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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM UNION COUNTY
COURT OF COMMON PLEAS
Hon. Walton J. McLeod, IV, Circuit Judge

Case No. 2019-CP-44-00222

Appellate Case No.: _ 2023-000643

Najm Ahmad Thomas, #377500, ... Appellant,

v.

State of South Carolina,. . . . . Respondent.

AMENDED NOTICE OF APPEAL

Najm Ahmad Thomas, #377500, Petitioner in the above captioned case, hereby appeals from the ORDER OF DISMISSAL signed by the Hon. Walton J. McLeod, IV, on April 17, 2023, a copy of which is incorporated herein by attachment and reference.

Respectfully submitted,
s/ J. Falkner Wilkes
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April 28, 2023.

STATE OF SOUTH CAROLINA COUNTY OF UNION	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Najm Ahmad Thomas, #377500, Applicant, v. State of South Carolina, Respondent.	Case No.: 2019-CP-44-00222 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Najm Ahmad Thomas ("Applicant") on July 15, 2019, and amended on August 22, 2022. The Court convened an evidentiary hearing into the matter on December 8, 2022, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by J. Falkner Wilkes, Esquire. Assistant Attorney General Zachary W. Jones, of the South Carolina Attorney General's Office, represented Respondent. The Court permitted the parties to submit additional memoranda concerning the issues addressed at the hearing.

The Court has before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Union County Clerk of Court regarding the subject conviction, the pleadings, and the additional memoranda submitted in this case. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and, therefore, denies and dismisses this application with prejudice. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In May 2017, the Union County Grand Jury indicted Applicant for Attempted Murder (2017-GS-44-0845). Michael Brown, Esquire ("Trial Counsel"), represented Applicant at trial. Deputy Solicitor John

Anthony, of the Sixteenth Circuit Solicitor's Office, prosecuted the case. On August 20, 2018, Applicant proceeded to a jury trial before the Honorable William A. McKinnon. On August 23, 2018, the jury found Applicant guilty of the lesser included offense of Assault and Battery of the High and Aggravated Nature (ABHAN). On August 23, 2018, Judge McKinnon sentenced Applicant to sixteen years of imprisonment. Applicant did not appeal his conviction or sentence.

II. FACTS GIVING RISE TO THE CONVICTION

On August 28, 2016, Applicant drove his black PT cruiser to Munro Street in Union County near a gas station. There he encountered the victim, Elizawon "Malik" Gray, while the latter was walking down the street; Gray had had a conflict with Applicant on a prior occasion. Applicant fired thirteen shots at Gray, striking him ten times. Applicant left the scene in his vehicle and drove to the nearby gas station, where he attempted unsuccessfully to sell the firearm used in the shooting to an acquaintance, Travis Duncan. (Trial Tr. pp. 320–28; pp. 168–72). Applicant told Duncan that "police were going to be hot" because "he had heard there had been a shooting." (Trial Tr. p. 172, lines 1–2).

After first responders arrived at the scene of the shooting, the injured Gray gave a description of Applicant and his vehicle. He said he knew Applicant by the nickname "Ghost," and he believed he was shot because Applicant "assumed I took something from him." (State's Exhibit #2). Shortly thereafter, Applicant returned to Munro Street, and officers recognized him and his car from Gray's description. (Trial Tr. p. 127). They questioned Applicant, who initially denied any involvement in the shooting. When asked if he had a gun, Applicant told investigators about a gun he kept at his parents' house but did not mention the gun used in the shooting, which Applicant kept in his car. (Trial Tr. pp. 198–99).

Investigators located a video from the gas station that showed Duncan getting into Applicant's car shortly after the shooting. When they questioned Duncan about that interaction, Duncan explained Applicant had shown him a gun he kept behind his glove box that he wanted to sell. Based on this information, investigators searched that part of Applicant's car and found the gun hidden behind a removable glove compartment. (Trial Tr. pp. 172–73; p. 184; p. 251). The gun found behind the glove box matched the spent casings found at the scene of the shooting. (Trial Tr. pp.308–10).

