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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from
Beaufort County
Honorable Brooks P. Goldsmith, Trial Judge
Honorable G.D. Morgan Jr., PCR Judge

Appellate Case No. 2024-000551

VARSHEEN ANTUAN SMITH,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION
FOR A WRIT OF CERTIORARI

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INDEX

QUESTIONS PRESENTED

1. Was trial counsel ineffective by failing to object to an investigators' improper bolstering testimony that he 'corroborated' the story of the State's key witness?

2. Did the PCR court err in ruling Rule 404, SCRE, did not bar testimony from the State's key witness that he knows "what kind of guy [petitioner] is" and implied petitioner intimidated witnesses?

3. Was trial counsel ineffective by refusing to object to the solicitor's closing argument where, among other things, she referred to petitioner as an "evil man" five times and invited the jury to speculate about the fact petitioner "has seen the inside of a courtroom" given his prior convictions?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Did the PCR court properly find counsel was not ineffective for not objecting to Investigator Erdel's testimony about his investigation when (1) the testimony did not constitute bolstering and was not objectionable, (2) counsel articulated a valid strategy for not objecting, and (3) it is not reasonably probable an objection would have excluded the testimony or changed the outcome?

II. Did the PCR court properly find Petitioner did not meet his burden of showing testimony about Frazier's fear or the snitching code was objectionable when (1) Petitioner's issue statement takes the testimony out of context, (2) the PCR court properly concluded Petitioner did not set forth a valid objection to this testimony and thus did not prove deficiency, and (3) it is not reasonably probable an objection would have excluded the testimony or changed the outcome?

III. Did the PCR court properly find counsel was not ineffective for not objecting to the State's closing argument when (1) the solicitor's argument was based on evidence presented, and Petitioner failed to point to any law that existed at the time of trial that indicated the use of "evil" or the argument related to demeanor was improper, and (2) the solicitor's argument did not so infect the trial with unfairness as to violate due process?

PROCEDURAL HISTORY

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

Petitioner filed a timely notice of appeal that was perfected by Chief Appellate Defender Robert M. Dudek, who filed a brief pursuant to Anders.[1] After review, the Court of Appeals ordered 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, finding Petitioner conceded the State could introduce the evidence and thus did not preserve the issue for appeal. State v. Smith, 2021-UP-199 (S.C. Ct. App. filed June 9, 2021). The remittitur was sent June 29, 2021.

On July 8, 2021, Petitioner timely filed an application for post-conviction relief (PCR). Respondent filed a return requesting an evidentiary hearing. On November 6, 2022, Petitioner filed an amended PCR application. On November 16, 2022, an evidentiary hearing convened before the Honorable G.D. Morgan, Jr. Petitioner was present and represented by Christopher R. Geel,

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

Esquire. Assistant Attorney General Lauren Mims represented Respondent. On July 25, 2023, Judge Morgan issued an order granting Petitioner a new trial. On August 9, 2023, Respondent filed a Motion to Alter or Amend pursuant to Ruel 59(e), SCRCP. Thereafter, on March 25, 2024, Judge Morgan issued an order granting the motion to reconsider, denying relief, and dismissing the application with prejudice.

Summary of Trial Testimony

At trial, Andre Frazier testified he went to his friend Ver'mon Steve's home on October 25, 2015. Prior to arriving, Frazier called to ensure Steve was home. (Tr. 84-91). Frazier testified that when he arrived, he saw Petitioner—Steve's roommate—and Tyrone Wallace outside. Frazier knew both men and had known Petitioner since childhood. (Tr. 91-93). Frazier stated he asked where Steve was, but Petitioner and Wallace ignored his question. Frazier testified,

> And he kind of kept on and I asked him again, Where's [Steve]. I said [Steve]. And he was like, Let me holler at you right quick. And then I asked him again, Where's [Steve]. Let me holler at you. And I asked him again, Where [Steve]. Man, [Steve] 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 Petitioner put a pistol into his stomach and told him to go inside. (Tr. 95-97). Once inside, Petitioner put the gun to the back of his head and tied his hands behind his back. (Tr. 98-100). Frazier testified Petitioner called him a snitch, accused him of "slipping," and said, "Funny time you came up here." (Tr. 100-01). Frazier further testified Petitioner hit him in the head with the gun and stuffed a rag in his mouth. (Tr. 100-103).

