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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO UNION COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2023-000643

Najm Ahmad Thomas,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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1. The PCR court correctly found Counsel was not ineffective for failing to obtain the appearance of the victim, Elizawon "Malik" Gray, because Gray could not be located in time for the trial or post-trial motion hearing and because, prior to the filing of Petitioner's PCR action, Gray had not indicated that his testimony would benefit the defense.

2. The PCR court correctly found Counsel was not ineffective for failing to object to hearsay testimony of Gray's statements to law enforcement because those statements were admissible under the "excited utterance" exception to the rule against hearsay and most were not prejudicial to the defense.

3. The PCR court correctly found Counsel was not ineffective for failing to object to the solicitor's comments to the jury because those comments were not improper.

4. Petitioner's request for belated review of direct appeal issues should be denied because Petitioner has failed to include a "Statement of Issues on Appeal" as required by Rule 243(i)(2), SCACR.

STATEMENT OF THE CASE

On August 28, 2016, Petitioner 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 Petitioner on a prior occasion. Petitioner fired thirteen shots at Gray, striking him ten times. Petitioner 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. (App. pp.422–30; pp.270–74). Petitioner told Duncan that "police were going to be hot" because "he had heard there had been a shooting." (App. p.274, lines 1–2).

After first responders arrived at the scene of the shooting, Gray gave a description of Petitioner and his vehicle. He said he knew Petitioner by the nickname "Ghost," and he believed he was shot because Petitioner "assumed I took something from him." (State's Exhibit #2). Shortly thereafter, Petitioner returned to Munro Street, and officers recognized him and his car from Gray's description. (App. p.229). They questioned Petitioner, who initially denied any involvement in the shooting. When asked if he had a gun, Petitioner told investigators about a gun he kept at his parents' house but did not mention the gun used in the shooting, which Petitioner kept in his car. (App. pp.300–01).

Investigators located a video from the gas station that showed Duncan getting into Petitioner's car shortly after the shooting. When they questioned Duncan about that interaction, Duncan explained Petitioner 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 Petitioner's car and found the gun hidden behind a removable glove compartment. (App. pp.274–75; p.286; p.353). The gun

found behind the glove box matched the spent casings found at the scene of the shooting. (App. pp.410–12).

Petitioner 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 Petitioner's trial. (App. pp.31–32). Petitioner testified in his own defense at trial, stating that on the night of the shooting he was driving down Siam Street 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." (App. p.423). Petitioner testified he got out of his car and was checking on it when Gray appeared from the bushes behind him. (App. p.424). Petitioner stated Gray emerged near a house on the left side of Siam Street. (App. p.453).[1]

Petitioner stated he recognized Gray as having robbed him a few weeks prior to the shooting. (App. p.427). Petitioner claimed he shot Gray in self-defense because Gray threatened him with something in his hand. (App. p.424). However, no weapon was found near Gray at the scene. (App. p.229, lines 1–2). Petitioner also stated he thought Gray ran away, and he testified "he was still running when I shot." (App. p.431).[2]

In May 2017, the Union County Grand Jury indicted Petitioner for attempted murder (2017-GS-44-0845). Michael Brown, Esquire, represented Petitioner at trial. Deputy Solicitor John Anthony of the Sixteenth Circuit Solicitor's Office prosecuted the case. On August 20, 2018,

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[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 Petitioner's gun were found farther still. (App. pp.366–69; State's Exhibit #3).

[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. (App. pp.328–30; State's Exhibit #8).

Petitioner proceeded to a jury trial before the Honorable William A. McKinnon. On August 23, 2018, the jury found Petitioner guilty of the lesser included offense of Assault and Battery of the High and Aggravated Nature (ABHAN). On August 23, 2018, Judge McKinnon sentenced Petitioner to sixteen years of imprisonment.

Petitioner filed a timely motion for a new trial pursuant to Rule 29(b), SCCrimP. A hearing was held before Judge McKinnon on October 26, 2018. At the conclusion of the hearing, Judge McKinnon denied the motion without prejudice. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief ("PCR") on July 15, 2019. An evidentiary hearing into the matter was held before the Honorable Walton J. McLeod, IV, at the Moss Justice Center on December 8, 2022. Judge McLeod denied and dismissed the application with prejudice by order dated April 17, 2023.

