VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. 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

APPENDIX

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Q. Okay. And so the portion that we just heard about?

A. I honestly, I don't -- I -- I can't believe I missed that. If that was something that was in the redacted version, and -- but it was in it, the jury heard it, so yeah, either I missed it every time I listened to that video, or I -- I don't know. I -- but yeah, I would've definitely asked for that to be redacted if I'd known that.

Q. Okay. And let's jump to do you recall that the video was played two times during ---

A. Yes.

Q. Correct? The jury came back with a question and asked the seat again?

A. Yes.

Q. And after the jury heard it the second time that -- at that point you caught the -- the phrase ---

A. Yeah.

Q. --- court's attention, correct?

A. Yes.

Q. And do you recall moving for a mistrial at that point?

A. Yes.

Q. Okay. And without belaboring, the point was the basis for that mistrial, essentially all the things that we just discussed?

A. Yes. Because I do remember when they played it the first time in front of the jury Varsheen noticed it. I think he heard, hey, I think I heard -- he heard that. I, you know, I didn't, you know, it goes by -- it comes out and then it just keeps playing. And I wasn't 100 percent sure. But then when the jury asked to hear it again it definitely, I mean, it was very clear. So that's when I made the motion. Obviously, I -- if I'd, you know, been sure the first time it was played I would -- I should have moved, you know, objected at that very moment.

Q. And -- and that's what the prosecutor argued.

A. Right.

Q. You recall?

A. Right.

Q. She essentially said, you've already played the video one.

A. Yeah.

Q. There's no objection.

A. Right.

Q. And -- and you're aware that one must be a contemporaneous objection?

A. Yes.

Q. Or it's waived, right?

A. Yes.

Q. Okay. And final point on this -- on the video, as

you sit here today, any strategic reason for not having that redacted or for not objecting contemporaneously when it was played?

A. No. I mean, I would've -- that is definitely -- certainly what I wanted to get redacted. I think the only reason I didn't object it contemporaneously is I wasn't 100 percent sure. I mean, I think I didn't quite hear it till he pointed it out and I missed you know, that's exactly what was said and, but I should have at least stood up and just objected.

Q. Okay. Let's move on to the remarks by the prosecutor during closing argument. Have you had occasion to review the prosecutor's closing argument ---

A. Yes.

Q. --- in preparation for today?

A. Mm-hmm.

Q. Okay. If you wouldn't mind, can we jump to page 274 in your packet? And are you with me on line 13 of page 274?

A. Yes.

Q. Okay. And now this is the closing argument by the state. The prosecution says "We heard investigator Ardell say that Andre was scared, he was terrified, he was upset, he was in fear, he was frightened, and he was crying, even went so far as to say he put his fear at the top of the list of

anybody he had ever questioned. And he told you that he had been in law enforcement since the 90s. Andre is a scared man, and rightfully so." I know we've kind of already gone --

A. Right.

Q. --- over a lot of this ground when this testimony substantively came in. Do you have any reaction reading this now?

A. I -- well, yeah. I think it's the same. I mean, one, I don't -- I try not to, and you know, the Judge tells the jury, you know, opening and closing arguments aren't, you know, they aren't -- are not evidence. I feel like both sides kind of, you know.

In my closing I was, you know, making generalized, you know, statements about Andre. But I think the same with this. It's the issue with, I think she could say he was scared, he was upset, he was frightened, he was crying. But I think talking about, you know, that I think it is bolstering that he had been saying, you know, and I'll go skip ahead, you know, they said he was an evil man right at the end. Anything about, he's been in law enforcement since the 90s so he should know basically, like he would know I think the generalized statement would be a problem.

Q. What about the remark and right. He -- he Andre's a scared man and rightfully so.

A. Right.

Q. I mean, would you agree that the implication here is that he actually had reason to be fearful for his safety? It wasn't just faceless fear, I mean, and rightfully so.

A. Right. Yeah. I mean, I do think that's an improper comment by the solicitor. But again, I mean, I think I probably, I did the same thing in a way in my own, but looking at this now, I think I did miss some things that I could have objected to.

Q. Okay. So that portion that I just read ---

A. Yeah.

Q. --- in those lines, as you sit here today, you agree that they would be objectionable potentially?

A. Yes.

Q. And I know the closing argument sort of zips past very quickly.

A. Right.

Q. Can you recall any strategic reason for not objecting to that remark in particular?

A. I mean, I think I was kind of using -- I mean, I think my closing was basically, you know, they're trying to act like he's this big bad man because they don't really have a case. So they're trying to say that. So I think in my head at the time, it was more of a, you know, I was trying to use against them that they really didn't have a case. They

only had Andre.

And so they're trying to make it sound like, you know, it's -- I think it's a big bad version. So I -- that was some strategy, but you know, the other side of it's that I could have objected to keep that out. You know, the hard thing is when you're in the middle of a closing, you know, you -- does it call attention to it? If you, you know, what's the jury even think if you object or are they going to, you know, call -- will it cause more attention to it? But yeah, no, I mean, I do think she did say some comments that were objectionable that I did not object to.

Q. Why don't we step forward to page 275 on line nine. Do you see in the middle of line nine where it says. "People weren't calling the police."

A. Mm-hmm.

Q. The prosecution says, "People weren't calling the police like they should, and Andre fell subject to that. He told you that he was scared of this man, this man is a big intimidator. You heard on that 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 of a snitch. And Andre wasn't going to do that. He had children that he

had to live for." And again, I mean, if you would agree that this is implying that he had to fear for his own life if he cooperated with this investigation, he had reason to fear Mr. Smith.

A. Right. Yeah. I would agree. I think some -- I mean, again, I think the, you know, him talking about being in fear and his kids I think that was part of whether he was testifying to, you know, and how he felt. But I agree, and, you know, with -- with the state saying it, and the -- I mean, yeah. I mean there are definitely things I would object to.

Q. Just a brief side point, there wasn't any evidence in this case of actual witness intimidation of any kind that you're aware of. Is that fair to say?

A. No. I mean, there was nothing they got admitted. There was a jail letters where they were -- I think they were trying to say Varsheen and his co-defendant were -- there's a snitch in the jail. He were -- I mean, I think they wrote a letter against him, but there was nothing that was going to come into evidence or ---

Q. Certainly (crosstalk).

A. Right. Nothing. Right. Yeah -- yeah.

Q. Okay. So the -- these remarks -- this argument that Mr. Frasier had reason to fear for his safety, there was no evidence to support that at trial?

A. Yeah, I think. I mean, I think the evidence was his testimony that, you know, if you believe -- you know, if you believe everything that he was saying, he was saying, "I was scared because of what happened." But I think like, this man is a big intimidator. I think that's a general problematic statement I could have objected to.

Q. That's a remark on Mr. Smith's ---

A. Right. Mm-hmm.

Q. --- capacity for violence, you would agree?

A. Yes.

Q. And is objectionable on those grounds?

A. Yes.

Q. Okay. Moving forward to page 282 on line two, the prosecution is talking about Varsheen Smith's statement to police. She says on line two, "Will you talk Varsheen?" "It depends." That is what he said. "He's there to talk about his missing roommate and a kidnaping at gunpoint. And somebody he find -- and he finds it comical, he's laughing, he's smirking, he does not care, he's smug." And then later on in line 15 on the same page, "What do we know after all this happens after Andre is kidnapped, after Monty goes missing? That man right there, like the coward that he is, he flees, he runs away and hides in rural Georgia." So when they're saying this man -- that man right there, I imagine that the prosecution was pointing at Mr. Smith?

A. Probably. Yes.

Q. She was certainly referring to Mr. Smith. You would agree?

A. I would agree.

Q. When she says that he's a coward.

A. Yes.

Q. She was talking about Mr. Smith?

A. Yes.

Q. And you would agree that that's a comment on his character?

A. Yes.

Q. And objectionable on those grounds?

A. Yes.

Q. Again, any -- any thoughts as far as any considerations that were at play at the time that you can identify now for not objecting?

A. No. I mean, I think part of it -- I mean, I think I was trying to explain a little bit during the evidence, you know, another reason why he'd be in Georgia besides fleeing, you know, he has a wife or he is -- but yeah, I mean, I think the general, "Like the coward that he is and he's hiding." Yeah. I agree that's objectionable.

Q. Okay. On page 285, if you could go to line 17, did you see where it says, "And finally," at the end of line 17?

A. Yes.

Q. Now discussing the charges the prosecutor says, "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 been inside of a courtroom, he's been convicted of burglary." Do -- do you have any reaction to that remark on his conviction is specifically, "I wonder what this shows you. This isn't his first time in a courtroom."?

A. Right. Yeah. I mean, I think at the time I was kind of like, you know, you have -- the jury's going to hear something because they have to show that he was convicted of a crime and violence. And so I think at the time I thought that was part of that -- part of that conviction. But I do. I mean, yeah the first, I mean, I think it can be inferred that obviously he's seen -- seen the inside of a courtroom since he has been convicted at least like one crime of violence. But I guess that in general, yeah, I mean, I think there are some objectionable. Especially, I mean, I'm sure. Going to 286, you know, talking about that as an evil man. I mean, that is -- yeah, I think that's improper.

Q. Okay. So just those lines, 17 to 22, you'd agree, raises an improper implication about familiarity with the criminal justice system?

A. Yeah. I mean, I think it was probably -- I think

I -- yeah, I mean, in a perfect world I would've objected to that, but I also at the time did not -- I thought it was something the jury was already going to hear because they had to show he had been convicted of a crime of violence.

Q. And again, the conviction itself was obviously admissible as an element.

A. Right.

Q. You would agree though ---

A. Yes.

Q. --- that was not admissible as to argue about his propensity for ---

A. Right.

Q. --- criminal conduct and familiarity with the criminal system, criminal justice system.

A. Right.

Q. Okay. The last portion down at the bottom of page 285, prosecution says, "I want to leave you with one last thing," are you with me there? 285?

A. Yes.

Q. I want to leave you with one last thing, and that is Varsheen Smith and I'm at the top of 286. "Look at this, man. This is a man who doesn't care. This is a man who thinks he's invincible. This is a man who thinks that nobody is going to snitch on him. This is not a man who's going to tell the truth. This is a man who was just told that 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 kidnaping that is an evil man." That is what Andre told you. He said, "He's an evil man. A man that can have this sort of reaction in speaking to police is not only an evil man, he's a guilty man. And I ask you to use your common sense. And you know that this man is evil man who finds all this comical for another person's nightmare is just a laugh to him. He is an evil man and a guilty man. Thank you." And that was the end of the closing argument part of it. These repeated remarks that Varsheen Smith is an evil man, do you have any reaction to those as you sit here today?

A. Yeah. I mean, I don't think that's proper for her to say that I do. I mean, the jury saw his interview video. He is -- he does laugh. He does kind of -- so I mean, the jury did see some of the, you know, that he did laugh or whatever it was, but I think, you know, her saying he's an evil man would be improper.

Q. No. Prosecutions -- prosecutors are prohibited from commenting on a defendant's character.

A. Right.

Q. And this is very clearly a comment on his character. You would agree?

A. Yes.

Q. And you didn't -- certainly didn't put his

character an issue in this case.

A. No.

Q. And same question as regards to the lack of remorse. You would agree that she's indicating that he's remorseless here?

A. Yes.

Q. IS that also objectionable?

A. Yes.

Q. You would agree?

A. Yes.

Q. As you sit here today, can you identify any strategic considerations that was at play?

A. I mean, I think it's the same. I mean, because that was right at the very end and I kind of opened with -- I mean, I tried to use that to say, you know, that's basically all their case is to try and say he's a bad man. But in hindsight, yeah. I -- yeah, anything about it's an evil man. I should have objected to that.

Q. You -- you would agree. They're simply not allowed to make that (inaudible) right?

A. Right.

Q. Okay. All right. So turning to the -- the final issue with the phone records. Do you recall receiving, it must have been a fair amount of phone records in this case?

A. Yes. And I actually -- I got a -- well, for this

case, I got funding for a cell phone expert. He analyzed the records and I also did get a private investigator to interview witnesses, possible witnesses for his defense.

And so I did -- we -- I mean we had Tom Slovenski from Cellular Forensics, he analyzed his phone records as far as the -- this was as far as the data, like the phone things and the -- which I mean it showed -- I mean, it did prove that he was not around, you know, for the accessory after the fact to murder. It showed he was not in that area where they were trying to say he was involved with after the murder. But because I did not put him up as a witness for -- because the cell records -- I mean, Varsheen admitted that he had been at the house with the victim Ramon Steve, during the day. And so it showed -- I mean, it pinged off the towers for that area. And so there really wasn't -- since his defense wasn't -- he wasn't there during the day leading up. It just -- we did have it analyzed, but not -- it didn't show that he wasn't at -- around the area of that home during the day. It just showed after the fact that he was in a different location.

Q. Let's -- let's talk about the call logs. The ---

A Yeah.

Q. --- logs themselves. As far as what they did show.

MR. GEEL: Your Honor, may I approach the witness?

THE COURT: Yeah.

MR. GEEL: Your Honor, I'm handing the witness applicant's 2. I've already flipped it over to six.

THE WITNESS: All right.

BY MR. GEEL:

Q. Were you present for Mr. Smith's testimony or were you outside the (inaudible)?

A. Oh, I heard it, yes.

Q. Okay. So directing your attention to page six there, do you see that bracketed portion where there's a number of calls between 7:12 p.m. and 8:16 p.m.?

A. Yes.

Q. Okay. And you heard Mr. Smith testify that these calls -- now this is Mr. Smith's phone that end in 025.

A. Right.

Q. Is that also consistent with your recollection?

A. Yes.

Q. That now this call log would indicate that there were 18 calls, if I counted them correctly, that took place between 7:12 p.m. and 8:16 p.m. Would you agree that this even -- even it's not the precise number?

A. Right.

Q. It's a number of phone calls?

A. Yes.

Q. Now, do you recall having discussions with the

defendant about getting into that piece of evidence at trial?

A. Yeah. We did -- we did talk about it. And I think -- I mean at the time, because the state put -- send the evidence, I didn't feel like I had to put it into evidence. I did go through it with the investigator Ardell and Shavonde Millege to try. And in my closing I pointed out, you know, he couldn't have been kidnaping Andre because he was calling -- he was calling Ramon, he was calling. But yeah, I didn't -- I did not specifically go through every single one of these calls and say, you know, this time he did this or this time he did that.

But I did point out, I mean, that was part of my closing, what I pointed out that he couldn't be doing what they said he was doing, which is kidnaping Andre Frasier at a certain time because he was actually on the phone making calls. I did bring that up and point that out, but no, I did not -- I did not go through every specific -- every single call. I basically just went through it with Shavonde and Ardell so that I could use it in closing.

Q. Just to clarify, we went over this a little bit with Mr. Smith, but these calls of -- these are not the calls to Shavonde. You would agree? Shavonde's calls were much later?

A. Well, there -- right, there was a confusing with

Shavonde. And I was a little confused between the incoming and outcoming when I was crossing her. But I did go through. It did come out that he was calling Ramon Steve. He was making calls during the time and that this allegedly happened.

Q. And -- and this -- to your recollection, these records were admitted as the state's exhibit, correct?

A. Yes.

Q. So you would've had the opportunity if you chose to, to actually step through these the way that I'm doing it right now ---

A. Right.

Q. --- with any witness.

A. Yeah.

Q. Who you testified to it, they could have gone over these phone records, correct?

A. Right.

Q. Under cross examination?

A. Yeah.

Q. But you did not do that?

A. No. I went through some -- I mean, obviously I went through some calls and I don't know. Obviously, I did not put anything into evidence. And so I -- I did go through with it with Ardell, but I didn't go through every single specific call in this manner. I did not.

Q. Okay.

MR. GEEL: All right. Thank you, Your Honor. That's all I have. May I have the exhibit?

THE WITNESS: Yep. Do you.

THE COURT: All right. Cross examination?