Frazier testified he was forced into a room with Petitioner while Wallace went elsewhere. When Petitioner left the room, Frazier started to dial 911, but he ended the call because he was worried the kidnappers would overhear. (Tr. 104-07). Frazier stated Petitioner and Wallace

returned, and Petitioner's mood had changed. He explained Petitioner previously looked "pretty evil," "but now he didn't look evil like he was." (Tr. 107). Frazier testified Petitioner told Wallace to let him go. (Tr. 107). Frazier surmised he was released because a police officer was outside and Petitioner and Wallace were afraid the police would discover them. (Tr. 108-09, 151, 161).

After Frazier left, he testified he tried calling Steve 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 Steve's mother and told her Steve was missing. (Tr. 152-54).

Investigator George Erdell, who interviewed Frazier, testified Frazier was nervous during his interview, which devolved into 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 Petitioner called her on October 26, 2015, and asked where Frazier lived; she refused to tell him. Milledge remained in contact with Petitioner until November 16, 2015. She testified Petitioner told her the police were looking for him, and she asked why he was running if he was not guilty. Milledge stated Petitioner 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, 2015, Petitioner was arrested in Georgia. (Tr. 256). On November 18, 2015, Monte's remains were discovered; thereafter, Wallace—but not Petitioner—was charged with his murder. (Tr. 210).

Standard of Review

The standard of review for PCR depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court properly found counsel was not ineffective for not objecting to Investigator Erdel's testimony about his investigation because (1) the testimony did not constitute bolstering and was not objectionable, (2) counsel articulated a valid strategy for not objecting, and (3) it is not reasonably probable an objection would have excluded the testimony or changed the outcome.

Petitioner first contends the PCR court erred in not finding counsel ineffective for not objecting to Investigator Erdel's testimony about his investigation. However, the PCR court properly found Investigator Erdel's testimony about his investigation did not constitute bolstering and was not objectionable. Further, counsel articulated a valid strategy for not objecting. Finally, it is not reasonably probable an objection would have excluded the testimony or changed the outcome; thus, the PCR court properly found Petitioner did not prove prejudice.

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.

1. The testimony did not constitute bolstering and was not objectionable.

In his petition, Petitioner asserts counsel should have objected to the following:

> 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 that the next thing in 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.[2]
>
> Q. Okay. And were they consistent with Mr. Frazier?

[2] Frazier testified that after his kidnappers released him, he went outside and saw police in the area. (App. 170-73). Officer Bill Wadman testified he responded to a noise-complaint call in the area around 7:55 p.m. and a shots-fired call about thirty minutes later. (App. 253-56). Officer Owen Goethe similarly testified he responded to a noise-complaint call and a shots-fired call, although he stated the noise-complaint call came in around 7:00 or 7:06 p.m. (App. 261-64).

A. They were.

(App. 268-69). The PCR court properly found the foregoing did not constitute improper bolstering.[3] In context, Investigator Erdel was explaining what he did in his investigation after speaking to Frazier. Investigator Erdel's testimony is the type of testimony commonly offered by the State in criminal trials. Nothing about this constituted improper bolstering.

Additionally, as the PCR court properly found, Petitioner did not set forth any law to show this was improper bolstering—and thus did not meet his burden. Petitioner seemingly admits no caselaw supports his proposition that this testimony is improper bolstering when he invites this Court to grant certiorari to "***develop the law*** on bolstering outside of the child sex crimes and forensic interviewer contexts." (Pet. 9 n.2, emphasis added). Doing so, however, would directly contradict the clear mandate of Strickland and its progeny, which requires Courts to evaluate an attorney's actions at the time of trial and under the law that existed at the time of trial. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and ***to evaluate the conduct from counsel's perspective at the time***." (emphasis added)); Briggs v. State, 421 S.C. 316, 322, 806 S.E.2d 713, 717 (2017) ("***[W]e may not judge the reasonableness of counsel's performance by standards that developed later***." (emphasis added)). Because PCR is not a proper vehicle for developing substantive criminal law, the Court should decline this invitation. See Pantovich v. State, 427 S.C. 555, 562-63, 832 S.E.2d

[3] The use of the word "corroborated," in and of itself, does not make this testimony improper bolstering. Cf. State v. Busse, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) ("Jennings and Kromah and their disapproval of the use of the word "compelling" are not applicable to this case. We find nothing improper in the deputy solicitor's use of the word "compelling" as part of his effort to stress the importance of a piece of evidence and thus convince the jury to believe the victim's testimony."). Rather, the statement must be judged in context.