Petitioner thereafter filed a timely notice of appeal. By and through counsel J. Falkner Wilkes, Esquire, Petitioner filed a petition for writ of certiorari on July 11, 2023. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

1. **The PCR court correctly found Counsel was not ineffective for failing to obtain the appearance of the victim, Elizawon "Malik" Gray, because Gray could not be located in time for the trial or post-trial motion hearing and because, prior to the filing of Petitioner's PCR action, Gray had not indicated that his testimony would benefit the defense.**

Petitioner argues Counsel was ineffective for failing to obtain Gray's appearance at either Petitioner's trial or the post-trial motion hearing because Gray would have testified that he was attempting to rob Petitioner on the night of the shooting, which would have supported Petitioner's claim to self-defense. The PCR court found Counsel was not ineffective because Gray was reluctant to testify and could not be located by either the State or the defense prior to trial or in time for the post-trial motion hearing. In addition, The PCR court found Counsel had no reason to believe Gray's testimony would be helpful to the defense because Gray never told anyone he was trying to rob Petitioner on the night of the shooting until years after the trial.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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 v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the Petitioner must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *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.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. "A 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." *Strickland*, 466 U.S. at 670. The Petitioner bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

This Court should deny the petition for a writ of certiorari because the PCR court correctly found Counsel was not ineffective in failing to call Gray to testify. First, both Counsel and the solicitor testified at the evidentiary hearing that Gray could not be located in time for the trial. (App. p.65, line 19–p.66, line 2; p.83, line 25–p.84, line 3; p.89, lines 11–17; p.95, line 24–p.96, line 20). In addition, Counsel testified that Gray was reluctant to speak with him and only came to Counsel's office under duress. (App. p.84, lines 9–22). Counsel also testified that, prior to the

trial, Gray never told him he had been trying to rob Petitioner on the night of the shooting. (App. p.64, line 21–p.65, line 5; p.83, line 8–p.84, line 8).

Based on this testimony, the PCR court determined Counsel was not deficient because "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 [Petitioner's] self-defense claim." (App. p.8). The PCR court's finding, therefore, was supported by probative evidence presented at the evidentiary hearing, and it should be upheld out of the "great deference" accorded to factual findings by the PCR court. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

In the petition for a writ of certiorari, Petitioner speculates that Counsel could have obtained Gray's appearance at trial by subpoenaing him. However, at the evidentiary hearing, the solicitor testified that the State *had* subpoenaed Gray and sent officers to find him, without success: "[W]e did issue a subpoena for Mr. Gray . . . and the sheriff's office was unable to locate him." (App. p.89, lines 15–17). Petitioner's mere speculation that further efforts by Counsel to track down Gray might have born fruit is not supported by the record and does not constitute sufficient ground for this Court to disturb the PCR court's factual finding.

Finally, the PCR court found that the objective evidence presented at the trial was not consistent with the theory that Gray was trying to rob Applicant when the shooting occurred: the shell casings from Applicant's gun were found a significant distance from where the purported "robbery" took place, as was the wounded Gray himself. Moreover, the PCR court noted that most of the State's evidence disproving self-defense—the fact that Petitioner admitted Gray was running away while he shot him, the fact that Gray was unarmed, the sheer number of times Petitioner shot

Gray, and the evidence of Petitioner's consciousness of guilt based on his efforts to conceal his involvement in the shooting by selling the gun and lying to investigators—would not be disturbed by Gray's testimony. Based on these facts, the PCR court found Petitioner suffered no prejudice because Gray's implausible claim of attempting to rob Petitioner at the time of the shooting would not likely have changed the outcome of the trial. Petitioner has failed to explain why this finding by the PCR court was error.

Because Petitioner has not established any error in the decision of the PCR court, the State asks this Court to deny the petition for a writ of certiorari on this ground.

2. **The PCR court correctly found Counsel was not ineffective for failing to object to hearsay testimony of Gray's statements to law enforcement because those statements were admissible under the "excited utterance" exception to the rule against hearsay and most were not prejudicial to the defense.**

Petitioner argues Counsel was ineffective for failing to object to hearsay testimony related to several statements made by Gray to law enforcement during officers' initial response to the shooting. However, Petitioner has not presented any argument against the PCR court's finding that Gray's statements were admissible under the "excited utterance" exception. Nor has Petitioner addressed the PCR court's finding that most of the challenged statements merely identified Petitioner as the shooter, which could not have prejudiced Petitioner because he was claiming self-defense and admitted being the shooter.

Petitioner 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." (App. pp.225–26).

At the time Gray made those statements, he was lying in the road "bleeding from obvious injuries." (App. p.225, line 4). Another first responder was performing first aid on Gray while the ambulance was on its way. (App. p.226). The PCR court found it was "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." Therefore, the PCR court found that "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." (App. p.12).

Petitioner also claims Counsel failed to object when the solicitor referred to Gray's identification of Petitioner during opening statements as being both hearsay and outside the record. Similarly, Petitioner claims Counsel should have raised hearsay and confrontation clause objections to the introduction of the body-cam video wherein Gray identifies Petitioner as the shooter. The PCR court found that, "[s]ince there was substantial other evidence implicating [Petitioner] as the shooter, including [Petitioner's] own testimony, there is no possibility that this statement by the solicitor or the body-cam video prejudiced [Petitioner]." (App. p.11). Petitioner has still failed to explain how he could possible have been prejudiced by comments or evidence identifying him as the shooter when Petitioner himself admitted shooting Gray as part of his self-defense claim. Therefore, Petitioner has failed to establish any error by the PCR court as to this issue, and the petition for a writ of certiorari should be denied.

