

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable G. D. Morgan, Jr., Circuit Court Judge

VARSHEEN ANTUAN SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000551

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Was trial counsel ineffective by failing to object to an investigator's improper bolstering testimony that he "corroborated" the story of the state's key witness?
2. Did the PCR court err in ruling Rule 404, SCRE, did not bar testimony from the state's key witness that he knows "what kind of guy [petitioner] is" and implied petitioner intimidated witnesses?
3. Was trial counsel ineffective by refusing to object to the solicitor's closing argument where, among other things, she referred to petitioner as an "evil man" five times and invited the jury to speculate about the fact petitioner "has seen the inside of a courtroom" given his prior convictions?

STATEMENT OF THE FACTS¹

Procedural History

In 2016 petitioner Varsheen Antuan Smith was indicted for kidnapping, possession of a handgun by a person convicted of a crime of violence, and possession of a weapon during the commission of a crime of violence. App. 400-08. In February 2018 he was tried before a jury and Judge Goldsmith in Beaufort County. App. 1, 63. Petitioner was represented at trial by Courtney Gibbes, and Mary Jones and Kimberly Smith represented the state. App. 64. The jury found him guilty of all three charges, and Judge Goldsmith sentenced him to twenty-five years in prison on the kidnapping charge and five years for each of the possession charges, all to run concurrently. App. 385:10-20, 397:3-25.

On direct appeal petitioner was represented by Chief Appellate Defender Robert Dudek. Appellate counsel filed an *Anders* brief arguing the trial court "erred by admitting evidence that Monte Ver'mon Steve was found murdered weeks after Andre Frazier's kidnapping." *State v. Smith*, Op. No. 2021-UP-199 (S.C. Ct. App. filed June 9, 2021). After re-briefing, the Court of Appeals affirmed his convictions because the issue was unpreserved. *Id.*

Petitioner filed a PCR application on July 8, 2021, and an amended application on November 6, 2022. App. 424-30, 450. He brought six claims that trial counsel was ineffective. App. 450. PCR counsel was Christopher Geel. App. 450. Judge G.D. Morgan held a PCR hearing on November 16, 2022, and Lauren Mims represented the state. App. 450-51. Only petitioner and trial counsel testified at the hearing. App. 453. In July 2023, the PCR court issued an order granting petitioner's application on all six grounds. App. 559-67. The state then filed a

¹ Further facts are presented below as relevant to each of the issues raised.

motion to alter or amend, App. 570, and on April 8, 2024, the court issued an amended order denying petitioner's application, App. 588. This petition for a writ of certiorari follows.

Factual History

Petitioner was convicted of allegedly kidnapping Andre Frazier on the night of October 25, 2015. App. 401. The entire case came down to Frazier's testimony at trial. He testified that on October 25 he went to visit his friend Ver'mon after leaving Buffalo Wild Wings. App. 151:8-22. On the way, he stopped at a Shell gas station and then pulled up to Ver'mon's house. App. 151:23-152:19. He saw two people outside the house and thought they were Ver'mon and another friend. App. 152:19-152:3. Frazier testified that as he approached, however, he realized it was petitioner and Tyron Wallace. App. 152:21-153:12, 155:10-17. Petitioner then asked Frazier if he spoke to Ver'mon. App. 157:4-19. Frazier testified he asked petitioner where Ver'mon was and petitioner told him he was in the house. App. 157:15-22.

Frazier then approached the house, and he testified that petitioner and Wallace elbowed him in the back, pushed him into the house after "a quick tussle," and pointed a gun at his stomach. App. 158:21-25. Frazier testified he acquiesced and then the two bound him with his belt and gagged him with a rag. App. 159:20-160:2, 162:10-16, 165:1-7. They also took everything in his pockets from him but later returned it all, including Frazier's cell phone. App. 160:17-25, 168:12-15. According to Frazier, petitioner "didn't realize" he gave the phone back. App. 168:13-15. The pair then stepped outside, leaving Frazier alone in the house. App. 168:2-6. Frazier attempted to call the police, but before he finished dialing, he decided not to. App. 168:13-169:9, 192:18-196:21. Frazier testified the pair eventually came back inside with a "different mentality." App. 169:10-12. They apparently untied him and marched him out the front door next to a police car. 169:18-171:2. Frazier testified petitioner had a gun and told him

not to say anything. App. 171:3-11. Frazier just stood there as the police pulled away. App. 172:13-173:4. Frazier did not report his alleged kidnapping until three days later. App. 266:16-25. He testified he was too scared to do so at first. App. 173:20-174:8. Captain Darrell Gruel and Investigator George Erdel interviewed petitioner, and the jury saw the recording. App. 241:5-242:5. They testified Frazier was scared when they interviewed him and that sometimes people do not report crimes out of fear. App. 242:7-243:22, 267:11-268:6.

