

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**RECEIVED**

**May 08 2020**

**SC Court of Appeals**

On Writ of Certiorari to Aiken County  
Honorable R. Scott Sprouse, Circuit Court Judge  
Appellate Case No. 2018-001674

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JOHN UPSON,

Respondent,

vs.

THE STATE,

Petitioner.

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**RETURN IN OPPOSITION TO  
SECOND PETITION FOR APPEAL BOND**

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Petitioner (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

**I.**

On April 28, 2020, Respondent John Upson filed a petition seeking for this Court to grant him an appeal bond. Upson’s petition is a successive one, and it follows a strikingly-similar petition seeking the exact same relief that was filed with the South Carolina Supreme Court in November of 2018. Upon considering the matter, our Supreme Court unanimously denied that earlier petition.

**II.**

At present, Upson is serving an aggregate twenty-year sentence with the South Carolina Department of Corrections after he was convicted by a jury of his peers of one count of armed

robbery and two counts of kidnapping. Inmate Search Detail Report for John L. Upson, <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000229134>. Currently, Upson is being housed at Lee Correctional Institution. Id.

### **III.**

Upson's convictions stem from an armed robbery committed by several individuals with their faces *partially* covered at a Captain D's restaurant located in Aiken, South Carolina. (App'x pp. 52-99). During the course of that robbery, the robbers held the restaurant's employees at gunpoint, demanded the restaurant's cash, forced the terrified employees into a freezer, and then were able to get away. (App'x pp. 52-99). However, because the robbers' faces were partially uncovered, one of the victims recognized one of the robbers—Upson—as an individual who had come into the restaurant a few days earlier, and she subsequently alerted law enforcement of Upson's involvement in the robbery after ascertaining his identity through independent internet research. (App'x pp. 55-58; p. 61; p. 65; pp. 72-77; pp. 102-103). Ultimately, based on the victim's identification coupled with other evidence uncovered in the investigation into the robbery, Upson—who had placed several calls to the restaurant shortly before the robbery was committed, including one in which he attempted to mask his caller identification information—was arrested, indicted for several highly serious offenses, and convicted as indicted. (App'x pp. 102-103; pp. 151-152; pp. 257-258).

### **IV.**

Subsequent to his trial and following an unsuccessful appeal, Upson filed an application seeking post-conviction relief. (App'x pp. 352-364). After conducting an evidentiary hearing on the matter, the post-conviction relief judge granted Upson's application and awarded him a new trial. (App'x pp. 475-493). In doing so, the post-conviction relief judge concluded defense

counsel was deficient for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim’s testimony about her belief Upson had a “lazy eye” on cross-examination; and (3) failing to challenge the State’s testimony discrediting Upson’s alibi defense with an expert of his own. (App’x pp. 475-493). Furthermore, the post-conviction relief judge determined Upson’s suffered some undefined prejudice as a result of defense counsel’s deficient performance. (App’x p. 483; p. 493).

## V.

Following the grant of relief, the State sought reconsideration, and that reconsideration request was summarily denied by the post-conviction relief judge. (App’x pp. 494-508). The State then timely initiated an appeal of the final order granting relief.

## VI.

Currently, the State’s appeal is pending before this Court, and the State’s petition for a writ of certiorari, Upson’s return to the State’s petition, and the appendix have all been submitted. As a result, the matter is now ready for consideration by this Court.

## VII.

Pursuant to South Carolina’s appellate court rules, a post-conviction relief 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 though, 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 Upson’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; see 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 factors: (1) the probability of success on appeal; (2) the nature of the relief the applicant will receive if successful in his or her case; (3) the seriousness of the criminal offense committed; (4) the danger the applicant may pose to the community if he or she is released; (5) the likelihood the applicant may flee if released; and (6) the character and circumstances of the applicant. Rule 243(k), SCACR. However, 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).

### VIII.

Through his most recent petition seeking an appeal bond, Upson raises two new contentions that were not previously raised in the earlier petition our Supreme Court unanimously rejected. First, Upson contends the coronavirus pandemic has significantly impacted the state’s prison system while he is allegedly “housed in a facility where the inmates

are tightly confined without sufficient safeguards for the virus.” Second, Upson maintains he has been diagnosed with glaucoma, expresses a desire to obtain “outside” medical treatment for that condition, and claims the South Carolina Department of Corrections’ medical services are “severely strained” such that he is fearful of losing his vision. Significantly, in raising those contentions, Upson has provided no evidence or information of any kind to support them.

