in which we dismiss the case. And I know the person has done something that I think the facts show they're guilty of, then I can't nolle pros it. I have to go forward with it. And as I said, my job is to show the truth. On the other hand, the defense attorney's jobs are to manipulate the truth. They're job is to shroud the truth. They're job is to confuse jurors. They're job is to do whatever they have to without regard for the truth... App. p.631 Lines 7-20
>
> **Defense Counsel:** Objection your Honor. App. p. 631 Line 21
>
> **Prosecutor:** to get a not guilty verdict. App. p. 631 Line 22
>
> **The Court:** I don't think that their job is to defraud the Court or the jury and to that extent, I sustain the objection. App. p. 631 Line 23
>
> **Defense Counsel:** Thank you your Hon or. No need to go that far. App. p. 631 Lines 2-3.

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

PMB

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

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters; (5) whether the prosecutor's remarks were invited by improper conduct of defense counsel; and (6) whether curative instructions were given to the jury.

Wilson, 135 F.3d at 299. The solicitor's remarks, while improper, are not so prejudicial to Applicant's substantial rights so as to deprive him of a fair trial, especially when combined with the accompanying objections of trial counsel and the curative comments of the trial judge.

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

PMB

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

CONCLUSION

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

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

IT IS SO ORDERED.

The Honorable Paul M. Burch
Judge, Fourth Judicial Circuit

Pageland, South Carolina
September 9, 2016

State of South Carolina	)	In the Court of Common Pleas
County of Chesterfield	)	For the Fourth Judicial Circuit
Oscar Fortune, #314269,	)	Case Number: 2009 – CP – 13 – 0323
Applicant,	)	**SCRCP Rule 59, (a) (2) and (e) Motion**
	)	and
	)	**Memorandum of Fact and Law**
v.	)	
State of South Carolina,	)	
Respondent.	)	
	)	

On Friday, September 23, 2016, Attorney Joel Stroud called the Chesterfield County Clerk of Court's Office to determine the status of the Fortune case. The information given by the Clerk's Office was that the Honorable Judge Paul Burch wrote an Order on September 9, 2016 which was filed on September 12, 2016. The Clerk's Office had no explanation for why Attorney Stroud was not informed about this Order. Thus, in accordance with Rule 59 (b) Time for Motion, the 10-day deadline ends on October 3, 2016. This Order was issued after the State and Attorney Stroud e-mailed briefs to Judge Burch on August 22, 2016. Neither the State nor Attorney Stroud filed these briefs with the Clerk of Court's Office. The September 2016 Order

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 to before me
this [illegible] day of [illegible]
[illegible]
Notary Public for South Carolina
My Commission expires [illegible]

[illegible]
Signature of Affiant

The Order filed by Judge Burch is in violation of the Court of Appeals appellate decision filed on March 2, 2016 remanding Fortune's PCR issues for a ruling on the merits of issues two, four, and seven. The Appellate Court found that Mr. Fortune presented evidence at the PCR Hearing that was relevant regarding these issues. The Court of Appeals held that the PCR Court "abused its discretion."

The Order filed on September 12, 2016 is predicated on conclusory assertions unsubstantiated by factual and legal analysis. The Order failed to address all of the supporting issues and remedies included in Mr. Fortune's August 22, 2016 brief. Thus, Mr. Fortune is again required to file a Rule 59 Motion and Memorandum of Law. Facts and legal arguments relevant to the PCR issues propounded by Mr. Fortune have been improperly dismissed.

Regarding Issue Number Two (Referred to in Order as Issue Number 1), the Court predicated its holding on the case of United States v. Wilson. The Court,