No evidence confirmed any of Frazier's description of a kidnapping. Only the parts of Frazier's story that are not criminal could be supported: security footage from the gas station showed Frazier bought gas at a Shell station that evening, App. 206:19; Officers Goethie and Wadman testified they responded to a noise complaint near the house around the time in question, implying one of them was driving the police car Frazier saw, App. 261:18-262:6, 254:10-256:8; and Shabonda Williams testified Tyron Wallace and petitioner knew each other, App. 307:12-18. One investigator agreed there was "no forensic or physical evidence that Andre Frazier was even in that house." App. 300:25-301:8. Investigators never located the gun allegedly used. App. 300:6-7.

Ultimately, the jury convicted petitioner of kidnapping, possession of a handgun by a person convicted of a crime of violence, and possession of a weapon during the commission of a crime of violence. App. 385:13-20. The court of appeals affirmed his convictions on direct appeal in an unpublished decision. *State v. Smith*, Op. No. 2021-UP-199 (S.C. Ct. App. filed June 9, 2021).

Petitioner filed his amended PCR application on November 6, 2022, bringing six claims that trial counsel was ineffective. App. 450. After a hearing, the PCR court found trial counsel was deficient for failing to object to certain bad character evidence under Rules 404 and 403,

SCRE, App. 559-61; for failing to object to improper lay-opinion and bolstering, App. 561-62; for failing to redact from an interview statements that petitioner had recently been in prison, App. 562-63; for failing to object to numerous improper comments during the solicitor's closing argument, App. 563-65; and for failing to adequately present petitioner's phone records from which the jury could have inferred he was otherwise busy at the time of the alleged crime, App. 566. The PCR court found each deficiency prejudiced the petitioner at trial and therefore violated his right to the effective assistance of counsel. App. 559-67.

The state then filed a motion under Rule 59(e), SCRCP, App. 570, and the PCR court reversed course. On almost every single issue, where the PCR court had previously found deficiency, it now found counsel rendered reasonable performance. App. 574-86. And where it had found counsel's errors were prejudicial, it now found no prejudice, even assuming there was deficiency. App. 574-87.

Petitioner now seeks a writ of certiorari to review the PCR court's order dismissing petitioner's application.

STANDARD OF REVIEW

The standard of review on appeal from a PCR order "depends on the specific issue." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). But they "review questions of law de novo, with no deference to trial courts." *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839 (citing *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527).

Whether trial counsel was so ineffective as to deprive petitioner of his Sixth Amendment right to counsel is a question of law that this Court reviews de novo. *See State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (stating appellate court will review with deference findings of fact but de novo whether those facts legally constitute waiver of right to counsel); *cf. State v. Frasier*, 437 S.C. 625, 632-34, 879 S.E.2d 762, 765-66 (2022) (holding whether given facts constitute a violation of the Fourth Amendment is a question of law reviewed de novo); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (holding whether a statement was voluntarily made to police is a question of law reviewed de novo).

ARGUMENTS

"The Sixth Amendment guarantees every criminal defendant the reasonably effective assistance of counsel." *Stone v. State*, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017) (citations omitted). "In order to prove counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). Counsel's performance is deficient if it "fell below an objective standard of reasonableness." *Rhodes v. State*, 349 S.C. 25, 30, 561 S.E.2d 606, 609 (2002) (citations omitted). For prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The PCR applicant bears the burden of proving his allegations. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

I. The PCR court erred in holding an investigator's testimony was not improper bolstering and impermissible lay opinion because it served no purpose but to inform the jury he believed Frazier.

a. Relevant Facts

After the jury heard Frazier's testimony, the state called Investigator Erdel. Erdel described interviewing Frazier and then explained how he "corroborated" Frazier's story:

Q: And after speaking with Mr. Frazier, what did you do?

A: Well, obviously, we -- you know, we went further with the investigation as far as to corroborate the elements of what he said
....

Q: Were you able to corroborate some of what he told you?

A: Yes.

Q: And what was that?

A: Well as far as -- a lot of things

App. 268:7-17. Erdel explained that he went to the gas station to determine if Frazier's "account of his time leading up to getting to the residence was able to be verified, which it was." App. 268:17-21. He explained that he checked the police calls for service around the time of the alleged kidnapping:

A: So, the calls that you -- that the jury has already heard about, basically I looked at the CAD data to verify the times and kind of pinpoint when those calls took place.

Q: Okay. And were they consistent with Mr. Frazier?

