

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Florence County
Honorable David B. Hocker, Trial Judge
Honorable George M. McFaddin, Jr., PCR Judge
Appellate Case No. 2021-001329

Tarmarquis Wingate,

Petitioner,

vs.

The State,

Respondent.

**RETURN IN OPPOSITION TO
PETITION FOR BAIL
PENDING APPELLATE REVIEW**

In response to Petitioner's petition for bail pending appellate review, Respondent would respectfully show unto the Court:

I. Procedural History – Trial and Direct Appeal

Petitioner is currently serving an aggregate twenty-year sentence in the South Carolina Department of Corrections. In December 2014, the Florence County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct (CSC) with a minor (2014-GS-21-1378). On December 9-10, 2014, Petitioner proceeded to a jury trial before the Honorable Donald B. Hocker. Daniel Jordan, Esquire, represented Petitioner, and Assistant Solicitor David Richardson prosecuted the case. The jury found Petitioner guilty as indicted, and Judge Hocker sentenced him to concurrent terms of twenty years' imprisonment.

Petitioner filed a timely notice of appeal (Appellate Case No. 2014-002717). Appellate Defender Robert Dudek represented Petitioner on appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On February 1, 2017, the South Carolina Court of Appeals dismissed the appeal pursuant to Anders. State v. Wingate, Op. No. 2017-UP-064 (S.C. Ct. App. filed February 1, 2017). Applicant filed a petition for rehearing, which was denied by order dated April 21, 2017. Applicant also filed a pro se petition for a writ of certiorari in the South Carolina Supreme Court, which was dismissed on May 31, 2017 (Appellate Case No. 2017-001211). The remittitur was returned July 26, 2017.

II. Procedural History – Underlying PCR Action

On March 5, 2018, Petitioner filed an application for post-conviction relief (PCR). On August 30, 2021, an evidentiary hearing convened before the Honorable George M. McFaddin, Jr. Jonathan D. Waller, Esquire, represented Petitioner, and then-Assistant Attorney General Yasmeen E. Klein represented the State. At the hearing, Petitioner proceeded on the following allegations, which were raised in his application:

1. Ineffective assistance of counsel: Applicant was denied effective assistance of counsel in violation of the Sixth Amendment and the South Carolina constitution.
2. Ineffective assistance of appellate counsel: Appellate counsel filed an Anders brief despite “the aid and assistance [Petitioner] supplied through numerous correspondence, where he cited State v. Stokes^[1] on various occasions.”
3. Denial of due process and fair trial: The trial court “issued erroneous jury instructions regarding ‘an alleged victim’s testimony’ which worked to bolster the credibility of the State’s witness.
4. Newly discovered evidence: Counsel failed to object to “new indictment being upgraded to third-degree CSC to first-degree CSC prior to trial.”

¹ State v. Stokes, 416 S.C. 493, 787 S.E.2d 480 (2016).

On October 20, 2021, the PCR court issued an order denying Petitioner's application. The PCR court found Petitioner failed to prove trial counsel was ineffective. Specifically, the PCR court found trial counsel credibly testified he met with Petitioner six or seven times, reviewed discovery with Petitioner, pursued leads and called potential witnesses, and conducted his own investigation. (PCR Or. 18). The PCR court found Petitioner's testimony regarding trial counsel's representation not credible. (PCR Or. 18). The PCR court found trial counsel credibly testified to his strategy and articulated a valid strategy for not objecting to statements about Petitioner's prior sex offense. (PCR Or. 18). The PCR court further found (1) trial counsel's articulated reason for not objecting to other statements as hearsay was credible, (2) trial counsel credibly testified he discussed with Petitioner the change of the charges to first degree, (3) Petitioner's testimony that he was not aware he was facing first-degree charges until the morning of trial was not credible, (4) trial counsel credibly testified he did not object to the jury instruction because it was the correct law at the time, and (5) Stukes was decided two years after Petitioner's trial, and trial counsel was not ineffective for not anticipating the change in the law. (PCR Or. 18-19).

Likewise, the PCR court found Petitioner did not prove appellate counsel was ineffective for filing an Anders brief. (PCR Or. 20-21). The PCR court found Stukes was not decided until two years after Petitioner's trial, and appellate counsel credibly testified that briefing an unpreserved issue would be a waste of time. (PCR Or. 20-21).