Applicant was arrested and charged with attempted murder. Prior to trial, Gray, who survived the shooting, told the solicitor he did not want to participate in Applicant's trial. (Rule 29 Tr. pp. 11–12). Applicant testified in his own defense at trial, stating that on the night of the shooting he was driving down Siam Street toward the Munro Street intersection when his car started having problems. He pulled over "at the stop sign at the bottom of Siam street . . . like in front of the house where you make the right on Siam Street." (Trial Tr. p. 321). Applicant testified he got out of his car and was checking on it when Gray appeared from the bushes behind him. (Trial Tr. p. 322). Applicant stated Gray emerged near a house on the left side of Siam Street. (Trial Tr. p. 351).[1]

Applicant stated he recognized Gray as having robbed him a few weeks prior to the shooting. (Trial Tr. p. 325). Applicant claimed he shot Gray in self-defense because Gray threatened him with something in his hand. (Trial Tr. p. 322). However, no weapon was found

[1] However, Gray was found by first responders a substantial distance to the right of the Siam Street intersection—two driveways away -and the spent shell casings from Applicant's gun were found farther still. (Trial Tr. pp. 264–67; State's Exhibit #3).

near Gray at the scene. (Trial Tr. p. 127, lines 1–2). Applicant also stated he thought Gray ran away, and he testified "he was still running when I shot." (Trial Tr. p. 329).[2]

III. CURRENT PCR ACTION

Applicant timely filed his initial post-conviction relief ("PCR") application on July 15, 2019. He later, through counsel, filed a "Statement to Make More Definite and Certain," raising the following allegations:

1. Trial counsel failed to investigate the potential reasons behind Gray's reluctance to testify and his absence at trial;
2. Trial counsel failed to subpoena Gray to provide exculpatory evidence for the "stand your ground" hearing held prior to trial;
3. Trial counsel failed to subpoena the alleged victim at trial to provide exculpatory evidence relating to Gray's prior armed robbery of Applicant and his attempt to rob Applicant on the date of the shooting;
4. Trial counsel failed to subpoena Gray to the Rule 29,[3] SCRCrimP, hearing or to move to continue the hearing upon learning Gray was not in court to testify;
5. Trial counsel failed to call the prosecutor as a witness at the Rule 29 hearing to give evidence regarding his interactions with Gray or any other potentially exculpatory evidence in the State's possession that should have been turned over to the defense;
6. Trial counsel failed to preserve the following issues for direct appeal:
   a. Court's error in admitting evidence of an alleged confession,
   b. Court's error in failing to direct a verdict,
   c. Admission of inadmissible hearsay attributed to Gray,
   d. Improper closing argument by the prosecutor,
   e. Court's error in proceeding with the Rule 29 hearing without the presence of Gray.
7. The prosecution failed to disclose all discoverable information to the defense regarding Gray's reluctance or refusal to cooperate with the prosecution.

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[2] At trial, Dr Brian Whitfield, who treated Gray, testified Gray had sustained multiple gunshot wounds on both the front and back of his body, although he could not say whether any of them were entrance or exit wounds. (Trial Tr. pp.226–28; State's Exhibit #8).

[3] In his filing, Applicant refers to this hearing as a "Rule 59" hearing.

Prior to the evidentiary hearing on December 8, 2022, Applicant agreed to drop the allegations relating to the prosecution's alleged failure to disclose discoverable information and to proceed on the allegations of ineffective assistance of Trial Counsel. At the hearing, Applicant supplemented his prior filings with a "Trial Memorandum," clarifying some of the remaining issues on which he intended to go forward. After the hearing, with the Court's permission, Respondent submitted a "Memorandum in Opposition to Amended Post-Conviction Relief Application," and Applicant subsequently submitted a "Post-Trial Memorandum of Applicant."

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Counsel, Generally

In a PCR action, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*.

First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 687; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the

court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, therefore, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

In sum, the standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696–97.

1. Allegations regarding Trial Counsel's Failure to Produce Gray's Testimony

Applicant raises multiple allegations of ineffective assistance of counsel relating to Trial Counsel's failure to ensure Gray appeared at trial to testify for the defense. The Court finds these allegations to be without merit.

Applicant called Gray at the evidentiary hearing, who testified that he had robbed Applicant prior to the shooting by threatening him with a pellet gun. Gray also testified that, on the night of the shooting, he had tried to rob Applicant, although Gray did not have a weapon. Applicant contends this testimony would have strengthened his self-defense claim if it was presented at trial and would have supported his motion for a new trial at the subsequent Rule 29 hearing. Without corroboration by Gray, Applicant was left with only his own self-serving testimony to support his claim of self-defense. Consequently, Applicant claims, Trial Counsel was ineffective for failing to subpoena Gray to testify.