A: They were.

App. 268:22-269:6. The state then emphasized this commentary, asking about what happened "[a]fter speaking with witnesses and corroborating Mr. Frazier's statements" App. 269:10-13. Erdel did not testify the time Frazier was at the gas station or what the CAD data showed—he testified only that he "verified" those parts of Frazier's story. Trial counsel did not object to Erdel's testimony. App. 268:13-14.

At the PCR hearing, trial counsel explained she did not object to Erdel's reference to Frazier visiting the gas station because she wanted the jury to understand the timeline about the gas station. App. 493:14-23. She intended to use it to challenge the timeline in Frazier's version of events. App. 493:19-23. She testified she "wasn't thinking [about] it as bolstering" because she wanted to attack his timeline. App. 493:25. Trial counsel did not give a reason for not objecting to Erdel's comment about the CAD data.

At first the PCR court granted petitioner relief on this issue, finding "[t]his sort of testimony very clearly invades on the province of the jury." App. 561. It held Erdel's testimony "was clearly inadmissible, and warranted a timely objection from trial counsel." App. 561. However, in a complete reversal, the PCR court later denied relief writing, "Erdel was merely explaining what he did after speaking to Frazier, and this Court finds this testimony did not

amount to improper corroboration, vouching, or bolstering." App. 599-600. It further found trial counsel's stated reason for not objecting was reasonable. App. 600.

b. Deficiency and Error

"[A] witness may not give an opinion for the purpose of conveying to the jury—*directly or indirectly*—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017) (emphasis added). That is "the central point of the prohibition against improper bolstering." *Id.* "[R]easonably competent trial counsel should know to object—absent a valid trial strategy—when [an] interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose."² *Briggs*, 421 S.C. at 325, 806 S.E.2d at 718.

Trial counsel failed to object to Erdel's testimony even though it "convey[ed] the witness's opinion that the victim is telling the truth," which "is obviously improper bolstering." *Id.* The only purpose in asking Erdel if he could "corroborate" Frazier's story was to elicit his opinion that Frazier was being truthful. The purpose of stating he verified some parts of Frazier's story was to imply that he believed the rest of Frazier's story. That goes beyond his role "as a person who collects facts for the jury to use in the jury's determination of whether the victim was telling the truth." *Briggs*, 421 S.C. at 328, 806 S.E.2d at 720. Critically, Erdel *never* stated the time at which Frazier was at the gas station or explained what the CAD data showed. His testimony served not to present the facts to the jury but to decide the facts himself.

² Many of the recent cases concerning bolstering and vouching, such as *Briggs*, relate to expert interviews with child victims of sexual crimes. Certiorari is particularly warranted on this issue because it would allow the Court to develop the law on bolstering outside of the child sex crimes and forensic interviewer contexts. The Court could further consider the circumstances under which law enforcement officers can testify about their opinions whether a defendant is truthful. *E.g. State v. Pickrell*, Op. No. 28229, 2024 WL 3805283 (S.C. Sup. Ct. filed Aug. 14, 2024).

Had Erdel simply testified what he discovered at the gas station or what the CAD data showed, that alone would not have been improper bolstering or vouching. Such testimony would have properly corroborated parts of Frazier's version of events without expressing or implying Erdel's opinion about Frazier's story. He would have simply explained his investigation, and it would have been up to the jury to determine what to do with the facts he collected. See *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) ("Generally, '[t]he assessment of witness credibility is within the exclusive province of the jury.'" (citing *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (alteration in original)); *Briggs*, 421 S.C. at 328, 806 S.E.2d at 719-20 (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). But the testimony he gave instead told the jury he had already "decided questions of fact"—that Frazier's version of events was the correct one—and therefore he improperly "invade[d] the province of the jury."³ *Briggs*, 421 S.C. at 329 n.4, 806 S.E.2d at 720 n.4. Therefore, the PCR court erred in finding this testimony was proper and counsel was not deficient.⁴

³ It was especially incumbent upon trial counsel to object to Erdel's testimony here because in petitioner's recorded interview played for the jury, Gruel and Erdel repeatedly—directly and indirectly—accuse of petitioner of lying and reported that Frazier is telling the truth. State's Exhibit 5 at 26:35-27:10, 46:15-46:45, 53:10-54:15. In particular, in that interview Gruel expressly threatened petitioner's credibility: "And now you're going to say he's lying, but I'm gonna tell people you're lying, . . . so a jury says 'What's he lying about? Why is he trying to hide something?'" Exhibit 5 at 42:30-42:50. With that context, it should have been abundantly clear to trial counsel Erdel was impermissibly telling the jury who it should believe and who it should not.