596, 600 (2019) ("Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective *at the time of the alleged error*. . . . [W]e do not require attorneys to be clairvoyant in anticipating changes to the law . . . ." (internal footnote omitted)).

In his petition, Petitioner relies on Briggs, which found "reasonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose." 421 S.C. at 325, 806 S.E.2d at 718. However, Briggs dealt with objectionable testimony by a forensic interviewer in a child sex case. Investigator Erdel's role as an investigator in a kidnapping case was vastly different than that of a forensic interviewer in a child sex case, and Briggs is inapposite.

Further, unlike testimony based on subjective beliefs, Investigator Erdel testified about objective evidence (a CAD report and a surveillance video) that supported what Frazier told him. This is different than a forensic interviewer testifying she instructed the victim on the importance of telling the truth; [4] or "found the Victim's statement 'believable' and stated the Victim had no reason 'not to be truthful'";[5] or determined "the child understood the difference between a truth and a lie before she conducted the [forensic] interviews." [6] In other words, Investigator Erdel was not giving his subjective *opinion* about whether Frazier was telling the truth; rather, he was testifying about objective evidence. Cf. Briggs, 421 S.C. at 325, 806 S.E.2d at 718 ("[N]o witness may give an opinion as to whether the victim is telling the truth.").

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[4] Briggs, 421 S.C. at 322, 806 S.E.2d at 717 (citing State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015)).
[5] Briggs, 421 S.C. at 324, 806 S.E.2d at 717 (quoting Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)).
[6] Briggs, 421 S.C. at 329, 806 S.E.2d at 720.

Finally, Investigator Erdel's testimony served a valid purpose of explaining to the jury how his investigation unfolded. Contra Briggs, 421 S.C. at 325, 806 S.E.2d at 718 ("[R]easonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, ***but does not serve some other valid purpose***." (emphasis added)). Based on the foregoing, the PCR court properly found Investigator Erdel's testimony was not objectionable, and Petitioner failed to meet his burden of proving otherwise.

2. Counsel articulated a valid reason for not objecting to this testimony and thus was not deficient.

As recognized by Briggs, a lawyer's failure to object to otherwise objectionable testimony is not deficient if the lawyer articulates a valid trial strategy for not objecting. See Briggs, 421 S.C. at 329, 806 S.E.2d at 720 ("[I]if Singleton decided not to object to Arroyo-Staggs' direct testimony based on a valid trial strategy, we would find his performance reasonable despite the inadmissibility of the evidence."). The PCR court properly found counsel articulated a valid strategy for not objecting to the foregoing. 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."[7] While cross-examining Investigator Erdel, counsel used the timestamp of the video and the time Frazier texted Steve to challenge Frazier's account. (App. 285-86). She likewise used this discrepancy during her cross-examination of Frazier (App. 182-83) and in her closing argument (App. 351, 353-54, 356-58). Counsel had a valid strategy in not objecting because she used the timestamp of the video to impeach Investigator Erdel *and* to challenge Frazier's account.

Counsel likewise articulated a valid strategy in using the CAD data to attack the State's

[7]The gas station video was entered into evidence during the testimony of Paul Patel, who agreed the video contained "a time stamp on the bottom with the date and time." (App. 235).

case.[8] Initially, Petitioner's assertion that Investigator Erdell "*never* . . . explained what the CAD data showed" (Pet. 9) is directly refuted by the transcript, where Investigator Erdell testified on cross-examination as follows:

> Q. Okay. And so, the noise complaint was at 7:56 p.m.; is that right?
>
> A. I wrote in my notes—I would have to look at the CAD, and I don't have the actual CAD. I thought it was 7:51, but I may be mistaken. But in that time frame, yes, ma'am.

