

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**RECEIVED**  
DEC 10 2018  
S.C. SUPREME COURT

Certiorari from Aiken County  
R. Scott Sprouse, Circuit Court Judge  
Appellate Case No. 2018-001674

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John Upson, SCDC #229134, ..... Respondent,

v.

State of South Carolina, ..... Petitioner.

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**RETURN TO PETITION FOR APPEAL BOND**

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The State of South Carolina respectfully submits the following return to the petition for appeal bond, served on November 13, 2018, and received by the State on November 15, 2018:<sup>1</sup>

1. Petitioner John Upson is currently incarcerated with the South Carolina Department of Corrections for current terms of twenty years' imprisonment following convictions for two counts of armed robbery and kidnapping in Aiken County.
2. Following his convictions, Upson appealed, arguing the trial court erred in denying his motion for a directed verdict on all charges. On appeal, the South Carolina Court of Appeals affirmed Upson's convictions and sentences. State v. John Lyndon Upson, 2016-UP-234 (Ct. App. filed June 1, 2016). Remittitur was subsequently issued on June 17, 2016.

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<sup>1</sup> This Court granted Respondent a ten-day extension until December 6, 2018, to respond to this petition. In making the extension request, the State noted it was seeking an extension in part so the victims could be contacted and provide input on Upson's bond request. The State reached out to the victims numerous times and had previous oral indications the victims would provide written opposition to the motion. As of the date of this filing, the State has not received anything in writing from the victims in opposition to this bond request.

3. On January 24, 2017, Upson filed an application for post-conviction relief (2015-CP-46-2859) alleging ineffective assistance of counsel based on the following allegations:

- a. "Failure to fully cross-examine Jameshia Alston."
- b. "Failure to ask for Neils v. Biggers hearing."
- c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright, and Brenda Smith."
- d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
- e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14<sup>th</sup> and 6<sup>th</sup> Amendments were violated by the confrontation clause."
- f. "Failure to object to in-court identification."
- g. "Failure to object to bolstering by the State during closing arguments."

The State served its return to the application on May 16, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on May 8, 2018, at the Aiken County Courthouse before the Honorable R. Scott Sprouse, circuit court judge. Upson was present at the hearing and represented by Tommy A. Thomas, Esquire. Julie A Coleman, Esquire, formerly of the South Carolina Attorney General's Office, represented the State. Judge Sprouse granted relief, finding: (1) Trial Counsel was ineffective for failing to request a pre-trial hearing to challenge the victim's identification of Upson; (2) Trial Counsel was ineffective for failing to challenge the victim's testimony about Upson's "lazy eye"; and (3) Trial Counsel was ineffective for failing to challenge the State's expert witness on cell phone technologies. The State filed a timely motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRPC, which was denied by written order filed August 29, 2018.

4. The State filed a timely Notice of Appeal and is awaiting receipt of the evidentiary hearing transcript. Once received, the State will submit its Petition for Writ of Certiorari and Appendix in accordance with Rule 243, SCACR.

5. On November 13, 2018, Upson served a petition for appeal bond requesting that this Court issue an order releasing him on bond pending the filing of the State's Petition for Writ of Certiorari, as well as the ultimate outcome in this case. In support of his motion for appeal bond, Upson asserts there is a substantial likelihood he will prevail on appellate review, and although his crime was admittedly a serious criminal offense, no one was injured and he is not a danger to the community. Upson further asserts he is a life-long resident of Aiken County and would be residing with his father in Aiken County if released, with employment at a barber shop.
6. The State asserts it is unlikely Upson will prevail as the post-conviction relief court's order granting post-conviction relief is based on errors of law and its findings lack probative evidence to support them.
7. The State asserts that Upson should be precluded from release on bond pending appeal because the sentence of imprisonment Upson received is in excess of ten years. See S.C. Code Ann. Section 18-1-90 (Supp. 2011) ("[B]ail is not allowed when the defendant has been sentenced to death, life imprisonment, or imprisonment for more than ten years."). Upson was sentenced to twenty years' imprisonment. As a result, granting Upson's request for bond would be inappropriate.
8. However, should this Court consider Upson's request, pursuant to State v. Whitener, 225 S.C. 244, 81 S.E.2d 784 (1945), the State asks this Court to exercise its discretion to deny Upson's motion. The South Carolina Appellate Court Rules provide that an applicant's release on bond pending appeal from a post-conviction relief order shall be exercised with caution and only in *exceptional circumstances*. Rule 243(k), SCACR (2015). In deciding whether to exercise the discretionary authority to admit an applicant to bail, the