MS. MIMS: Yes, Your Honor. (Inaudible).

CROSS EXAMINATION BY MS. MIMS:

Q. Good afternoon.

A. Good afternoon.

Q. How long have you been practicing law?

A. About 15 years.

Q. How much of that has been criminal law?

A. All of it.

Q. Can you kind of go through the facts of applicant's case as you understood them?

A. The facts. I mean, I guess ---

Q. Or I -- your theory of the -- the case.

A. I think the most theory was, you know, that Andre -- his -- I mean their whole case was Andre's testimony. Basically in that we pointed out times he was not telling the truth. The investigator didn't think he was telling the truth. So we tried to impeach him -- I tried to impeach him as much as I could with the different things that he said or how things changed or how he didn't -- he didn't report it immediately, you know. I mean, I guess I would say it's just

reasonable doubt, but it was mostly that they didn't have -- the only evidence they had was Andre Frasier's statement.

Q. You tried to -- it's your testimony that you tried to kind of pick that apart, correct?

A. Yes. Mm-hmm.

Q. Was that your main trial strategy?

A. I mean, we did talk about, you know, putting up a case. I did have some -- my investigator trying to interview some witnesses that didn't really pan out as far as -- so yeah, I mean that was mostly the -- the strategy was that they couldn't prove it that he was lying and that's all they had. The investigation was poor, you know, yeah, basically. I'm sure I'm missing ---

Q. Do you recall about how many times you met with applicant?

A. Well, he said five to seven, but I looked -- I have at least 10 pieces of paper where I wrote notes, and it -- and we talked on the phone a lot. I can't say the exact number, but I know it was more than five to seven times.

Q. Okay. And what were your discussions during those times? Did you discuss discovery?

A. Yes.

Q. Okay. And did applicant express any concerns regarding anything in his discovery?

A. We did talk about, I mean, yeah, I mean, he was --

Varsheen is a good client because he pick -- lets me know every single thing where he sees there's a problem. And so that was a lot of the things I got out. Is because he noticed there were differences. And, you know, how things were, you know, what was going on with the witness's statements and what was changing and, you know, with Andre. We did talk about those phone records. We did talk about, you know, last closing. You know, I wouldn't -- I mean, obviously somebody's decision to testify that's putting up witness, that's their decision. I would never tell somebody, you know, they have to not testify or they have to not put up witnesses if we had witnesses. I think the issue is -- I mean, some of the -- we had a couple alibi witnesses I looked into that just didn't -- we had one who said he couldn't -- who was a woman named Christine Matthews who he was in a hotel room with that evening. And she basically didn't want to be involved and said that she couldn't -- my investigator spoke to her and she wasn't able to -- there was a time where she could not out by him.

There's another -- he'll -- somebody named Larry a tow truck driver who, you know, to show that he wasn't with the other co-defendants, we interviewed him. And he didn't really -- he didn't have anything to say that he remembered anything about who was -- and the hotel -- the hotel video, we did try and get that in. At first they gave us kind of a

hard time saying, we have a warrant to get the video from the hotel where he was. And then they said, yeah, they only keep him for 30 days. So we only had a 30 day window to get it. And obviously by the time I got it, and that was -- but we did do that. But as far as putting up a case, there just wasn't any witnesses that I felt were helpful from our investigation.

Q. So there -- it's your testimony, there wasn't any witnesses that you would feel would be helpful to the applicant's -- to defense, to bring up after the state's rest of their case.

A. Right.

Q. And it is also your testimony that you would never tell applicant that he could not testify or ---

A. Oh, no.

Q. Or if there was anything that he wanted to be brought before the jury?

A. Yeah. I mean, I think, yeah, definitely. I mean, obviously I'm not going to tell anybody, you know, what they have to -- that's their decision, you know, plea or trial, testify or not testify. I think if we had, you know, a witness that could -- that was credible or would, I mean, we had one -- the witness that was the main alibi witness she basically told my investigator she couldn't. There was a time period, you know, the most important time that he -- she

couldn't testify about.

Now, if this is the trial for the accessory after the fact, I think she would've been more helpful because it was a later time frame. But for the actual kidnaping that we -- it was earlier. So yeah, she could not alibi. But yeah, I wouldn't -- I mean, I wouldn't say, no, you can't -- we can't present this. I just -- I felt there wasn't any credible witnesses that would help.

Q. It was your testimony that you were able to get out some of the cell phone records with some of the witnesses from trial, correct?

A. Yes.

Q. Let's go into applicant's specific allegations. I think you spoke a little bit with applicant's counsel about remarks on page 11. If you could follow me back. Do you have that in front of you?

A. Yes.

Q. And think you specifically pointed out to the testimony of Mr. Frasier that he didn't call the police that night, correct?

A. Right.

Q. And he talked about his kids. He wanted to make sure he made the right decision, correct?

A. Yes.

Q. And at the time, did you think this was

objectionable? Not, you know, having the benefit of ---

A. Right

Q. --- hindsight, but at the time, would you have thought this to object to this testimony?

A. No. I mean, I didn't. So ...

Q. Is there any particular reason as to why you wouldn't have ---

A. Are we ---

Q. I'm sorry.

A. Which one are we ---

Q. We're talking about page 111, lines 20, 21, 23 through 25. And then once ...

A. I got you. Yeah, no, I thought, because we had already heard his testimony, Andre's testimony, and he said he was in fear. He said he had kids. At the time, I believe that was his testimony

Q. And that it was no reason for you ---

A. Right. Yeah, I did not catch that as an objection.

Q. All right. And I think we'll follow -- go ahead and follow over to page 181 if you have that with you.

A. Yes.

Q. And it was your testimony earlier that you didn't think this was going towards Varsheen's character, right? Those lines two through nine?

A. Yeah. I think the -- what I was thinking about was -- is maybe going towards Andre, you know, saying, you know, he's in the street and street he wanted to handle it his own way or, you know. So at the time I did not think of it as something that would show that he was in fear about snitching. Yeah. At the time I did not think that was an objection.

Q. And you testified in hindsight, you may have -- you may have objected, but at the time there was nothing that you could see.

A. Yes. I mean, I didn't object.

Q. You'll follow me to page 205. And this follows essentially the same sort of testimony regarding the street mentality. If you could just read over that portion for me as well. You don't have to read all of it out.

A. Right.

Q. And would the same general idea apply to that as well?

A. Yes, same thing.

Q. And specifically about question started on page 205, line 24 and through the top of 206 through six, line six, you testified that you felt this was kind of his idea or what his opinion of what his demeanor was at the time, correct?

A. Right. I was thinking it was what the

investigator observed, you know, as to his demeanor and that he was scared and he was crying. And, you know, I think maybe at the time I was thinking, you know, about he was talking about his experience, but yeah, I mean, in hindsight reading this I think the generalized comment is something I could have objected to about. I've never seen anybody in the interview room and that is saying something.

Q. And would you agree that is his opinion?

A. Yes.

Q. Regarding his experience, correct?

A. Yes.

Q. Follow me again to page 20, 20. I apologize for the -- for the slow turning here. I think you testified a little bit earlier that you knew that Mr. Frasier would be testifying that he was scared, correct?

A. Yes.

Q. And you also testified that you may have wanted to use it as a trial strategy regarding Mr. Wallace, correct?

A. Yeah. I mean, I think, yeah, that was kind of the thought that it could be -- he could be scared of -- of Mr. Wallace as well.

Q. And did you rely on any testimony about Mr. Wallace in your closing?

A. I -- well, yeah, I mean, I think what I was basically saying is, you know, they're trying to say --

they're basically trying to, you know, get sympathy and convict Varsheen based on there's a murder. But that he -- that Varsheen was in charge of the murder. And so I think my thought was to use that, you know, they're trying to say he's so bad, but really it's type, you know, Mr. Wallace is the one -- he's the one who is charged with the murder, not Varsheen.

Q. And that was your thought process at the time to not object to this testimony?

A. Oh wait, sorry. I'm forgetting the words. The language. What line? I'm sorry.

Q. This is the testimony by Mr. Ardell when he was talking about, "I'm trying to think about anybody else's." That was ---

A. Yeah. I mean, I think that was a thought process that, you know, he -- that can imply that he wasn't, you know -- it could be in talking about Mr. Wallace. But again, in hindsight I understand that it could be objectionable.

Q. You'll follow me to page 246. This is regarding the testimony of Shavonde Millege where she talked about asking questions regarding whether applicant may have been running. Did you find that objectable at the -- objectionable at the time?

A. No. I think, I just thought because it was her -- in the moment, it was her statement that she would be able to

-- to make her statement to what she said. But yeah, again, looking at that I can see why that's objectionable.

Q. Go ahead. Let's flip back to page 206. I'm sorry. This issue specifically towards the bolstering and the vouchering of the testimony.

THE COURT: What page is that Ms. Mims?

MS. MIMS: That is on 206, lines nine through two. Well, nine through, I guess you could say to the end of the page 325.

BY MS. MIMS:

Q. And that didn't bring you any pause at the time of trial?

A. No.

Q. And why not? Why didn't you?

A. I think, again, what -- what I was thinking in my mind was that I kind of wanted the jury to hear the video, the time that it showed, because I was arguing in closing that Andre's timeline doesn't make sense after that one, you know, that he pulled up to the gas station. His account doesn't -- it doesn't make sense after that, was my thought. I think what I'm looking at now though is -- where is it? Basically just saying that he -- he was right or he -- we, you know, we corroborated his statement. Oh, yeah. Were you able to call? Oh yeah, a lot of things.

Q. Oh, I apologize.

A. Oh, you're fine. I was at 17. Yeah.

Q. But yes. But at the time, would it be your testimony that you had a strategic reason to allow that testimony in regarding the time?

A. Yeah. I mean, that's what I was thinking. I didn't -- I didn't think it was bad for the jury to hear the time that he was at the gas station. I thought.

Q. If you would please come with me to page three. Regarding the motion for mistrial.

A. Oh.

Q. And the video evidence.

THE COURT: What page is that?

MS. MIMS: That is page 321. Beginning at line one through page 322, ending at line (inaudible).

BY MS. MIMS:

Q. You testified that you wanted to keep out any reference to probation or parole or anything like that, correct?

A. Yes.

Q. And it was your testimony that you did ask for redaction, correct?

A. Yes.

Q. But it's also your testimony that you did not hear this portion of the video, correct?

A. Right.

Q. And when you heard the portion of the video, you objected to it, correct?

A. Yeah. I mean, I didn't hear the first -- he caught it and I may have -- I mean, I just didn't hear the whole thing and so I didn't -- at that moment I didn't object in that moment. But I knew that, you know, because he had heard it, that it was an issue. But then when we heard it again, I mean it was very obvious and that's when I made the motion for a mistrial then.

But it was not at the right time. I think actually at the time I was like, you know, I'm going to preserve this for PCR because I missed that. I am going to -- yeah, I said right there I missed that.

Q. There, but it was also -- and if you -- it was also the testimony of the solicitor.

A. That was my watch. I'm sorry, it's not my phone.

Q. Testimony of the solicitor in the court. They didn't hear that, correct?

A. Right. I didn't hear it. I didn't -- yeah. The first time Varsheen heard it and I maybe caught the, you know, the tail word or sentence, but I didn't hear it enough to know what was actually said.

Q. And do you recall the court stating that he didn't -- that they didn't remember hearing it, but also there was evidence presented that he was convicted of something before?

A. Yeah. Just because they had to prove as an element that he was convicted of a violent crime. Right.

Q. And that was testimony that was elicited throughout?

A. Yes.

Q. And while your mistrial motion was unsuccessful, do you think it would've been successful if you had ---

A. I mean obviously I lost it. So the Judge didn't agree. You know, I think -- I think what I -- you know, the timing, the -- yeah, I don't think I would've won the motion for a mistrial, but it is just the objection, the timing. I wish I had stood up.

Q. All right. And if you could flip that for me to the present argument of the state. Would you agree that you did not object to anything in the state?

A. I did not object to anything.

Q. And is it your practice to generally object?

A. I mean, I try not to just because I don't know. I mean, it has to be something that's, I don't know, glaring -- glaring to me. And just because I don't know, the jury might -- what they might think about me standing up and objecting every time during closing argument. But so yeah, I mean, it's not something I try to do. Just in practice.

Q. I believe on page two -- I bet the counsel don't know. I believe on page 286 there is some references to

applicant being an evil man.

A. Yes.

Q. And you testified a little bit earlier that you used that in your closing argument, correct?

A. Yeah, I did. I mean, I think I said it right back at the beginning. You know, the beginning of my closing was basically trying to use their -- their -- their theory to try and kind of take it as, you know, a negative in using our closing.

Q. So you ---

A. Oh yeah, I did.

Q. So you wanted to diminish their testimony?

A. Yes.

Q. So would it -- would have been a reasonable to object to that testimony if you were going to use it later in your closing argument?

A. Yeah. I mean, I didn't object because I used it. But at the time I don't know that -- I should have objected to an evil man. But I did -- my strategy was I did use it. That was kind of my strategy was saying their -- that's their whole case is that he's this evil man, but it's not. I -- you know, that's not the case. They don't have enough to -- enough evidence or enough, you know, they have to rely on that. They didn't really have anything else to show besides Andre's testimony, which I was obviously trying to pick a

part.

Q. If you could look with me to page 285, starting at line 17, possession of a weapon. Solicitor states filing possession of a weapon by a person convicted of a crime of violence. I don't know what this shows you. This isn't the first time Mr. Smith has seen the inside of a courtroom. And did that testimony come out in trial?

A. It did come out that he was convicted of a burglary, second violent agree. As far as breaking into somebody's house, I don't recall. I don't know if that was specifically -- if that came out. I mean, and it did come out that he was convicted of a crime of violence, which was burglary second nonviolent. And I addressed -- I did try and diminish that as well in my closing. So it happened when he was a youthful offender and it was -- so at the time I think I believed it was under it -- that fell under what the jury had heard already.

Q. So it wouldn't have been reasonable to object to that testimony?

A. I did not think -- I didn't think about objecting to it.

MS. MIMS: Okay. I had the (inaudible).

THE COURT: Mm-hmm.

BY MS. MIMS:

Q. I think you testified earlier that in hindsight

you may have objected to lines 15 through 18 on page 282.

A. Oh, yeah. About fleeing, like the coward that he is. And I guess, I mean, I was trying to -- at some point, I mean, she brings up his wife. I think I was trying to get out that there was another reason he was there besides fleeing is because he had a wife there.

Q. And was that in your -- that was in your closing argument, correct?

A. Yes.

Q. And so you tried to diminish this statement as much as you could ---

A. Yes.

Q. --- in your closing argument?

A. Yes.

Q. So would it have been reasonable to object to that testimony at that time?

A. I mean there -- it -- I think the hiding, I should've. That he's hiding or he is not visiting his wife. Yeah, I mean at the time I did not think of objecting, but in hindsight I can see how that is an objectionable. Or like that a coward he is.

Q. Let me ask you, closing arguments are not evidence, correct?

A. Right.

Q. And the jury is instructed on that portion,

correct?

A. Right.

And yeah, I mean, and I think sometimes, I mean, I know I'm probably saying some things in closing that could be objectionable as well, you know, talking about their witnesses. So -- but yeah, it's not evidence.

MS. MIMS: No further questions, Your Honor.

THE COURT: All right. Any redirect?

MR. GEEL: Very briefly, Your Honor. Thank you.

REDIRECT EXAMINATION BY MR. GEEL:

Q. I just want to touch on a few brief points. Regarding the testimony on page 206 that we all alleged was bolstering. You just indicated that you didn't mind the jury hearing that particular part -- piece of testimony because you didn't mind them hearing about the gas -- the time at the gas station. Am I recounting you ---

A. Yes.

Q. --- on that correctly?

A. Mm-hmm.

Q. Let's just draw a distinction here between these two things. The -- the gas station video was entered into evidence during this trial, correct?