## **IX.**

Contrary to Upson’s first claim, the South Carolina Department of Corrections has actively instituted safeguards to protect the health and wellbeing of the inmate population during the course of the coronavirus pandemic and has instituted an action plan to prepare for and respond to any challenges that may arise in conjunction with the Governor’s Office, the South Carolina Department of Health and Environmental Control, the South Carolina Emergency Management Division, and other state agencies. South Carolina Department of Corrections COVID-19 Action Plan, [http://www.doc.sc.gov/scdc\\_covid-19\\_action\\_plan\\_031620.pdf](http://www.doc.sc.gov/scdc_covid-19_action_plan_031620.pdf) (last visited May 8, 2020). Notably, through the active measures undertaken by the Department of Corrections, only forty-two cases of COVID-19 have been confirmed amongst the entire inmate population housed throughout twenty-one separate institutions, and, of those confirmed cases, all involve inmates from either Kirkland Evaluation and Reception Center or Allendale Correctional Institution. South Carolina Department of Corrections Confirmed COVID-19 Cases Information, <http://www.doc.sc.gov/covid.html> (last visited May 8, 2020). Meanwhile, *none* of the confirmed cases involve inmates assigned to Lee Correctional Institution, which is the facility where Upson is currently housed. *Id.* Therefore, Upson’s unsupported and inaccurate contention the Department of Corrections does not have sufficient safeguards in place to respond to the current pandemic does not render his case an “exceptional” one such that the grant of an

appeal bond is warranted. Like the earlier one before it, Upson’s latest petition for an appeal bond should be denied.

**X.**

Likewise, the South Carolina Department of Corrections does, in fact, provide—and has expressly confirmed it provides—medical care for all its inmates.<sup>1</sup> Notably, that medical care includes care for inmates diagnosed with glaucoma. Therefore, assuming the diagnostic information reported by Upson is accurate, the Department of Corrections will provide Upson with any medical treatment he needs for his condition. As a result, Upson’s glaucoma diagnosis does not render his case an “exceptional” one such that the grant of an appeal bond is warranted. Once again, Upson’s petition for an appeal bond should be denied.

**XI.**

Beyond his claims related to the coronavirus pandemic and his glaucoma diagnosis, Upson also again alleges in his most-recent petition the pertinent factors identified in our appellate court rules warrant the grant of an appeal bond in his case. However, as support for that particular allegation, Upson simply repeats in a nearly word-for-word fashion the arguments he made in his earlier appeal bond petition while including the same affidavits and letters he included with that earlier petition. In fact, the included affidavits and letters are marked with a date stamp reflecting they were received by our Supreme Court on November 18, 2018.

**XII.**

Since those same grounds for an appeal bond have already been advanced to and rejected by our Supreme Court once before in Upson’s case, those unchanged grounds should not now be

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<sup>1</sup> A letter sent by Deputy General Counsel Christina C. Bigelow from the South Carolina Department of Corrections regarding the agency’s response to the coronavirus pandemic and the availability of medical care to inmates for conditions like glaucoma has been included with the State’s return as Attachment “A.”

found to warrant the grant of an appeal bond simply by virtue of being repeated. Moreover, when considered on the merits, those grounds—just as our Supreme Court has already recognized—do not warrant the grant of an appeal bond in Upson’s case. Specifically, for the reasons articulated in its petition for a writ of certiorari, the State believes its appellate arguments will be meritorious in Upson’s case, which weighs against a grant of an appeal bond. (Pet. for Cert. pp. 1-24). However, even if the State’s appeal is unsuccessful, Upson will still be facing trial, which weighs against a grant of an appeal bond. Additionally, Upson’s charges of armed robbery and kidnapping 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. See State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) (“[F]ew would argue that first-degree burglary, *armed robbery*, and *kidnapping* are anything other than grave offenses of the ‘most serious’ nature.” (emphasis added)). Furthermore, even if the State’s appeal is ultimately unsuccessful, Upson will still be facing a potential maximum sentence of ninety years, which is factor creating a strong incentive for flight if he is released. See S.C. Code Ann. § 16-3-910 (mandating a person convicting of kidnapping “must be imprisoned for a period not to exceed thirty years”); S.C. Code Ann. § 16-11-330 (mandating a person convicted of armed robbery “must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted”). Accordingly, because the circumstances of Upson’s case do not warrant the grant of an appeal bond, Upson’s petition for an appeal bond should be denied.

