THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No.: 2023-000643

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

July 11, 2023.

PETITION

Now comes Najm Ahmad Thomas respectfully petitions the Court to review and reverse the decision of the Circuit Court in his post conviction relief action based on the following:

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.

Applicant timely filed an application for post conviction relief filed 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. An Order of Dismissal was signed on April 17, 2023. A timely notice of appeal was filed and this Petition follows.

Issues Presented

I. Was counsel ineffective for failing to file a direct appeal or properly advise applicant of his right to appeal?

II. Was counsel ineffective for failing to timely or properly object or otherwise preserve issues for appeal?

III. Was counsel ineffective in failing to take reasonable steps to compel the appearance of witness at trial and post trial motion?

Standard of Review

In a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986). As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, supra. This Court must affirm the findings of the PCR judge if they are supported by any evidence in the record. 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).

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A DIRECT APPEAL OR PROPERLY ADVISE APPLICANT OF HIS RIGHT TO APPEAL.

Applicant alleged ineffective assistance of counsel based on counsel's failure to file a direct appeal or properly advise Applicant of his right to appeal. In its Order of Dismissal the PCR court denied relief stating:

> *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.

App. P. 10.

At the PCR hearing Appellant's trial counsel was specifically asked why he did not file a notice of appeal. To which counsel responded:

> 16 Q. Now, I'd like to move on to did you file a notice of
>
> 17 appeal in this case?
>
> 18 A. I didn't.
>
> 19 Q. And did you discuss that decision with Mr. Thomas?
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> 20 A. Not after the trial. No.
>
> 21 Q. Okay. And why not file a notice of appeal?
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> 22 A. I hadn't had a conversation with him. I know the
>
> 23 conversation that we had prior to going to trial and during
>
> 24 the course of trial.

25 Q. But after the conviction, did you have a conversation

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1 with him about the decision to file an appeal?

2 A. No.

App. P. 69, l. 16-P. 70, l. 2.

The record shows that Applicant presented evidence on the issue at the PCR hearing. The record further shows that counsel failed to adequately advise the Applicant of his right to a direct appeal. Any discussions counsel may have had prior or during trial are simply insufficient to infer that the Applicant was fully aware of his right to appeal or that he make an intelligent waiver of that right:

> Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (*Turner I*); *see also* Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (*Turner II*). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)." Turner, 380 S.C. at 224, 670 S.E.2d *at* 374 (*citation omitted*).

Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

Explaining an appeal process before a defendant has even gone to trial does not equate to making a convicted client fully aware of his right to appeal that conviction.
Clark v. State, 396 S.C. 164, 169, 719 S.E.2d 708, 710 (Ct. App. 2011)

"To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (*citation omitted*).

Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010).

Counsel rendered ineffective assistance of counsel by failing to properly advise the Applicant of his right to a direct appeal. Counsel was further ineffective in failing to file an appeal in the Applicant's case where the Applicant had not made a knowing and intelligent waiver of his right to appeal. The decision of the PCR court was therefore in error. The Applicant is therefore entitled to a belated review of direct appeal issues. White v. State, 263 S.C. 110, 208 S.E.2d 35 (S.C. 1974); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (S.C. 1986).

II. COUNSEL FAILED TO TIMELY OR PROPERLY OBJECT OR PRESERVE ISSUES FOR APPEAL.

Applicant's trial counsel repeatedly failed to object to highly prejudicial evidence, the majority of which was admitted through impermissible hearsay. See Rule 801(c), SCRE (defining "Hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); Rule 802, SCRE (prohibiting the admission of hearsay into evidence except as otherwise provided by the South Carolina Rules of Evidence or by other rules prescribed by our supreme court or by statute). In each of the following the State offered hearsay in violation of Rule 802, SCRE. The admission of hearsay further violated the Applicant's ability to confront and cross-examine the declarant of these out-of-court statements. The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." Similarly, S.C. Const. art. I, § 14, guarantees the criminal defendant this right. In addition, S.C.Code Ann. § 17-23-60 (1985) provides: "Every person shall, at his trial, be allowed to be heard by counsel, may defend himself and shall have a right to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face."

