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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2022-000434

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Daniel W. Spade .....Respondent- Petitioner,

v.

State of South Carolina, .....Petitioner-Respondent.

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# RETURN TO STATE'S PETITION FOR WRIT OF CERTIORARI

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E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

***Attorney for Respondent-Petitioner Daniel W. Spade***

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## QUESTION PRESENTED

Did the post-conviction relief court err by reversing its prior ruling correctly denying relief and erroneously finding Spade established trial counsel was constitutionally ineffective for failing to object to a portion of the prosecutor's closing argument, where the post-conviction relief court improperly determined that the portion of the closing argument was unconstitutional, incorrectly determined trial counsel must have objected based on reasonable professional standards, and mistakenly determined Spade met his high burden of establishing prejudice when there is no reasonable probability that the result of his trial would have been different but for counsel's failure to object?

## COUNTER STATEMENT OF QUESTION PRESENTED

Should this Court disturb the post-conviction relief court's finding that trial counsel was constitutionally deficient for not objecting to the private prosecutor's closing argument telling the jurors that they are "good" people who protect other "good" people, like the child complaining witness, from "bad" people, like Daniel Spade, when the post-conviction court expressly found the private prosecutor intended to appeal and invoke the passions and the emotions of the jury and the phrasing of the closing argument beseeched the jury to become an advocate for the child, thus asking them to depart from their constitutional duty to consider the facts of the case impartially?

## STATEMENT OF CASE

Mr. Spade's cross-petition for a writ of certiorari, at 2-4, contains a detailed statement of the case. On August 16, 2022, the State filed its petition for a writ of certiorari ("Petition"). This return follows.

## STATEMENT OF FACTS

Mr. Spade's cross-petition for a writ of certiorari, at 4-6, contains a summary of the facts presented at trial. The additional facts set forth below are relevant to the State's petition.

The State's case against Daniel Spade relied on the very brief testimony of the child complaining witness and three expert witnesses. Prior to trial, Douglas N. Brannon represented the child's mother and soon-to-be adoptive father in a Family Court action to terminate Mr. Spade's

parental rights. Mr. Brannon later joined the prosecution team a as special private prosecutor. During the State's closing argument, Mr. Brannon told the jurors:[1]

> You know, several years ago – my daughter is now twenty years old. Several years ago she came home from school and she said "daddy, I know what your do." She said "I know you're a lawyer, daddy, and you tell people stories. That's what you do." And she said "daddy, I know what the police do. They arrest bad people." She said "but daddy, I'm really scared and concerned." And I said 'well baby what is it?" She said "daddy, who takes care of the good people." And, you know, I'm a pretty well educated person. I have been a dad for a long time, but there are certain things you cannot prepare for. That question was one of those things that I wasn't prepared for, because at that point my daughter was maybe five or six years old. And that question was so deep and so out of my perception of her ability to think. And so me, this well educated lawyer, kind of took a step back and I said "baby, that's a really great question, but you are going to have to give daddy a minute or two to think about that, because I want to give you the right answer." And I did, I thought for a few minutes. Then we sat down at the dinner table and is just came to me. And I said "baby, do you remember the question you asked me?" She said "yeah, daddy." I said, "I think I have an answer." I said "you are right, baby. My job is to tell somebody as story," and "I'm telling [the child's] story today. And I said "you are right, the police, they arrest the bad people." And is said "but baby, there is a group of people that take care of the good people." Ladies and gentlemen, that group of people is you. You take care of the good people. I told her "baby, the jury takes care of the good people."

[1] The State attempts to minimize the objectionable portion of the private prosecutor's closing argument: "Then, more than two-thirds into his closing argument, Special Prosecutor Brannon tells a story of when his daughter came to him and asked him, "daddy who takes care of the good people?", to which Special Prosecutor Brannon ultimately responds that the jury takes care of the good people." Petition, at 16-17 (citing A. 305-07). The full story about the alleged interaction between Mr. Brannon and his daughter provides necessary context for the argument's finale:

> [The Child] put it best when she was asked, 'who is Danny D?" She said "he's a bad guy." Ladies and Gentlemen, you are good people. You take care of good people. [The child] in in your hands. He's guilty. Thank you.

A. 308. After considering the testimony at the evidentiary hearing, the PCR Court made factual and credibility findings regarding the private prosecutor's honest and candid "intent to appeal and invoke the passions or the emotions of the jury." A. 3282; *see also* A. 3233 ("Again, this Court notes, the Special Prosecutor's comments were candid. He spoke honestly.").