A. Correct.

Q. So that portion of the evidence in this case was completely separate from this witness's opinion as to whether

Frasier's testimony is corroborated. Would you agree?

A. Right. Yes.

Q. So although there may be something that was said here that incidentally was not objectionable, what we're focusing here is on the opinion that this testimony is corroborated. Do you?

A. Yeah. I mean, I think that's just why I didn't object. Because I think at the time I didn't really -- I think looking at it, I mean, when he is talking about a lot of things I mean, yeah, I mean, I agree. I think at the time I did not object because my thought was I was okay with that coming in, but I could see how that's objectionable.

Q. I guess. To put it another way, this is a piece of evidence that was already in, that you didn't mind the jury hearing, but there was also remarks on the corroboration ---

A. True

Q. --- interspersed with that ---

A. Right.

Q. --- comment there. You would agree?

A. Yes.

Q. And the latter portion was objectionable. You would agree?

A. Yes. I would agree.

Q. Jumping forward, and I apologize, we're going to

jump around a little bit just because I wanted to touch on a few brief points. As to the mistrial motion regarding the -- the video coming in, one of the arguments that the prosecution made when you made that mistrial motion was that the motion was not timely. Do you recall that?

A. Yes.

Q. Specifically, and this is at page 322, finds 11 and 12. Ms. Jones says, "Your Honor," this is after your mistrial motion, "Your Honor, Ms. Gibbs had a copy of the disc yesterday. She had it before it was submitted into evidence. It was submitted into evidence without objection, even after it was played in its entirety. I feel like the objection is not timely. The evidence was already submitted to the jury." And then the court immediately responds, "Okay. I understand the motion for mistrial, but I'm going to deny the motion." So the motion for mistrial was denied immediately after the prosecution argued that it wasn't timely.

A. Right.

Q. You agree based on that?

A. Yes.

Q. We can't be sure that the court agreed with that argument, but we simply don't know and ---

A. Right.

Q. --- here's two reasons we don't know. One of them

is that there was no contemporaneous objection when it was initially planned.

A. Yeah.

Q. And you didn't request a specific articulation from the court as to whether they were finding the objection not timely?

A. Right. I did not.

Q. Okay. So in any event, we don't know the court's reasoning and we can only ---

A. Sure.

Q. --- read the transcript. You would agree?

A. Yes.

Q. The two of the issues that you touched on in the cross-examination was the -- the closing argument. Ms. Mims had essentially touched on the fact that you attempted to diminish these remarks during your closing.

A. Yes.

Q. Now, you would agree that the -- whether you are remarking on these issues or whether you're objecting to them during the state's closing, these are two completely separate ---

A. Yes.

Q. --- things. You would agree?

A. Mm-hmm.

Q. And in terms of if you were seeking to diminish

these remarks objecting and moving for a curative instruction and moving for an admonishment, those would also diminish those remarks. You would agree?

A. Yes.

Q. Having the Judge reprimand the prosecutor for calling your client evil in front of the jury, for example?

A. Yes. Mm-hmm.

Q. You would agree that that would diminish those remarks in a more direct way than your closing argument?

A. Yes. I agree. I mean, I guess --

Q. Has more authority ---

A. Yeah.

Q. --- than -- than your own closing argument. You would agree? From the Judge?

A. Yes. I mean, that's another way to do that for sure.

Q. And you would have -- you would've had grounds to at least make that request, you agree?

A. Yes.

Q. To move, to strike, and move for a curative instruction and reprimand ---

A. Right.

Q. --- et cetera. You would've had grounds to do that. You agree?

A. Yes.

Q. And the last point that I'll touch on is the issue with the remarks about Mr. Smith's prior conviction and the fact that this isn't the first time inside of a courtroom.

We are in agreement that his conviction was admissible. Again, I want -- I'd like to separate that out. Do you agree that the remarks that this isn't the first time he's seen a courtroom is separate and apart from the evidence of his conviction itself?

A. Yes.

Q. Do you agree? The -- the former is a remark upon his familiarity with the justice system?

A. Yes.

Q. Which is separate and apart from whether ---

A. Right.

Q. --- he is a conviction. You would agree?

A. Yes.

Q. And you're a criminal defense practitioner, you said, I mean, a Judge remarking that one of your clients has seen the inside of a courtroom before is almost never a good thing. You would agree?

A. Yes.

Q. It carries an implication that they are -- have a propensity to make crimes. You would agree?

A. Yes. I agree.

Q. If a Judge said that, for example, during a

sentencing.

A. Sure.

Q. The Judge said, "Here, you -- this isn't your first time inside of a courtroom."

A. Right.

Q. It's not going well for you.

A. Right. I agree.

MR. GEEL: Okay. Thank you. Nothing further.

THE COURT: Any re-cross?

MS. MIMS: May the court indulgence us one second. Briefly, Your Honor.

THE COURT: Mm-hmm.

RE-CROSS EXAMINATION BY MS. MIMS:

Q. I just like to touch on the portion about the solicitor's closing remarks. You testified on the end cross-examination that it's not really your general practice to object to jury remarks.

A. I mean, I definitely have before. I just -- I try not to, unless it's a glaring, and I think in this case at the time I obviously did not object and I was using it. I did it in a different way by trying to handle it in my closing argument.

Q. And so, wow. I'm sorry.

A. But well, yeah, I mean, I think just because the jury does hear this is an evidence, you know, at certain

points you have to just think about whether or not, you know, who's going to look bad if you're objecting during the closing. And you just never know. I mean, it could go either way.

MS. MIMS: No further questions, Your Honor.

THE COURT: All right. Any other questions?

MR. GEEL: That was all, Your Honor. Thank you.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Thank you. All right. Any other witnesses?

MR. GEEL: That concludes our evidence, Your Honor.

THE COURT: All right. State have any witnesses?

MS. MIMS: No, Your Honor.

THE COURT: All right. Come one -- Johnny. Johnny, you have exhibits?

COURT REPORTER: I have exhibit, Your Honor.

THE COURT: Can I see those? Let me just point of clarification, Mr. Geel, on the arguments on the phone records from 7:12 to 8:16, clarify if you would for me, your -- your position on the admission of these records and the time period of 7:12 to 8:16 and the relevance to your argument.

MR. GEEL: Yes, sir. Certainly, Your Honor. The -- these -- the exhibit that you hold in your hands is an

excerpt of an exhibit that was admitted at trial, a more voluminous call log record. So these items were in evidence.

Directing your attention to page six. The calls that are bracketed there between 7:12 and 8:16 p.m. this is the window where the alleged kidnaping took place. It isn't clear exactly when the kidnaping was alleged to have taken place because they were working backwards from Mr. Frasier leaving the gas station and then going over to the incident location. So it was basically -- could only be narrowed down to a window that was roughly 7:15 p.m. to about 8:15, 8:30 p.m. on that date.

What we are arguing here is that the -- the fact that Mr. Smith was -- these are Mr. Smith's phone records, his cell phone record. The fact that he was making so many phone calls and so many frequent phone calls throughout this time period is evidence that he didn't actually participate in the kidnaping. The record will obviously speak for itself, but there isn't an indication from the alleged victim that Mr. Smith was on the phone throughout the duration of the kidnaping incident.

THE COURT: So what was the evidence that narrowed it down to this -- this time period? What -- what was that evidence?

MR. GEEL: Your Honor, my understanding is that it was bracketed by two events. The earlier event being Mr. Frasier

departing from a gas station. And it is undisputed that he went from the gas station to the incident location. I believe that that video shows him departing at approximately 7:15 p.m. Again, that exhibit will -- will speak for itself, but that's my understanding of what it said.

And then the latter portion was after the incident concluded, the alleged victim had his cell phone and sent the text message to Mr. Steve, the -- the gentleman who was there to find to -- to try and track down. And so he had his phone back. So that was after the alleged incident.

THE COURT: So what time was that?

MR. GEEL: I believe that that was about 8:30, Your Honor. 8:15, 8:30, somewhere in that window. So that's why we bracketed that. So it's a conservative bracketing. It's a -- it's 7:15 to about 8:30. So this is the window where the incident was alleged to have taken place. Nobody's clear exactly what the time frame was. It's just that window. We don't know exactly how long the -- or precisely when the incident was ---

THE COURT: All right. So was there any other evidence presented at trial that there was any other time other than that window?

MR. GEEL: No, Your Honor.

MS. MIMS: No. I -- none that I have, Your Honor.

MR. GEEL: I think it's undisputed that it was, if the

incident did take place, it was inside that window. Now, Your Honor, the duration of the entire incident is not at all clear whether it was a five-minute long thing or a 10-minute or a 15-minute long thing. So we don't know if it would've taken that entire window. It would've been a very small slice of that window. It's -- it's not very clear. The -- the alleged victim here wasn't looking at the -- the -- the clock essentially. And so ---

THE COURT: Okay.

MR. GEEL: --- we've just narrowed it to that window. So our argument of position here, Your Honor, is that defense counsel could have highlighted for the fact for the jury that Mr. Varsheen Smith was on his phone basically, you know, numerous times throughout this time period. And that's just not consistent with him perpetrating a kidnaping at gunpoint during that same time window.

THE COURT: So the records were admitted there into evidence.

MR. GEEL: I believe that was state's Exhibit 8, that's an excerpt from state's Exhibit 8.

THE COURT: Mm-hmm.

MR. GEEL: Now, I received those materials from my client. They were in discovery. So ...

THE COURT: And then just to make sure that I'm clear though, the argument, then they were admitted into evidence

and the argument from the applicant is that the defense counsel didn't argue that -- that -- that 7:12 to 8:16 bracket of time. And argue showing the records to the jury, they were in evidence. But arguing and showing the records to the jury, it looked from 7:12 to 8:16 he was on his phone. And so your argument is defense counsel did not make that argument; is that correct?

MR. GEEL: Yes. Did not sufficiently elicit that. As -- as defense counsel testified, she didn't sort of step through or highlight that portion at all, and didn't -- in our view, it didn't make the argument to the jury that this demonstrates that he couldn't -- it certainly couldn't have happened the way that the alleged victim said it happened. There's no indication that he was -- I mean, if you look at the record, he's on the phone throughout that time period. So that's our position, is essentially at minimum that should have been pointed out to the jury. And even though these records were in evidence, I -- I -- is to say, Your Honor, that these markings were not on these materials.

THE COURT: Right.

MR. GEEL: It wouldn't have been -- it wouldn't jump out at the jury in the same way that it has for these exhibits.

THE COURT: Mm-hmm.

MR. GEEL: So it wouldn't have been obvious to the jury

at all that this was a -- a -- a basis for arguing not guilty.

THE COURT: And Ms. Mims, what -- the counter to that was based on the testimony -- I assume the testimony Ms. Gibbs here, it -- there was some reference made, but not specifically to the numbers?

MS. MIMS: Yes. Yes. That she spoke with her sorry, his name is escaping me, the investigator Ardell.

THE COURT: Mm-hmm.

MS. MIMS: She had talked about that spec. Talked about, you know, the times had kind of got that out on testimony -- in testimony. And then also spoke about -- used the times to say that, you know, that Mr. Frasier -- that his time line was off in her closing.

THE COURT: And I've got in my notes that she testified that, or through your questions, that she was able to get this information through other witnesses. And that's what I was trying to kind of nail down. What -- do you have who those witnesses were or the -- is that who you're talking about the investigator?

MS. MIMS: Yes. And she did -- she did testify that she didn't exactly lay it out, but she discussed the testimony and these phone records with ---

THE COURT: Okay. All right. Well, I'll take it under advisement, and per our discussion earlier I'll allow you to

submit briefs on the issues.

MR. GEEL: Your Honor, very briefly, just -- I want to make sure I -- I'm not -- not imprecise with the court. On page 224, what they testified to is that Mr. Frasier is last seen at the gas station at 7:15 and that he sent a text message to the alleged victim at 8:26 p.m.

THE COURT: Okay.

MR. GEEL: I want to make sure that that -- that's ---

THE COURT: 7:15 to 8: ---

MR. GEEL: Yeah. That's ---

THE COURT: --- 26.

MR. GEEL: --- 24 of the trial transcript.

THE COURT: Okay. All right. I'll wait to receive your -- your briefs, and once I review those and I've reviewed some of the file already and I'll re-review it and I'll read the transcript as well. And then I will take it under advisement and let you know my decision.

MR. GEEL: Thank you, Your Honor.

THE COURT: Thank you both.

(THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED AT 4:14 P.M.)

CERTIFICATE OF TRANSCRIBER

I, NATASHA BARRIENTOS, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of CIRCUIT 13 for BEAUFORT County, South Carolina, on the 16th day of November, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

_____

August 3, 2023

Natasha Barrientos

Transcriber

State of South Carolina Beaufort County	In the Court of Common Pleas For the Fourteenth Judicial Circuit Case No: 2021-CP-07-01235
Varsheen Smith (#211467) v. State of South Carolina	**ORDER GRANTING APPLICATION FOR POST-CONVICTION RELIEF**

This matter came before this Court in Horry County for a hearing on Applicant's request for post-conviction relief ("PCR"). At the hearing, the State was represented by Lauren Mims, Esq., and the Applicant was represented by Christopher Geel, Esq. The Applicant Varsheen Smith, through PCR counsel, made several arguments in support of his claims of ineffective assistance of trial counsel. Those arguments and this Court's findings regarding each alleged ground for relief are discussed in detail below.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. Applicant was indicted in Beaufort County for kidnapping (2015-GS-07-01890), possession of a handgun by a person convicted of a crime of violence (2015-GS-07-01908), and possession of a weapon during a violent crime (2015-GS-07-01909). On February 21, 2018, Applicant proceeded to trial before the Honorable Brooks P. Goldsmith. The jury found Applicant guilty of all charges. The court sentenced Applicant to twenty-five years' imprisonment for the kidnapping charge, with concurrent five-year sentences on the remaining charges. Applicant filed a timely notice of appeal. Appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asking the Court to consider whether the trial court erred by admitting evidence that the kidnapping victim's friend was found dead weeks after the kidnapping incident, when Applicant was not charged

with that person's murder. On March 20, 2020, the Court ordered further briefing on this issue, but ultimately affirmed Applicant's convictions and sentences on June 9, 2021. *State v. Smith*, 2021-UP-199 (S.C. Ct.. App., June 9, 2021). Remittitur was issued on June 29, 2021.

Smith filed a PCR application in Beaufort County on July 8, 2021. The application was amended on November 16, 2022. The matter was convened for an evidentiary hearing and at that evidentiary hearing, Smith asserted the following grounds for relief:

> Trial counsel was constitutionally ineffective pursuant to *Strickland v. Washington*[1] as follows:
>
> 1. Failure to object to inflammatory remarks by witnesses (Trial Tr. 40-45, 111, 181, 205-206);
> 2. Failure to object to inadmissible bad character evidence (Trial Tr. 246-247);
> 3. Failure to object to witness bolstering/vouching (Trial Tr. 181, 205-206, 220, 274);
> 4. Failure to redact the portion of Defendant's interview that mentioned that Defendant had previously been in prison. (Trial Tr. 320-22); as well as failure to properly argue and preserve mistrial motion for appellate review (Trial Tr. 322);
> 5. Failure to object to improper comments by the prosecutor during closing argument (Trial Tr. 275, 282, 285); and
> 6. Failure to present phone records (disclosed among Rule 5 materials) that challenged the State's version of events.

At the evidentiary hearing, Smith testified on his own behalf, and the State presented the testimony of trial counsel as well as the trial-level prosecutor. Having heard the evidence presented in this matter, Smith's application is hereby GRANTED for the reasons set forth below.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court has had the opportunity to review the record in its entirety and has heard the testimony presented at Applicant's evidentiary hearing. Further, this Court has had the opportunity to observe the witnesses and to pass on their credibility, and to weigh their testimony accordingly. Unless expressly stated otherwise, all disputed factual matters in this proceeding were resolved by the Court by assessing the credibility of the witnesses and evidence presented, in light of the trial record before the Court.