At the evidentiary hearing, Trial Counsel testified that it was difficult to get any information out of Gray. Trial Counsel explained that, in his conversations with Gray, Gray never told him he had been trying to rob Applicant on the night of the shooting until after the trial. Before the trial, Gray had only told Trial Counsel that he had an altercation with Applicant *prior to* the night of the shooting and that he did not want to cooperate with the prosecution. This testimony

was consistent with Trial Counsel's position at the Rule 29 hearing. (Rule 29 Tr. p. 4, lines 4–20; p.7, lines 5–21). Trial Counsel testified that, had he known Gray was going to say he tried to rob Applicant on the night of the shooting, he would have attempted to call him to testify at Applicant's trial; however, at the time of trial he had seen no indication Gray was going to admit that on the stand.

At the Rule 29 hearing, Trial Counsel attempted to obtain a new trial based on his post-trial communication with Gray regarding Gray's purported attempt to rob Applicant on the night of the shooting. Trial Counsel, however, was not able to locate Gray in time for him to provide an affidavit or to testify at the Rule 29 hearing. (Rule 29 Tr. p.15, line 25–p.16, line 14). Contrary to the allegation in Applicant's "Statement to Make More Definite and Certain," Trial counsel *did* move for a continuance and requested additional time to locate Gray. (Rule 29 Tr. p. 16, lines 15–19). The court denied the motion for a continuance but granted Applicant leave to re-file his new trial motion within the one-year deadline, i.e. by August 24, 2019. (Rule 29 Tr. p. 18, lines 1–20).

At the evidentiary hearing, Trial Counsel testified he attempted to locate Gray but was unsuccessful. The solicitor also testified, stating he attempted to subpoena Gray to testify at trial, but Gray could not be located. The only subsequent record of Gray's involvement is an affidavit dated April 12, 2021—long after the one-year deadline for filing a Rule 29(b) motion had expired. Due to Gray's admitted reluctance to participate in the criminal proceedings against Applicant, and both parties' inability to locate him, there is no evidence that Trial Counsel had any opportunity to produce Gray's testimony, either at trial or at any other time within the one-year period for filing a Rule 29(b) motion. In addition, Trial Counsel had no way of knowing prior to trial that Gray's testimony would be consistent with Applicant's self-defense claim; all he knew was that the victim refused to cooperate with the prosecution, which is normally *favorable* to the

defense. Applicant has not shown that Trial Counsel's conduct fell below an objective standard of reasonableness. Therefore, Applicant has not met his burden to prove Trial Counsel's failure to produce Gray's testimony was deficient.

In addition, Applicant has not met his burden of proving prejudice from Gray's failure to testify. The account of the incident that Gray presented at the evidentiary hearing did not describe the event in any detail. In his April 12th, 2021, affidavit, he merely states that he saw Applicant on the side of a street and approached him in an "aggressive manner," at which point Applicant "started to defend hisself [*sic*]." He does not explain what about his "manner" was "aggressive," and he admits he did not have a weapon. Contrast this barebones account with Gray's statements to first responders shortly after he was shot, in which—despite his life-threatening wounds—he is able to articulate that he was shot by a young male with dreads, nicknamed "Ghost," driving a black PT cruiser. Gray's statement to first responders was sufficiently accurate that police were able to apprehend Applicant that same night based on his description. However, on the night of the shooting, Gray told police Applicant shot him because he "assumed I took something from him," instead of saying Applicant was defending himself from Gray's aggression. Put simply, the detailed and accurate account given by Gray on the night of the incident is inconsistent with the cursory account he gave at the evidentiary hearing.

Furthermore, even if Gray had testified at trial, most of the State's case *disproving* self-defense would not be disturbed by Gray's testimony: that Applicant admitted Gray was running away while he shot him; that Gray was unarmed; that Applicant shot Gray numerous times; and that Applicant's efforts to conceal his involvement in the shooting by selling the gun and lying to investigators showed consciousness of guilt.