Tr. 305-07. One page later in the transcript, the private prosecutor concluded his closing argument by saying the child put it best "when she was asked 'who is Danny D?' She said 'he's a bad guy.'" *Id.,* at 308. The special prosecutor finished, "Ladies and gentlemen, you are the good people. You take care of the good people. [The child] is in your hands. He's guilty. Thank you." *Id*.

In his Third Amended Application for Post-Conviction Relief ("PCR"), Mr. Spade alleged his trial counsel were ineffective for "[f]ailing to object to the Special Prosecutor's improper closing argument that appealed the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of the good people.'" A. 1182, 84.

During in the evidentiary hearing, Mr. Brannon testified about representing the child's mother and soon-to-be adoptive father against Mr. Spade in the Family Court.[2] Within several weeks of Mr. Spade's jury trial, the Solicitor's Office asked Mr. Brannon to assist in Mr. Spade's prosecution. Even after becoming the special prosecutor, Mr. Brannon maintained a duty of loyalty and an attorney-client privilege with the child's mother and soon-to-be adoptive father. The court below ultimately ordered Mr. Brannon to comply with the *Brady* obligations of a prosecutor. A. 1074-1144, 1968-88, 2662-74; *see also* A. 2256-2447.

At the evidentiary hearing, Mr. Spade developed the record regarding the circumstances surrounding the closing argument. Mr. Brannon requested the fulltime prosecutors allow him to make the closing argument. During the closing argument, Mr. Brannon told the story about his

[2] This Court disciplined Mr. Brannon after he continued to represent the child's mother in the Family Court even after Mr. Spade's lead trial counsel joined the private prosecutor's law firm. *Matter of Brannon*, 428 S.C. 644, 837 S.E.2d 488 (2019).

own daughter that he "plagiarized from Trey Gowdy."[3] Mr. Brannon testified he was "familiar with case law about closing arguments that prohibit making an emotional appeal to jurors to decide the case [based] on something other than the elements of the crime." He testified that he is "also aware of what happens in the courtroom on a daily basis," from watching "Mr. Gowdy stand in front of 12 people in the box with tears running down their faces and telling that story."[4] Mr. Brannon considers former Solicitor Gowdy "a passionate lawyer," and Mr. Brannon "was gonna try to be more passionate than him." A. 1984, 1986-87.

In the Form 4 order,[5] the PCR court observed:

> The argument in the present matter can be argued as wrong because it sought to have the jury view the evidence through an emotional lens rather than factual. More concerning in the present case was that private counsel acknowledged during the PCR that his motives in making the argument was to appeal to the jury's sympathies.

A. 2763. The initial order of dismissal, however, reasoned:

> [P]rivate counsel's argument did not rise to the constitutionally improper level as described in *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), or *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998). When private counsel's argument is viewed as a whole, it appears to be based on a proper analysis of the evidence and the burden of proof; and unlike in *Simmons*, private counsel did not misrepresent the law to the jurors. Counsel's argument was not the type of argument as found in *Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016).

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[3] Harold Watson "Trey" Gowdy III was the elected Solicitor for the Seventh Judicial Circuit from 2000 to 2010. From 2011 to 2019, he was the United States Representative for South Carolina's Fourth Congressional District. He is member of the Nelson Mullins Riley & Scarborough Law Firm and the host of *Sunday Night in America with Trey Gowdy* on the Fox News Chanel. https://en.wikipedia.org/wiki/Trey_Gowdy (last viewed Sept. 28, 2022).

[4] Mr. Brannon acknowledged "it might of been" objectionable, during prior jury trials, where Solicitor Gowdy told that story about his daughter during his closing argument. A. 1987.

[5] The From 4 order is found at A. 2755-64. The index to the Appendix does not list the Form 4 order. Rather, the index identifies the State's proposed order as starting on A. 2755. The State's proposed order begins on A. 2765.