⁴ While the harm of impermissible bolstering is "compounded" when the witness is qualified as an expert, *Thompson v. State*, 423 S.C. 235, 250 n.5, 814 S.E.2d 487, 494 n.5 (2018), as explained below Erdel's non-expert bolstering was still extremely harmful because there was no evidence of a crime except for Frazier's testimony.

Erdel's testimony is similar to the forensic interviewer's report that was improperly admitted in *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). There, the interviewer's reports "stated that during the interviews, each child had 'provided a compelling disclosure of abuse by appellant'" and concluded the children "provided details consistent with [known] background information." 394 S.C. at 480, 716 S.E.2d at 94 (cleaned up). Erdel's testimony he "corroborated" Frazier's story served exactly the same purpose as stating the children in *Jennings* were "consistent" with other known information. As in *Jennings*, "[t]here is no other way to interpret" his testimony "other than to mean the . . . interviewer believed [Frazier was] being truthful." 394 S.C. at 480, 716 S.E.2d at 94. And, as in *State v. Pickrell*, Op. No. 28229, 2024 WL 3805283 (S.C. Sup. Ct. filed Aug. 14, 2024), the opinion testimony was not "helpful to a clear understanding of a fact in issue." *Pickrell*, Op. No. 28229 at *2. In exactly the same way as Investigator Bailey in *Pickrell*, Erdel's testimony went further than to place the facts before the jury—the direction of the bullet wound there, the unimportant details of Frazier's story here—and instead gave the officer's opinion about what the facts meant. *Id.* That is not valid.

Trial counsel's explanation is not a sound, strategic reason for allowing Erdel's bolstering. See *Stone v. State*, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). Her stated strategy was objectively unreasonable because she could have easily objected to the bolstering while also attacking Frazier's timeline during cross-examination. The two are plainly not connected. That counsel intended to attack Frazier's timeline instead indicates she simply failed to appreciate what Erdel's testimony was actually doing. Nowhere in his testimony did he explain what the gas station video shows or when, precisely, he believed Frazier was at the gas station. That was because the purpose of Erdel's testimony was not to establish when Frazier went to the gas station—an unimportant point—but rather to bolster his credibility as someone with a story that

has been verified by a police investigator using outside information.⁵ Trial counsel's decision to allow that testimony without objection was not reasonable. Further, she gave no reason whatsoever for not objecting to his testimony about the CAD data that served the same purpose.

c. Prejudice

At the very beginning of its closing, the state argued, "the defense wants you to not believe anything [Frazier] says, and I am going to ask that you do believe him." App. 332:8-10. Later in closing the state then attacked petitioner's credibility: "And you know who is a liar and who lied for almost an hour straight? Varsheen Smith." App. 340:16-17. The state did this because Frazier's relative credibility was the cornerstone of its case. Frazier's testimony was the *only* evidence that a kidnapping took place or that petitioner possessed a weapon.⁶ Because the state's entire case hinged upon his credibility, the failure to object to the testimony was necessarily prejudicial. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95 (holding bolstering of children's accounts of events was not harmless where it was "the only evidence" of a crime).

⁵ Erdel's testimony is on its face inadmissible for the purpose of proving Frazier was truthful or correct in his testimony actually describing the alleged crimes. *See* 70 CORPUS JURIS, *Witnesses* § 933 (1935) ("The testimony of a witness cannot be sustained or impeached by proof of his correctness or incorrectness in other specific transactions."). While stated in different terms, even almost 100 years ago it was well established one witness could not bolster the credibility of another by explaining that in different circumstances he had been correct or truthful.

⁶ Technically there was one other piece of evidence against petitioner, although standing alone it was exceptionally weak. Shabonda Milledge testified that petitioner called her in the weeks after Frazier was allegedly kidnapped. App. 307:24-308:23. She testified she asked him, "if he wasn't guilty of what they were accusing him of, why was he running[?]" App. 308:25-309:2. She testified he knew "the police were looking for him." App. 309:7-12. Evidence of flight can be relevant proof of a crime so long as "there is a nexus between the flight and the offense charged." *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). However, such evidence will almost never be a substantial factor in finding an error was not prejudicial. *See United States v. Foutz*, 540 F.2d 733, 740 (4th Cir. 1976) ("The inference that one who flees from the law is motivated by consciousness of guilt is weak at best . . .").

The Court has previously found prejudice where "the outcome of Petitioner's jury trial hinged on Victim's credibility, and there was otherwise an absence of overwhelming evidence of guilt." *Thompson v. State*, 423 S.C. 235, 249, 814 S.E.2d 487, 494 (2018) (citing *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010)); see also *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (reversing denial of PCR where trial counsel failed to object to testimony that "served only to bolster [the victim's] credibility" because the case "hinged on whether [the victim] was credible").⁷ This case is the same, and counsel's deficiency was "sufficient to undermine confidence in the outcome." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 669 (1984)). Thus, the PCR court erred in denying petitioner's application.