In addition, Applicant's story was not consistent with objective evidence found at the scene. To wit, Applicant claimed to have pulled over to the right of the Siam Street stop sign, at which point Applicant approached from the house on the left side of Siam Street and "threatened" him. As was shown at trial, however, the spent shell casings matching Applicant's gun were found a substantial distance down Munro Street, as was Gray himself and his various personal effects. If Gray had testified consistently with Applicant, this evidence would discredit both their stories equally. As such, for the reasons described above, Applicant has not shown that the result of his trial would likely be different if Gray had testified.

The Court, therefore, finds Applicant has failed to prove either deficiency or prejudice from Trial Counsel's failure to procure Gray's testimony in his defense.

2. Trial Counsel's Alleged Failure to Advise Applicant of the Right to Appeal

Applicant also claims Trial Counsel failed to advise him of the right to appeal. However, Applicant failed to present evidence at the hearing to substantiate this claim. Therefore, the Court finds Applicant has failed to meet his burden of proving Trial Counsel was ineffective as to this issue.

3. Trial Counsel's Failure to Object

Applicant claims trial counsel failed to properly object to inadmissible evidence and to certain prejudicial comments by the solicitor. The Court finds these allegations to be without merit.

First, Applicant alleges Trial Counsel failed to object when the court excluded evidence of Gray's statement explaining his prior difficulties with Applicant. (Trial Tr. pp. 97–99). Presumably, Applicant is referring to the June 2017 affidavit in which Gray states he had an

altercation with Applicant prior to the night of the shooting. Applicant, however, neglects to explain what was improper about the court's ruling.

Affidavits generally constitute inadmissible hearsay. *Ex Parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). In addition, Applicant does not explain how he was prejudiced by the exclusion of that statement. By itself, the fact that a defendant had prior difficulties with a victim is not inconsistent with guilt of a charge of ABHAN. The burden is on Applicant to show how the result of his trial would have been different had Trial Counsel acted differently, but this burden has not been met with respect to this allegation.

Second, Applicant claims Trial Counsel failed to object when the solicitor referred to Gray's identification of Applicant during opening statements as being both hearsay and outside the record. Similarly, Applicant claims Trial Counsel should have raised hearsay and confrontation clause objections to the introduction of the body-cam video wherein Gray identifies Applicant as the shooter. Since there was substantial other evidence implicating Applicant as the shooter, including Applicant's own testimony, there is no possibility that this statement by the solicitor or the body-cam video prejudiced Applicant.

Third, Applicant claims Trial Counsel failed to object "to the solicitor's comments about defense calling of witnesses," citing page 113 of the transcript. There, the solicitor states to the jury, "Mr. Thomas is not under any obligation to call any witnesses, but if he calls witnesses, listen to the questions that his lawyer asks of the witnesses, but listen to the questions that I ask those witnesses, too." (Trial Tr. p. 113, lines 5–9). This sentence is the only reference to "witnesses" on the cited page. Applicant has not explained what was allegedly objectionable about that sentence or how the result of the trial would have been different had Trial Counsel objected to it.

Finally, Applicant claims Trial Counsel should have objected on hearsay grounds when one of the State's witnesses, Investigator Scott Ruby, testified to statements made by Gray shortly after the shooting when Ruby was dispatched to the incident location. Ruby testified Gray identified the shooter as "Ghost" and said he was shot because Ghost "thought [Gray] owed him something." (Trial Tr. pp. 123–24).

At the time Gray made those statements, he was lying in the road "bleeding from obvious injuries." (Trial Tr. p. 123, line 4). Another first responder was performing first aid on Gray while the ambulance was on its way. (Trial Tr. p. 124). The body-cam video recorded Ruby's interactions with Gray. (State's Exhibit #2). It is plain from these facts that Gray made the statements while under extreme stress due to the shooting, and the topic of his statements was related to the shooting—explaining who shot him and why. Under the circumstances, Gray's statements were clearly admissible under the "excited utterance" exception to the rule against hearsay. *See* Rule 803(2), SCRE. There was, therefore, no ground for an objection.