(App. 285). In context, this passage supports that counsel was attacking Frazier's timeline. After eliciting the time of the call from the CAD data, counsel questioned Investigator Erdel about the timestamp on the gas station video, Frazier's statement that he was at the home "for about 20 to 30 minutes," and evidence that Frazier texted Steve when he left at 8:26 p.m. (App. 285-86). Counsel likewise used testimony about the time police were in the area (as reported on the CAD report) to attack Frazier during cross-examination. (App. 206-12). In context, counsel used the CAD report to attack Frazier's timeline, which was a reasonable strategy. Thus, the PCR court properly found counsel was not deficient.

3. There is no reasonable probability an objection would have excluded the testimony or changed the outcome.

Finally, it is not reasonably probable the outcome would be different had counsel objected to this testimony. Critically, Petitioner has failed to set forth a valid objection, and based on the foregoing, it is not reasonably likely an objection would have been sustained. Further, it is not reasonably likely the outcome would have been different had the foregoing testimony been excluded. Thus, the PCR court properly found Petitioner did not prove prejudice.

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[8] Although Petitioner asserts counsel did not give a reason for not objecting to testimony about the CAD data (Pet. 8), counsel *did* testify to a reason for not objecting: "My thought was to try and kind of use their case against them in a way to kind of use, you know, the timeline and, you know, the time, what he's saying and the CAD." (App. 496).

II. The PCR court properly found Petitioner did not meet his burden of showing testimony about Frazier's fear or the snitching code was objectionable when (1) Petitioner's issue statement takes the testimony out of context, (2) the PCR court properly concluded Petitioner did not set forth a valid objection to this testimony and thus did not prove deficiency, and (3) it is not reasonably probable an objection would have excluded the testimony or changed the outcome.

Petitioner next contends "the PCR court erred in ruling Rule 404, SCRE, did not bar testimony that petitioner was the kind of guy that would intimidate witnesses into silence." Initially, this statement, in and of itself, misstates the actual testimony that Petitioner criticized at the PCR hearing—testimony that Frazier was afraid when he spoke to police, and testimony about the anti-snitching code. Further, the PCR court properly concluded Petitioner did not set forth a valid objection to this testimony and thus did not prove deficiency. Finally, it is not reasonably probable an objection would have excluded the testimony or changed the outcome.

1. Petitioner's issue statement takes the testimony out of context.

In his petition, Petitioner asserts "[t]he PCR court erred in ruling Rule 404, SCRE, did not bar testimony that petitioner was the "kind of guy" ***that would intimidate witnesses into silence***." However, it is incredulous to suggest the testimony that Petitioner cited as inflammatory indicated Petitioner had a reputation for "intimidating witnesses into silence." In his application and amended application, Petitioner cited the following testimony by Frazier as "inflammatory":

> Q. You didn't call the police that night, did you?
>
> A. No, ma'am.
>
> Q. Why not?
>
> A. Because, for number one, I have kids. I know what kind of guy he is, so I had to really think what I was going to do, you know, make sure that I made the right choice to know what I was going to do.

(App. 173-74; Tr. 111-12).[9]

> [Investigator Gruel] Well, there 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.
>
> In this particular incident, I don't think that he would have come forward, this would have probably went unreported. Obviously, it would have been a concern of his, but I don't think that he would have brought it to our attention, but it was a more important thing of Ver'mon being missing and he had to tell his mother that Ver'mon was missing and this is what happened to me. So I don't think—I just don't think it would have come to our attention otherwise.
>
> Q. So it's not uncommon for crimes not to be reported?
>
> A. No, it is not uncommon. Probably happens more than I would like.

(App. 243; Tr. 181).

> Q. Do you know if [Frazier] called to report his kidnapping?
>
> [Investigator Erdel]: To my knowledge he did not.
>
> Q. Okay. Have you experienced that before?
>
> A. Yes.
>
> Q. Can you explain a little bit your experience with that?
>
> A. It is basically the same thing that Captain Gruel said. 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 is not uncommon for things like that to go unreported.
>
> Q. When you met with Mr. Frazier, what is his demeanor; how is he

[9] Petitioner only cited page 111 of the transcript in reference to Frazier's testimony. The Petition cites additional testimony elicited during Frazier's cross-examination that was not raised as objectionable in the application, amended application, or at the PCR hearing; thus, any argument related to that testimony is not preserved. (Pet. 13-14; App. 213; Tr. 151).

acting?