### **XIII.**

Finally, although the State firmly believes this Court should do just as our Supreme Court has already done and deny Upson’s petition for an appeal bond, this Court should impose

reasonable bond conditions to protect the community and ensure Upson does not abscond in the event it determines Upson's case is so exceptional it now 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 Upson's crimes, this Court should—at a minimum—order Upson to remain on home detention pursuant to the county home detention program during the pendency of the State's appeal, require Upson to submit to electronic monitoring at his own expense, preclude Upson from changing his address without prior court approval, direct Upson to surrender any passport he may have to the Aiken County Clerk of Court, and mandate Upson to refrain from applying for any new passports until his case is finally resolved. See S.C. Code Ann. § 16-1-60 (identifying armed robbery and kidnapping as "violent" crimes); S.C. Code Ann. § 17-25-45(C)(1) (classifying armed robbery and kidnapping as "most serious" offenses).

**WHEREFORE**, Petitioner prays this Court will deny Upson's successive Petition for Appeal Bond; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON  
Attorney General

MARK R. FARTHING  
Senior Assistant Attorney General



By: \_\_\_\_\_

Mark R. Farthing  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

May 8, 2020

**ATTACHMENT "A"**



**OFFICE OF GENERAL COUNSEL**

May 5, 2020

Mark R. Farthing, Esquire  
S.C. Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

**RE: John L. Upson, SCDC # 229134**

Dear Mr. Farthing:

Inmate John L. Upson is currently serving sentences out of Aiken County for kidnapping and armed robbery. His current projected maxout date is 11/28/2030, and he is housed at Lee Correctional Institution. Per your request, attached is SCDC's official **COVID-19 Action Plan**, as well as the most recent **COVID-19 News Update** (dated May 1, 2020). Prior updates are available on our public website. Please be advised that SCDC provides medical care for all our inmates, including inmates who are diagnosed with glaucoma.

Please do not hesitate to contact me should you have any further questions or concerns.

Sincerely,

Christina C. Bigelow  
Deputy General Counsel  
South Carolina Department of Corrections

## South Carolina Department of Corrections (SCDC) COVID-19 Action Plan

SCDC manages a statewide correctional system involving 21 prisons located throughout the state, which are of various security levels and specialized missions. SCDC has been planning for coronavirus (COVID-19) since February 2020. Phase One activities included guidance from the Medical Services Division regarding description of the disease, where the infection was occurring and best practices to mitigate transmission. An agency task force was working in conjunction with subject matter experts from the Governor's Office, S.C. Department of Health and Environmental Control, Emergency Management Division and other state agencies. SCDC's planning is structured using the Incident Command System (ICS) framework.

As a result of these ongoing efforts, SCDC, after coordination with DHEC and the Governor's Office is implementing Phase Two of our COVID-19 response. Effective immediately, the following measures are being deployed by the SCDC in order to mitigate the spread of COVID-19, acknowledging the state will have more confirmed cases in the coming weeks. These measures are being implemented to ensure the safety of our inmates and the continued effective operations of the state prison system and to ensure that staff remain healthy and available for duty.

**VISITATION:** Visitation will be suspended for 30 days, at which time the suspension will be reevaluated. To ensure inmates maintain social ties, SCDC and GTL will allow for two free calls per week between March 17, 2020 through April 13, 2020.

**LEGAL VISITS:** Access to legal counsel remains a paramount requirement in the SCDC but like visitation, the SCDC is mitigating the risk of exposure created by external visitors. Attorneys seeking an in-person visit with their client or a confidential call should contact the institution (<http://www.doc.sc.gov/institutions/institutions.html>) or contact the Office of General Counsel at (803) 896-8508 to arrange. The attorney will need to undergo screening using the same procedures as staff and complete an Attestation of No Known Illness form (SCDC Form M-217). Attorneys should also maintain social distancing of 6' from their client.

**INMATE MOVEMENT:** All inmate facility transfers will be suspended, unless medically necessary, for 30 days, at which time the suspension will be reevaluated or by the approval of the Deputy Director for Operations. Admission of new inmates will continue; however, such inmates will be screened, checked for exposure and isolated or quarantined as deemed appropriate. For more information on isolation and quarantine, please visit the following link: <https://www.cdc.gov/quarantine/index.html>.

**WORK RELEASE AND LABOR CREWS:** All work release and labor crews will be suspended for 14 days and then will be reevaluated. The work crew exceptions are as follows: Goodman crews for Facilities Management, Support Services and Transportation and Camille Graham crew for Headquarters and Recruiting.

**OFFICIAL STAFF TRAVEL:** Official staff travel will be suspended for 30 days, at which time the suspension will be reevaluated. Any exceptions may be approved by the Director of SCDC.

**TRAINING:** All staff training, and meetings are suspended through March 31, 2020 and will be reassessed at that time. Please take this opportunity to complete your on-line training.

**STAFF HIRING:** Staff hiring initiatives will continue. Interviews may be conducted by telephone or via video conference.