4. Solicitor's Closing Argument and Trial Counsel's Failure to Object

Applicant raises multiple claims regarding Trial Counsel's failure to object to certain allegedly inappropriate comments made by the solicitor during closing arguments. The solicitor made this statement:

> I want just to address something that was said by Mr. Thomas's attorney in his opening statement a few days ago. Nothing requires me or the solicitor's office to prosecute this case. Mr. Brown said that we can't stop this prosecution because the sheriff's office made a quick judgment and they charged Mr. Thomas. Well, that's completely wrong. The solicitor's office decides not to prosecute cases made by the sheriff's office all the time. And we get along pretty well, but sometimes they don't like that too much. But that is our prerogative. That is the solicitor's office's decision.
>
> So the indictment in this case that charged Mr. Thomas with attempted murder, that was signed by me and- not the sheriff's office. It was signed by me. And that means that I thought there was

> enough evidence in this case to prove that Mr. Thomas committed this crime. And if I didn't think that, I wouldn't have spent what amounts to a whole week of court time presenting this case to y'all and prosecuting this case. Because what gets brought to court is my responsibility, not anybody else's.
>
> And y'all, as long as I'm doing this, when these cases arise and somebody is getting gunned down in the middle of a street here in this county, I'm going to try and do something about it, you know, whether the victim is here or not. If there's evidence, I'm going to present that evidence. And that's what I did this week. And that doesn't have anything to do with what anybody thinks or what anybody wants. It's a decision that I make as a solicitor working here in this county.

(August 23 Trial Tr. pp. 37–38).

Applicant argues the above statement was improper because the solicitor conveyed to the jury his own personal impression that Applicant was guilty. Applicant characterizes the solicitor's comment as "essentially the same type of argument" held to be improper in *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019). The Court disagrees.

The following arguments were held to be improper in *Fortune*:

> Ladies and gentlemen of the jury, thank you so much for your time throughout the course of this trial. I want to start by telling you that we both have jobs here. My job is to present the truth. In fact if you look in the South Carolina Code of Laws which mandates what a solicitor's job is we can't be like a normal attorney is.
>
> A normal lawyer has to advocate on behalf of his client. But on the other hand the Solicitor can't. We have to say what the truth is . . . And [if] I know the person has done something that I think the facts show they're guilty of, then I can't nolle prosse 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 attorneys' jobs are to manipulate the truth. Their job is to shroud the truth. Their job is [to] confuse jurors. Their job is to do whatever they have to—without regard for the truth—to get a not guilty verdict.

Id. at 550- 51, 837 S.E.2d at 40.

The statements by the solicitor in *Fortune* are dissimilar to the statements made by the solicitor in Applicant's case. The solicitor in *Fortune* stated his "job is to present the truth" and

he "had to go forward with" the case because "I know the person has done something." The Supreme Court condemned the solicitor's comment because it "convey[ed] the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant." *Id.* at 552, 837 S.E.2d at 41.

At Applicant's trial, however, the solicitor's statements in closing did not assert the personal belief or knowledge that Applicant was guilty, as condemned in *Fortune*; rather, he "thought there was enough evidence in this case to prove Mr. Thomas committed this crime. . . . If there's evidence, I'm going to present that evidence."

Furthermore, the solicitor in Applicant's case never "invoke[d] his duty to dismiss unfounded cases," as *Fortune* also condemned. *Id.* at 553, 837 S.E.2d at 41. The closest he came to that impropriety was his explanation that, contrary to Trial Counsel's opening statement, he was *not* required to prosecute the case just because the sheriff's office charged Applicant. This was a response to the opening statement made by Trial Counsel:

> You've heard from the Assistant Solicitor why we're here, they brought charges. He didn't bring the charges, he's prosecuting them. Law enforcement brought the charges . . . But I understand they have to follow this case because, unfortunately, Mr. Thomas was arrested. Unfortunately, a case was immediately made against him based upon the shooting. Rush to judgment. Rush to assumption. That's what the prosecution has done. . . . I want to make an argument that, clearly, this case had to start somewhere and it started with the sheriff's office. . . . So once you get this train rolling, you can't just automatically say oh, we're sorry, we want to stop the prosecution.

(Trial Tr. pp. 113–16). Trial Counsel's opening statement suggested that, once the sheriff's office brought charges against Applicant, the solicitor had no choice but to continue to prosecute Applicant. Therefore, the solicitor's comments about his ability to interrupt the prosecution and his decision to sign the indictment were made in order to refute this suggestion.

Even arguments that would otherwise be improper may be excused under the "invited reply" doctrine if those arguments were an appropriate response to statements or arguments made by the defense. *See Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); *see also State v. Mazique*, 419 S.C. 282, 296–97, 797 S.E.2d 730, 737 (Ct. App. 2016) (holding a solicitor's comments referring to his belief that the defendant was guilty were made in response to the defendant's closing argument that the solicitor did not investigate before charging and misled the jury).