The Confrontation Clause "(1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility." Lee v. Illinois, 476 U.S. ----, ----, 106 S.Ct. 2056 2062, 90 L.Ed.2d 514, 526 (1986), *quoting* California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930 1935, 26 L.Ed.2d 489, 497 (1970).

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." Davis v. Alaska, 415 U.S. 308, 315-316, 94 S.Ct. 1105 1110, 39 L.Ed.2d 347, 353 (1974) [emphasis omitted], *quoting* 5 J. Wigmore, Evidence § 1395, at 123 (3rd ed. 1970). *See also* Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (S.C. 1986).

The record in the Applicant's case shows that counsel's repeated failure to object to improper hearsay was not the product of a valid trial strategy:

> "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (*citing* Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992)). "Where counsel articulates a strategy, it is measured under an objective standard of reasonableness." *Id.* (*citing* Roseboro, 317 S.C. at 294, 454 S.E.2d at 313). Vail v. State, 402 S.C. 77, 88, 738 S.E.2d 503, 509 (Ct. App. 2013).

"[I]mproper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." *Id. at* 156, 551 S.E.2d at 263; *see* Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (finding the admittance of the social worker's hearsay testimony identifying the defendant as the perpetrator could not be harmless error because testimony was cumulative to social worker's unobjected testimony and victim's testimony).

Vail v. State, 402 S.C. 77, 90, 738 S.E.2d 503, 510 (Ct. App. 2013).

1. Counsel failed to object to improper hearsay testimony relating to the statement of the alleged victim (Gray) to the police about "prior difficulties" with defendant. App. P. 199-201. "'The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.' " Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) (*quoting* Dawkins, 346 S.C. at 156, 551 S.E.2d at 262). Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (S.C. App. 2013). Counsel stated that he did not object as he believed that this testimony was favorable to the defense. App. P. 39-40. Here the prior difficulty was that Gray had robbed the Applicant at gun point on a prior occasion. Allowing the hearsay in without objection allowed the jury to find a motive for the Applicant to shoot Gray unprovoked as opposed to showing basis for Applicant's reasonable fear of serious bodily harm. Allowing Gray's hearsay statement in without being able to show what the prior difficulties were clearly could not be beneficial to the case.

2. Failure to object to solicitor's opening arguments stating hearsay testimony of victim's identification of defendant. App. P. 211. Vail v. State, 402 S.C. 77, 90, 738 S.E.2d 503, 510 (Ct. App. 2013). These statements were made to the jury based on what the solicitor knew would be facts outside of the record as the State was not calling Gray as a witness. The out-of-court identification of the Applicant was constituted impermissible hearsay. When asked about his reason for not objecting counsel failed to articulate any valid basis for a contemporaneous objection. PCR p. 35-36.

3. Failure to object to solicitor's opening comments to the jury about the defense calling witnesses. App. P. 215.

4. Failure to object to victim's hearsay of identification of defendant as "ghost". App. P. 225. "'The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.' " Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) (*quoting* Dawkins, 346 S.C. at 156, 551 S.E.2d at 262). Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (S.C. App. 2013). Counsel stated that he had no strategy behind not objecting to this testimony. PCR p. 35-36.

5. Failure to object to statement (hearsay) that Applicant's motive was "owed him something. App. P. 226. "'The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.' " Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) (*quoting* Dawkins, 346 S.C. at 156, 551 S.E.2d at 262). Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (S.C. App. 2013).

6. Failure to object properly/timely to introduction of DVD of body-cam footage of victim where victim identified defendant. (Defense objected under 403 rather than a proper objection based on evidence being hearsay and a violation of the confrontation clause.) App. P. 238. "'The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.' " Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) (*quoting* Dawkins, 346 S.C. at 156, 551 S.E.2d at 262). Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (S.C. App. 2013). The improper basis for counsel's objection as well as the failure to make a timely objection allowed the introduction of inadmissible hearsay in violation of the Applicant's rights under the Confrontation Clause.