> A. He was pretty nervous about being there. 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 room and that is saying something. He was pretty scared.

(App. 267-68; Tr. 205-06).

The foregoing is not testimony that Petitioner had a reputation for intimidating witnesses into silence. This Court should go to the source to see what was actually testified to at trial when considering what objection, if any, counsel could have raised. Petitioner's issue statement misconstrues the testimony, which is what the PCR court properly considered in its ruling.

2. The PCR court properly concluded Petitioner did not set forth a valid objection to this testimony and thus did not meet his burden.

In determining whether the PCR court erred, it is critical to examine *what* the PCR court was being asked to rule on. In his application and amended application, Petitioner asserted counsel was ineffective for not objecting to the foregoing as "inflammatory remarks by witnesses." (App. 426, 450; Tr. 111-12, 181, 205-06.). Although Petitioner asserted these were "inflammatory remarks," he did not elaborate on a legal basis for objecting.[10]

Petitioner likewise did not clarify at the PCR hearing what *legal* objection counsel should have made to this testimony. Contrary to Petitioner's assertion, PCR counsel's questioning did not clarify the ground he believed counsel should have used to object. In the portion of the PCR transcript Petitioner relies on, PCR counsel first questioned trial counsel specifically about Petitioner's prior felony conviction. (App. 478 ln. 3-22). PCR counsel then questioned trial counsel—repeatedly—about whether she believed testimony that Frazier was "fearful" was

[10] Petitioner alternately asserted Investigator Erdel's and Captain Gruel's testimony about fear and the no-snitch code constituted improper vouching, but the PCR court separately addressed that argument. (App. 426, 598-600).

objectionable:

> Q. So an implication that an individual is fearful of the defendant and that that person has kids that he's thinking of, as you sit here now, do you—do you believe that that's essentially a comment on—
>
> A. Well, I mean, at this point I had heard his pretrial proffer and I mean, the whole of his testimony, he's talking about how he's scared and the, you know. And so I think there is a fine line between him being scared, you know, what he would testify to about this impressions during what he alleged happened versus a general characterization of his character.
>
> So yeah, I think a general characterization of his character I should have object to, but any sort of, he's in fear, I have kids, this is why I do what I do. I would—I did not see that as objectionable.

(App. 478-79).[11] Nothing about this question put the Court on notice of the *legal* objection Petitioner was relying on in asserting counsel should have objected.[12] A PCR court should not have to comb testimony with a fine-toothed comb to ascertain what issue is being presented. Petitioner did not clearly present a legal objection to this testimony, and the PCR court properly found he did not meet his burden of proof.[13]

Further, the PCR court properly found Investigator Erdel and Captain Gruel's testimony

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[11] This is the entire portion Petitioner cites to support his contention that PCR counsel set forth the legal basis for why trial counsel should have objected. Following this, PCR counsel continued to question trial counsel about fear testimony, and trial counsel maintained she did not believe it was objectionable.

[12] Petitioner's reliance on the PCR court's initial order in clarifying this ground is likewise misplaced. As pointed out in the Motion to Reconsider, this portion of the order conflated two separate allegations raised by Petitioner—allegations related to "inflammatory comments" (discussed herein) and allegations related to alleged "bad character" evidence presented by Milledge. (App. 574). In discussing these allegations, the court relied on Rules 404 and 403. Given the way these allegations were combined and the conclusory nature of the analysis, it is difficult to ascertain *what* testimony should have been objected to based on Rule 404(a) versus Rule 404(b). In other words, assuming *arguendo* the PCR court's first order could be relied on as evidence of what Petitioner presented, it does not clearly state what objection counsel should have made to the testimony.