Applicant argues that the purpose of the "invited reply" doctrine is "not to excuse improper comments, but to determine their effect on the trial as a whole." *Fortune*, 428 S.C. at 556, 837 S.E.2d at 43 (citing *Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75). The Supreme Court in *Fortune* held that the defense attorney's argument was *not* improper and that there was "no argument a defense attorney could make that would justify the improper remarks by the assistant solicitor" in that case. *Id.* As pointed out above, the comments made by the solicitor in this case are a far cry from the "inexcusable" comments at issue in *Fortune*. Therefore, in order "to determine their effect upon the trial as a whole," this Court applies the invited reply doctrine and views the solicitor's arguments as an appropriate response to the misleading suggestion by Trial Counsel that the State "rushed to judgment" and then could not "stop the prosecution."

Applicant also contends there was no overwhelming evidence of guilt in this case, again citing *Fortune* where the State "pointed to no element of self-defense where it presented overwhelming evidence the element did not exist." *Id.* However, the Supreme Court's overwhelming evidence analysis came *after* it had rejected the application of the "invited reply" doctrine to the solicitor's "inexcusable" comments. The analysis was only relevant because overwhelming evidence is a categorical bar to a finding of prejudice, which would otherwise be

necessitated based on the solicitor's outrageous misconduct. Generally, overwhelming evidence is sufficient, but not necessary, to defeat a claim of ineffective assistance. *See, e.g.*, *Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018) ("Because we find the evidence is *not overwhelming*, Smalls' individual claims of deficient performance must be analyzed separately to determine whether either of them gives rise to a reasonable probability the result of the trial would have been different without counsel's error.") (emphasis added).

In this case, the evidence showed that Applicant shot an unarmed man ten times before driving away in his car to sell the weapon so that it would not be found by law enforcement. According to Applicant's own testimony, he shot at Gray multiple times and was still firing while Gray was running away from him. (Trial Tr. p. 329, lines 7–9). This was corroborated by the evidence of two gunshot wounds in Gray's back. (Trial Tr. pp. 226–28; State's Exhibit #8). Therefore, unlike in *Fortune*, there was arguably overwhelming evidence in this case that one of the elements of self-defense—a reasonable belief that Applicant was in imminent danger of losing his life or sustaining serious bodily injury—did not exist. *See State v. Jones*, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016) (setting forth the elements of self-defense); *State v. Rosenbaum*, Op. No. 5928 (S.C. Ct. App. filed August 3, 2022) (holding the trial court properly rejected a defendant's self-defense claim where the victim was killed after he tried to flee and was admittedly no longer a threat).

Whether or not the State's evidence rose to the level of "overwhelming evidence" as that term was used in *Fortune*, it was still sufficiently strong that the result of the trial would not have changed, even if Trial Counsel had kept out those portions of the solicitor's closing argument. Applicant, therefore, has failed to show he was prejudiced by Trial Counsel's alleged error.

Applicant next takes issue with this portion of the solicitor's argument:

> There's a lot of people who need to know the truth in this case. Najm Thomas needs to hear the truth. He is a young man but he's going down a very bad, very scary path. And he needs to be told that you just can't go around shooting people. The sheriff's office needs to be told that when they work on a case that's this hard and they respond to a scene and they collect their evidence and they do their job the best they can and they gather enough evidence to convict somebody of a serious, violent crime, when they do their job, they need to know that a jury will do something about it and will hold the person that is being proven guilty responsible.
>
> But the real group that needs to hear the truth in this case are the people of Union County. Because this case is really not about justice for Malik Gray. It's about justice for the people of the Union County. Because your verdict will say a lot about the kind of county you want to have. Do you want have a county where it's okay to go around gunning people down in the middle of the road? Do you want to have the kind of county where somebody like Mr. Thomas can just come in here with some trumped-up story that flies in the face of all the evidence? All the evidence in the case and tell a bunch of—bunch of lies to people and get out of it after shooting a man 10 times? You want to have that kind of county?
>
> Well, I think that y'all are smarter than that. And I think you want a Union County where people like Najm Thomas can't go around gunning people down. And I will ask when you go back to that jury that you consider this evidence that has been presented to you and you render a verdict that tells Najm Thomas, that tells the Sheriff's office, and that tells all the people in Union that there is law here and that people will be held responsible for the crimes they commit and that we're not the Wild West. I ask that you find Najm Thomas guilty of attempted murder. Thank you.