7. Failure to object to improper arguments by the solicitor:

A. THE SOLICITOR IMPROPERLY COMMENTED TO THE JURY THAT IT WAS HIS PERSONAL BELIEF THAT APPLICANT COMMITTED THE CRIME.

"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 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 hear 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 anybody thinks or what anybody wants. It's a decision that I make as a solicitor working here in this county."

App. P. 509, l. 22-P. 510, l. 16.

When asked about why counsel choose not to object to the solicitor's comments to the jury counsel failed to explain any valid trial strategy:

> I think in abstract it is -- it could be arguable to be objectionable, but based upon the events of the trial that happened prior to the closing argument, I did not see the merits of that to raise an objection based upon what was being said at the time.

App. P. 28. l. 12-16.

The applicable law in the present case:

> "The Supreme Court has condemned a prosecutor's closing argument in which he suggests to the jury his "personal impression[]" the defendant is guilty.
>
> [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. United States v. Young, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 1048, 84 L. Ed. 2d 1, 14-15 (1985)."
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> Fortune v. State, 428 S.C. 545, 552-53, 837 S.E.2d 37, 41 (2019).

In Fortune the Court went on to say:

> "If the misconduct in Thomas was not identical to the assistant solicitor's misconduct in this case, the misconduct in State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981), was identical. The solicitor argued,
>
> You know, the initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried . . . . I mean I had the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried 2
>
> 277 S.C. at 175, 284 S.E.2d at 359. We condemned the "solicitor's personal opinion [being] explicitly injected into the jury's deliberations as though it were in

itself evidence." *Id*."

Fortune v. State, 428 S.C. 545, 554, 837 S.E.2d 37, 42 (2019).

In the present case the solicitor clearly injected his personal belief and a sense of his righteousness into the closing for the jury's consideration. The solicitor's arguments were therefore improper. The solicitor's improper comments were prejudicial and thus a violation of due process:

> "We next must determine whether the improper argument so unfairly prejudiced the defendant as to deprive him of a fair trial. Chorman, 910 F.2d at 113; Simmons, 331 S.C. at 338, 503 S.E.2d at 166-67; *see also* Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (stating outside the PCR context, "Improper comments do not require reversal if they are not prejudicial to the defendant"); State v. Durden, 264 S.C. 86, 93, 212 S.E.2d 587, 590-91 (1975) (stating outside the PCR context, "The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial")."

Fortune v. State, 428 S.C. 545, 556, 837 S.E.2d 37, 43 (2019).

In Fortune, addressing essentially the same type of argument as presented in this case the Court said:

> "Turning squarely now to whether the assistant solicitor's misconduct prejudiced Fortune, we find our discussion so far leaves little need for further analysis. As we cautioned in State v. Thomas, 'arguments of this kind can rarely be harmless.' 287 S.C. at 413, 339 S.E.2d at 129."

Fortune v. State, 428 S.C. 545, 559, 837 S.E.2d 37, 45 (2019).

Attempts to justify comments such as the Solicitor made in the present case have been rejected by the Court in Fortune:

> Applying Fortune to the present case Invited Argument and Opened Door Does Not Excuse Improper Argument:
>
> Before we conduct this prejudice analysis, we first address three arguments the State makes to justify or excuse the assistant solicitor's misconduct. First, the

> State seeks to justify the remarks on the ground they were invited by improper closing argument by the defense attorney. We have reviewed the defense attorney's closing argument, and we do not find it to be improper. Even if it had been improper, the State's remedy is not to retaliate, but to object, which the State did not do. *See Criminal Justice Standards for the Prosecution Function 3-6.8(b)* (Am. Bar Ass'n 2018) ("If the prosecutor believes the defense closing argument is or was improper, the prosecutor should timely object and request relief from the court, rather than respond with arguments that the prosecutor knows are improper."). In addition, "the idea of an invited response is used not to excuse improper comments, but to determine their effect on the trial as a whole." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (*citing* Young, 470 U.S. at 11-12, 105 S. Ct. at 1044, 84 L. Ed. 2d at 9-11). There is no argument a defense attorney could make that could justify the improper remarks by the assistant solicitor in this case.