III. Current Petition for a Writ of Certiorari

Petitioner filed a notice of appeal from the order denying PCR in this Court on November 15, 2021. On September 14, 2022, this Court granted Petitioner's motion to proceed pro se. On November 3, 2022, Petitioner served pro se motion for bail on the undersigned. On November

14, 2022, this Court issued an order granting Respondent's motion to extend the time for serving and filing a return to the motion for bail until November 21, 2022. Petitioner has not yet filed an appendix or a petition for a writ of certiorari; thus, the underlying matter is not yet ready for consideration by this Court.

IV. Arguments raised in Petitioner's Petition for Bail

In his petition for bail, Petitioner asserts as exceptional circumstances warranting bail that he is actually innocent of the sex crimes he was convicted of. (Pet. 3). He contends he has a high probability of success because the trial court erred in (1) instructing the jury "to an admonition[] that very well established an essential element of [CSC] with a minor," (2) allowing improper hearsay testimony, and (3) improperly charging the jury that the victims' testimony did not need to be corroborated (Pet. 3-4); appellate counsel was ineffective for filing an Anders brief and not arguing Stukes applied to Petitioner's case (Pet. 5); the PCR court erred in not ruling on every issue presented, including an allegation of after-discovered evidence (Pet. 6); and PCR counsel did not adequately investigate (Pet. 6). Petitioner agrees the crimes he was convicted of are serious in nature but again reasserts his innocence. (Pet. 8). Petitioner asserts he will not pose a danger if released because he will not reside in the same area where the victim resides. (Pet. 9). Finally, he avers that if released on bail, the likelihood he will flee is minimal because he will be monitored by GPS, he will be required to register on the sex offender registry, and he will be closely monitored. (Pet. 9-10). Petitioner contends he does not suffer from any mental health injury, he is healthy, and he will be able to gain employment. (Pet. 10-11).

V. Applicable Law

A PCR applicant "may" be admitted to bail during the pendency of an appeal of a trial court order by either the applicant or the State. Rule 243(k), SCACR. Importantly, an applicant

has no right to an appeal bond, and a court will only issue one in an “exceptional” case. See id. (“The authority to grant bail will be exercised with caution and only in exceptional cases.”); Nichols v. Patterson, 202 S.C. 352, ___, 25 S.E.2d 155, 156 (1943) (instructing the allowance of bail after a conviction is *not* a matter of right). In cases—like Petitioner’s—in which an applicant was originally sentenced to a term of imprisonment exceeding ten years, South Carolina’s appellate courts alone have discretion to decide whether an appeal bond should be issued. Rule 243(k), SCACR; Rule 243(l), SCACR (“If transferred, the Court of Appeals shall proceed with the case in the same manner as the Supreme Court would have done under this rule[.]”). When deciding whether to exercise that discretion, **an appellate court should consider the following: (1) the probability of success on appeal; (2) the nature of the relief the applicant will receive if successful in his case; (3) the seriousness of the criminal offense committed; (4) the danger the applicant may pose to the community if he is released; (5) the likelihood the applicant may flee if released; and (6) the character and circumstances of the applicant.** Rule 243(k), SCACR.

Our legislature has demonstrated a strong preference for an appeal bond *not* to be granted in a case in which a convicted offender has been sentenced to a term of imprisonment exceeding ten years. See S.C. Code Ann. § 18-1-90 (“Bail may be allowed to the defendant in all cases in which the appeal is from the trial, conviction, or sentence for a criminal offense. However, bail is not allowed when the defendant has been sentenced to death, life imprisonment, or imprisonment for more than ten years.”); see also State v. Whitener, 225 S.C. 244, 248, 81 S.E.2d 784, 786 (1954) (concluding—in a divided opinion—the Supreme Court could “grant bail, in its discretion, where the sentence exceeds ten years” despite the existence of a statutory provision prohibiting a grant of bail under such circumstances).

VI. The factors set forth in Rule 243(k) do not support granting an appeal bond

The factors set forth in Rule 243(k), SCACR, weigh against setting an appeal bond. First, the State submits **it is unlikely Petitioner will prevail on appeal**. Although Petitioner has not yet filed his petition for writ of certiorari—and thus the State does not know what issues he will raise—the allegations Petitioner raised in his petition for bail include allegations of trial court error, appellate counsel error, and PCR counsel error. These claims, however, do not constitute reversible grounds.