A. Synopsis of Trial Evidence

This case arises from an alleged kidnapping incident in Beaufort County. The State argued that Varsheen Smith ("Smith") and his accomplice Tyrone Wallace ("Wallace") kidnapped Andre Frazier ("Frazier") at gunpoint. The State presented evidence at trial that on October 25, 2015, Frazier went to his friend Vermon "Monte" Steve's ("Steve") residence. Outside the residence, Frazier encountered Smith and Wallace. Frazier knew both men, and was aware that Smith was living in the same residence with Steve. Frazier asked Smith where Steve was, and Smith informed Frazier that Steve was inside the house. Frazier began walking towards the house, but he felt as though it was a "funny situation," and was suspicious. Frazier testified that he had a bad feeling about going inside the house, in part because the lights were on inside, and the door was open. Frazier testified that as he approached the doorway, Smith and Wallace forced him inside, pointed a firearm at him, and closed the door behind them once they were inside. Frazier testified that Smith and Wallace went through his pockets and took out his phone and other personal items. Frazier testified that Smith pointed a gun at him while this was taking place. Frazier further testified that Smith struck him on the head with the firearm and stuffed a rag in his mouth and tied up his wrists. Some time later, Frazier recalled that Smith and Wallace untied him and released him, and Frazier walked out. Frazier asked Smith again where Steve was, and Smith stated "[H]e thought that I was going to shoot him and he ran," and Smith asked Frazier to tell Steve to come and see him (Smith). After Frazier left he tried to contact Steve, but was unable to reach him. Frazier suspected that Steve may have been hiding, and he did not contact the police that

evening. The next day, Frazier continued his search for Steve but was unable to locate him, and so he contacted Monte Steve's mother, Janice Steve. She also testified at trial, stating that after Frazier contacted her, she drove to Beaufort to file a missing persons report.

The investigator who followed up on the missing persons report testified that he combined the missing persons case involving Monte Steve and the kidnapping case involving Frazier because in his view the incidents were "intertwined." He testified that he interviewed Frazier regarding the kidnapping, and that Frazier was fearful, and "as scared as I have ever seen anybody in an interview room..." (Trial Tr. 206). The investigator also testified that Monte Steve's remains were found in St. Helena Island on November 18, weeks after the kidnapping incident, and that Wallace was charged with the murder. (Trial Tr. 210). Varsheen Smith was eventually apprehended in Georgia, and was charged with the instant offenses stemming from the kidnapping incident. Smith was never charged with the murder of Monte Steve.

B. Summary of PCR Proceedings

Applicant's Testimony

Smith testified that trial counsel Ms. Gibbes commenced her representation approximately 30 days after his arrest. (PCR Tr. 9). Applicant testified that he never made bond, and remained in custody pending trial. (PCR Tr. 9). He stated that he received and thoroughly reviewed his discovery materials in this matter. (PCR Tr. 10). Applicant testified that he identified several matters that warranted investigation, but that trial counsel did not follow up on those requests. (PCR Tr. 11). During his PCR testimony, Applicant took note of the fact that the discovery materials included phone call records from his (Applicant's) cell phone during the time of the alleged kidnapping. (PCR Tr. 12). Applicant noted that the phone records revealed that he was on his phone for a substantial portion of the window of time when the kidnapping was alleged to have taken place – between 7:12 p.m. and 8:16 p.m. on October 25, 2015. (PCR Tr. 14-15). Applicant testified that he brought this to his trial attorney's attention, but that trial counsel indicated that they would not be tendering any evidence during Applicant's trial.

(PCR Tr. 15). Applicant stated that trial counsel wanted to have "the last say so" during closing argument. (PCR Tr. 15, 21, 23). Applicant testified that he was surprised that his trial attorney did not raise this issue during his trial. (PCR Tr. 16). Applicant further testified that he raised the issue regarding the phone records with his lawyer every time she visited him at the detention center. (PCR Tr. 17). Applicant also stated that these discussions continued during his actual trial. (PCR Tr. 17). Applicant testified that he continued to urge his attorney to enter the phone records into evidence, even though it would forfeit the defense's right to speak last during closing argument. (PCR Tr. 24).

Trial Counsel's Testimony

PCR counsel directed trial counsel's attention to portions of the trial transcript that revealed that Frazier was fearful to contact police about the kidnapping incident because according to Frazier, "I know what kind of guy [Applicant] is." (PCR Tr. 27). Trial counsel stated that she "could have objected to that." (PCR Tr. 27). Trial counsel acknowledged that the prosecution was prohibited from making remarks or presenting testimony that touched on Applicant's character. (PCR Tr. 28). Trial counsel admitted that "characterizations of [Applicant's] character" should have drawn an objection. (PCR Tr. 29-30). Although trial counsel maintained that the witness was authorized to testify about being fearful, she conceded that remarks about the defendant's character such as "I know what kind of guy [Applicant] is" were not admissible. (PCR Tr. 30). Counsel was unable to identify a strategic reason for not objecting, only noting that she "just didn't latch on to it." (PCR Tr. 30). Regarding the subsequent testimony that Frazier was crying during his police interview, and "as scared as I had ever seen anybody in an interview room," trial counsel testified that in retrospect such testimony was objectionable, and she admitted that such testimony clearly implied that Frazier feared possible harm from Smith due to his cooperation. (PCR Tr. 36-37). Counsel did not identify any strategic reason for not objecting, and merely stated that "I didn't catch that." (PCR Tr. 37). Counsel expressed the same view and opinion regarding other testimony that Frazier was "afraid of what was going to happen if he's cooperating," and Investigator Erdel's

testimony that "I can't think of anyone who beats [Frazier] for that kind of fear in the interview room." (PCR Tr. 37-38).

PCR counsel directed trial counsel's attention to portions of the trial transcript relating to Smith's alleged telephone conversation with Shabonda Milledge. (PCR Tr. 39). At trial, Ms. Milledge testified that she had spoken with Smith on the phone after the alleged kidnapping incident. (Trial Tr. 246-47, PCR 39). Milledge testified at trial that she asked Smith about the incident with Frazier, saying "I just asked him questions like, if he wasn't guilty of what they were accusing him of, why was he running." (Trial Tr. 246-47). Trial counsel acknowledged that in retrospect these remarks "could have [been] objected to," and acknowledged that prior to trial she was concerned about keeping the jury from learning of Smith's alleged flight from law enforcement. (PCR Tr. 40-41). Counsel admitted that Milledge's testimony directly implied that Smith was fleeing from law enforcement because he was guilty of the alleged offense, and that she failed to object to such testimony. (PCR Tr. 41). Counsel agreed that the testimony was objectionable, but stated that she "just – I didn't catch it." (PCR Tr. 41).

Next, PCR counsel directed trial counsel's testimony to a portion of Investigator Erdel's testimony regarding Frazier's police interview:

> 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, tried to locate the people that he referenced.
>
> 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, but I think the next thing in the sequence would have been, you know, I went to the gas station and pulled the video to see if, you know,

> his account of his time leading up to getting to the residence was able to be verified, which it was.
>
> Q: Okay. And did you review any sort of calls for service?
>
> A: Oh, yes. Yes, because he referenced certain events. 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.

(Trial Tr. 206-07). Regarding Erdel's testimony that he was able to corroborate significant portions of Frazier's interview (Trial Tr. 206-07), trial counsel agreed that such testimony was vouching/bolstering of Frazier's credibility, and was therefore inadmissible. (PCR Tr. 44-46). Trial counsel stated that in hindsight, she could have objected to Erdel's opinion that Frazier's statement was corroborated by other evidence in the case. (PCR Tr. 46). Trial counsel stated that she intended to "use their case against them," but that Erdel's testimony was "bolstering, [and] I could see that that may have been something I should have objected to." (PCR Tr. 46).

PCR Counsel also questioned trial counsel regarding remarks that implicated Applicant's prior criminal history. Trial counsel acknowledged that prior to Applicant's trial, she had concerns about issues relating to Applicant's criminal history being revealed to the jury. (PCR Tr. 26). Specifically, she stated that she was concerned that there would be testimony that Applicant was on probation/parole, and that he had prior convictions on his record. (PCR Tr. 26). During Applicant's trial, a recording of Applicant's police interview was played for the jury. (Trial Tr. 180). This interview video included the following colloquy between the police investigator and Applicant:

> Investigator: Here's the thing. You're on federal probation.
>
> Applicant: Yes I am.
>
> Investigator: You're a parolee. You're old enough, you've been through the system.

Applicant: Yes, I have. I just came home.

(Trial Tr. 45, 179-80, State's Ex. 1). Prior to trial, counsel moved to exclude/redact this portion of the interview, arguing that the jury should not hear this portion of the interview. (Trial Tr. 46). Despite this, trial counsel failed to ensure that the State's exhibit was properly redacted, and failed to object when the unredacted copy was played for the jury. (Trial Tr. 180). It was not until the interview was played for a second time during jury deliberations that trial counsel objected to the video. (Trial Tr. 321). At Applicant's PCR hearing, trial counsel acknowledged that she had specifically requested that the video be redacted, and that the remarks about Applicant being on probation/parole "should not have been in that video." (PCR Tr. 47). Trial counsel admitted that she "definitely missed it" when the video was initially played. (PCR Tr. 47). Counsel candidly acknowledged that there was no strategic reason for failing to object when the video was played for the first time. (PCR Tr. 52).

PCR counsel also questioned trial counsel about remarks made by the prosecutor during closing argument. (PCR Tr. 53). PCR counsel specifically noted the following remarks by the prosecutor during closing arguments:

> We heard investigator Erdel say that Andre [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 as 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. **Andre is a scared man. And rightfully so**... (Trial Tr. 274)(emphasis added).
>
> He told you that he was scared of [Applicant]. **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... (Trial Tr. 275)(emphasis added).

> [During his police interview Applicant] is there to talk about his missing roommate and a kidnapping as gunpoint of somebody and he finds it comical. He is laughing. He's smirking. **He does not care. He is smug**... What do we know after all this happens, after Andre [Frazier] is kidnapped, after Monte [Steve] goes missing? That man right there, **like the coward that he is**, he flees. He runs away and he hides in rural Georgia ... he told Shabonda, I know the police are looking for me ... **he was hiding from this courtroom**... (Trial Tr. 282-83)(emphasis added).
>
> He is charged with ... possession of a weapon by a person convicted of a crime of violence. I wonder what that shows you? **This isn't the first time Mr. Smith has seen the inside of a courtroom**. (Trial Tr. 285)(emphasis added).
>
> 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 is 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 Andre 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 ... he is an evil man and a guilty man**. (Trial Tr. 285-86)(emphasis added).

Trial counsel acknowledged that many of these remarks were "a problem." (PCR Tr. 54). Counsel said that "I try not to – you know, object. You know, the judge tells the

jury, you know, opening and closing arguments aren't ... are not evidence." (PCR Tr. 54). Counsel conceded that she "did miss some things that I could have objected to." (PCR Tr. 54-55). Counsel stated that she did not object because "in my head at the time ... I was trying to use against them that they didn't have a case. They only had Andre. And they're trying to make it sound like, you know, it's – I think it's a big bad Varsheen." (PCR Tr. 55). Counsel did acknowledge, however, that "I could have objected to keep that out." (PCR Tr. 55).

Lastly, PCR counsel questioned trial counsel about phone records that were part of the discovery materials disclosed prior to trial. (PCR Tr. 63-64). Trial counsel acknowledged that a portion of the call logs show that Applicant was using his phone during the timeframe when the alleged kidnapping took place. (PCR Tr. 65-66). Counsel further acknowledged that some of these records were admitted at trial as a State's Exhibit. (PCR Tr. 66). Trial counsel acknowledged, however, that she did not review the call logs on cross examination and illustrate for the jury that Applicant was using his phone when the alleged kidnapping took place. (PCR Tr. 67).

C. Ineffective Assistance of Trial Counsel

Smith alleges that he received ineffective assistance of trial counsel in several respects. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389 (2002). Mere allegation of ineffective assistance is not sufficient to warrant granting relief. *State v. Pendergrass*, 270 S.C. 1, 239 S.E.2d 750 (1977). The applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Attorneys are held to an objective standard of "reasonably effective assistance" under "prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 385 S.E.2d at 625, citing *Strickland*. A PCR applicant must also show prejudice to receive relief. Prejudice is defined as a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

D. Analysis of Grounds for Relief

For the reasons set forth below, this Court finds that Applicant has established sufficient constitutional violations which entitle him to Post-Conviction Relief. Specifically, the Applicant's Sixth Amendment rights were violated when trial counsel failed to object to inflammatory remarks by witnesses (Trial Tr. 40-45, 111, 181, 205-206), failed to object to inadmissible bad character evidence (Trial Tr. 246-247), failed to object to witness bolstering/vouching (Trial Tr. 181, 205-206, 220, 274), failed to redact the portion of Applicant's interview that mentioned that he had recently been in prison. (Trial Tr. 320-22), failed to object to improper comments by the prosecutor during closing argument (Trial Tr. 275, 282, 285), and failed to adequately present phone records (disclosed among Rule 5 materials) that challenged the State's version of events. The application must be granted for these reasons.

Failure to object to inflammatory remarks by witnesses and inadmissible "bad character evidence" (Trial Tr. 111, 181, 205-06, 246-47).

Applicant alleges that trial counsel was constitutionally ineffective pursuant to *Strickland v. Washington* due to trial counsel's failure to object to numerous examples of inadmissible and inflammatory remarks by the State's witnesses. The South Carolina Rules of Evidence provides that "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," outside of limited exceptions which are not pertinent here. Rule 404, SCRE. "In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue." *State v. McElveen*, 280 S.C. 325, 313 S.E.2d 298 (1984); *State v. Swords*, 279 S.C. 554, 309 S.E.2d 750 (1983). "Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate

that the accused is a bad person." *Id.* (citing *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987)). Counsel's failure to object to the introduction of this character evidence can constitute ineffective assistance of counsel. *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989). Additionally, even where evidence has no direct bearing on the accused's character, certain evidence that is relevant may nevertheless be excluded in some situations pursuant to Rule 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

In the instant case, Applicant has identified numerous examples of improper remarks by State's witnesses, detailed *supra*, which collectively impugn Applicant's character in varied ways. Remarks by State's witnesses 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," that Frazier was terrified of Applicant and more fearful than any alleged victim the investigators had ever seen, and that Applicant left the State of South Carolina because he was guilty of the alleged offenses. The Court finds that trial counsel was deficient in failing to object to these remarks by the State's witnesses. In making this finding, the Court specifically notes the clear implication that Frazier feared reprisal from Smith (both aimed at himself and his family) despite there being no evidence in the trial record to support this implication. 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. Moreover, trial counsel did not articulate any valid strategic basis for failing to object to these remarks by the State's witnesses, and therefore the failure to object was unreasonable under the *Strickland* framework. And lastly, the trial record amply demonstrates that these remarks were prejudicial to Smith, in part because the prosecutor specifically highlighted these portions of witness testimony in closing argument to

support the inference that Applicant was guilty of the alleged offenses. But-for counsel's failure to object, a reasonable possibility exists that the outcome of trial would have been different. As such, Applicant is entitled to relief on this ground.

Failure to object to improper corroboration of the victim's statements, lay-opinion testimony, improper vouching, and improper bolstering testimony (Trial Tr. 181, 205-06, 220, 274).

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464 (2012). Our appellate courts have repeatedly noted that witnesses must not invade on the province of the jury as the factfinder, either by offering their personal opinion on the evidence, or by vouching for the credibility of other individuals or witnesses. *See, e.g., State v. Taylor*, 404 S.C. 506 (2013)(noting that vouching is improper "because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror").