A. 3011-12.

After considering Mr. Spade's Rule 59(e), SCRCP motion (A. 3108-09, 3163-64, 3204-08, 2338-40, 3242-43, 3253-54),[6] the PCR court reconsidered the ruling on this claim and granted post-conviction relief. (A. 3281-90). The PCR court concluded the "Special Prosecutor's argument was improper and trial counsel erred by not objecting," noting, "The overall emotional tenor of the prosecutor's argument was to define [Mr. Spade] as different from the members of the jury because he was a 'bad' person." The closing argument, which defined the jurors as "'good' people" who "take care of 'good' people" like the child, conveyed that Mr. Spade "was not worthy of the jury's obligation of reviewing the evidence objectively and fairly." Before issuing the ruling, the PCR court reviewed "[a]n unofficial version of the PCR transcript" and identified Mr. Brannon's honest and "candid comments" revealing his "intent of making an appeal to the jury's emotions or passions when he made his argument." The PCR court concluded the argument was "constitutionally improper." The PCR court analyzed prejudice under *Strickland* and this Court's guidance in *Smalls* and *Thompson*. In doing so, the PCR court observed that Mr. Spade's "guilt was established at the trial only from the testimony of the minor child" and the evidence of Mr. Spade's guilt was not overwhelming. The PCR court concluded "trial counsel's error undermines confidence in the outcome to the trial and that a reasonable probability exists for a different outcome." The PCR court, accordingly, granted Mr. Spade post-conviction relief and ordered a new trial. A. 3281-90.

## STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, a defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under

[6] *See also* Mr. Spade's Objection's to the State's proposed order. A. 2893-98.

"prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf*. *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

The second prong of *Strickland* requires a defendant establish this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). *See also Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (adhering to *Smalls*).

This Court's "standard of review in PCR cases depends on the specific issue before" it. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017). This Court will "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Id*. This Court will "not defer to a PCR court's rulings on questions of law." *Id*. "Questions of law are reviewed de novo, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

## ARGUMENT

**This Court should not disturb the post-conviction relief court's finding that trial counsel was constitutionally deficient for not objecting to the private prosecutor's closing argument telling the jurors that they are "good" people who protect other "good" people, like the child complaining witness, from "bad" people, like Daniel Spade, when the post-conviction court expressly found the private prosecutor intended to appeal and invoke the passions and the emotions of the jury and the phrasing of the closing argument beseeched the jury to become an advocate for the child, thus asking them to depart from their constitutional duty to consider the facts of the case impartially.**

The State argues, "When presenting a closing argument, a solicitor generally possesses 'wide latitude' as to the substance of his remarks to the jury and is fully permitted to prosecute with earnest and vigor." Petition, at 17. This Court, however, "repeatedly condemned closing arguments that lessen the jury's sense of responsibility" because these statements "inject an arbitrary factor into jury deliberations" and risk "that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts." *State v. Thomas*, 287 S.C. 411, 412-13, 339 S.E.2d 129, 129 (1986) (citing *Thompson v. Aiken,* 281 S.C. 239, 315 S.E.2d 110 (1984), *State v. Sloan,* 278 S.C. 435, 298 S.E.2d 92 (1982), *State v. Butler,* 277 S.C. 543, 290 S.E.2d 420 (1982), *State v. Woomer,* 277 S.C. 170, 284 S.E.2d 357 (1981), and *State v. Tyner,* 273 S.C. 646, 258 S.E.2d 559 (1979)).

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (citing *State v. Copeland,* 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) and *State v. Linder,* 276 S.C. 304, 278 S.E.2d 335 (1981)). This Court "strongly disapprove[s]" of closing arguments calculated "to improperly arouse the passions and prejudices of jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective." *Id*., 360 S.C. at 614, 602 S.E.2d at 746. In *Tappeiner*,

> [a]s her final statement to the jury, the solicitor asserted that in making their decision, the jurors should consider "would you let [Tappeiner] babysit your kids? Your grand kids [sic]? Nieces and nephews? I think the answer to that is why you should find her guilty."

416 S.C. at 247, 785 S.E.2d at 475. This Court held, "[T]he solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record." *Id.*, 416 S.C. at 252, 785 S.E.2d at 478. This Court further observed:

> Moreover, the emotional plea was the very last thing the jury heard before beginning its deliberations, and connected the jurors personally to the alleged abuse in the case. Thus, the comment was likely at the forefront of the jurors' minds when beginning their discussions.

*Id.*, 416 S.C. at 254, fn. 8, 785 S.E.2d at 479, fn. 8. *See also State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (prosecutor's use of "you" some 45 times in closing argument, asking jury to put themselves in place of victim, constituted reversible error).

Here, just as the special prosecutor admitted at the PCR hearing (A. 1984, 1986-87), his argument appealed to the juror's emotions rather than the evidence in the record. The last thing the jurors heard from the prosecution was, "Ladies and gentlemen, you are the good people. You take care of the good people. [The child] is in your hands. He's guilty. Thank you." A. 308. This final emotional plea was a clear attempt to connect the jurors emotionally to the child the prosecution was placing in the hands of the jurors.