3. The PCR court correctly found Counsel was not ineffective for failing to object to the solicitor's comments to the jury because those comments were not improper.

Petitioner argues Counsel was ineffective for failing to object to several of the solicitor's comments to the jury during opening and closing statements. The PCR court, however, found Petitioner had failed to show that any of the challenged comments were objectionable.

First, Petitioner claims Counsel failed to object "to the solicitor's comments about defense calling of witnesses," citing page 215 of the Appendix. 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." (App. p.215, lines 5–9). This sentence is the only reference to "witnesses" on the cited page. The PCR court found Petitioner "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." (App. p.11). Petitioner still has not offered any explanation on this point.

Petitioner also raises multiple claims regarding 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.

(App. pp. 509–10).

Petitioner argues the above statement was improper because the solicitor conveyed to the jury his own personal impression that Petitioner was guilty. Petitioner 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 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 egregious statements by the solicitor in *Fortune* are nothing like the statements made by the solicitor in this 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 Petitioner's trial, the solicitor *never* claimed to have any personal belief or knowledge that Petitioner was guilty; 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." The solicitor properly limited his argument to the evidence; at no point did he claim his job was to "present the truth." Nor is there any statement in the solicitor's arguments in this case that even comes close to the *Fortune* solicitor's inexcusable comments impugning the character of defense attorneys.

Furthermore, the solicitor in this 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 Counsel's opening statement, he was *not* required to prosecute the case just because the sheriff's office charged Petitioner. This was a response to the opening statement made by 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.

(App. pp. 215–17). Counsel's opening statement suggested that, once the sheriff's office brought charges against Petitioner, the solicitor had no choice but to continue to prosecute Petitioner. 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).

Petitioner 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 should apply the invited reply doctrine and view the solicitor's arguments as an appropriate response to the misleading suggestion by Counsel that the State "rushed to judgment" and then could not "stop the prosecution."

Petitioner 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, however, 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 Petitioner 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 Petitioner's own testimony, he shot at Gray multiple times and was still firing while Gray was running away from him. (App. p.431, lines 7–9). This was corroborated by the evidence of two gunshot wounds in Gray's back. (App. pp.328–30; State's Exhibit #8). Therefore, unlike in *Fortune*, there was overwhelming evidence in this case that one of the elements of self-defense—a reasonable belief that Petitioner 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). The PCR court found that the State's evidence was "sufficiently strong that the result of the trial likely would not have changed, even if Trial Counsel had kept out those portions of the solicitor's closing argument." (App. p.16). Therefore, the PCR court found Petitioner had not shown he was prejudiced by Counsel's alleged error.

Petitioner 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.

(App. pp.511–12.)

Petitioner 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.

Needless to say, 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 Petitioner's guilt. He began his closing argument by discussing the evidence against Applicant for more than ten pages. (App. pp.497–508). He also accurately explained that the State had to prove Petitioner's guilt beyond a reasonable doubt. (App. p.509). 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 Petitioner'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 Petitioner 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, 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. Therefore, the PCR court found Counsel had articulated a valid strategic reason

for not objecting to those portions of the solicitor's closing arguments. The PCR court reiterated that "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." (App. p.19).

Finally, Petitioner takes issue with a portion of the solicitor's closing argument where he clarifies that, if jurors disagree as to whether Petitioner is guilty or not guilty, or whether he was guilty of attempted murder or ABHAN, the jury does not need to find Petitioner not guilty but should inform the judge so he can give appropriate instructions. Petitioner appears to concede that there is no precedent expressly disapproving such a comment by the solicitor. Nevertheless, he contends Counsel was ineffective for failing to object to it. The PCR court correctly found this argument without merit: "Counsel had no duty to make an objection that was not grounded in any existing law at the time of Petitioner's trial. *See, e.g.*, *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993)." (App. p.19).

The PCR court correctly found there was no ground for Counsel to object to any of these comments by the solicitor. Accordingly, the petition for a writ of certiorari should be denied as to this issue.

4. **Petitioner's request for belated review of direct appeal issues should be denied because Petitioner has failed to include a "Statement of Issues on Appeal" as required by Rule 243(i)(2), SCACR.**

Petitioner argues this Court should grant the petition for a writ of certiorari in order to belatedly review his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). However, Rule 243(i)(2), SCACR, provides:

> When the post-conviction relief judge has found that the applicant is not entitled to a *White v. State* review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The

> petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a *White v. State* review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.

Here, the PCR court determined Petitioner was not entitled to *White v. State* review. Therefore, pursuant to the Rule, Petitioner was required to provide a "Statement of Issues on Appeal" listing issues to be raised if *White v. State* review were to be granted. Nevertheless, Petitioner has not provided any such statement. Petitioner does not even mention any direct appeal issues in the body of the petition for a writ of certiorari. Because Petitioner has not listed any direct appeal issues as required by Rule 243(i)(2), SCACR, there is no basis for either the State or this Court to consider and evaluate such issues. Accordingly, this Court should deny the petition for a writ of certiorari on this ground.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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