In this case, Applicant has identified several occasions at trial when the State's witnesses opined that there is "code of silence" and a "no snitch rule" in Frazier's community that silences victims of crimes. (Trial Tr. 181). Further, Applicant has noted that Investigator Erdel offered his opinion that the evidence revealed by his investigation corroborated Frazier's account of the alleged kidnapping incident, and he was permitted to specify precisely which evidence corroborated Frazier's account. (Trial Tr. 205-06). This sort of testimony very clearly invades on the province of the jury. As trial counsel admitted during Applicant's PCR hearing, the jury sits as the factfinder and they are tasked with resolving issues of witness credibility and the weight of corroboration supplied by other evidence. (PCR Tr. 45-46). Thus, the testimony at issue here was clearly inadmissible, and warranted a timely objection from trial counsel. Counsel's failure to pose such an objection was deficient under *Strickland*, as counsel failed to supply any valid strategic reason for not posing a timely objection. Further, this Court finds that the evidence in question was prejudicial to Applicant under the *Strickland* framework, since the testimony bolstered the credibility of the State's key witness in this case. As the victim (and sole eyewitness) to the events in question, Frazier's credibility

was the primary contested issue at trial. Bolstering Frazier's credibility and improperly permitting the State's witness to highlight the evidence that corroborates Frazier's account is self-evidently prejudicial to Applicant. As such, Applicant is entitled to relief on this ground, and the PCR application must be granted for this reason.

Failure to redact portion of Defendant's interview that mentioned that Defendant had previously been in prison. (Trial Tr. 320-22); as well as failure to properly argue and preserve mistrial motion for appellate review (Trial Tr. 322).

It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. *See, e.g., State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939). "Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (S.C. 1987).

In this matter, the interview video in which the Applicant stated that he had recently been released from prison – clearly evidence of a prior conviction for an unrelated offense – was plainly inadmissible and prejudicial to Applicant. Trial counsel acknowledged this fact by moving to exclude the evidence from trial before the commencement of the State's case. The fact that trial counsel failed to ensure that the State's exhibit was actually redacted before it was presented to the jury was clearly deficient. There is no plausible strategic purpose for moving to exclude prejudicial evidence and then failing to ensure that it *is in fact* excluded from trial. In the same vein, it was clearly incumbent upon trial counsel to pose an objection contemporaneously when the exhibit was played for the jury without redaction. Trial counsel admitted in Applicant's PCR hearing that she "definitely missed it" when the video was initially played, and acknowledged that there was no strategic reason for failing to object when the video was played for the first time. (PCR Tr. 47, 52). Counsel did move for a mistrial when the video was played for a second time, but the objection was already waived at that point in the trial, and thus trial counsel could not have prevailed in that motion.

Taken in conjunction with the balance of the evidence presented at Applicant's trial, counsel's failure to exclude this evidence (and object when it was presented

inadvertently) was clearly prejudicial to Applicant under *Strickland*. Because the State's case relied so heavily on the testimony of a single witness – Frazier – the references to Smith's prior (and recent) prison sentence were extremely prejudicial to the defense. This harm was clearly aggravated by the prosecution's statements in closing argument that highlighted Smith's prior criminal history, "I wonder what [his criminal record] shows you? This isn't the first time Mr. Smith has seen the inside of a courtroom." (Trial Tr. 285). This remark was inappropriate even without the improper admission of Smith's prior prison sentence, but it is doubly so in light of the improper admission of Smith's unredacted interview. "[T]he amount of attention drawn to a prior bad act can play a role in determining whether the evidence is unduly prejudicial." *State v. Ostrowski*, 435 S.C. 364, 867 S.E.2d 269 (S.C. App. 2021). Based on the foregoing, this Court finds that Applicant has demonstrated that he received ineffective assistance of counsel under *Strickland*, and that he is entitled to relief on this ground.

Failure to object to improper comments by prosecutor during closing argument (Trial Tr. 275, 282, 285).

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." *Id.* "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, "[s]olicitors are bound to rules of fairness in their closing arguments," and:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore 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.

Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (S.C. 2010)(finding that PCR Applicant was prejudiced by solicitor's argument that he was like a "domestic terrorist" and likened Applicant's conduct to the attacks on September 11, 2001).

Turning to the present matter, this Court finds that the prosecutor's remarks during closing argument were highly inappropriate, and very clearly warranted a timely objection from trial counsel. The Court refers to the prosecution's numerous comments on Applicant's character, repeated comments on Applicant's apparent lack of remorse, and numerous references to inflammatory and prejudicial portions of the State's case. The solicitor highlighted the fact that Andre Frazier was fearful of Applicant, and offered his opinion that Frazier was "rightfully" scared of Applicant. (Trial Tr. 274). The solicitor described Applicant as a "big intimidator," and noted that Frazier feared for the safety of his children. (Trial Tr. 275). The solicitor argued that during his police interview, the Applicant did not appear remorseful: "he is smug." (Trial Tr. 282).[2] The solicitor described Applicant as a "coward" for traveling to Georgia after the incident took place, and argued that Applicant was "hiding from this courtroom." (Trial Tr. 282-83). The solicitor referenced Applicant's prior criminal history, and argued that "this isn't the first time Mr. Smith has seen the inside of a courtroom." (Trial Tr. 285). The solicitor concluded his argument with numerous unambiguous references to Applicant's character, stating as follows:

> 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 is missing and this is how he's acting. A man that laughs at a missing person. A man that

[2] *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987) ("No right is more fundamental than the right of an accused to plead not guilty... Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent.").

> laughs at a kidnapping. **That is an evil man**. And that is what Andre 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 ... he is an evil man and a guilty man**.

At Applicant's PCR hearing, trial counsel acknowledged that she could have (and should have) objected to these remarks, but failed to provide a valid strategic purpose for failing to do so. Trial counsel acknowledged that many of these remarks were "a problem." (PCR Tr. 54). Reviewing the State's closing remarks during her testimony, trial counsel conceded that she "did miss some things that I could have objected to." (PCR Tr. 54-55). This Court agrees with trial counsel's candid admission that she should have objected to the prosecutor's remarks in closing argument. The prosecutor's remarks very clearly impugned Applicant's character, and commented on his alleged lack of remorse. The prosecutor also commented on Applicant's apprehension in Georgia, and expressly stated that Applicant was hiding from the judicial process and courtroom itself. These remarks run afoul of the standard articulated in *Vasquez*, and it was incumbent upon trial counsel to pose an objection.

Reviewing the balance of evidence at trial, this Court finds that the prosecutor's remarks and counsel's failure to object were prejudicial to Applicant under the *Strickland* framework. As noted *supra*, this case hinged on the first-person account of Andre Frazier. There was inadmissible testimony in this trial record about Frazier's extreme fear of reprisal from Applicant, and the Applicant's alleged violent character. The harm from such testimony was magnified by the prosecutor's comments on these subjects. There is a reasonable likelihood that these inappropriate remarks influenced the outcome of this trial, and that the outcome would have been different if trial counsel had posed a timely objection to these remarks. Consequently, Applicant is entitled to relief on this ground.

Failure to properly present phone records

In order to establish a claim that trial counsel was ineffective for failing to prepare/present evidence adequately at trial, an Applicant must present the evidence in question to demonstrate what *could have been* presented at Applicant's jury trial, given adequate preparation by trial counsel. *Jackson v. State*, 329 S.C. 345 (1998). In the instant case, PCR counsel presented phone logs from the Applicant's pre-trial discovery materials that demonstrate that between 7:12 p.m. and 8:16 p.m. on the date of the alleged kidnapping, Applicant participated in eighteen phone calls. (PCR Tr. 65). Many of the calls in question were brief in duration, but many calls lasted several minutes, and would have taken place during the precise window of time when the State alleged that Applicant was committing the instant offenses. At Applicant's PCR hearing, trial counsel testified that the State put the call logs into evidence, but conceded that she did not review the call logs to point out the sheer number of calls that had taken place. (PCR Tr. 65-66). Although trial counsel did mention the substance of the call logs during closing argument (Trial Tr. 288-89), the Court finds that trial counsel failed to highlight the number of calls that took place during this time period, and failed to convey adequately to the jury that the Applicant was using his phone for a substantial period of time during the window of time when the alleged offense took place. Counsel was deficient pursuant to *Strickland* to the extent that she failed to provide or identify a strategic and/or reasonable purpose for neglecting to do highlight this evidence adequately.

This Court further finds that counsel's deficient performance was prejudicial to Applicant under *Strickland.* Specifically, this Court finds that counsel's failure to clearly illustrate and explore the contents of the call logs on cross-examination gives rise to a reasonable likelihood that but-for counsel's failure, the outcome of trial might have been different. As noted in its analysis *supra*, this case hinged on the eyewitness testimony of the alleged victim Andre Frazier. Clear evidence that Applicant was using his phone during the time period when Andre Frazier alleged he was committing the instant offenses would have provided substantial impeachment of Frazier's account, and raised substantial doubts about the State's narrative at trial. This Court finds that if counsel had thoroughly explored this issue during Applicant's trial, a reasonable likelihood exists that

the outcome would have been different. For this reason, Applicant is entitled to relief on this ground.

III. CONCLUSION

Based on the foregoing, this Court finds that Applicant has established sufficient constitutional violations, which entitle him to Post-Conviction Relief. Specifically, the Applicant's Sixth Amendment rights were violated as detailed herein. The application must be granted for these reasons. IT IS THEREFORE ORDERED that the Application for Post-Conviction Relief must be granted and that the Applicant's conviction and sentence is hereby SET ASIDE and VACATED. This matter is hereby REMANDED for further proceedings in General Sessions.

IT IS SO ORDERED, this 18th day of July, 2023.

G.D. Morgan, Jr.
Presiding Judge
Fourteenth Judicial Circuit

Beaufort, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2021CP0701235

Varsheen Antuan Smith		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Order Granting Application for Post-Conviction Relief

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ G. D. Morgan, Jr	2773	7/26/2023
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **July 25, 2023**, and a copy mailed first class or placed in the appropriate attorney's box on **July 26, 2023**, to attorneys of record or to parties (when appearing pro se) as follows:

Christopher Reginald Geel PO Box 21771 Charleston, SC 29413

Caroline Whitney O'Kelly PO Box 11549 Columbia, SC 29211-1549
Danielle Dixon PO Box 11549 Columbia, SC 29211
Lauren T'Coya Mims 1901 Main Street Suite 1700 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

MMK

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Varsheen Antuan Smith, SCDC #211467, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-07-01235 **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER GRANTING POST-CONVICTION RELIEF (Rule 59(e), SCRCP)**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Varsheen Antuan Smith (Applicant) on July 8, 2021. On November 16, 2022, an evidentiary hearing convened before the Honorable G.D. Morgan, Jr. At the conclusion of the hearing, the parties requested time to obtain the PCR hearing transcript and submit proposed briefs or orders. Thereafter, Applicant submitted to the Court a proposed order granting relief on June 28, 2023. On July 18, 2023, Judge Morgan signed the order granting post-conviction relief; the Order was subsequently filed on July 25, 2023.[1] At the time the Order was signed and filed, Respondent was not yet in possession of the PCR transcript and had not submitted a proposed order.[2] Pursuant to Rule 59(e), SCRCP, Respondent respectfully requests this Court reconsider its Order granting relief. Specifically, Respondent contends probative evidence does not support the PCR court's findings. For the reasons set forth herein, Respondent requests this Court vacate its order granting post-conviction relief and issue an order denying relief.

[1] Respondent received written notice of the entry of this Order on July 26, 2023.
[2] Respondent received the PCR transcript on August 4, 2023.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a twenty-five-year sentence. In March 2016, the Beaufort County Grand Jury indicted Applicant for kidnapping (2015-GS-07-01890), possession of a handgun by person convicted of a crime of violence (2015-GS-07-01908), and possession of a weapon during a violent crime (2015-GS-07-01909). On February 21-22, 2018, Applicant proceeded to a jury trial before the Honorable Brooks P. Goldsmith. Courtney Gibbes, Esquire, represented Applicant. Assistant Solicitors Mary Jones and Kimberly Smith prosecuted the case. The jury convicted Applicant as indicted, and Judge Goldsmith sentenced him concurrently to twenty-five years for kidnapping and five years for each weapon charge.

Applicant filed a timely notice of appeal and was represented by Chief Appellate Defender Robert M. Dudek, who filed a brief pursuant to Anders.[3] Thereafter, the Court of appeals requested briefing on two issues: (1) Is the issue of whether trial court erred in allowing evidence of Monte Ver'mon Steve's death preserved for appellate review? and (2) Did the trial court err by permitting the State to present evidence of Steve's death? On June 9, 2021, the Court of Appeals issued an opinion affirming. State v. Smith, 2021-UP-199 (S.C. Ct. App. filed June 9, 2021). The remittitur was sent June 29, 2021.

Brief Summary of Trial Testimony

At trial, the State relied primarily on the testimony of victim Andre Frazier. Frazier testified he went to the home of his friend Ver'mon Monte Steve (Monte) on October 25, 2015. He explained he had seen Steve earlier that evening at a restaurant. Prior to arriving at Monte's house, Frazier called to ensure he was home. (Tr. 84-91).

[3] Anders v. California, 386 U.S. 738 (1967).

Frazier testified he saw Applicant and Tyrone Wallace in front of Monte's apartment; he explained Applicant and Monte were roommates. Frazier testified he knew both men and had known Applicant since childhood. (Tr. 91-93). Frazier asked where Monte was, but Applicant and Wallace ignored his question. Frazier testified,

> And he kind of kept on and I asked him again, Where's [Steve]. I said Monte. And he was like, Let me holler at you right quick. And then I asked him again, Where's Monte. Let me holler at you. And I asked him again, Where Monte. Man, Monte in the house. I kind of believed him, but knowing that that was my best friend and what type of guy he was I took that, but I started walking toward the house. As I started walking toward the house, he came behind me and [Wallace] came behind him and I kind of feel a funny situation.

(Tr. 95). Frazier stated he walked toward the door but stopped; thereafter, Applicant put a pistol into his stomach and told him to go inside. (Tr. 95-97). Frazier stated they shut the front door and Wallace went through Frazier's pockets. However, they returned everything except a cigar. Frazier stated Applicant put the gun to the back of his head and tied his hands behind his back. (Tr. 98-100). He testified Applicant called him a snitch, accused him of "slipping, " and said, "Funny time you came up here." (Tr. 100-01). Frazier further testified Applicant hit him in the head with the gun and stuffed a rag in his mouth. (Tr. 100-103).

Frazier testified he went into a second room with Applicant while Wallace went elsewhere. When Applicant left the room, Frazier dialed 911. However, he ended the call because he was worried the kidnappers would overhear the operator. (Tr. 104-07). Frazier stated Applicant and Wallace returned, and Applicant's mood had changed. He explained Applicant had previously looked "pretty evil," "but now he didn't look evil like he was." (Tr. 107). Frazier testified Applicant told Wallace to let him go. (Tr. 107). Frazier saw a police officer outside when he left and surmised he was released because Applicant and Wallace were afraid the police would discover them. (Tr. 108-09, 151, 161).

Once outside, Frazier stated he and Applicant walked around the corner. Frazier saw a phone light up by an abandoned house but denied seeing it when Applicant asked because he thought it might be Monte hiding. Frazier testified Applicant walked over by the side of the house with his gun and beckoned, "Monte, come out, come out, wherever you are . . . ." (Tr. 140-41).

Frazier testified he asked Applicant where Monte was and Applicant replied, "[H]e thought that I was going to shoot him and he ran." (Tr. 111). After Frazier left, he tried to call Monte but was unable to reach him. Frazier initially thought Monte "ran" or went into hiding. (Tr. 111-12, 146). When asked why he did not call the police that evening; Frazier 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. . . . When he said he ran, I kind of believed him. It was a throw-off but I kind of believed him. And I thought that he ran and went to one of his girlfriends' house[s], because he had a few girlfriends.

(Tr. 111-12). Frazier testified he was scared and could not sleep. (Tr. 112). He later contacted Monte's mother and told her Monte was missing. (Tr. 152-54).

