

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Apr 12 2022**

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

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S.C. SUPREME COURT

Appellate Case No. 2022-000434

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Daniel W. Spade ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**MOTION FOR APPEAL BOND**

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Pursuant to Rule 243(k), SCACR, Daniel W. Spade moves this Court for an order granting him an appeal bond while the State seeks to appeal the Circuit Court's order granting him Post-Conviction Relief ("PCR").

**I. PROCEDURAL AND FACTUAL BACKGROUND.**

On June 29 and 30, 2009, the Honorable Georgia C. Anderson convened a hearing in the Family Court for Spartanburg County regarding Heather and David Jolley's petition to terminate Dany Spade's parental rights. This action was not successful. Judge Anderson issued a final order on January 13, 2010. This order was supplemented on June 29, 2010. Heather Jolley filed another Family Court Action on November 23, 2010.

On May 3, 2011, Spartanburg County Sheriff's Office Investigator Nikki Cantrell, assisted by officers of the Prince William County Police Department, arrested Mr. Spade in Virginia, charging him in Spartanburg County with first-degree criminal sexual conduct

with a minor involving his daughter. On January 9, 2012, the Jolleys amended the November 2010 complaint to petition to terminate Mr. Spade's parental rights and to allow David Jolley to adopt the child. Beginning on October 15, 2012, the Honorable James F. Fraley, Jr. convened a hearing in the Family Court for Spartanburg County. Judge Fraley ultimately terminated Mr. Spade's parental rights and allowed Mr. Jolley to adopt the child. Mr. Spade's Rule 60, SCRPC Motion for Relief from Judgment is still pending in the Spartanburg County Family Court.

From February 24-26, 2014, the State tried Mr. Spade before the Honorable R. Keith Kelly and a jury. Solicitor Barry J. Barnett, Assistant Solicitor Jennifer A.J. Jordan, Assistant Solicitor Kimberly L. Leskanic, and Special Prosecutor N. Douglas Brannon<sup>1</sup> represented the State. Kenneth P. Shabel and Shawn M. Campbell represented Mr. Spade. On February 26, 2014, the jurors found Mr. Spade guilty of first-degree criminal sexual conduct with a minor. Judge Kelly sentenced Mr. Spade to thirty-five years imprisonment.

Mr. Spade appealed to the Court of Appeals. C. Rauch Wise and Mr. Shabel represented Mr. Spade. On February 11, 2016, the Court of Appeals convened an oral argument. While the decision was still pending, Mr. Shabel joined Mr. Brannon's law firm and, accordingly, moved to be relieved as counsel by petition dated March 11, 2016. On July 6, 2016, the Court of Appeals affirmed Mr. Spade's conviction and sentence. *State v. Spade*, Unpublished Op. No. 2016-UP-352 (Filed July 6, 2016). On August 18, 2016, the Court of Appeals denied Mr. Spade's petition for rehearing.

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<sup>1</sup> Mr. Brannon represented the Jolleys in the successful termination of parental rights case. After Mr. Spade's jury trial, Mr. Shabel joined Mr. Brannon's law firm. "[D]espite the concurrent conflict of interest due to the employment of" Mr. Shabel, Mr. Brannon continued to represent the Jolleys in the Family Court. *Matter of Brannon*, 428 S.C. 644, 648, 837 S.E.2d 488, 490 (2019).

On October 6, 2016, Mr. Spade filed a petition for writ of *certiorari* in this Court. Mr. Wise represented Mr. Spade. On June 16, 2017, this Court denied Mr. Spade's petition for a writ of *certiorari*.

On July 13, 2017, Mr. Spade filed a *pro se* PCR application. With the assistance of undersigned counsel, Mr. Spade amended his PCR application on October 2, 2017, December 24, 2018, and May 14, 2019. From May 15-21, 2019, the Honorable J. Mark Hayes, II convened an evidentiary hearing.