Fortune v. State, 428 S.C. 545, 556-57, 837 S.E.2d 37, 43 (2019)

Overwhelming evidence is not present in this case so as to mitigate prejudice of solicitor's comments. Here the record contains no testimony from the alleged victim. The Defendant, Najm Thomas testified that he shot Gray in self-defense. There were no witnesses to the event. There was evidence of "prior difficulties" between Gray and Thomas. Thomas testified that Gray had robbed him in the past and thought Gray was attempting to rob him again when he shot Gray. The jury found Najm Thomas not guilty of Attempted Murder and guilty of ABHAN, and then only after having indicated to the Court at one point that it was "deadlocked". The evidence was therefore far from overwhelming.

> Second, the State seeks to excuse the improper remarks on the basis the evidence against Fortune was overwhelming. There is no dispute Fortune shot and killed Shields. Fortune testified at trial and admitted he shot Shields multiple times. This case, however, turned on the question of self-defense. The evidence of who shot first was hotly disputed. The State pointed to no element of self-defense where it presented overwhelming evidence the element did not exist. *See* State v. Williams, 427 S.C. 246, 250, 830 S.E.2d 904, 906 (2019) (stating it is "the State's burden to persuade the jury beyond a reasonable doubt that at least one element of [self-] defense does not exist").

Fortune v. State, 428 S.C. 545, 557, 837 S.E.2d 37, 43 (2019).

The solicitor's improper comments to the jury in the present case constitute a violation of Thomas' rights to due process under the Sixth and Fourteenth Amendments. Counsel's failure to object to the comments and seek either a mistrial or curative instructions constitutes ineffective assistance of counsel. Thomas is therefore entitled to relief and must be granted a new trial.

B. STATE CALLING ON A GUILTY VERDICT TO VINDICATE THE SHERIFF FOR HIS HARD WORK ON THE CASE AND TO SEND A MESSAGE TO THE COMMUNITY THAT PEOPLE CAN'T GO AROUND GUNNING PEOPLE DOWN

In closing arguments the solicitor stated to the jury:

> "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 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 the 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 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 to 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 room 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."

App. P. 511, l. 2-P. 512, l. 4.

Counsel failed to raise an objection to the solicitor's argument. At the PCR hearing counsel acknowledged that the argument showed great disdain of the prosecution for the Applicant at the time based on the prosecutor's opinion. When asked why he chose not to object counsel stated "cause I was watching the jury." App. 77, l. 9-16. Counsel went on to essentially say that he thought the argument was good for the defense.

In this case the solicitor's argument clearly appealed to the jury's passions and prejudices by playing on the jury's fear that their failure to convict Thomas would result in Union becoming the Wild West where people would be gunned down in the streets. Arguing to a jury that the future safety of their community turns on the jury finding a defendant has been found impermissible and prejudicial:

> In our view, the argument was calculated to appeal to the jury's passions and prejudices by playing on the jury's fear of the impact of drugs on our society. The argument 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. Such an appeal is clearly improper:
>
> > A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.
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> United States v. Monaghan, 239 U.S. App. D.C. 275, 741 F.2d 1434, 1441 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1085, 85 L. Ed. 2d 146, 105 S. Ct. 1847 (1985); *see also* United States v. Hawkins, 193 U.S. App. D.C. 366, 595 F.2d 751, 754

> (D.C. Cir. 1978) (Prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem."), *cert. denied*, 441 U.S. 910, 60 L. Ed. 2d 380, 99 S. Ct. 2005 (1979); United States v. Barker, 553 F.2d 1013, 1025 (6th Cir. 1977) ("It is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community."); *cf.* State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (finding solicitor's closing argument urging that "law officers who risked their lives in [the defendant's] recapture would be aggrieved by a sentence less than death" and implying that "other citizens of Lexington County including himself would strongly disapprove of a life sentence," to be improper, noting that "jurors are simply not to consider the opinions of neighbors, officials or even other juries") (*emphasis added*), *cert. denied*, 460 U.S. 1088, 76 L. Ed. 2d 353, 103 S. Ct. 1784 (1983), overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); United States v. Radka, 904 F.2d 357, 361 (6th Cir. 1990) ("Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.'").