following factors are considered: the probability the applicant will prevail on appellate review and the nature of the relief he or she will receive; the seriousness of the criminal offense committed; the danger the applicant may pose to the community if he or she is released; the likelihood that the applicant may flee if released; and the character and circumstances of the applicant. Id. The State submits this case does not present the requisite circumstances to warrant Upson's release on bond pending appeal. For the reasons set forth below, the State opposes this motion and requests that this Court deny Upson's motion for appeal bond pending appeal to the Supreme Court.

9. As stated above, Upson's request for release on bond pending appeal should be denied because it is unlikely he will prevail on appeal. The State submits the post-conviction relief court's grant of relief is predicated on errors of law and is not supported by probative evidence.
10. Upson's request should also be denied based upon the likelihood that Upson may flee if released. Because Upson is sentenced to imprisonment for twenty years, he would have a much greater incentive to flee while out on bond. Even if Upson were to prevail on appeal, the affirmation of the grant of his PCR application would only entitle him to a new trial, not an acquittal. Therefore, facing a maximum sentence of ninety years imprisonment, Upson would have both the motive and opportunity to flee if released on bond.
11. Based upon all the foregoing, the State prays this Court deny Upson's request for release on bond pending appeal.
12. Should this Court determine that this is the exceptional case that would permit Upson's release on bond, the State requests that the Court impose conditions on his release.


Specifically, due to the seriousness of his convictions and the risk that he will flee if released, the State requests that, at a minimum, Upson be placed on the following special conditions in addition to the usual and ordinary conditions of release: home detention pursuant to the county home detention program to include GPS monitoring at Upson's expense; and no change of address without prior court approval. Furthermore, the State requests that Upson be prohibited from applying for a passport and must be required to surrender any current passport to the Aiken County Clerk of Court.

WHEREFORE, the State requests Upson's petition for appeal bond be denied and dismissed.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
SC Bar No. 100108

  
ATTORNEYS FOR PETITIONER  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803)734-3737

ATTORNEYS FOR PETITIONER

December 6, 2018

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY  
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-001674

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S.C. SUPREME COURT

JOHN LYNDON UPSON,

Respondent,

v.

STATE OF SOUTH CAROLINA,

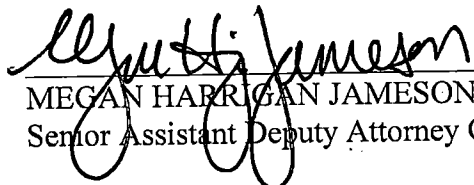
Petitioner.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the Return to Motion for Appeal Bond, has been served upon opposing counsel by mailing two copies in the United States mail, postage prepaid:

Tommy A. Thomas, Esquire  
Post Office Box 88  
Irmo, South Carolina 29063

This 6th day of December, 2018

  
MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General



ALAN WILSON  
ATTORNEY GENERAL

December 6, 2018

RECEIVED  
DEC 10 2018  
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: John Lyndon Upson v. State of South Carolina**  
**Appellate Case No. 2018-001674**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Motion for Appeal Bond** in the above above-referenced post-conviction relief appeal for filing with the Court. Respondent is simultaneously being served with a copy of this Return.

Thank you for your consideration in this matter. Please let me know if I can provide any additional information for the Court.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General  
SC Bar No. 100108

MHJ/ks  
Enclosures

cc: Tommy A. Thomas, Esquire (2 copies)