THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No.: 2023-000643

Najm Ahmad Thomas, #377500, ... Petitioner,

v.

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

BRIEF OF PETITIONER

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August 13, 2023.

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STATEMENT OF ISSUES

I. Was counsel's performance constitutionally deficient in failing to timely or properly object or otherwise preserve issues for appeal relating to the prosecutor's statements at closing?

II. Was counsel constitutionally deficient in failing to properly advise Petitioner of his right to appeal, and in the absence of a knowing and intelligent waiver by Petitioner, to file the notice of appeal?

III. Did counsel's errors result in prejudice to the Petitioner?

IV. Based on the record Is Petitioner entitled to a reversal of the post-conviction relief court's decision and his conviction?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. In May 2017, the Union County Grand Jury indicted Petitioner for Attempted Murder (2017-GS-44-0845). Michael Brown, Esquire ("Trial Counsel"), represented Petitioner at trial. Deputy Solicitor John Anthony, of the Sixteenth Circuit Solicitor's Office, prosecuted the case. On August 20, 2018, 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's trial counsel did not appeal the conviction or sentence.

Petitioner 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. Petitioner was present at the hearing and represented by J. Falkner Wilkes of Oakland, Mississippi. Assistant Attorney General Zachary W. Jones, of the South Carolina Attorney General's Office, represented Respondent. The Court permitted the parties to submit memoranda concerning the issues addressed at the hearing. An Order of Dismissal was signed on April 17, 2023. The timely notice of appeal was filed followed by a petition for writ of certiorari which was granted in part. This brief follows.

STATEMENT OF FACTS

Relevant facts are contained within the arguments below.

ARGUMENT

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).

In his post-conviction relief action the Petitioner alleged that trial counsel failed to object to several improper comments made by the prosecutor to the jury during closing arguments.

> The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland , 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland , 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial [court]'s instructions adequately cured

the improper argument and whether there is overwhelming evidence of the defendant's guilt." State v. Rudd , 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003). The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright , 477 U.S. 168, 169, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." State v. Black , 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." State v. Watts , 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996).

State v. Holcomb, 426 S.C. 557, 827 S.E.2d 367 (S.C. App. 2019), 372.

In Fortune v. State, the supreme court said:

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 ; id. amend. XIV, § 1. To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we 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. *See* Darden v. Wainwright , 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986) ("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.' " (*quoting* Donnelly v. DeChristoforo , 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431, 437 (1974))); United States v. Chorman , 910 F.2d 102, 113 (4th Cir. 1990) (stating "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" (citation omitted)). As this Court has stated,

> Improper comments do not automatically require reversal if they are not prejudicial to the defendant. On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record .... The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Simmons v. State , 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (*citations omitted*); see also Vasquez v. State , 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The relevant question is whether the solicitor's comments [in closing

argument] so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

Fortune v. State, 428 S.C. 545 *at* 549, 837 S.E.2d 37 *at* 39 (S.C. 2019).

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE PETITIONER OF HIS RIGHT TO APPEAL, AND IN THE ABSENCE OF A KNOWING AND INTELLIGENT WAIVER, TO FILE AN APPEAL.

At the post-conviction relief hearing Petitioner alleged ineffective assistance of counsel based on counsel's failure to properly advise Petitioner of his right to appeal and, in the absence of a knowing and intelligent waiver by the Petitioner, to file an 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 post-conviction relief hearing Petitioner's trial counsel was specifically asked why he did not file a notice of appeal:

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

decision to file an appeal?
A. No.

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

The record shows that Petitioner presented evidence on the issue at the post-conviction relief hearing. The record further shows that after the trial counsel failed to adequately advise the Petitioner of his right to a direct appeal. Any discussions counsel may have had prior or during trial are simply insufficient to infer that the Petitioner was fully aware of his right to appeal or that he made 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. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). The Court will reverse a PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).” Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (S.C. 2004), 651.