[13] The lack of clarity in the legal ground Petitioner believed counsel should have used is further illustrated by the PCR court's footnote, where it attempted to ascertain the legal basis Petitioner was relying upon. (App. 595). Ultimately it is Petitioner's burden to clearly articulate and prove his grounds—not the PCR court's burden to comb the record and guess at the legal objection counsel could have raised.

was not objectionable. Testimony about the no-snitch code was not objectionable because it was based on the officers' experience in criminal investigations and common knowledge. Cf. State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999) (finding solicitor's argument that the testifying inmate would be labeled a 'rat' was not objectionable because the credibility of the witness was an issue and the argument was based upon common knowledge). Likewise, testimony about Frazier's fear was based on Investigator Erdel's observation of Frazier and was not objectionable. Critically, nothing about this testimony can be construed as an impermissible comment on Petitioner's character—the only basis Petitioner raises in his petition.

Finally, Frazier's statement, in context, does not constitute improper character evidence. 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 Petitioner. Although Frazier said "I know what kind of guy he is," he did not otherwise elaborate on Petitioner's character or testify to any prior bad acts by Petitioner (other than the kidnapping itself—which Petitioner was on trial for). Thus, the PCR court properly found Petitioner did not meet his burden of proving deficiency.

3. The PCR court properly concluded Petitioner did not prove prejudice.

The PCR court properly found Petitioner did not articulate a valid objection that would have excluded the testimony and thus did not meet his burden of proving prejudice. Further, as set forth herein, the testimony by Investigator Erdel and Captain Gruel was proper and not objectionable. Even if Frazier's statement, "I know what kind of guy he is," could somehow be construed as improper character evidence (which Respondent does NOT concede), it is not reasonably probable the outcome would be different had this passing statement been stricken when Frazier testified extensively about the kidnapping itself. Specifically, Frazier testified Petitioner

put a gun to his stomach, forced him inside the house, put the gun to his head, forced him to his knees, tied his hands behind his back with a belt, hit him in the head with a gun, and told Wallace to stuff a rag in his mouth. (App. 159-67). Based on Frazier's extensive testimony about the kidnapping itself, it is not reasonably probable this passing statement, "I know what kind of guy he is," is the thing that tipped the jury into convicting Petitioner, nor is it reasonably probable the outcome would be different had this statement been stricken. Thus, the PCR court properly found Petitioner did not prove prejudice.

III. The PCR court properly found counsel was not ineffective for not objecting to the State's closing argument when (1) the solicitor's argument was based on evidence presented, and Petitioner failed to point to any law that existed at the time of trial that indicated the use of "evil" or the argument related to demeanor was improper, and (2) the solicitor's argument did not so infect the trial with unfairness as to violate due process.

Petitioner contends the PCR court erred in finding trial counsel was not ineffective for failing to object to improper closing arguments by the State. Specifically, he contends the solicitor's argument that Petitioner was "evil" invited the jury to judge his character rather than his guilt. Second, he contends comments about his burglary conviction invited the jury to infer his guilt of the crimes charged based on his prior convictions. Finally, he avers attacking his demeanor during the recorded interview highlighted facts irrelevant to his guilt, improperly impugned his character, and unfairly implied his refusal to confess was evidence of his guilty. However, Petitioner has not shown the solicitor's use of the word "evil' or her argument related to his demeanor in this interview was improper. Further, these comments, in context, did not so infect the trial with unfairness as to violate due process.

"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C.

318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). ***"[A] prosecutor is expected to comment on the credibility of the witnesses*** when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer." State v. Busse, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) (emphasis added). "A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial." Id. at 109, 886 S.E. 2d at 211.

"Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted." Id. "The legal concept of "vouching" prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury". 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." Vasquez, 388 S.C. at 458, 698 S.E.2d at 566. In determining whether an improper comment prejudiced a defendant, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986). "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.

1. The solicitor's argument was based on evidence presented, and Petitioner has failed to point to any law that existed at the time of trial that indicated the use of "evil" or the argument related to demeanor was improper.

In his petition, Petitioner cites to the following as alleged improper comments by the solicitor:

> 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.

(App. 336).

> 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.

(App. 337).

> Will you talk, [Petitioner]? 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.

(App. 344).

> 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.

(App. 347).

> 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 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 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.

(App. 347).[14]

Initially, this PCR court properly found the foregoing were reasonable inferences from the evidence presented at trial.[15] Petitioner has not challenged this finding, making it law of the case.