**CONTRACTORS:** Essential contractor access to SCDC facilities will continue; however, contractors who require access will be screened using the same procedures as staff prior to entry and will have limited access to the inmate population.

**VENDORS:** Essential vendors access to SCDC facilities will continue; however, vendors who require access will be screened using the same procedures as staff prior to entry and will have limited access to the inmate population.

**INSTITUTIONAL MAINTENANCE:** Institutional maintenance needs will be evaluated on a case by case basis and will focus on essential functions.

**VOLUNTEERS:** Volunteer visits will be suspended for 14 days, at which time the suspension will be reevaluated. Exceptions will be approved by the Deputy Director for Operations.

**SCREENING OF STAFF:** Enhanced health screening of staff will be implemented statewide. Such screening includes self-reporting and temperature checks for the next 30 days, at which time the process will be reevaluated. Please see attached information from SCDC Office of Human Resources as well as an attachment from the S.C. Department of Administration State Office of Human Resources, regarding human resource updates. (SEE ATTACHMENT BELOW)

**SCREENING OF INMATES:** The SCDC maintains an infectious disease management program as a matter of routine. To address the specific issues involving COVID-19, the SCDC uses the following practices:

- All newly-arriving SCDC inmates are being screened for COVID-19 exposure risk factors and symptoms.
- Asymptomatic inmates with exposure risk factors are quarantined.
- Symptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per SCDC health authority protocols.

**TOURS:** Tours will be suspended for 30 days, at which time the suspension will be reevaluated. Any exceptions will be approved by the Deputy Director of the Operations.

**MODIFIED OPERATIONS:** For the next 30 days, the SCDC will implement statewide modified operations to maximize social distancing and limit group gatherings in our facilities. For example, depending on the facility's population and physical layout, the institution may implement staggered meal times, recreation, etc. These modifications will be reevaluated in 30 days.

**\*Please note that this action plan will be reevaluated as needed.**

# COVID-19 Update

May 1, 2020

7 p.m.

SCDC is requesting assistance from the S.C. National Guard to help monitor offenders for COVID-19 symptoms at three institutions. The agency is asking for 20-30 National Guard soldiers to help temporarily augment the SCDC medical teams at Kirkland, Allendale and Lee correctional institutions.

Kirkland and Allendale are both on institution-wide quarantines after offenders there tested positive for the COVID-19 virus. That means about 1,600 offenders must be monitored at least twice daily. That monitoring includes taking temperatures, pulse and checking other symptoms.

Offenders who have tested positive for COVID-19 are being treated in isolation units at Lee and Kirkland. Their cellmates and any other offenders who present as symptomatic also are being monitored.

The National Guard is stepping in to supplement corrections medical staffs across the country, including in Kansas, Ohio, Wisconsin and Illinois.

“We’re grateful to Gen. Van McCarty and the National Guard for this collaboration in helping us keep staff and offenders safe during this unprecedented time,” said Bryan Stirling, Director of the S.C. Department of Corrections.

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JOHN UPSON,

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vs.

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Petitioner.

**PROOF OF SERVICE**

I, Caroline Collins, certify I have served the within Return in Opposition to Second Petition for Appeal Bond on Respondent by sending an electronic copy via email to the address listed in AIS for the following individual along with physical copies to follow:

Tommy A. Thomas, Esq.  
Post Office Box 88  
Irmo, SC 29063

I further certify all parties required by Rule to be served have been served.  
This 8th day of May, 2020



CAROLINE COLLINS  
Administrative Coordinator  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

## Caroline Collins

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**From:** Caroline Collins  
**Sent:** Friday, May 8, 2020 11:06 AM  
**To:** 'thomaslaw@me.com'  
**Cc:** 'Jackie Miller'; Mark Farthing; Megan Jameson  
**Subject:** John Upson v. State of South Carolina (2018-001674)  
**Attachments:** Upson.Cover Letter - Return to Second Pet for Appeal Bond (02275428xD2C78).PDF; Upson.Return to Second Pet for Appeal Bond (02275414xD2C78).PDF

Good Morning Mr. Thomas,

Attached please find a copy of the Return in Opposition to Second Petition for Appeal Bond in John Upson v. State of South Carolina (2018-001674), along with its cover letter. This Return will be submitted to the Court of Appeals through the AIS system. In addition to this email, a hard copy has been deposited in today's mail.

If you will, please reply to confirm receipt of this email.

Thank you!

*Caroline Collins*

Administrative Coordinator  
South Carolina Attorney General's Office  
P: (803) 734-3723

**RECEIVED**  
**May 08 2020**  
**SC Court of Appeals**