II. The PCR court erred in ruling Rule 404, SCRE, did not bar testimony that petitioner was the "kind of guy" that would intimidate witnesses into silence.

a. Relevant Facts

At trial the solicitor asked Frazier why he did not call the police the night of his alleged kidnapping. App. 173:20-21. He explained:

Because, for number one, I have kids. I know what kind of guy he is, so I had to really think what I was going to do, you know, make sure that I made the right choice to know what I was going to do.

App. 174:23-174:1. Then, on cross-examination and unprompted, trial counsel allowed Frazier to expound on his fear:

I raised my son from three years old and he lives with me and at that time my daughter was staying with me too, so at that time I really had to think what I was doing. I didn't want to put my kids

⁷ See *Tappeiner*, 416 S.C. at 253, 785 S.E.2d at 478 ("Given the dearth of evidence beyond Victim's assertions, we cannot say evidence of Tappeiner's guilt was overwhelming. Therefore, we find that but-for the improper vouching for Victim's credibility, there is a reasonable likelihood the outcome of the trial would have been different, and Tappeiner was thus prejudiced by trial counsel's failure to object.").

in a situation, when you have [people] running in the woods doing crazy stuff. I have kids that I am raising, I have a job, I have good things going for me that I didn't want to sink, but sometimes when a person really got to do what they got to do, they got to do what they got to do, you get tired of it.

App. 213:7-19. In closing argument, the solicitor used this testimony to paint petitioner as a "big intimidator" and repeated that Frazier told the jury, "I have two kids that I take care of and they live with me and I have to think about their safety." App. 337:11-15.

Captain Darrell Gruel testified that "there is a code of silence" that explains why Frazier delayed in reporting his alleged kidnapping. App. 242:7-243:9. Erdel testified similarly that "there is kind of a street mentality" and "people are typically afraid for any number of reasons." App. 267:18-23.

b. Deficiency and Error

In the body of its order dismissing petitioner's application, the PCR court wrote about Frazier's testimony: "Applicant did not identify in his application or at the PCR hearing the legal basis for which counsel should have objected other than to say this testimony was inflammatory." App. 594. This was incorrect given the PCR court's own prior order makes clear it understood the basis of the alleged deficiency. The PCR court had previously explained: "State's witnesses collectively impugn[ed] Applicant's character in varied ways," including statements that "implied (or explicitly stated) that Applicant was a violent and dangerous person, that Applicant was likely to harm or intimidate the State's primary witness (Frazier) and place Frazier's family and children in harm's way for 'snitching'" App. 560. Also, PCR counsel asked trial counsel at the PCR hearing about this testimony and connected it to bad character evidence. App. 478:3-479:13. Trial counsel agreed, "I think a general characterization of his character I should have objected to" App. 479:10-11. Petitioner's argument has been

consistently clear that Frazier's testimony was improper bad character evidence, and the PCR court erred in denying his claim on this basis.

In a footnote, the PCR court ruled Frazier's comment was not inadmissible bad character evidence under Rule 404(b) because, since Frazier alleged petitioner kidnapped him, "any assessment of 'what kind of guy he is' could relate directly to Frazier's account of the incident itself and does not rise to the level of impermissible bad act evidence." App. 595. n.3. The PCR court erred in two ways. First, the PCR court was mistaken that petitioner argues the testimony violated Rule 404(b), SCRE. Because Frazier described no prior acts, petitioner has not suggested the testimony violated Rule 404(b). Rather, it was a comment on petitioner's character in general—i.e. the "kind of guy he is"—and therefore violated Rule 404(a).

Second, that his testimony "could relate directly to Frazier's account of the incident itself" does not reflect a fair interpretation of the facts established at trial. While it is possible the jury could ascribe Frazier's fear to the conduct he alleged, it is not the only explanation given Frazier's other testimony. He testified he recognized petitioner on sight and that as soon as he saw petitioner approaching, he said to himself, "This mother fucker." App. 189:1-5. Thus the jury could have rationally inferred his fear was based on his previous interactions with petitioner or petitioner's general reputation. Taken together, the jury could infer Frazier was referring to his opinion that petitioner is of the character to harm people or their families for going to the police—or, as the solicitor put it, that he is a "big intimidator." Therefore, the PCR court erred in finding as a matter of law there was but one way for the jury to interpret the testimony.