Initially, direct appeal errors are not appropriate for PCR. See § 17-27-20(b) (providing the PCR act “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court”); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (providing a PCR application cannot raise issues that could have been raised at trial or on appeal). Petitioner’s claims of actual innocence are likewise not cognizable PCR grounds. See § 17-27-20(a)(6) (“[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.”). Further, any claim regarding the effectiveness of PCR counsel is not preserved and is likewise not a proper PCR claim. See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (rejecting argument that applicant could file successive PCR application based on claim that PCR counsel was ineffective). Finally, the State submits the PCR court properly found appellate counsel was not ineffective for filing an Anders brief and not arguing an unpreserved issue related to Stukes, which was decided *after* Petitioner’s trial.

Although Petitioner, in his petition for bail, does not raise any allegations against trial counsel, the State submits the PCR court properly found Petitioner did not prove trial counsel was ineffective. The PCR court made multiple credibility findings, and its order was not based on an error of law. Thus, it is unlikely Petitioner will be successful in this current appeal, and

this first factor weighs against granting bail. See Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (providing appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them).

Second, **even if Petitioner's appeal is successful, Petitioner will still be facing trial on two charges of first-degree CSC with a minor**, which weighs against granting an appeal bond. Third, as conceded by Petitioner, **Petitioner was convicted of serious crimes**. (Pet. 8). Fourth, Petitioner's charges of CSC with a minor are highly serious charges, and **the fact a jury unanimously convicted him of those offenses supports a conclusion he poses a danger to the community**. Further showing he is a danger to the community is the fact he was required to register on the sex offender registry prior to this underlying offense. (ROA 135-35). Thus, factors two, three, and four weigh against granting bail.

Fifth, according to the PCR court's order of dismissal, Petitioner testified at the PCR hearing that he was released on bond prior to his trial but did not make his initial appearance, causing the circuit court to issue a bench warrant for his arrest.² The fact he failed to appear for his initial appearance when he was released on bond prior to trial suggests **he may be a flight risk**. Furthermore, even if Petitioner's appeal is ultimately successful, Petitioner will face a potential maximum sentence of sixty years if he is again convicted of these charges, which is factor creating **a strong incentive for flight if he is released**. See S.C. Code Ann. § 16-3-655(D)(2) (providing a person convicted of first-degree CSC with a minor as set forth in 16-3-655(A)(2) must be sentenced to between ten- and thirty-years' imprisonment). This factor thus weighs against granting bail.

² The State has not yet been served an appendix and currently does not have a copy of the PCR transcript.

Sixth, Petitioner was previously convicted of an offense that required him to register on the sex offender registry. At trial, Officer Scott Dangerfield testified Petitioner began registering on the sex offender registry in October 2012—merely two months before the incidents with this minor victim began. (ROA 135-37, 256). Based on this prior registry requirement, the State submits **the character and circumstances of Petitioner weigh against granting bail.**

Based on the foregoing, the State submits all the factors set forth in Rule 243(k), SCACR, weigh against granting bail. Thus, Petitioner’s petition for an appeal bond should be denied.

XIII. Bond conditions in the event the Court grants bond

Finally, although the State firmly believes this Court should deny Petitioner’s petition for an appeal bond, this Court should impose reasonable bond conditions to protect the community and ensure Petitioner does not abscond in the event it determines Petitioner’s case is so exceptional it warrants the grant of an appeal bond. See Rule 243(k), SCACR (“If bail is granted, the court may require the posting of a bond and impose other conditions.”). Specifically, due to the “violent” and “most serious” nature of Petitioner’s crimes, this Court should—at a minimum—order Petitioner to remain on home detention pursuant to the county home detention program during the pendency of this appeal, require Petitioner to submit to electronic monitoring at his own expense, preclude Petitioner from changing his address without prior court approval, direct Petitioner to surrender any passport he may have to the Florence County Clerk of Court, and mandate Petitioner to refrain from applying for any new passports until his case is finally resolved. Finally, this Court should require Petitioner to register on the sex offender registry, as required due to a prior conviction.

[Signature page follows]

WHEREFORE, Respondent prays this Court will deny this petition for an appeal bond and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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