This Court invalidated a murder conviction in *Fortune v. State* because the prosecutor engaged in "misconduct" by stating, during closing argument, that it was his job to "present the truth," that he had a statutory duty to screen cases and would have dismissed the case if he had determined defendant was not guilty, and that job of defense attorneys was to "manipulate the truth," "shroud the truth," and "confuse jurors." 428 S.C. 545, 551-53, 837 S.E.2d 37, 40-41

(2019). Although he did not make this precise argument in Mr. Spade's case, the private prosecutor committed similar misconduct by telling the jurors the role of the police is to arrest "bad people," his role as a prosecutor is to tell the child's story, implying the child is a good person, and the jurors' role is to "take care of the good people." A. 305-08.

The State contends, "[T]he argument made by Special Prosecutor Brannon did not rely on inadmissible evidence, but, rather, was based on properly admitted evidence and reasonable inferences to be drawn from this evidence." Petition, at 19. This argument is contrary to the record. The PCR court specifically addressed the distinction the State's evidence and the improper argument by the private prosecutor:

> The child was quoted as calling [Mr. Spade] as bad. For clarity, quoting the child's comment is not unconstitutional. Multiple times, however, the Special Prosecutor stated [Mr. Spade] was a "bad" guy, and the jury was told "the police, they arrest the bad people."

A. 3281, n. 21. The PCR court found and concluded that Mr. Branon's "phrasing beseech[d] the jury to become an advocate for the [child], thus asking them to depart from their constitutional duty to consider the facts of the case impartially."[7] A. 3282, n. 22.

The State faults the PCR court for "plac[ing] significant emphasis on the testimony of Special Prosecutor Brannon during the evidentiary hearing, which the court characterized as an acknowledgment that this portion of the argument was knowingly improper and specifically intended to arouse the passions of the jury." Petition, at 19. The State then accuses the PCR court of "a mischaracterization of the testimony provided at the evidentiary hearing, and, again, shows

[7] The State never addressed the private prosecutor vouching for law enforcement who "arrest bad people." Nor does the State address Mr. Brannon vouching for the child as a "good person" and labeling Mr. Spade as a "bad person." *See, e.g., Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002) (ordering new trial where trial counsel failed to object when state improperly vouched for witness's credibility in its opening statement).

a troubling pattern of the lower court stretching to find a way to ultimately grant relief following a lengthy and hard-fought collateral review process." *Id*., at 20. This argument ignores the deference this Court gives to factual and credibility findings by the trial court. *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017) (This Court "defer[s] to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them."); *State v. Johnson*, 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015) ("Credibility findings are treated as factual findings, and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record."); *State v. Blackwell-Selim*, 392 S.C. 1, 3, 707 S.E.2d 426, 427-28 (2011) ("The appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence."). The PCR court expressly found:

> [T]he Special Prosecutor acknowledged during the PCR hearing that his motive in making this type of argument was to appeal to the jury's sympathies. His motives were also to appeal to the jury's emotions. The Special Prosecutor's words and demeanor at the PCR hearing were candid and clear that he had the intent to appeal and invoke the passions or the emotions of the jury.

A. 3282; *see also* A. 3233 ("Again, this Court notes, the Special Prosecutor's comments were candid. He spoke honestly."). In the order denying the State's Rule 59(e), SCRCP motion, the PCR court additionally found:

> In the State's motion [A. 3310-11], a portion of Brannon's testimony is quoted in an effort to explain the State's disagreement with this Court's finding that the argument was not unconstitutional. Having witnessed and heard the testimony of the Special Counsel during the PCR hearing, the more reasonable and accurate conclusion of the quoted testimony is that, being a private attorney, Special Counsel incorrectly viewed the role of zealous advocacy of a private attorney in a criminal trial as constitutionally the same as the role of a solicitor.

A. 3328, n. 8. *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001) (prosecutors "are 'ministers of justice and not mere advocates.' . . . Their special 'responsibility carries with it

specific obligations to see the defendant is accorded procedural justice.'" (citing *State v. Quattlebaum,* 338 S.C. 441, 527 S.E.2d 105 (2000) and Comment, Rule 3.8, RPC, Rule 407, SCACR)).