in Wilson, concluded that the prosecutor's argument was highly improper, and that Mr. Wilson's substantial rights were prejudiced to the point of denying him a fair trial. The Wilson Court developed a six factor test to determine if a defendant has been denied a fair trial. In the case at bar, the order quoted the six factors but did not include an analysis of the facts and legal arguments Mr. Fortune and the Court of Appeals recognized as relevant evidence. The Order simply states that the solicitor's remarks, while improper, are not so prejudicial to applicant's substantial rights so as to deprive him of a fair trial, especially when combined with the coming objections of trial counsel and the curative comments of the trial judge. Mr. Fortune presented evidence that the trial counsel's objections and the curative instructions issued by Judge Milling were not effective in eliminating the prejudice to Mr. Fortune. The order failed to address the cases Mr. Fortune cited in support, as well as failing to address Mr. Fortune's Invited Reply Rule analysis. The Order failed to address the relevant evidence Mr. Fortune offered to show how the closing arguments impacted the jury. The Wilson Court thoroughly analyzed the six factors, whereas this Order only quoted the six factors, gave a decision, and failed to provide the appellate courts with any reasoned analysis. A thorough analysis of the six factors would support Mr. Fortune's argument that this prosecutorial misconduct was prejudicial and did deny him a fair trial.

Regarding Issues Number Four and Seven, (Referred to in Order as Issue Numbers 2 & 3) the Order did not recognize the relationship between prosecutorial misconduct denoted in issues one and two and the ineffective assistance

of counsel denoted in issue three. Had this nexus been recognized, Mr. Fortune's many supporting arguments would have served to link the improper closing argument to improper bolstering and vouching of the conflicting and contradictory testimony of State's Witness Ms. Douglas Gaston. This analysis would have shown that the jury made its decision based upon the conflicting testimony as opposed to the self-defense jury instructions given by Judge Milling. In Riddle v. Ozmint, 631 S.E.2d 70, 369 S.C. 39 (S.C., 2006), the Court held that:

> The issue is not why Jason failed to tell the truth: rather, it is why the solicitor, who knew Jason's testimony to be false, failed to correct it. A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. The failure to correct false evidence is as reprehensible as its presentation. The PCR judge erred in concluding that the State was not obligated to correct Jason's false testimony, and in failing to hold that this violation of petitioner's due process rights required that he be granted a new trial.

Rather than following this holding, the September 2016 Order disposed of Issue Number Four with a half of a page of non-persuasive content that ignored Mr. Fortune's argument that the contradictory testimony of Ms. Douglas Gaston, as well as the State's bolstering of tainted evidence, misled the jury and affected the jury's judgment and its ability to function impartially.

The Order also failed to address the Affidavit of Carolyn King Miles, a member of the March 2006 jury. In her Affidavit, Ms. Miles stated the effect the contradictory testimony had on Mr. Fortune's self-defense argument. Rather than address the actual issues regarding the contradictory statements that the State knew were false,

the Order instead focused on trying to show that contradictory statements were not perjury. Mr. Fortune never made the argument that Ms. Douglas Gaston should have been charged with perjury, nor is it important that she was not charged. The argument was that the contradictory statements impacted the jury and the verdict. The contradictory statements, in conjunction with the improper closing argument by the State, as well as the improper credibility the State imparted to this testimony by its improper bolstering and vouching of this contradictory testimony destroyed the self-defense jury instructions and denied a fair trial.

Moreover, the State and the Order cited State v. Byrd, an 1888 case that held that a conviction for perjury cannot be sustained merely on the contradictory sworn statement of the defendant. Again, the important issue is not whether Ms. Douglas Gaston was arrested for perjury, but how her testimony influenced the jurors. Furthermore, the leading case on perjury is State v. Stanley, 615 S.E.2d 455, 365 S.C. 24 (SC, 2005). In Stanley, the Court held:

> Deral contends that Richard's testimony at trial was not perjury because the police statement was not made under oath. We disagree. Section 16-9-10 of the South Carolina Code provides in pertinent part: (A)(1) It is unlawful for a person to willfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State. (2) It is unlawful for a person to willfully give false, misleading, or incomplete information on a document, record, report, or form required by the laws of this State. S.C.Code Ann. § 16-9-10 (2003). Mr. Richards' initial trial testimony directly contradicted his prior testimony given in a police statement. Giving false testimony in a document or report required by the laws of this State is perjury. Thus, if the information given to Officer Little was false, Richard was guilty of perjury. If the information was true, Richard perjured himself on the stand by contradicting it under subsection A1.

Thus, citing Byrd rather than Stanley is an egregious error. The Order's analysis of Issues Number Four and Number Seven is misguided and subverts the legal issues Mr. Fortune raised.