State v. Liberte, 336 S.C. 648, 653-54, 521 S.E.2d 744, 747 (Ct. App. 1999).

Similarly, the argument that the jury must convict Thomas so the Sheriff's office will know that when they work really hard the jury will find a defendant guilty is also appealing to the jury to convict on something other than just the evidence presented.

It is unnecessary to reach the issue of whether the prosecutor actually intended to play on the passions of the jury as courts have held that the actual intent of the prosecutor is not relevant:

> While there is no indication that the prosecutor in this case intended to inflame the jury or to prejudice the Defendants' case, we do not find the absence of intent to be relevant. Because the prosecutor's arguments encouraged the jury to disregard the most fundamental aspect of our criminal justice system, we conclude that reversal is required, notwithstanding the fact that the argument may have been the result of unintentional, overzealous rhetoric. *See* Berger v. United States, 295 U.S. 78, 88-89, 79 L. Ed. 1314, 55 S. Ct. 629 (1935) (A prosecutor "may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); California v. Bolton, 23 Cal. 3d 208, 589 P.2d 396, 398, 152 Cal. Rptr. 141 (1979) ("Injury to appellant is nonetheless

an injury because it was committed inadvertently rather than intentionally.").

State v. Liberte, 336 S.C. 648, 657, 521 S.E.2d 744, 749 (Ct. App. 1999)

C. THE SOLICITOR'S IMPROPERLY INSTRUCTED THE JURY THAT THEY DIDN'T HAVE TO FIND THE APPLICANT NOT GUILTY IF THEY COULD NOT AGREE.

In closing arguments the solicitor stated to the jury:

> "A couple of other things I want to mention. If you go back there to the jury room and some of you are voting guilty and some of you're voting not guilty, that does not mean that you just have to throw your hands up and find Mr. Thomas not guilty. If that happens, all you need to do is just send a note out to the judge and he will give you some more instructions. If you can't agree on the charge, it's the same thing. If some of all vote attempted murder and some of y'all voted assault battery of a high and aggravated nature, you can't agree, you just tell the judge and he will give you some more instructions., It doesn't mean that you have to find Mr. Tomas not guilty if you can't agree on the charge."

App. P. 508, l. 11-25.

This may be a *de novo* issue. It is difficult to say what this argument or instruction to the jury was, but it is clearly wrong. The Solicitor is commenting on what goes on in the jury's deliberations and instructing the jury that if they become deadlocked they don't have to find the jury guilty. This in essence is an instruction on how the jury should lean to resolve a deadlock. The Solicitor is essentially giving instructions that the jury should find a way not to have to find Thomas guilty. The Solicitor didn't say that you don't have to find him guilty or not guilty if you become deadlocked but that you don't have to find him not guilty if there is a deadlock during deliberations. This impermissibly interferes with the deliberations of the jury and negates the presumption of innocence. It clearly had an effect on the jury as sent a note to the judge as instructed saying that they were deadlocked and informing the judge of their vote. This presented the Court with a situation it had never encountered before which was clearly based on the

prosecutor’s instructions. When asked why he did not object to these comments counsel stated that there was no strategy behind not objecting to the solicitor's comments.

The Due Process Clauses in both the Fifth and Fourteenth Amendments provide that no person may be deprived of liberty without due process of law. U.S. Const. amend. V and XIV, § To find whether a prosecutors' comments in closing argument violated a defendant's due process rights, a court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. The test for reversible prosecutorial misconduct in a prosecutor's closing argument is the prosecutor's remarks or conduct must in fact have been improper, and such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial. Here the record shows that the comments were improper and prejudicial. Counsel failed to object and thus the Applicant lost the ability to raise the improper argument on direct appeal. As a result, trial counsel was ineffective and the Applicant prejudiced by the loss of issues that he would have prevailed on at trial and on appeal.

III. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO TAKE REASONABLE STEPS TO COMPEL THE APPEARANCE OF WITNESS AT TRIAL AND POST TRIAL MOTION.