Monte's mother, Janice Steve, testified she last saw Monte the Sunday before he disappeared and he seemed uneasy. After Frazier told her Monte was missing, she filed a missing person's report. (Tr. 68-71).

Investigator George Erdell, who interviewed Frazier, testified Frazier was nervous during his interview and it devolved to outright fear. Investigator Erdell stated Frazier cried "pretty hard" and "was probably about as scared as [he had] ever seen anybody in an interview." (Tr. 206).

Shabonda Milledge testified Applicant called her on October 26, 2015, and asked where Monte lived; she refused to tell him. Milledge remained in contact with Applicant until November 16. She testified Applicant told her the police were looking for him, and she asked why he was running if he was not guilty. Milledge stated Applicant would not tell her where he was calling

from; at first he called from a local number but later switched to an out of state number. (Tr. 244-47, 254). On November 16, Applicant was arrested in Georgia. (Tr. 256). On November 18, Monte's remains were discovered; thereafter, Wallace—but not Applicant—was charged with his murder. (Tr. 210).

Motion to Reconsider Order granting Post-Conviction Relief

Respondent respectfully moves pursuant to Rule 59(e), SCRCP, to have the Court reconsider its order granting post-conviction relief. In its Order, the PCR court found Applicant proved counsel was ineffective for failing to (1) object to inflammatory remarks by witnesses and inadmissible bad character evidence, (2) object to improper corroboration of the victim's statements, lay-opinion testimony, improper vouching, and improper bolstering testimony, (3) redact portion of Applicant's interviews that mentioned Applicant had previously been in prison, as well as failing to properly argue and preserve a mistrial motion for appellate review, (4) object to improper comments by the prosecutor during closing argument, and (5) properly present phone records. Respondent respectfully submits probative evidence does not support the PCR court's findings of ineffective assistance of counsel.

Failed to object to inflammatory remarks and inadmissible "bad character evidence"

Probative evidence does not support the PCR court's finding that Applicant proved counsel was ineffective for failing to object to inflammatory remarks by witnesses and inadmissible bad character evidence because the testimony relied upon by the Court is not so inflammatory as to be objectionable and does not amount to inadmissible bad character evidence.[4] In support of this ground, the PCR court's order cites to the following excerpts from the trial transcript:

[4] Although Applicant presented these as separate grounds in his application, the PCR court's order combined them into one section. This makes it difficult to ascertain what the Court perceives as inadmissible bad character evidence and what the court perceives as inflammatory.

During trial, Frazier was asked why he did not call police the evening of the kidnapping. He replied,

> 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 I made the right choice to know what I was going to do. And not that, I was looking for Monte that night. When [Applicant] said he ran, I kind of believed him. It was a throw-off but I kind of believed him. And I thought that he ran and went to one of his girlfriend's house . . . .

(Tr. 111-12). Frazier averred he was scared and couldn't sleep that night. (Tr. 112).

During Captain Gruel's testimony, the solicitor asked why he told Applicant that no one would have reported this incident, and trial counsel objected based on speculation. (Tr. 180). The solicitor responded, "Personal experience in law enforcement, I think that he can testify to that." The trial court replied, "I'm not sure that question is supported by the evidence." Following a sidebar, the trial court overruled the objection. (Tr. 180). Thereafter, Captain Gruel testified,

> [T]here was a slight delay in the incident and it being reported. And in our line of work and in my experience there is a code of silence, particularly with incidences that we deal with, it's kind of been heard about the no snitch rule so it's tough at times and very common for people not to provide us or report important—to come forward with information that they know about a crime.

(Tr. 181). During Investigator Erdel's testimony, he stated Frazier did not call to report his kidnapping. When asked whether he had experienced that before, he replied, "You know, there is kind of a street mentality, so to speak. You know, people are typically afraid for any number of reasons, they don't want to be labeled a snitch, they may want to handle it themselves. It's not uncommon for things like that to go unreported." (Tr. 205). Investigator Erdel stated Frazier was "pretty nervous" about talking to police. (Tr. 205-06). He explained, "I would say that his nervousness kind of devolved as the interview progressed to outright fear. He cried pretty hard.

Probably—he was probably about as scared as I have ever seen anybody in an interview and that is saying something. He was pretty scared." (Tr. 206).

Finally, during Milledge's testimony, the following exchange occurred:

> Q Okay. From October 26th until about November 16 of 2015, were you in communication with the defendant?
> A I was.
> Q And you actually spoke with him on the phone?
> A Yes, Ma'am.
> Q Did you ever ask him about [Frazier]?
> A I just asked him questions like, if he wasn't guilty of what they were accusing him of, why was he running. He asked me more questions about [Frazier].
> Q What was he asking you about [Frazier]?
> A He just asked me, you know, stuff like if I spoke to [Frazier] and is [Frazier] accusing him of what they said and stuff like that.
> Q Okay. Did you tell him the police were looking for him?
> A He told me that.

(Tr. 246-47).[5]

These portions of the transcript, however, do not support a finding that counsel was ineffective. The Order relies on Rules 404, SCRE, and 403, SCRE, as a legal basis for an objection. However, the foregoing testimony by Captain Gruel and Investigator Erdel regarding Frazier's fear and the fact that people often are not forthcoming with law enforcement due to fear of "snitching" does not relate to Applicant's character and thus does not violate Rule 404. See Rule 404(a), SCRE (providing evidence of a person's character or a trait of character is generally not admissible to prove action in conformity therewith). Likewise, Frazier would understandably be afraid of Applicant based on his testimony about the kidnapping itself. Further, testimony about the anti-snitch code was probative in (1) explaining why some individuals delay disclosing information to law enforcement and (2) contradicting Applicant's argument that Frazier was not

[5] Milledge's testimony was discussed pretrial; counsel objected to any mention that Applicant was on probation or was afraid he would fail a drug test. (Tr. 40-45).

credible because he did not notify law enforcement right away about the kidnapping. (Tr. 151-52, 289-90). Thus, it is not reasonably likely a court would have found the probative value of this testimony was "substantially outweighed by the danger of undue prejudice." Rule 403, SCRE. In short, the Court's reliance on Captain Gruel's and Investigator Erdel's testimony as grounds for a Rule 404 or 403 objection is simply misplaced.

Likewise, Milledge's testimony about Applicant's statements to her were not inadmissible under Rule 404 or Rule 403. Milledge's testimony does not relate to Applicant's character at all, much less imply that Applicant was "acting in conformity therewith." See Rule 404(a), SCRE. Further, Milledge's testimony that Applicant knowingly ran from police and was concerned about what Frazier might say was probative of Applicant's guilt and was not unfair, confusing, or misleading; thus, the probative value of this testimony was not substantially outweighed by the risk of undue prejudice. See State v. Pagan, 369 S.C. 201, 208-09, 631 S.E.2d 262, 266 (2006) ("Flight from prosecution is admissible as guilt. The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. It is sufficient that circumstances justify an inference that the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Flight or evasion of arrest is a circumstance to go to the jury." (internal citations omitted)) Thus, counsel was not deficient for not objecting to Milledge's testimony based on Rule 404 or 403.

Additionally, the order misconstrues Frazier's testimony about Applicant. At trial, Frazier merely said, "I know what kind of guy he is." (Tr. 111-12). This was generic testimony provided by a person who accused Applicant of kidnapping him; thus, any assessment of "what kind of guy he is" could relate directly to Frazier's account of the incident itself. Frazier did not otherwise

elaborate on Applicant's character. The order's characterization of this testimony as implying "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,'" is simply not supported by Anderson's statement.[6] Further, the officer's perception of Fraizer's fear was legitimate evidence to rebut the inference that Frazier's delayed disclosure implied he was not being truthful. Finally, testimony that Applicant left South Carolian because he was guilty is not testimony that would be inadmissible under Rule 404 or Rule 403. Overall, the foregoing testimony is not inflammatory enough to warrant an objection and does not amount to inadmissible bad character evidence. Thus, probative evidence does not support a finding that counsel was deficient for not objecting under Rule 404 and Rule 403.

Finally, it is not reasonably likely Applicant suffered prejudice due to counsel's failure to object to the foregoing. Initially, it is not reasonably likely the foregoing would have been excluded under Rule 404 or Rule 403.[7] Further—and critically—in light of Frazier's testimony that he had known Applicant since childhood and recognized him outside Monte's home and Frazier's extensive testimony about the kidnapping itself, it is not reasonably likely the outcome would have been different had the foregoing testimony been stricken or excluded. Thus, probative evidence does not support the court's finding of prejudice.

[6] Even if Frazier's testimony *did* support this statement, his proper testimony about the kidnapping itself would justify any fear Frazier may have had of Applicant, regardless of Applicant's character or reputation.

[7] Counsel *did* object to Captain Gruel's testimony about why people are not forthcoming with law enforcement, but that objection was overruled.

Failed to object to improper corroboration of the victim's statements, lay-opinion testimony, improper vouching, and improper bolstering testimony

Probative evidence does not support the PCR court's finding that Applicant proved counsel was ineffective for failing to object to improper corroboration of the victims' statements, lay-opinion testimony, improper vouching, and improper bolstering. In support of this ground, the Court relied on Captain Gruel and Investigator Erdel's aforementioned testimony about the "no-snitch rule" and the typical delay in people reporting crimes. (Tr. 180-81, 205-06). The Court also relied on additional testimony from Investigator Erdell that Frazier was "afraid" of what would happen if he cooperated with law enforcement, and a portion of the State's closing argument that referenced Investigator Erdell's testimony that Frazier was afraid. (Tr. 220, 274). These portions of the transcript, however, do not amount to improper corroboration, improper lay opinion testimony, improper vouching, or improper bolstering.

Captain Gurel and Investigator Erdel's testimony regarding the "no-snitch" code was based on their experience in law enforcement and was admissible to explain to the jury why Frazier may not have initially reported the kidnapping. Likewise, testimony about Frazier's fear was admissible as the officers' perception of his demeanor and did not amount to improper corroboration, vouching, or bolstering. Finally, the Order's finding that "Investigator Erdel offered his opinion that the evidence revealed by his investigation corroborated Frazier's account of the alleged kidnapping incident, and he was permitted to specify precisely which evidence corroborated Frazier's account," is not supported by the transcript. Investigator Erdel did not testify that in his opinion the evidence corroborated Frazier's account. Rather, in the transcript pages relied upon by the Court, Investigator Erdel merely stated it was common for crimes to go unreported because "people are typically afraid for any number of reasons, they don't want to be labeled a snitch, they may want to handle it themselves." (Tr. 205). He then testified to his

perception that Frazier was nervous to be speaking to police. (Tr. 206). The foregoing does not amount to an opinion that his investigation corroborated Frazier's account of the kidnapping. Rather, this was admissible to explain why Frazier may have delayed reporting the kidnapping, and there was no basis to object based on vouching, bolstering, improper corroboration, or lay-opinion testimony. Cf. State v. Acker, 435 S.C. 716, 728, 869 S.E.2d 873, 879 (Ct. App. 2022) (finding testimony about why a child may delay disclosing abuse "provided context for the jury and assisted jurors in understanding . . . why a child might delay disclosure"). Thus, probative evidence does not support the Court's finding that Applicant proved counsel was deficient for failing to object.

Likewise, it is not reasonably likely an objection to this testimony on these grounds would have been sustained. It is also not reasonably likely, based on Frazier's account of the kidnapping itself and his identification of Applicant as someone he knew, that the outcome would have been different had the foregoing testimony been excluded. Thus, probative evidence does not support the PCR court's finding of prejudice.

Failed to redact portion of interview and properly argue and preserve mistrial motion

Probative evidence does not support the PCR court's finding that counsel was ineffective for failing to redact a portion of Applicant's police interview and properly argue and preserve the mistrial motion. In support, the PCR court specifically relies on Applicant's statement in the interview that he had recently been released from prison. (Or. 14). Critically, however, the State presented evidence at trial through the Clerk of Court that Applicant had previously been convicted and sentenced for second-degree burglary. (Tr. 258-59). This testimony was properly admitted to support Applicant's charge of possession of a firearm by a person convicted of a crime of violence. (Tr. 266-67). See S.C. Code Ann. 16-23-30 (providing it is illegal for an individual convicted of

a violent crime to possess a handgun); State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000) ("[E]vidence of other crimes is admissible to establish a material fact or element of the crime charged."); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) ("[E]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime."). Thus, testimony was before the jury that Application had previously been convicted and sentenced of another crime—and had been previously incarcerated. Although counsel may not have ensured that Applicant's statement about previously being in prison was redacted after the State agreed to redact it, it is not reasonably likely the admission of this statement changed the outcome of trial when it was merely cumulative to properly-admitted evidence of Applicant's prior conviction. (Tr. 45-46, 258-59). Cf. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Likewise, and for the same reason, it is not reasonably likely a properly preserved mistrial motion would have changed the outcome of Applicant's trial or appeal on this issue.[8] (Tr. 321-22). Thus, probative evidence does not support the PCR court's finding that Applicant suffered prejudice from counsel's failure to ensure his statement was redacted or counsel's failure to properly preserve a mistrial motion.

Failed to object to improper comments by solicitor during closing

Probative evidence does not support the PCR court's finding that counsel was ineffective for failing to object to improper comments by the solicitor during closing argument because the

[8] Although the State argued the mistrial motion was untimely, the trial court did not deny it on that ground but ultimately denied it because "there was also evidence that he was already . . . convicted of something before." (Tr. 321-22). Thus, it is not reasonably likely a timely mistrial motion would have changed the trial court's decision.

solicitor's comments (1) were reasonable inferences from the evidence presented at trial and (2) did not so infect the trial with unfairness as to violate due process.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Id. However, "[s]olicitors are bound to rules of fairness in their closing arguments." Id.

"On appeal, the 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." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. "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." Id.

In support of finding counsel ineffective on this ground, the PCR Court relied on the following statements from the solicitor's closing argument:

> 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 and the top 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.

(Tr. 274).

> 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. [Frazier] couldn't be a snitch. You don't live in this world, you don't live on those streets having the title snitch. And [Frazier] wasn't going to do that, he had children that he had to live for.

(Tr. 275).

> Will you talk, [Applicant]? It depends, that is what he said. He is there to talk about this 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.

(Tr. 282).[9]

> What do we know after all of this happens, after [Frazier] is kidnapped, after Monte goes missing? That man right there, like the coward that he is, he flees. He runs away and he hides in rural Georgia. He's not there visiting his wife. Or is girlfriend is in Walterboro, so maybe he is visiting his wife in Georgia, but that is beside the point. No, he is not there visiting his wife. He's hiding. He told Shabonda, I know the police are looking for me. She didn't ask him that, he gives her this information.
>
> So does he come in? No, he runs, he hides, and it takes the U.S. Marshals to track him down and find him and it takes a Beaufort police officer to bring him back to South Carolina. He doesn't visit any family, he was hiding from this courtroom.

(Tr. 282-83).

> 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. The Judge is going to instruct you that burglary in South Carolina is defined as a crime of violence.

(Tr. 285).

> I want to leave you with one last thing, and that is Versheen 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 things 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 is missing and this is how he's acting. A man that laughs at a missing person. A man that laughs at kidnapping. That is an evil man. And that is what Andre told you. He said, He is an evil man. And a man that can have that sort of reaction is 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

[9] Contrary to the PCR court's characterization, the State did not explicitly argue Applicant lacked remorse.

> this comical for another person's nightmare is just a laugh to him. He is an evil man and a guilty man.

(Tr. 286).