Respondent agrees with Petitioner's contention that "there are other ways solicitors can inject impermissible considerations into a proceeding and violate defendants' right to a fair trial." (Pet. 18). Critically, however, Petitioner has not pointed to any law that existed at the time of trial to show the State's comments on his demeanor during his interview or calling him "evil" was

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[14] In his original application, Petitioner also cited to the following:

> 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). However, he does not raise any issue with this argument on appeal, making the PCR court's ruling that this was not improper the law of the case.

[15] Contrary to Petitioner's assertion, *nothing* in the solicitor's argument suggested the solicitor argued Petitioner "would hurt children to keep people from 'snitching" (Pet. 18).

objectionable. Nothing about the foregoing amounts to a golden rule argument, or interjections of parole considerations, or the improper comments by the solicitor in Fortune regarding the role of a prosecutor. Because a court must measure counsel's conduct under the law that existed at the time of trial, it is incumbent upon Petitioner to point to *something* that existed at the time of trial to show these comments were improper. Petitioner has not met that burden.

b. The solicitor's mere passing statement did not so infect the trial with unfairness as to violate due process.

The PCR court properly found the solicitor's argument did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Initially, an improper comment, in and of itself, does not warrant reversal unless it so infects the trial with unfairness as to violate due process. In Darden, 477 U.S. 168 (1986), the United States Supreme Court concluded that although the solicitor's references to the capital defendant as "an animal" whose head he wished had been blown off were improper, they did not so infect the trial with unfairness as to violate due process. 477 U.S. at 168. If the solicitor's egregious statements in Darden did not violate due process, then the solicitor's mere passing comments here did not violate due process.

The Court in Hart reached a similar conclusion regarding a solicitor's use of the word "evil." There, the Court found that although the solicitor described the defendant as "evil" six times during closing argument, "the State's characterizing Hart as 'evil' did not prejudice him, nor did the solicitor's comments so [infect] the trial with unfairness as to make the resulting conviction a denial of due process." 436 S.C. at 162, 871 S.E.2d at 207. Likewise, the solicitor's use of the word "evil" five times here—at the end of a seventeen-paging-closing argument—did not so infect the trial with unfairness as to violate due process.[16]

[16] Petitioner has not pointed to any law that holds a solicitor cannot make arguments about a defendant's demeanor during his interview, and the State maintains that argument was not objectionable.

Finally, the solicitor's statement, "This isn't the first time Mr. Smith has seen the inside of a courtroom," was argued as part of the State's argument about the crime of possession of a weapon by a person convicted of a violent crime. (App. 347). In context, this statement was not propensity evidence.[17] Even if improper, this comment—standing alone—does not warrant reversal. See Fortune 428 S.C. at 550, 837 S.E.2d at 40 (***"Improper comments do not automatically require reversal if they are not prejudicial to the defendant.*** On appeal, ***the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record*** . . . .The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (emphasis added)).

Unlike the solicitor in State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), who called the defendant "outlaw" twenty-three times during closing argument, the statement here was a mere passing statement in a seventeen-page closing argument and was argued in context of an element of a crime for which Petitioner was charged. Contra State v. Day, 341 S.C. 410, 423, 535 S.E.2d 431, 438 (2000) ("The solicitor's reference to the nickname was excessive and repetitious, and was not used to prove any matter in controversy.").

Further, the trial judge properly charged the jury on the presumption of innocence and the State's burden of proof. (App. 364-66). In context of the solicitor's entire closing argument as well as the entire trial, this passing comment did not "so infect the trial as to make the resulting

[17] Petitioner's reliance on State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020) is misplaced. Not only did Perry come out *after* Petitioner's trial, the issue in Perry was whether prior bad act evidence was admissible under Rule 404(b)—not whether the solicitor improperly relied on such evidence in closing argument. As Petitioner concedes, evidence of his prior conviction was clearly admissible to prove an element of the offense of "possession of a weapon by a person convicted of a violent crime." (Pet. 21).

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.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

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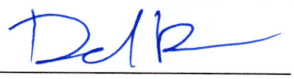

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This 7th day of February, 2025.