Frazier's explanation of his fear was an attempt to show petitioner is the "kind of guy"—i.e. that he has a certain character—who would do violence to someone or their family for calling the police in response to a crime. That is impermissible under Rule 404, SCRE. *See* 22 CORPUS

JURIS, *Evidence* § 561 (1920) ("It is well established as a general rule of evidence that the character of a party to an action is not a proper subject of inquiry"); *German v. State*, 325 S.C. 25, 27-28, 478 S.E.2d 687, 688 (1996) (holding officers could not refer to other alleged criminal conduct in the course of explaining their investigation because the statements were "improper comments on petitioner's character"). As the PCR court initially ruled, "While it may have been the case that Frazier was fearful, the fact that Frazier's fear was explicitly based upon his belief about Smith's character—and was thus based on propensity for intimidation and violence—such evidence was inadmissible in this case, and should have drawn an objection from trial counsel." App. 560.

c. Prejudice

As explained further below, Frazier's testimony about petitioner's character helped to establish the state's theory that he is an evil person. The solicitor compounded the improper characterization in closing. Because Frazier's and petitioner's credibility effectively determined the outcome of the case, there is a reasonable probability that had counsel objected the outcome would have been different.

III. The solicitor's closing argument was improper and prejudicial because it attacked petitioner's character as an "evil man" and invited the jury to use his prior conviction as evidence he committed the crimes alleged.

a. Relevant Facts

In closing and without objection, the solicitor repeatedly asked the jury to disregard its role as factfinder on specific charges of criminal conduct and instead act as judges of petitioner's character—to convict him for being an evil man. That intent is clear from her final plea to the jury at the end of her closing in which she described petitioner as an "evil man" five times without once referring to any evidence:

I want to leave you with one last thing, and that is Varsheen Smith. Look at this man. This is a man who doesn't care. This is a man who thinks that he is invincible. This is a man who thinks that nobody is going to snitch on him. This is not a man who is going to tell the truth. This is a man who was just told his roommate was missing and this is how he's acting. A man that laughs at a missing person. A man that laughs at a kidnapping. That is an evil man.

And that is what [Frazier] told you. He said, He is an evil man. And a man that can have that sort of reaction in speaking with police is not only an evil man, he is a guilty man. And I ask that you use your common sense. And you know that this man, this evil man who finds all of this comical for another person's nightmare is just a laugh to him. He is an evil man and a guilty man.

App. 347:25-348:17. The PCR court particularly considered those statements and six others made during the solicitor's closing, App. 602-04:

We heard Investigator Erdel say that [Frazier] was scared, he was terrified, he was upset, he was in fear. He was frightened and he was crying. He even went so far to say that he put his fear at the top of the list of anybody he had ever questioned, and he told you that he's been in law enforcement since the '90s. [Frazier] is a scared man. *And rightfully so.*

App. 336:13-19 (emphasis added).

People weren't calling the police like they should. And [Frazier] fell subject to that. He told you he was scared of this man. This man is a big intimidator. You heard that on the recording. And more importantly he told you, I have kids. I have two kids that I take care of and they live with me and I have to think about their safety. I'm raising those kids, no one else. Andre couldn't be a snitch. You don't live in this world, you don't live on those streets having the title snitch. And Andre wasn't going to do that, he had children that he had to live for.

App. 337:9-20.

Will you talk, Varsheen? It depends, that is what he said. He is there to talk about his missing roommate and a kidnapping at gun point of somebody and he finds it comical. He is laughing. He's smirking. He does not care. He is smug.

App. 344:2-6.

And finally, possession of a weapon by a person convicted of a crime of violence. *I wonder what this shows you? This isn't the first time Mr. Smith has seen the inside of a courtroom.* He's been convicted of burglary. Breaking into somebody's house. . . .

App. 347:17-24 (emphasis added).

Without explanation, the PCR court found these comments were "reasonable inferences from the evidence presented at trial" and that therefore counsel was not deficient for failing to object. App. 604.

b. Deficiency and Error

"[S]olicitors . . . must tailor their remarks 'so as not to appeal to the personal biases of the jury' or 'arouse the jurors' passions or prejudices.'" *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (quoting *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). Improper closing arguments require a new trial if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Vasquez v. State*, 388 S.C. 447, 459, 698 S.E.2d 561, 566-67 (2010) (quoting *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166).

In her closing argument the solicitor focused not on the isolated evidence that petitioner kidnapped Frazier with a gun, but rather argued petitioner is an "evil man" that intimidates potential witnesses, would hurt children to keep people from "snitching," laughs at a time when seriousness is warranted, and is someone that "has seen the inside of a courtroom." Taken together those arguments are blatantly improper, and reasonable counsel would have objected to them.