(August 23 Trial Tr. pp. 39–40.)

Applicant contends this argument appealed to the jury's passions and prejudices, played on their fear, and appealed to the jury's sympathy for law enforcement, likening this argument to that held improper by *State v. Liberte*, 336 S.C. 648, 521 S.E.2d 744 (1999). In that case, the solicitor argued that the reasonable doubt standard "is . . . being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets." *Id.* at 652, 521 S.E.2d at 746. The *Liberte* court held those comments improper because they "invited the jury to convict the Defendants, even if the evidence did not prove their guilt beyond a

reasonable doubt, in order to keep the streets safe from the scourge of drugs." *Id.* at 653, 521 S.E.2d at 747.

The solicitor's comments in the present case came nowhere near the outrageous comments condemned in *Liberte*. In this case, the solicitor repeatedly emphasized the jury's duty to base its decision on the evidence and whether the State had proven Applicant's guilt. His discussion of the evidence against Applicant occupies more than ten pages of the transcript. (August 23 Trial Tr. pp. 25–36). He also accurately explained that the State had to prove Applicant's guilt beyond a reasonable doubt. (August 23 Trial Tr. p.37). When he brought up the sheriff's office, it was only to say that, if the sheriff's office "gather[ed] *enough evidence to convict* somebody," the jury should "hold the person *that is being proven guilty* responsible." He urged the jury to dismiss Applicant's story because it "flies in the face of all the evidence." He concluded by reminding the jury to "consider the evidence that has been presented to you." Not once did he suggest that the jury should base its decision on anything other than the evidence or apply any standard lower than the reasonable doubt standard. While he did rhetorically invite the jury to consider the other salutary or pernicious effects its verdict might have, the ultimate thrust of his argument was that the evidence proved Applicant guilty of the crime beyond a reasonable doubt and that the jury should find him guilty for that reason. *See State v. Cain*, 297 S.C. 497, 508–09, 377 S.E.2d 556, 562 (1988) (holding an argument asking the jury to "send a message" that "you don't do [murder] in Chesterfield County," when viewed in the context of the entire argument, "certainly did not rise to the level of arousing juror passion or prejudice").

In addition, Trial Counsel testified at the evidentiary hearing that he believed the solicitor's praise for the efforts of the sheriff's office worked in the defense's favor because the sheriff at the time was unpopular. He testified that he watched the jury's reactions during the solicitor's closing

arguments and saw disdain and disbelief on their faces when the solicitor tied the case to the sheriff's office. Even if some portions of the solicitor's closing arguments had been objectionable, Trial Counsel articulated a valid strategic reason for not objecting to those portions of the solicitor's closing arguments. Furthermore, as already discussed, the strength of the State's case in disproving self-defense militates against any claim of prejudice based on cherry-picked portions of the solicitor's closing argument.

Finally, Applicant takes issue with a portion of the solicitor's closing argument where he clarifies that, if jurors disagree as to whether Applicant is guilty or not guilty, or whether he was guilty of attempted murder or ABHAN, the jury does not need to find Applicant not guilty but should inform the judge so he can give appropriate instructions. Applicant appears to concede that there is no precedent expressly disapproving such a comment by the solicitor. Nevertheless, he contends Trial Counsel was ineffective for failing to object to it. This argument is without merit: Trial Counsel had no duty to make an objection that was not grounded in any existing law at the time of Applicant's trial. *See, e.g.*, *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993)

V. CONCLUSION

For the reasons discussed above, the Court finds Applicant has failed to meet his burden of proving that Trial Counsel's representation fell below an objective standard of reasonableness. In addition, Applicant has not proved how the result of his trial would have been different but for the alleged errors of Trial Counsel. Therefore, the Court finds and concludes that Applicant's allegations of ineffective assistance of counsel are without merit and that this post-conviction relief application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty

(30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and

2. That Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 17 **day of** APRIL **, 2023.**

Walton J. McLeod, IV
Presiding Judge
Third Judicial Circuit

Lexington, South Carolina