At trial Applicant testified that he had been robbed at gun point once before by the alleged victim, Elizawan Gray, and that he was acting out of fear and shot Gray believing that Gray was attempting to rob him again. App. P. 420-486. Self defense was the only issue at the Applicant's trial. It was the sole theory of the defense's case. Prior to the trial Gray had met with

Applicant's counsel. At that meeting Gray told Applicant's counsel that he had indeed robbed the Applicant at gun point in past. App. 555-556. Part of the defense at trial required a showing that the Applicant's fear was reasonable based on his having been robbed at gun point by Gray in the past. App. 64-65. Gray's testimony would have corroborated Applicant's testimony and established a basis for the Applicant's fear and subsequent actions. Despite Gray's potential testimony clearly being exculpatory counsel failed to make reasonable efforts to have Gray served with a subpoena for trial, or later for Applicant's Rule 29 Motion hearing. Applicant alleged ineffective assistance on that basis and called Gray as a witness at the PCR hearing. Gray testified that not only that he had robbed Applicant at gun point on a prior occasion but that had approached the Applicant aggressively in attempt to rob Applicant again when he was shot by the Applicant. PCR 6. Had the jury heard testimony from Gray*, as the alleged victim,* that he had been shot while trying to rob the Applicant for the second time, the outcome of the case would most likely have been different.

It is clear that prior to trial counsel was aware of Gray's prior robbery of the Applicant. Counsel testified at the PCR that the Applicant had told him that Gray had robbed him at gun point on a prior occasion. App. P. 63. Counsel was aware of this through discovery material, but more importantly, he had heard it directly from Gray. While counsel testified at the PCR that Gray had told him only that there had been a prior physical altercation with the Applicant but had not expounded upon what that meant, at sentencing immediately after the jury's verdict counsel told the judge: "The victim in the case came to my office. He shared information with me directly as it relates to the prior incident that he had with Mr. Thomas in which he admitted to me that he did rob him." App. P. 556, l. 16-19. This was consistent with the information counsel was aware

of through a supplemental police report provided in discovery indicating that there had been independent witnesses to prior hospitalities between Gray and the Applicant where Applicant had been beaten up, pistol-whipped and ultimately robbed. App. P. 64. Despite self-defense being the Applicant's only defense at trial counsel failed to take reasonable steps to have Gray located and served with a subpoena. App. P. 65-66. At the PCR hearing counsel admitted that given the exculpatory nature of Gray's potential testimony about the prior robbery it would have been reasonable for him to subpoena Gray for trial. App. P. 65.

Counsel knew well in advance of trial that he would have to do more than simply make a call or two to have Gray come to court and testify. When asked why he did not subpoena Gray counsel explained that when he had met with Gray prior to trial *Gray had told him* that he had moved out of the area, did not want to participate and could not be found. App. P. 65. In counsel's Rule 29 Motion counsel stated "Prior to this case going to trial, the alleged victim indicated both to the State and defense counsel that he did not want to participate in the case." App. P. 580. Despite knowing that having Gray located and served would most likely be difficult, counsel made no meaningful attempt to do so. Counsel described his efforts to locate Gray for trial as "... I inquired of his location through the means of contact I had it was shared with me that they didn't know where he was at." App. P. 65, l. 19- P. 66, l. 2. Counsel made no other effort to locate or compel Gray's appearance. Yet when asked at the PCR, counsel acknowledged that it was not uncommon to require the sheriff to hunt down reluctant witnesses and have the served to compel their appearance. App. P. 66-67. Despite knowing that Gray would potentially be difficult to find counsel failed to issue a subpoena and request the sheriff attempt to locate and serve Gray. App. P. 66. As a result, the jury never heard that Gray had

previously robbed the Applicant at gun point or that he was attempting to rob Gray again when Gray shot him. Counsel testified at the PCR that if Gray had testified at trial as he did at the PCR the outcome of the trial would have been different. App. P. 67. Counsel's performance was therefore deficient and resulted in prejudice to the Applicant.

Based on the foregoing the decision of the PCR Court should be reversed and the Applicant's conviction and sentence reversed and set aside, and a new trial granted.

Respectfully submitted,
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