The PCR court erred because there are other ways solicitors can inject impermissible considerations into a proceeding and violate defendants' right to a fair trial. *See, e.g., Von Dohlen*, 360 S.C. at 610, 602 S.E.2d at 744 (holding "golden rule arguments" are improper);

Simmons v. State, 331 S.C. 333, 338-39, 503 S.E.2d 164, 167 (1998) (holding closing argument "improperly inject[ed] parole considerations into the jury's sentencing decision"); *Fortune v. State*, 428 S.C. 545, 551, 837 S.E.2d 37, 40-41 (2019) (holding solicitor's argument that "my job is to show the truth," among other comments, was "absolutely inexcusable"). Whether they were "reasonable inferences" from the evidence is not the only question.

There are three ways in which the solicitor's closing arguments were improper in this case. First, in repeatedly referring to petitioner as an "evil man," the solicitor asked the jury to judge petitioner's character rather than his guilt of the crimes charged and to act on emotion rather than reason. Second, her comments about his burglary conviction clearly invited the jury to infer his guilt of the crimes charged based on his prior convictions. Third, attacking his demeanor during the recorded interview highlighted facts that are entirely irrelevant to his guilt, improperly impugned his character, and unfairly implied a defendant's refusal to confess is evidence of his guilt.

Calling petitioner an "evil man" five times at the very end of her closing argument was improper. The comments served only to unfairly impugn petitioner's character. Unlike with a murder charge where the state must prove malice, there was no valid purpose in describing petitioner or his actions as evil. *See State v. Hart*, 436 S.C. 153, 162, 871 S.E.2d 202, 207 (Ct. App. 2022) (affirming solicitor's description of defendant as evil "[b]ecause malice is a statutory element the State must prove to sustain a murder conviction"). Further, the solicitor's comments were not even based on the alleged crimes he committed but other irrelevant factors, such as his bad attitude towards police. They were an abdication of the solicitor's "duty . . . to see justice done" and an over-zealous pursuit of a conviction. *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

Their only purpose was "to improperly arouse the passions and prejudices of jurors" *Von Dohlen*, 360 S.C. at 614, 602 S.E.2d at 746. Reasonable counsel needed to object to the attacks.

The solicitor also described petitioner as a "big intimidator" and invoked Frazier's fear on behalf of his children. The solicitor then compounded the problems by opining Frazier was "rightfully" afraid of petitioner. As the PCR court originally ruled in its order granting relief, the problem with the solicitor's arguments is that they "very clearly impugned Applicant's character" without justification or valid purpose. App. 565. In context, and particularly the reference to Frazier's children, the arguments were an invitation for the jury to act on an emotional basis. *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566 (holding solicitor's description of defendant as a "domestic terrorist" was improper and repeating that solicitors' closing arguments "must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice" (quoting *Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881)). For whatever evidentiary worth Frazier's fear could have had, the solicitor did not use it properly but rather to stoke the passion of the jury, attack petitioner's character, and reinforce its story that petitioner is an evil man.

Second, trial counsel allowed the state to use petitioner's burglary conviction to violate the long-standing rule against propensity evidence. *State v. Perry*, 430 S.C. 24, 29, 842 S.E.2d 654, 657 (2020) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." (quoting *Michelson v. United States*, 335 U.S. 469, 475 (1948)); *see also* 16 CORPUS JURIS, *Criminal Law* § 1132 (1918) ("The general rule is that . . . evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial . . . is irrelevant and inadmissible.")). Asking

the jury, "I wonder what this shows you?" expressly invited it to make this forbidden inference. That is a blatant disregard of the rule and an impermissible attempt "to raise a legally spurious presumption of guilt in the minds of the jurors." *Perry*, 430 S.C. at 30, 842 S.E.2d at 657 (2020) (quoting *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923)). While the prior conviction was a necessary element for proving one of the weapons charges, the state did not use it as proof of that element but for the improper propensity purpose. *Cf. State v. Day*, 341 S.C. 410, 423, 535 S.E.2d 431, 438 (2000) (holding closing argument improper where solicitor repeatedly referred to defendant as "outlaw"—admittedly his nickname—because it "was not used to prove any matter in controversy").

Third, the solicitor's comments on petitioner's attitude during the interview—"He is laughing. He's smirking. He does not care. He is smug."—invited the jury to make unreasonable inferences and, as the PCR court initially wrote, improperly "commented on his alleged lack of remorse." App. 565. In choosing not to object during the closing argument, trial counsel allowed the state to "invite the jury to draw an adverse inference merely because the defendant did not appear penitent" during his interview with police. *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987). That is improper because the state cannot use petitioner's refusal to admit guilt as evidence of guilt. *Johnson*, 293 S.C. at 324, 360 S.E.2d at 319 (holding it is error for a solicitor to reference a defendant's "lack of remorse . . . because it [i]s a comment upon his constitutional right to plead not guilty . . ."). At the least, whether petitioner was laughing, smirking, or smug is not evidence of a kidnapping.