The September 2016 Order disposed of Issue Number Seven in one paragraph and never addressed any of the issues Mr. Fortune argued in the August 22, 2016 brief. The September 2016 Order never addressed ineffective assistance of counsel under either the Strickland or the Cronic Standards. The arguments Mr. Fortune propounded in this Brief regarding Issues Number Two, Four and Seven include the following:

1. The September 2016 Order failed to address the affidavit of Carolyn King Miles and the effect of Ms. Douglas Gaston's contradictory statements regarding the jury's decision of guilt as opposed to his defense and jury instruction of self-defense.
2. The Order failed to address Mr. Fortune's argument that he was wrongfully convicted due to ineffective assistance of counsel and prosecutorial misconduct that denied him a fair trial.
3. Absence of overwhelming evidence of guilt.
4. Ineffective assistance of counsel based on both the Strickland and the Cronic Standards.
5. The impact on the jury of Ms. Douglas Gaston's testimony that Mr. Fortune fired the last shot into Mr. Shield's back, as he was crawling, was so damaging that cross-examination could not refute or contain the

damage even though both of Ms. Douglas Gaston's contradictory statements were read into the record.

6. Evidence and testimony proving that Mr. Shields had a 25 caliber gun which he fired first.

7. Evidence and testimony that for 30 minutes after the shooting, the scene was unsecured and people of the crime scene tampered with evidence. The police and the state collected evidence, photographs, and determined facts based upon evidence at the scene after people had compromised the crime scene. Before the police arrived to secure the scene, Mr. Vincent Davis, State's witness, removed Mr. Shield's 25 caliber gun from the scene and kept it.

8. 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.

9. The September 2016 Order failed to address Mr. Fortune's harmless error analysis and thus this issue must be addressed in order to preserve it for appellate review.

10. The September 2016 Order failed to address Mr. Fortune's argument that law enforcement and the solicitor's office incorrectly determined that Mr. Shield's death was a murder, and that the act of putting Mr. Fortune on trial for nonexistent crime is unconscionable.

11. The September 2016 Order failed to address Mr. Fortune's argument that the evidence the State used to determine that the death of Mr. Shields was a murder conflicts with the South Carolina Rules of Evidence Rule 102 and Rule 41, as well as South Carolina Rules of Evidence 403.
12. The September 2016 Order failed to address Mr. Fortune's argument that a new trial would conflict with South Carolina Rules of Professional Conduct Rule 3.8 and Comment one.
13. The September 2006 Order failed to address Mr. Fortune's arguments that a new trial would present unresolvable burdens to both the solicitor and defense attorneys.
14. The September 2016 Order failed to address Mr. Fortune's argument that the remedy of discharge is the appropriate remedy and is provided pursuant to UPCRA SC Code Section 17 – 27 – 80.
15. The September 2016 Order failed to address Mr. Fortune's argument regarding his cumulative error analysis of issues Two, Four, and Seven.

SCRCP Rule 59 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.

The September 2016 Order must be reconsidered and address every issue and remedy Mr. Fortune set out in his August 22, 2016 Brief. This brief is hereby

presented below and considered to be part of this Rule 59 Motion and Memorandum of Law.

Respectfully submitted this 3rd day of October, 2016.

Joel Stroud

FORTUNE POST TRIAL BRIEF
by Attorney Joel Stroud

Justice demands that a wrongfully convicted person should be given his liberty forthwith. Mr. Fortune has already been in prison for over ten years after being convicted of murder, when he actually acted in self-defense. Keeping Mr. Fortune in prison is an attack on the right of self-defense. Mr. Shields, decedent, fired first, and in so doing, created the need for Mr. Fortune to use self-defense as a means of survival. The jury was given the verdict options of not guilty by reason of self-defense, guilty of voluntary manslaughter, or guilty of murder. Mr. Fortune was wrongfully convicted. The jury relied upon the perjured testimony of one witness in its choice to convict. The conviction was based on the perjured testimony given by Mrs. Douglas/Gaston that Mr. Shields was "crawling" away and was shot in the back, rather than on the truth as verified by the other witnesses, including the pathologist, that Shields was running, and the last shot fired was into his hand, not his back. According to several of the jurors who served in this trial, they wanted to render a verdict of not guilty based on self-defense, but the perjured testimony, combined with the fact that the prosecutor knowingly quoted the perjured statements in his closing argument, led the jury to convict Mr. Fortune.