The decision of the post-conviction relief court based on a finding that the Petitioner had

not produced any evidence on the issue was clearly in error. Where there is no probative evidence that counsel informed Petitioner of his right to a direct appeal, nor is there any evidence that Petitioner waived his right to a direct appeal, the Petitioner is entitled to a belated appeal. *See* Simuel v. State, 390 S.C. 267, 701 S.E.2d 738 (S.C. 2010). The court's decision is without factual support and therefore constitutes an abuse of discretion. Counsel rendered ineffective assistance by failing to properly advise the Petitioner of his right to a direct appeal following the trial. Counsel was further ineffective in failing to file an appeal in the Petitioner's case where the Petitioner had not made a knowing and intelligent waiver of his right to appeal. The Petitioner 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 AND PRESERVE ISSUES FOR APPEAL RELATING TO IMPROPER COMMENTS TO THE JURY.

A. In His Comments to the Jury the Assistant Solicitor Improperly Conveyed His Personal Belief That the Petitioner Committed the Crime and Thus Guilty.

> "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 he chose not to object to the prosecutor's comments to the jury counsel failed to explain any meaningful thought process or valid trial strategy behind that decision: "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 harm in the prosecutor's comments was obvious:

> "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)."

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 . . . .
>
> 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) (*Footnote omitted*).

In the present case with a sense of righteousness the prosecutor clearly injected his personal belief that Petitioner was guilty into the closing for the jury's consideration. The prosecutor's arguments were improper under Fortune. The post-conviction relief court failed to properly apply the law to the facts in Petitioner's case.

B. The Prosecutor Improperly Suggested to the Jury That it Should Find the Petitioner Guilty 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 prosecutor 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 prosecutor's argument. At the post-conviction relief hearing counsel acknowledged that the argument "showed great disdain" by the prosecution for the Petitioner. App. 76. 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 prosecutor's argument was good for the defense. Counsel's answer fails to reveal any valid trial strategy behind the decision not to object.

In this case the prosecutor's argument clearly appealed to the jury's passions and prejudices by playing on the jury's fear that their failure to convict Petitioner 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 guilty has been found impermissible and prejudicial. Similarly, the argument that the jury must convict Petitioner so the Sheriff's office will know that when they work really hard the jury will find a defendant guilty is appealing to the passion of the jury to convict on something other than the evidence presented. This Court has addressed similar arguments:

> 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."
>
> 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).

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).

Here the prosecutor's comments invited the evil lurking in such prosecutorial appeals, that the Petitioner be convicted for reasons wholly irrelevant to his own guilt or innocence. The comments were improper and counsel constitutionally deficient for failing to object.

C. The Solicitor Improperly Commented to the Jury That They Didn't Have to Find the Petitioner Not Guilty If They Could Not Agree.

In closing arguments the prosecutor 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.

The prosecutor's comments may present a *de novo* issue. It is difficult to say what this argument or instruction to the jury was intended to be, but it was clearly wrong. Counsel testified that it sounded objectionable: "Certainly that would be objectionable." App 79, l. 11. Counsel admitted that there was no strategy behind his decision not to object. App. 79, l. 12-15. The jury could have interpreted the prosecutor's comments to be an instruction that the jury, rather than continuing to deliberate in an attempt to work through what might appear at the moment to be an

impasse and possibly resolve it with a not guilt verdict, should instead notify the judge for instructions. The jury could interpret this to mean that if they are in disagreement as to guilt, they should not resolve that disagreement by finding Petitioner not guilty. This impermissibly interferes with the deliberations of the jury and negates the presumption of innocence. "A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)." The statement by the prosecutor was likely to cause the jury to stop deliberations at a point that they may otherwise have continued to deliberate and resolved the conflict with a unanimous verdict of not guilty. The statement was likely to have influenced the jury to make a finding of guilt rather than not guilty to resolve a conflict. From the record it appears that jury sent a note to the judge and then continued to deliberate without further instructions, finding Petitioner not guilty of attempted murder but guilty of assault and battery of a high and aggravated nature. App. 549-550. The jury therefore appears to have resolved the conflict avoiding a not guilty verdict consistent with the prosecutor's instructions.