In summary, the state expressly and repeatedly portrayed petitioner as an "evil man," and it relied on his prior conviction to do so. It invited the jury to judge not whether he committed any crimes on October 25, 2015, but whether he was a bad person—the kind of person that

would harm children to silence a witness. And it used his demeanor in an interview as proof he committed a kidnapping. *All* of these comments demanded trial counsel object. None of those arguments genuinely tend to show that petitioner committed any crimes, but rather they invited the jury to do exactly what the solicitor asked: find petitioner guilty because he is an evil man—whether he kidnapped anyone or unlawfully used or possessed a weapon was not the point.

It may be reasonable for trial counsel to choose not to object to minor comments, even if arguably unfair, because each alone would not be too likely to arouse the passions of the jury. On PCR review, a court might defer to that decision as part of the "presumption that counsel was effective." *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) (holding trial counsel was not deficient in choosing not to object to the solicitor calling the defendant "Doc Holliday" because evidence established that was his nickname and "no negative connotations arose at trial from use of the nickname"). But here the solicitor's improper arguments are not so insubstantial or limited. They were pervasive and glaring. She repeatedly called for the jury to find petitioner guilty based on irrelevant and legally impermissible factors. It was incumbent on trial counsel to object to such clearly improper arguments.

Trial counsel also lacked a sound reason for not objecting. *See Stone v. State*, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) ("[C]ounsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound."). At the PCR hearing, trial counsel testified she has a general rule not to object in closing "because I don't know, the jury might – what they might think about me standing up and objecting." Trial counsel's belief that she should not object for fear of what the jury *might* think of her is not a sufficient reason to allow the solicitor to expressly *tell* the jury to think petitioner is an evil man.

c. Prejudice

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent 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. "In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine 'whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (citation omitted). "[T]he appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166 (citations omitted). When reviewing objections to multiple comments in a solicitor's closing arguments, courts can consider them "in conjunction with" each other to find prejudice. *Tappeiner*, 416 S.C. at 254, 785 S.E.2d at 479-80.

In *Tappeiner* the solicitor "improperly appealed to the jurors' emotions" by asking if they would want Tappeiner—on trial for criminal sexual conduct with a minor—babysitting their children or relatives. 416 S.C. at 252, 785 S.E.2d at 478. The Court explained: "[G]iven the lack of physical evidence, the solicitor's emotional plea that Tappeiner was a bad actor and could not be trusted to watch the jurors' own family members is reasonably likely to have had a substantially stronger impact than would be the case in a trial where there was additional, independent evidence of the defendant's guilt." 416 S.C. at 253-54, 785 S.E.2d at 478.

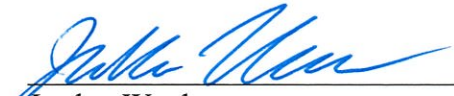
Here, the solicitor's exhortations that petitioner is an "evil man" and a "big intimidator" improperly invited an emotional response from the jury in the same way as in *Tappeiner*. Painting petitioner as an evil man that would hurt children to intimidate witnesses did not serve

any valid purpose. Instead, it was a plea to emotion with the hope the jury would convict him regardless of his guilt of the crime charged. And, like in *Tappeiner*, "given the lack of physical evidence, the solicitor's emotional plea" that petitioner is a "bad actor" likely had a strong impact. 416 S.C. at 253, 785 S.E.2d at 478. Trial counsel's failure to object was therefore prejudicial. *Id.*

For similar reasons, the solicitor's invitation for impermissible speculation because petitioner "has seen the inside of a courtroom" cannot be harmless. First, this clear attack on petitioner's character—his prior record—in a case all about credibility was inherently prejudicial. Second, given the evidence presented there was no "overwhelming evidence of guilt" because only Frazier's testimony described any crime. Third, the trial court did not instruct the jury that it must not use his prior conviction as evidence of petitioner's guilt. *See Simmons*, 331 S.C. at 340, 503 S.E.2d at 167 (finding trial counsel ineffective where "no jury instructions cured the solicitor's improper argument" in closing).

CONCLUSION

For the reasons, state above, petitioner asks the Court to grant his petition for a writ of certiorari, reverse the PCR court, and grant his application for relief.


Jordan Wayburn
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2024.