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
[illegible] day of [illegible] [illegible]
[signature]
Notary Public for South Carolina

My Commission expires [illegible]

[signature]
Signature of Affiant

ISSUE NUMBER 2: Failing to rule he was denied a fair trial because the State, in its closing argument, "denigrated the integrity of trial counsel" and impugned the "institutional role of defense lawyers."

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. In United States v. Ollivierre, 378 F.3d 412, 421 (4th Cir. 2004), (vacated on other grounds by 543 U.S. 1112 (2005)); the prosecutor did attack "the institutional role of defense attorneys." See also United States v. Vaccaro, 115 F.3d 1211, 1218 (5th Cir. 1997) (finding that a statement that defense lawyers as a class seek to "muddle the issues" and "[t]ry[] to make [them] as fuzzy as possible" was "clearly improper"). See Susan Tappeiner v. State of South Carolina, Appellate Case No. 2013-001885.

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 improper and prejudicial 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 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 Hon or. No need to go that far.

These comments by the prosecutor violated Ollivierre and Wilson by attacking the institutional role of defense counsel and also denigrating the integrity of defense counsel to prejudice the Defendant's right to a fair trial. The trial was "so infected with unfairness as to make the resulting conviction a denial of due process." United States v. McDonald, 61 F.3d 248, 253 (4th Cir.1995). 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. See State v. Smith, 350 S.E.2d 923, 290 S.C. 393 (S.C. 1986) and State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). [1] Great care should be exercised in the "delicate, difficult, and important matter" of instructing the jury to disregard incompetent evidence. See 75 Am.Jur.2d, Trial, Section 748. The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the jury was far from sufficient to correct the error.[2]

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, circumstance is best addressed by a proper objection.[3] Mr. Fortune argues that his defense counsel's closing comments (App. p. 626, Lines 05-9[4] and p.

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[1] An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced.

[2] "the judge is not a mere moderator, [105 S.Ct. 1044] but is the governor of the trial for the purpose of assuring its proper conduct." Quercia v. United States, 289 U.S. 466, 469 (1933).

[3] 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." Young, 470 U.S. at 12-13, 105 S.Ct. 1038 (applying invited reply rule of Lawn).

[4] 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 [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.

643, Lines 18-22[5]) were not the kinds of comments that allow the prosecutor to fall within the ambit of the Invited Reply Rule as applied in Young.

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 trial, the prosecutor's closing argument went far beyond the outer boundaries of proper closing argument. 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."[6] 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.

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. 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

[5]The 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.

[6]March 2006 Trial Transcript, App. p. 662, Line 25 and p. 663, Lines 01-02.

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."[7] Mr. Fortune asserts that the prosecutor's closing argument violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel so as to warrant reversal.

ISSUE NUMBER 4: Failing to rule he was denied a fair trial because the State knowingly allowed a witness to commit perjury.

Mr. Fortune's defense of self-defense was unduly prejudiced by prosecutorial misconduct. 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) [8]

Ms. Douglass/Gaston's court testimony stating that Mr. Shields crawled away and was shot in the back contradicted 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 or five shots, but does not mention **seeing** any shot.

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

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[7]State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686 (1982).

[8] 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).

court testimony. 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.

On Direct of State's witness, Ms. Stephanie Douglas/Gaston, App. p. 469, Line 8-p. 470, Line10, Ms. Douglas/Gaston testified as follows:

> **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.

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. 311, Lines 14-17) 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." (App. p. 477, lines 1-4)

The Assistant Solicitor, 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. (App. p. 663 lines 15-18) 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.** This prosecutorial misconduct by the State was damning to Mr. Fortune in the minds of the jury.

In 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, 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 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 State's Direct of Mr. Barry Davis, he states that he **heard** the first set of shots. (App. p. 415, lines 5-6) Yet, in the State's closing, (App. p. 658, lines 6- 20), The Assistant Solicitor misstates the testimony of Mr. Davis and misleads the jury. The Assistant Solicitor tells the jury that the testimony of Mr. Barry Davis is that he **saw** those first shots. The Assistant Solicitor told the jury in this part of his closing on 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. The Assistant Solicitor 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. The Assistant Solicitor'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, The Assistant Solicitor 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. (App. p. 665, lines 8-13 and p. 666, lines 1-5) This is an outright misstatement of the evidence presented in the Autopsy Report which states that only one shot was located in Mr. Shield's back. 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 Mr. Shields' Autopsy Report, Dr. Inas Z. Yacoub, M.D., Pathologist, App. p. 897, 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."