Initially, the PCR court's reliance on Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) in finding these statements objectionable is misplaced. (Or. 16). In Vasquez, a capital case, the solicitor referred to the defendant—a Muslim—as a domestic terrorist during opening argument. During closing argument, the solicitor directly referenced the events of 9-11. Although the PCR court found counsel was deficient for failing to object, the PCR court found Vasquez did not prove prejudice. On certiorari, the South Carolina Supreme Court disagreed. The Court found the reference to Vasquez as a domestic terrorist was not supported by the evidence because Vasquez's "case was clearly not one that constituted 'terrorism' by the legal sense of the word." Id. at 459, 698 S.E.2d at 567. The Court further found "the solicitor's statements improperly evoked religious prejudice and, thus, served only to inflame the passions and prejudice of the jury." Id. at 460, 698 S.E.2d at 567. Ultimately, the Court concluded the "comments so infected the trial with unfairness as to make the resulting death sentence a denial of due process." Id. at 459, 698 S.E.2d at 566-67.

Unlike the comments in Vasquez, the solicitor's comments here are reasonable inferences from the evidence presented at trial. Further, probative evidence does not support the Court's finding that "[t]here was inadmissible testimony in this trial record about Frazier's extreme fear of reprisal from Applicant, and the Applicant's alleged violent character." Overall, these comments were reasonable inferences from the evidence that do not reference Applicant's religion or ethnicity.

Additionally, it is not reasonably likely the outcome would have been different had counsel objected. See Strickland v. Washington, 466 U.S. 668 (1984) (providing an applicant must prove

both deficiency and prejudice to establish ineffective assistance of counsel); id. ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). Viewed in the context of the solicitor's entire closing argument as well as the transcript, these comments did not "so infect the trial as to make the resulting conviction a denial of due process." Vasquez, 388 S.C. at 459, 698 S.E.2d at 567; c.f. Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no face, blown away by a shotgun"—did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process"). Thus, probative evidence does not support the PCR court's finding that it is reasonably likely the outcome would have been different had counsel objected.

Failed to present phone records that challenged State's version of events

Probative evidence does not support the PCR court's finding that counsel was ineffective for failing to properly present phone records. As noted by the Court's Order, the State entered into evidence the same phone records that were before the PCR court. Thus, the phone records were before the jury. (Tr. 189-91). Further, contrary to the PCR court's finding, PCR counsel *did* highlight the number of calls that took place during the timeframe of the kidnapping. During cross-examination of Investigator Erdel, counsel elicited testimony that Applicant's phone placed calls at 7:40 pm, 7:41 pm, 7:45 pm, 7:50 pm, and 8:04 pm—all of which were in the timeframe of the kidnapping. (Tr. 236-37). Likewise, during closing argument, counsel argued,

> [Applicant] had called Monte. I got that out through the investigator by his phone records. **[Applicant] at the exact time that he was supposedly kidnapping Andre Frazier, at about 7:40, he called Monte. And 7:41 he called Monte. And 7:50 he called Monte. That is about the exact same time where Andre was talking about he was getting tied up.** And you remember, Andre said he

> didn't call Monte, he never called Monte on the phone. Well, that is not true, it is proven on the records.

(Tr. 288-89, emphasis added). Counsel *did* elicit the number of calls placed during the timeframe and argued they were placed at the same time Frazier was kidnapped. Because counsel *did* raise this argument to the jury, probative evidence does not support the PCR court's finding that counsel was deficient for "failing to highlight the number of calls that took place during this time period, and failing to convey adequately to the jury that Applicant was using his phone for a substantial period of time[10] during the window of time when the alleged offense took place." Thus, probative evidence does not support the PCR court's finding of deficiency.

Likewise, probative evidence does not support a finding that Applicant suffered prejudice based on counsel's failure to further elicit the number calls placed during the time frame of the robbery. Based on the transcript, Applicant told law enforcement he called Monte while Frazier "was there because he was looking for him." (Tr. 234). Thus, the calls corroborated Applicant's statement that Frazier was at his house looking for Monte and do not in and of themselves exonerate Applicant. Further, the calls placed between 7:20[11] and 8:16 pm—the approximate timeframe of the kidnapping—do not exonerate Applicant or show he could not have committed the kidnapping. Of the 17 calls during this timeframe, only two lasted more than one minute: a 238-second (under four minutes) call placed at 7:21 p.m. and a 66-second call placed at 7:45 pm. Based on Frazier's testimony that Applicant was not in the room with him the entire time, it would have been feasible for Applicant participate in these short calls *and* be involved in the kidnapping.

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[10] The phone records themselves do not support a finding that Applicant was using his phone during a "substantial period of time" while the kidnapping took place. Notably, of the 17 calls placed between 7:21 pm and 8:16 p.m., only two lasted for longer than a minute: a 238-second call at 7:21 pm, and a 66-second call at 7:45 pm.

[11] Law enforcement recovered video showing Frazier at a nearby gas station around 7:15 pm; Frazier testified he went to the gas station prior to going to Monte's house. (Tr. 89-81, 206, 224).

Thus, it is not reasonably likely that further highlighting the number of calls here would have changed the outcome of trial, and probative evidence does not support the PCR court's finding of prejudice.

Conclusion

WHEREFORE, Respondent respectfully requests this Court reconsider and vacate its order granting PCR and issue an order denying PCR and dismissing this action with prejudice.

Respectfully submitted,

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August 4, 2023

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Varsheen Antuan Smith, SCDC #211467, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-07-01235 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Varsheen Antuan Smith (Applicant) on July 8, 2021. On November 16, 2022, an evidentiary hearing convened before the Honorable G.D. Morgan, Jr. Applicant was present and represented by Christopher R. Geel, Esquire. Assistant Attorney General Lauren Mims represented the State. At the hearing, Applicant testified on his behalf and called as a witness trial counsel Courtney Gibbs.

On July 25, 2023, this Court issued an order granting post-conviction relief. Thereafter, Respondent timely filed a Motion to Alter or Amend Order Granting Post-Conviction Relief pursuant to Rule 59(e), SCRCP. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court grants Respondent's motion to alter or amend. Further, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a twenty-five-year sentence. In March 2016, the Beaufort County Grand Jury indicted Applicant for kidnapping (2015-GS-07-01890), possession of a handgun by person convicted of a violent

crime (2015-GS-07-01908), and possession of a weapon during a violent crime (2015-GS-07-01909). On February 21-22, 2018, Applicant proceeded to a jury trial before the Honorable Brooks P. Goldsmith. Courtney Gibbes, Esquire, represented Applicant. Assistant Solicitors Mary Jones and Kimberly Smith prosecuted the case. The jury convicted Applicant as indicted, and Judge Goldsmith sentenced him concurrently to twenty-five years for kidnapping and five years for each weapon charge.

Applicant filed a timely notice of appeal that was perfected by Chief Appellate Defender Robert M. Dudek, who filed a brief pursuant to Anders.[1] Thereafter, the Court of appeals requested briefing on two issues: (1) Is the issue of whether trial court erred in allowing evidence of Monte Ver'mon Steve's death preserved for appellate review? and (2) Did the trial court err by permitting the State to present evidence of Steve's death? On June 9, 2021, the Court of Appeals issued an opinion affirming. State v. Smith, 2021-UP-199 (S.C. Ct. App. filed June 9, 2021). The remittitur was sent June 29, 2021.

BRIEF SUMMARY OF TRIAL TESTIMONY

At trial, the State relied primarily on the testimony of victim Andre Frazier, who testified he went to the home of his friend Ver'mon Monte Steve (Victim) on October 25, 2015. Prior to arriving at Victim's house, Frazier called to ensure Victim was home. (Tr. 84-91).

Frazier testified he saw Applicant, who was Victim's roommate, with Tyrone Wallace outside Victim's apartment when he arrived. Frazier testified he knew both men and had known Applicant since childhood. (Tr. 91-93). Frazier stated he asked where Victim was, but Applicant and Wallace ignored his question. Frazier testified,

> And he kind of kept on and I asked him again, Where's [Victim]. I said [Victim]. And he was like, Let me holler at you right quick.

[1] Anders v. California, 386 U.S. 738 (1967).

> And then I asked him again, Where's [Victim]. Let me holler at you. And I asked him again, Where [Victim]. Man, [Victim] in the house. I kind of believed him, but knowing that that was my best friend and what type of guy he was I took that, but I started walking toward the house. As I started walking toward the house, he came behind me and [Wallace] came behind him and I kind of feel a funny situation.

(Tr. 95). Frazier stated Applicant put a pistol into his stomach and told him to go inside. (Tr. 95-97). Once inside, Applicant put the gun to the back of his head and tied his hands behind his back. (Tr. 98-100). Frazier testified Applicant called him a snitch, accused him of "slipping," and said, "Funny time you came up here." (Tr. 100-01). Frazier further testified Applicant hit him in the head with the gun and stuffed a rag in his mouth. (Tr. 100-103).

Frazier testified he went into a room with Applicant while Wallace went elsewhere. When Applicant left the room, Frazier dialed 911, but he ended the call because he was worried the kidnappers would overhear the operator. (Tr. 104-07). Frazier stated Applicant and Wallace returned, and Applicant's mood had changed. He explained Applicant previously looked "pretty evil," "but now he didn't look evil like he was." (Tr. 107). Frazier testified Applicant told Wallace to let him go. (Tr. 107). Frazier surmised he was released because a police officer was outside and Applicant and Wallace were afraid the police would discover them. (Tr. 108-09, 151, 161).

Once outside, Frazier stated he and Applicant walked around the corner. Frazier saw a phone light up by an abandoned house and thought it might be Victim hiding. Frazier testified Applicant walked over by the side of the house with his gun and beckoned, "[Victim], come out, come out, wherever you are . . . ." (Tr. 140-41). Frazier testified he asked Applicant where Victim was and Applicant replied, "[H]e thought that I was going to shoot him and he ran." (Tr. 111).

After Frazier left, he tried to call Victim but was unable to reach him. Frazier initially

thought Victim "ran" or went into hiding. (Tr. 111-12, 146). When asked why he did not call the police that evening; Frazier 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. . . . When he said he ran, I kind of believed him. It was a throw-off but I kind of believed him. And I thought that he ran and went to one of his girlfriends' house[s], because he had a few girlfriends.

(Tr. 111-12). Frazier testified he was scared and could not sleep. (Tr. 112). He later contacted Victim's mother and told her Victim was missing. (Tr. 152-54).

Victim's mother, Janice Steve, testified she last saw Victim the Sunday before he disappeared. After learning Victim was missing, she filed a missing person's report. (Tr. 68-71).

Investigator George Erdell, who interviewed Frazier, testified Frazier was nervous during his interview, which devolved to fear. Investigator Erdell stated Frazier cried "pretty hard" and "was probably about as scared as [he had] ever seen anybody in an interview." (Tr. 206).

Shabonda Milledge testified Applicant called her on October 26, 2015, and asked where Frazier lived; she refused to tell him. Milledge remained in contact with Applicant until November 16. She testified Applicant told her the police were looking for him, and she asked why he was running if he was not guilty. Milledge stated Applicant would not tell her where he was calling from; at first he used a local number but later used an out of state number. (Tr. 244-47, 254). On November 16, Applicant was arrested in Georgia. (Tr. 256). On November 18, Monte's remains were discovered; thereafter, Wallace—but not Applicant—was charged with his murder. (Tr. 210).

CURRENT APPLICATION

On July 8, 2021, Applicant timely commenced this PCR action alleging he is being held in custody unlawfully due to the following:

1. Ineffective assistance of trial counsel

a. Failure to object to inflammatory remarks by witnesses;
b. Failure to object to inadmissible bad character evidence;
c. Failure to object to witness bolstering/vouching;
d. Failure to properly argues and preserve mistrial motion for appellate review;
e. Failure to object to improper comments by prosecutor during closing argument; and

2. Ineffective assistance of appellate counsel
   a. Failure of appellate counsel to raise preserved and meritorious issues on direct appeal.

On November 16, 2022, Applicant amended his application. At the evidentiary hearing, he proceeded on the following grounds:

Ineffective assistance of counsel:

1. Failed to object to inflammatory remarks by witnesses (Tr. 40-45, 111, 181, 205-06);

2. Failed to object to inadmissible bad character evidence (Tr. 246-47);

3. Failed to object to witness bolstering/vouching (Tr. 181, 205-06, 220, 274);

4. Failed to redact the portion of Defendant's interview that mentioned Defendant had previously been in prison (Tr. 320-22), as well as failed to properly argue and preserve mistrial motion for appellate review (Tr. 322);

5. Failed to object to improper comments by the prosecutor during closing argument (Tr. 275, 282, 285);

6. Failed to present phone records (disclosed among Rule 5 materials) that challenged the State's version of events.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Beaufort County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records from this PCR action. This Court has further had the opportunity to observe the witnesses

presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "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, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure 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 an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief.

Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failed to object to inflammatory remarks by Frazier[2]

Applicant first contends counsel was ineffective for failing to object to inflammatory remarks by Frazier. In support, Applicant cites to Frazier's response when asked why he did not call police the evening of the kidnapping:

> 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 I made the right choice to know what I was going to do. And not that, I was looking for [Victim] that night. When [Applicant] said he ran, I kind of believed him. It was a throw-off but I kind of believed him. And I thought that he ran and went to one of his girlfriend's house . . . .

(R. 111-12). Frazier averred he was scared and couldn't sleep that night. (R. 112). This Court finds Applicant has failed to show counsel was ineffective in this regard.

At the PCR hearing, counsel agreed any comment on Applicant's character would be objectionable, and she acknowledged that in hindsight she "probably could have objected to" the comment "I know what kind of guy he is." She clarified, however, that "there is a fine line between [Frasier] being scared, you know, what he would testify to about his impressions during what he alleged happened versus a general characterization of his character." She averred testimony that Frazier was afraid was not objectionable. (PCR 27-31).

Initially, 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.

[2] This section addresses a portion of allegation 1 in Applicant's amended application. The remainder of allegation 1 will be discussed in the following section.

Without identifying an objectionable legal basis, Applicant did not prove deficiency.[3] Further, it is not reasonably likely the outcome would have been different had counsel objected. Critically, Frazier was testifying about why he did not immediately call police the night of the kidnapping. Based on Frazier's extensive testimony about the kidnapping itself, Frazier would understandably be afraid of Applicant. Although Frazier said "I know what kind of guy he is," he did not otherwise elaborate on Applicant's character or testify to any prior bad acts by Applicant (other than the kidnapping itself, which Applicant was on trial for). Thus, it is not reasonably likely this passing statement, "I know what kind of guy he is," impacted the outcome of trial—especially in light of Frazier's extensive, admissible testimony about the kidnapping. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object to inflammatory remarks by law enforcement

Applicant also contends counsel was ineffective for failing to object to inflammatory remarks by law enforcement. This Court finds Applicant has failed to show counsel was ineffective in this regard.

During Captain Gruel's testimony, the solicitor asked why he told Applicant that no one would have reported this incident, and trial counsel objected based on speculation. (R. 180). The solicitor responded, "Personal experience in law enforcement, I think that he can testify to that." The trial court replied, "I'm not sure that question is supported by the evidence." Following a sidebar, the trial court overruled the objection. (R. 180). Thereafter, Captain Gruel testified,

> [T]here was a slight delay in the incident and it being reported. And in our line of work and in my experience there is a code of silence,

[3] This Court further finds the statement in and of itself is not so inflammatory as to be objectionable. To the extent Applicant is relying on Rule 404(b), during his testimony, Frazier merely said, "I know what kind of guy he is." (Tr. 111-12). This was generic testimony provided by a person who accused Applicant of kidnapping him; thus, 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. Likewise, to the extent Applicant relies on Rule 403, this Court finds the mere statement "what kind of guy he is" was not unduly prejudicial—especially in light of Frazier's extensive testimony about what Applicant did to him during the kidnapping itself.

> particularly with incidences that we deal with, it's kind of been heard about the no snitch rule so it's tough at times and very common for people not to provide us or report important—to come forward with information that they know about a crime.