The PCR court further ruled Mr. Spade established prejudice resulting from trial counsel's failure to object to the private prosecutor's closing argument. The State, however, argues, "There is no conceivable way the result of Spade's trial would have been different but for counsel's failure to object to this closing argument." Petition, at 25. This argument, once again, ignores this Court's guidance in *Smalls* and *Thompson* regarding the *Strickland* prejudice analysis.[8] The PCR court properly followed this Court's guidance in *Smalls* and *Thompson* and considered the "specific impact" trial counsel's "error had on the outcome of the trial." A. 3285-89. The PCR court found and concluded "the record of the present PCR does not establish that the State's case at trial consisted of 'overwhelming evidence of guilt' as defined by *Strickland* and *Smalls*." A. 3286. The PCR court observed "the only evidence of [Mr. Spade's] guilt was the testimony of the" child that was only fourteen pages of the record. *Id*. The PCR court correctly concluded the State did not present any physical evidence, medical evidence, or DNA evidence. *Id*., at 3286-87. The PCR Court then concluded:

> Not finding "overwhelming" evidence of guilt in the trial record, the analysis turns to the specific impact of trial counsel's failure to object to the solicitor's improper argument to determine if [Mr. Spade] has met his burden of proving prejudice; *i.e*., a reasonable probability the result of the trial would have been different without counsel's error. This Court finds that trial counsel's failure to object to the solicitor's improper closing argument was prejudicial to [Mr. Spade] and there exists a reasonable probability the trial would have been different without counsel's error. This Court finds counsel's error undermines confidence in the outcome of the trial and that a reasonable probability exists for a different outcome.

[8] In the order denying the State's Rule 59(e), SCRCP motion, the PCR court observed Mr. Spade and the State "agreed that *Smalls* was the controlling authority when determining prejudice related to the closing argument," but the State did not request the PCR court to reconsider the *Smalls* analysis in its Rule 59(e) motion. A. 3327-28.

*Id*., at 3287.[9]

The PCR court next noted the child's "believability was central to the State's case." In addition to this conclusion being consistent with *Smalls* and *Thompson*, this conclusion is consistent with other precedent of this Court. In *Tappeiner*:

> [T]he case was entirely dependent on a credibility determination between the prosecution's witnesses and the defense's witness. Given the dearth of evidence beyond Victim's assertions, we cannot say evidence of Tappeiner's guilt was overwhelming. Therefore, we find that but-for the improper vouching for Victim's credibility, there is a reasonable likelihood the outcome of the trial would have been different, and Tappeiner was thus prejudiced by trial counsel's failure to object.

416 S.C. at 253, 785 S.E.2d at 478. *See also State v. Rudd*, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) ("On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt."). Compare *Tappeiner* with *Brown v. State*, 383 S.C. 506, 517-18, 680 S.E.2d 909, 915–16 (2009) (holding "trial counsel was deficient in failing to object to the challenged portion of the solicitor's closing argument because it constituted a 'Golden Rule' argument which impermissibly appealed to the passion of the jurors by asking them to 'speak up' for the child victim," but finding no prejudice because "there was overwhelming evidence of Brown's guilt."). *And see State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006) (solicitor's improper Golden Rule closing argument, asking jurors to abandon their impartiality and view the evidence from victim's viewpoint, deprived defendant of a fair trial), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

[9] Rather than engage in a *Strickland* prejudice analysis, following this Court's guidance in *Smalls* and *Thompson*, the State asks this Court to overlook the lack of overwhelming evidence by arguing the unique natures of child sexual abuse cases. Petition, at 11, n. 5.

Regarding the absence of any curative instruction, the PCR court further observed:

> By not objecting, the trial record is void of the trial judge being given the opportunity to correct the error through ruling on the objection. Also, because no objection was raised, the trial judge was denied an opportunity to instruct the jury against the improper influence of emotion and passion when evaluating the evidence.

A. 3288.[10] *See, e.g.*, *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("jurors are presumed to follow the law as instructed to them," including curative instructions"); *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911–12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured.").

The factual findings contained in the PCR court's order granting post-conviction relief are supported by the record. Because the order granting post-conviction relief does not contain an error of law, this Court should not disturb the order granting a new trial.

## CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for a writ of certiorari and allow this case to proceed to a new trial.

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[10] The State spends much of its prejudice discussion taking issue with this portion of the PCR court's order and argues, "The lower court's finding that Spade established prejudice from trial counsel's failure to object because the jury did not receive a special curative instruction that its verdict must be free from passion is not supported by the record in light of the repeated instructions the jury received explaining the verdict must be based solely on the evidence presented from the witness stand and the other proper jury instructions given by the trial court." Petition, at 223-24. In making this argument, the State attempts to misdirect this Court from lack of a curative instruction. The record fully supports the conclusion that the trial judge did not instruct the jurors to disregard the private prosecutor's improper argument and provide a contemporaneous instruction that the verdict should not be based on passion, prejudice, or caprice.

Respectfully Submitted,

By s/*E. Charles Grose, Jr*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

***Attorney for Daniel W. Spade***

September 30, 2022.
Greenwood, South Carolina