III. THE PREJUDICIAL EFFECT OF THE IMPROPER COMMENTS REQUIRES A REVERSAL OF THE LOWER COURT'S DECISION.

Having shown that the prosecutor's comments to the jury were improper the question turns whether the improper comments, singularly or as a whole, were prejudicial to Petitioner. The supreme court in Fortune v. State said:

> 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, § 1. 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. 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 comments as presented in this case the supreme 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).

Under essentially the same facts the supreme court in Fortune rejected the same justifications given in the Order of Dismissal in the present case:

> 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)

As in Fortune, overwhelming evidence is lacking in the present case. Petitioner testified at trial that he was having car trouble and had pulled over on the side of the road. 423. While Petitioner was outside of the car someone came out of the bushes behind his car and approached him. 423. It was pitch dark so Petitioner did not recognize Gray until he was really close and had raised his hand holding what Petitioner believed was a gun. 423. Petitioner who also had a gun then fired at Gray in self-defense. 425-427. Petitioner testified that he wanted to live and with so much adrenaline he started firing and couldn't say how many shots he fired. 426-427. Petitioner appears to have fired a total of 13 rounds, striking Gray ten times. App. 91. (Gray ultimately recovered from his wounds.) Petitioner testified that Gray had robbed him at gunpoint weeks before and he thought that Gray was attempting to rob him again and that Gray was pointing a gun at him. 426. Petitioner therefore presented evidence of self-defense:

> The basic definition of when a person is justified in using deadly force in self-defense is comprised of four elements:(1) The defendant was without fault in bringing on the difficulty;(2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;(3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and(4)

> The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (S.C. 1998), 545.

Because Petitioner believed Gray had a gun, whether or not he was correct does not alter the Petitioner's right to self-defense:

> A person has the right to act on appearances, even if the person's belief is ultimately mistaken. State v. Fuller, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (*citing* State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)). There is uncontroverted testimony that Petitioner acted upon the appearance that Boot had a deadly weapon."

State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (S.C. 2011), 501.

Petitioner having presented evidence of self-defense the burden shifts to the State to present evidence to disprove self-defense beyond a reasonable doubt:

> At one time, self-defense was an affirmative defense in this State, and a defendant bore the burden of establishing it by a preponderance or greater weight of the evidence. State v. McDowell, 272 S.C. 203, 249 S.E.2d 916 (1978). However, current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt. *See* State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989); State v. Bellamy, 293 S.C. 103, 105, 359 S.E.2d 63, 64-65 (1987),overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) ("It is clear that the defendant need not establish self-defense by a preponderance of the evidence but must merely produce evidence which causes the jury to have a reasonable doubt regarding his guilt.").

State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (S.C. 1998), 549.

At trial the State presented no eyewitnesses to the shooting. Nor did the State call Gray to

testify at the trial.[1] While the State points to forensic evidence that two of the bullets struck Gray in the back, there is no evidence to show when or why Gray may have turned away from the Petitioner, or that the Petitioner could tell that Gray had turned away from him in the pitch black as he was firing at Gray. The only clear evidence as to Petitioner's state of mind and the events leading up to the shooting was Petitioner's own testimony. The State failed to offer sufficient evidence to disprove self-defense beyond a reasonable doubt or otherwise to present overwhelming evidence of guilt. As a result, applying Fortune, the prosecutor's comments to the jury were prejudicial:

> 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 prosecutor's comments to the jury violated Petitioner's rights to due process under the Sixth and Fourteenth Amendments. Counsel's failure to object to the comments, his failure after the trial to advise Petitioner of his of the right to appeal and, his failure to file an appeal in the absence of an informed waiver by Petitioner, constitute ineffective assistance of counsel. The Petitioner has therefore satisfied both prongs under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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[1]Gray testified at the post-conviction relief hearing and confirmed Petitioner's trial testimony on the facts essential to self-defense. App. 51-62.

CONCLUSION

Based on the foregoing the decision of the post-conviction relief court should be reversed and the Petitioner's conviction and sentence reversed and set aside, and a new trial granted.

Respectfully submitted,
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