(R. 181). During Investigator Erdel's testimony, he stated Frazier did not call to report his kidnapping. When asked whether he had experienced that before, he replied, "You know, there is kind of a street mentality, so to speak. You know, people are typically afraid for any number of reasons, they don't want to be labeled a snitch, they may want to handle it themselves. It's not uncommon for things like that to go unreported." (R. 205). Investigator Erdel stated Frazier was "pretty nervous" about talking to police. (R. 205-06). He explained, "I would say that his nervousness kind of devolved as the interview progressed to outright fear. He cried pretty hard. Probably—he was probably about as scared as I have ever seen anybody in an interview and that is saying something. He was pretty scared." (R. 206).[4]

This Court finds Applicant has not shown counsel was ineffective for not objecting to this testimony. Initially, the foregoing testimony regarding Frazier's fear and the fact that people often are not forthcoming with law enforcement due to fear of "snitching" is not inflammatory enough to warrant an objection. Applicant has failed to set forth the legal basis for an objection to this testimony and thus failed to prove counsel was deficient in this regard. Likewise, it is not reasonably likely Applicant suffered prejudice due to counsel's failure to object to the foregoing. Applicant has not identified the legal basis for an objection to this testimony, and thus has not shown a likelihood this evidence would have been excluded had counsel objected.[5] Further—and

[4] Applicant also referenced a portion of a pretrial hearing regarding the admissibility of Milledge's testimony; however, that testimony was not before the jury and thus does not support the claim that counsel was ineffective for not objecting to inflammatory evidence. (R. 40-45).

[5] Notably counsel *did* object to Captain Gruel's testimony about why people are not forthcoming with law enforcement, but that objection was overruled. To the extent Applicant relies on Rule 404(a) to support this claim, the foregoing testimony by Captain Gruel and Investigator Erdel does not relate to Applicant's character and thus does not violate Rule 404. See Rule 404(a), SCRE (providing evidence of a person's character or a trait of character is generally not admissible to prove action in conformity therewith). Further, testimony about the anti-snitch code was

critically—in light of Frazier's extensive testimony about the kidnapping itself, it is not reasonably likely the outcome would have been different had the foregoing been stricken or excluded. In other words, it was reasonable for Frazier to be afraid of Applicant based on Frazier's extensive, admissible testimony about the kidnapping itself. Thus, Applicant did not prove prejudice.

Failed to object to inadmissible bad character evidence[6]

Applicant next contends counsel was ineffective for not objecting to inadmissible bad character evidence. In support of this claim Applicant cites the following exchange that occurred during Milledge's testimony:

> Q Okay. From October 26th until about November 16 of 2015, were you in communication with the defendant?
> A I was.
> Q And you actually spoke with him on the phone?
> A Yes, Ma'am.
> Q Did you ever ask him about [Frazier]?
> A I just asked him questions like, if he wasn't guilty of what they were accusing him of, why was he running. He asked me more questions about [Frazier].
> Q What was he asking you about [Frazier]?
> A He just asked me, you know, stuff like if I spoke to [Frazier] and is [Frazier] accusing him of what they said and stuff like that.
> Q Okay. Did you tell him the police were looking for him?
> A He told me that.

(R. 246-47).[7] This Court finds Applicant has not counsel was ineffective in this regard.

The foregoing testimony does not constitute inadmissible bad character evidence.

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probative in (1) explaining why some individuals delay disclosing information to law enforcement and (2) contradicting Applicant's argument that Frazier was not credible because he did not notify law enforcement right away about the kidnapping. (Tr. 151-52, 289-90). Thus, it is not reasonably likely a court would have found the probative value of this testimony was "substantially outweighed by the danger of undue prejudice." Rule 403, SCRE. Finally, the officer's perception of Fraizer's fear was legitimate evidence to rebut the inference that Frazier's delayed disclosure implied he was not being truthful, and testimony that Applicant left South Carolina because he was guilty is not testimony that would be inadmissible under Rule 404 or Rule 403. Overall, the foregoing testimony is not inflammatory enough to warrant an objection and does not amount to inadmissible bad character evidence or evidence that would have been excluded under Rule 403. Thus, Applicant did not prove deficiency or resulting prejudice.

[6] This section addresses allegation two of the amended application.

[7] Milledge's testimony was discussed pretrial; counsel objected to any mention that Applicant was on probation or was afraid he would fail a drug test. (R. 40-45).

Milledge's testimony does not relate to Applicant's character at all, much less imply that Applicant was "acting in conformity therewith." See Rule 404(a), SCRE. Further, Milledge's testimony that Applicant knowingly ran from police and was concerned about what Frazier might say was probative of Applicant's guilt and was not unfair, confusing, or misleading; thus, the probative value of this testimony was not substantially outweighed by the risk of undue prejudice. See State v. Pagan, 369 S.C. 201, 208-09, 631 S.E.2d 262, 266 (2006) ("Flight from prosecution is admissible as guilt. The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. It is sufficient that circumstances justify an inference that the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Flight or evasion of arrest is a circumstance to go to the jury." (internal citations omitted)). Thus, counsel was not deficient for not objecting to Milledge's testimony based on Rule 404 or 403. Further, based on the foregoing, it is not reasonably likely this testimony would have been excluded under Rule 404 or Rule 403. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object to witness bolstering / vouching[8]

Applicant next contends counsel was ineffective for failing to object to improper witness bolstering and vouching. In support, Applicant relies on Captain Gruel and Investigator Erdel's aforementioned testimony about the "no-snitch rule" and the typical delay in people reporting crimes. (Tr. 180-81, 205-06). Applicant also relies on Investigator Erdel's testimony that he further investigated to attempt to corroborate Frazier's story, including pulling a video from the gas station to verify "his account of the time leading up to getting to the residence" and the CAD

[8] This section addresses allegation three of the amended application.

data from the 911 call "to verify the times and kind of pinpoint when those calls took place." (Tr. 206-07). Finally, Applicant relies on additional testimony from Investigator Erdell that Frazier was "afraid" of what would happen if he cooperated with law enforcement, and a portion of the State's closing argument that referenced Investigator Erdell's testimony that Frazier was afraid. (Tr. 220, 274). These portions of the transcript, however, do not amount to improper corroboration, improper lay opinion testimony, improper vouching, or improper bolstering. Thus, Applicant has not shown counsel was ineffective in this regard.

Captain Gurel and Investigator Erdel's testimony regarding the "no-snitch" code was based on their experience in law enforcement and was admissible to explain to the jury why Frazier may not have initially reported the kidnapping. Likewise, testimony about Frazier's fear was admissible as the officers' perception of his demeanor and did not amount to improper corroboration, vouching, or bolstering. The foregoing does not amount to an opinion that the investigation corroborated Frazier's account of the kidnapping. Rather, this was admissible to explain why Frazier may have delayed reporting the kidnapping, and there was no basis to object based on vouching, bolstering, improper corroboration, or lay-opinion testimony. Cf. State v. Acker, 435 S.C. 716, 728, 869 S.E.2d 873, 879 (Ct. App. 2022) (finding testimony about why a child may delay disclosing abuse "provided context for the jury and assisted jurors in understanding . . . why a child might delay disclosure"). Applicant has not set forth any law to show the foregoing amounted to improper lay-opinion testimony, corroboration, vouching, or bolstering and thus has not met his burden of proving deficiency.

Likewise, Applicant did not set forth any law to show Investigator Erdel's testimony about his investigation constituted improper corroboration, vouching, or bolstering. During this testimony, Investigator 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. Further, this Court finds counsel articulated a valid strategy in not objecting to Investigator Erdel's testimony about the gas station video and the CAD data. Specifically, counsel explained she wanted to bring out the time Frazier was at the gas station because "it kind of messed up what [Frazier] was saying as far as his timeline." Counsel likewise articulated a valid strategy in attempting to use the State's case against them in terms of the CAD data and Frazier's timeline. Thus, Applicant did not prove deficiency.

Finally, it is not reasonably likely the outcome would be different had counsel objected to this testimony. Initially, this Court finds it is not reasonably likely an objection on these grounds would have been sustained. It is also not reasonably likely, based on Frazier's account of the kidnapping itself and his identification of Applicant as someone he knew, that the outcome would have been different had the foregoing testimony been excluded. Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to redact portion of interview and properly argue and preserve mistrial motion[9]

Applicant contends counsel was ineffective for failing to redact a portion of Applicant's police interview where he stated he had recently been released from prison. He further contends counsel was ineffective for failing to properly argue and preserve a mistrial motion related to this issue. This Court finds Applicant did not prove counsel was ineffective in this regard.

Although this Court finds counsel was deficient for not ensuring this portion of the interview was redacted, this Court finds Applicant did not prove prejudice. Specifically, it is not reasonably likely the outcome would have been different had counsel ensured this was redacted because it was cumulative to other properly-admitted evidence. The State presented evidence

[9] This section addresses allegation four of the amended application.

through the Clerk of Court that Applicant had previously been convicted and sentenced for second-degree burglary. (Tr. 258-59). This testimony was properly admitted to support Applicant's charge of possession of a firearm by a person convicted of a crime of violence. (Tr. 266-67). See S.C. Code Ann. 16-23-30 (providing it is illegal for an individual convicted of a violent crime to possess a handgun); State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000) ("[E]vidence of other crimes is admissible to establish a material fact or element of the crime charged."); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) ("[E]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime."). Thus, testimony was before the jury that Application had previously been convicted and sentenced of another crime—and had been previously incarcerated. Although counsel may not have ensured that Applicant's statement about previously being in prison was redacted after the State agreed to redact it, it is not reasonably likely the admission of this statement changed the outcome of trial when it was merely cumulative to properly-admitted evidence of Applicant's prior conviction. (Tr. 45-46, 258-59). Cf. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Likewise, and for the same reason, it is not reasonably likely a properly preserved mistrial motion would have changed the outcome of Applicant's trial or appeal on this issue.[10] (Tr. 321-22). Thus, Applicant did not prove prejudice from counsel's failure to ensure his statement was redacted or counsel's failure to properly preserve a mistrial motion.

[10] Although the State argued the mistrial motion was untimely, the trial court did not deny it on that ground but ultimately denied it because "there was also evidence that he was already . . . convicted of something before." (Tr. 321-22). Thus, it is not reasonably likely a timely mistrial motion would have changed the trial court's decision.

Failed to object to improper comments by solicitor during closing[11]

Applicant asserts counsel was ineffective for failing to object to improper comments by the solicitor during closing argument. This Court finds Applicant did not prove counsel was ineffective in this regard.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Id. However, "[s]olicitors are bound to rules of fairness in their closing arguments." Id.

"On appeal, the 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." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. "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." Id.

In support of finding counsel ineffective on this ground, the PCR Court relied on the following statements from the solicitor's closing argument:

> 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 and the top 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.

(Tr. 274).

[11] This section addresses allegation five of the amended application.

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. [Frazier] couldn't be a snitch. You don't live in this world, you don't live on those streets having the title snitch. And [Frazier] wasn't going to do that, he had children that he had to live for.

(Tr. 275).

Will you talk, [Applicant]? It depends, that is what he said. He is there to talk about this 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.

(Tr. 282).

What do we know after all of this happens, after [Frazier] is kidnapped, after Monte goes missing? That man right there, like the coward that he is, he flees. He runs away and he hides in rural Georgia. He's not there visiting his wife. Or is girlfriend is in Walterboro, so maybe he is visiting his wife in Georgia, but that is beside the point. No, he is not there visiting his wife. He's hiding. He told Shabonda, I know the police are looking for me. She didn't ask him that, he gives her this information.

So does he come in? No, he runs, he hides, and it takes the U.S. Marshals to track him down and find him and it takes a Beaufort police officer to bring him back to South Carolina. He doesn't visit any family, he was hiding from this courtroom.

(Tr. 282-83).

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. The Judge is going to instruct you that burglary in South Carolina is defined as a crime of violence.

(Tr. 285).

I want to leave you with one last thing, and that is Versheen 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 things 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 is missing and this is how he's acting. A man that laughs at a missing person. A man that laughs at kidnapping. That is an evil man. And that is what Andre told you. He said, He is an evil man. And a man that can have that sort of reaction is 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.

(Tr. 286).

Initially, this Court finds the solicitor's comments were reasonable inferences from the evidence presented at trial. Additionally, it is not reasonably likely the outcome would have been different had counsel objected. See Strickland v. Washington, 466 U.S. 668 (1984) (providing an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel); id. ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). Viewed in the context of the solicitor's entire closing argument as well as the transcript, these comments did not "so infect the trial as to make the resulting conviction a denial of due process." Vasquez, 388 S.C. at 459, 698 S.E.2d at 567; c.f. Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no face, blown away by a shotgun"—did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process"). Thus, it is not reasonably likely the outcome would have been different had counsel objected.

Failed to present phone records that challenged State's version of events[12]

Applicant asserts counsel was ineffective for failing to properly present phone records. This Court finds Applicant did not prove counsel was ineffective in this regard.

Initially, trial counsel *did* highlight the number of calls that took place during the timeframe of the kidnapping. During cross-examination of Investigator Erdel, counsel elicited testimony that Applicant's phone placed calls at 7:40 pm, 7:41 pm, 7:45 pm, 7:50 pm, and 8:04 pm—all of which

[12] This section addresses allegation six of the amended application.

were in the timeframe of the kidnapping. (Tr. 236-37). Likewise, during closing argument, counsel argued,

> [Applicant] had called Monte. I got that out through the investigator by his phone records. **[Applicant] at the exact time that he was supposedly kidnapping Andre Frazier, at about 7:40, he called Monte. And 7:41 he called Monte. And 7:50 he called Monte. That is about the exact same time where Andre was talking about he was getting tied up.** And you remember, Andre said he didn't call Monte, he never called Monte on the phone. Well, that is not true, it is proven on the records.

(Tr. 288-89, emphasis added). Counsel *did* elicit the number of calls placed during the timeframe and argued they were placed at the same time Frazier was kidnapped. Because counsel raised this argument to the jury, Applicant did not prove deficiency.[13]

Likewise, Applicant did not prove prejudice. Based on the transcript, Applicant told law enforcement he called Monte while Frazier "was there because he was looking for him." (Tr. 234). Thus, the calls corroborated Applicant's statement that Frazier was at his house looking for Monte and do not in and of themselves exonerate Applicant. Further, the calls placed between 7:20[14] and 8:16 pm—the approximate timeframe of the kidnapping—do not exonerate Applicant or show he could not have committed the kidnapping. Of the 17 calls during this timeframe, only two lasted more than one minute: a 238-second (under four minutes) call placed at 7:21 p.m. and a 66-second call placed at 7:45 pm. Based on Frazier's testimony that Applicant was not in the room with him the entire time, it would have been feasible for Applicant participate in these short calls *and* be involved in the kidnapping. Thus, it is not reasonably likely that further highlighting the number of calls here would have changed the outcome of trial, and Applicant did not prove prejudice.

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[13] The phone records themselves do not show Applicant was using his phone during a "substantial period of time" while the kidnapping took place. Notably, of the 17 calls placed between 7:21 pm and 8:16 p.m., only two lasted for longer than a minute: a 238-second call at 7:21 pm, and a 66-second call at 7:45 pm.

[14] Law enforcement recovered video showing Frazier at a nearby gas station around 7:15 pm; Frazier testified he went to the gas station prior to going to Monte's house. (Tr. 89-81, 206, 224).

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. This, this application is denied and dismissed with prejudice. Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgement. See Rule 203, SCAC. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If applicant wishes to seek appellate review, PCR counsel must serve and file a notice appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 12th **day of** March **, 2023**

G.D. MORGAN, JR.
Presiding Judge
Ninth Judicial Circuit

Greenville, South Carolina.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2021CP0701235

Varsheen Antuan Smith		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: **Order of Dismissal**

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Order of Dismissal

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ G. D. Morgan, Jr	2773	3/12/2024
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **March 25, 2024**, and a copy mailed first class or placed in the appropriate attorney's box on **March 25, 2024**, to attorneys of record or to parties (when appearing pro se) as follows:

Christopher Reginald Geel PO Box 21771 Charleston, SC 29413

Danielle Dixon PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.