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. **The pathologist's testimony signifies that the first or second shot was in the back and described as a contact wound, and the last shot was in the hand, not in the back. This testimony by the pathologist contradicts Ms. Douglas/Gaston's testimony that the final shot was into Mr. Shield's back as he was crawling on the ground.**

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 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. 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 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 the conviction 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.

ISSUE NUMBER 7: Failing to find trial counsel ineffective for relying solely on cross examination to cure the prejudice of a witness's alleged perjury.

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 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.[9] 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)).[10]

[9] State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).
[10] State v. Bostick, 708 S.E.2d 774, 392 S.C. 134 (S.C. 2011).

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 on the jury of Ms. Douglas/Gaston's testimony 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. 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.

Evidence and testimony showed that Mr. Shields had a .25-caliber gun, which he fired first. 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.

For 30 minutes after the shooting, the scene was unsecured, and people at the crime scene tampered with evidence. 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 to secure the crime scene, **Mr. Vincent Davis, State's witness 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.

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. 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 was in fear for his live. These facts caused Mr. Fortune to use self-defense as his only recourse.

CONCLUSION

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. Both of Fortune's issues of prosecutorial misconduct and ineffectiveness of counsel would survive the crucible of harmless error analysis.

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. Mr. Fortune, with the remedy of discharge as provided pursuant to UPCRA S.C. Code § 17-27-80, can be restored to a useful place in the community.

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. 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. 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. 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 10 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 respectfully requests this Court to grant the remedy of discharge. His murder conviction was fundamentally unfair and without due process. Mr. Fortune must be exonerated and his record of conviction expunged. His conviction and assignments must be vacated, set aside, and rendered void. Mr. Fortune requests that the Court Grant a Rule nisi, directing that the State cannot subject him to a new trial on this matter. Mr. Fortune requests that the Court have the Record reflect that he acted in self-defense. Pursuant to Simpson v. Moore, 627 S. E. 2d 701, 367 S.C. 587 (S.C. 2006). Mr. Fortune reserves the right to include a cumulative error analysis as one of his arguments regarding issues 2, 4, and 7.

Mr. Fortune requests any and all other remedies the Court may find applicable.

Respectfully submitted this 22nd day of August, 2016 by Attorney Joel Stroud as requested by Judge Burch at the August 2, 2016 hearing.

Joel Stroud

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

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

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

AND IT IS SO ORDERED.

Honorable Paul Michael Burch
Judge, Fourth Judicial Circuit

Pageland, South Carolina
October 7, 2016

VTS/1092

WITNESSES

Harold Hainey

Ccsd JH.

ARREST WARRANT #:

D649533

Arrested on December 23, 2001

ACTION OF GRAND JURY

True Bill

Foreman: Cynthia J. Davidson
Grand Jury

2/28/02

VERDICT

Foreman: _____
Petit Jury

Date: _____

DOCKET #: 02GS13-0137

THE STATE OF SOUTH CAROLINA

County of Chesterfield

COURT OF GENERAL SESSIONS

Term: March, 2002

THE STATE

vs.

Oscar James Fortune

GUN DB

INDICTMENT FOR

0116

MURDER

16-3-10

BOOK _____ PAGE _____

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

STATE OF SOUTH CAROLINA)
) INDICTMENT #02GS13-0137
County of Chesterfield)

At a Court of General Sessions, convened on March 04, 2002 the Grand Jurors of Chesterfield County present upon their oath:

COUNT: MURDER
16-3-10

That Oscar James Fortune in the County of Chesterfield on or about December 23, 2001, feloniously, wilfully and with malice and aforethought, kill one, Anthony Shields by means of shooting and that the said Anthony Shields did die in Chesterfield County as a proximate result thereof on or about the 23rd day of December, 2001.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

SOLICITOR: _____