By Form 4 Order dated May 7, 2020, the PCR Court announced its intentions to deny Mr. Spade's PCR application and instructed the Attorney General's Office to prepare a proposed order, consistent with the PCR court's findings of fact. On June 8, 2020, the Attorney General submitted the State's proposed order. On July 7, 2020, Mr. Spade objected to the State's proposed order. *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) ("Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order."). On October 8, 2020, the PCR court dismissed Mr. Spade's PCR application. On October 19, 2020, Mr. Spade served his Rule 59(e), SCRCP motion. The State responded on January 13, 2021, and Mr. Spade replied on March 19, 2021. On March 29, 2021, the PCR court convened a hearing on the motion.

On November 12, 2021, the PCR Court issued an order modifying, in part, the order of dismissal dated October 8, 2020 and granting Mr. Spade a new trial "find[ing] that Special Prosecutor's [closing] argument was improper and trial counsel erred by not objecting." Order (11/12/21), at 19. Based on the evidentiary hearing testimony, the PCR court expressly found the Special Prosecutor "motive in making this type of argument was

to appeal to the jury’s sympathies” and “emotions.” *Id.*, at 20-21. The PCR court further found and concluded, “The objectionable statements made by Special Counsel were unconstitutional, even without knowing Special Counsel’s intent, because they shifted the role of the jury away from being fair and impartial arbitrators of the facts” and “the statements were crafted to have the jury view the evidence through an unconstitutional lens.” *Id.*, at 21-23 (citing *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007), *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998), and *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981)).

The PCR court additionally analyzed the prejudice prong of *Strickland*,<sup>2</sup> applying this Court’s precedent in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) and *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018). *Id.*, at 23-27. “Not finding ‘overwhelming’ evidence of guilt in the trial record,” the PCR Court found “that trial counsel’s failure to object to the solicitor’s improper closing was prejudicial to [Mr. Spade] and there exists a reasonable probability the trial would have been different without counsel’s error” and “counsel’s error undermines confidence in the outcome of the trial.” *Id.*, at 25.

On November 29, 2021, the State served a Rule 59(e), SCRCP motion. On January 24, 2022, Mr. Spade responded. On March 11, 2022, the PCR Court denied the State’s motion. On April 11, 2022, the State filed a notice of appeal. Subsequently, on April 11, 2022, Mr. Spade filed a notice of cross-appeal.<sup>3</sup>

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<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>3</sup> Concurrent with the notices of appeal, both parties filed with this Court copies of the orders dated October 8, 2020, November 11, 2021, and March 3, 2022.

## II. RELEVANT LEGAL PRINCIPLES.

A post-conviction relief applicant may be admitted to bail after the service of the notice of appeal by either the applicant or the State. Where the sentence originally imposed did not exceed imprisonment for ten (10) years, the petition for bail shall be made to the lower court. In all other cases, the petition for bail shall be made to the Supreme Court.

Rule 243(k), SCACR. The factors to be considered in admitting a person to bail pending appeal in PCR cases include the probability of prevailing on appellate review, the seriousness of the crime involved, the potential danger the person may pose to the community if released, the risk of flight, and the character and circumstances of the person. *Id.*; see also *In re Michael H.*, 360 S.C. 540, 553, 602 S.E.2d 729, 736 (2004) (citing *Nichols v. Patterson*, 202 S.C. 352, 25 S.E.2d 155 (1943)).

### A. Probability of Prevailing on Appellate Review.

For at least three reasons, there is a strong probability Mr. Spade will prevail on the merits. The first reason relates to the relief granted by the PCR court. The second and third reasons relate to matters Mr. Spade will raise on the cross-appeal.

First, the PCR court ruled in Mr. Spade's favor regarding the Special Prosecutor's closing argument. This ruling included credibility findings regarding the testimony of the Special Prosecutor, which are entitled to difference on appeal.<sup>4</sup> *Mangal v. State*, 421 S.C.

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<sup>4</sup> In one of the factual findings, the PCR Court found:

In the State's [Rule 59(e)] motion pp. 19-20, a portion of the PCR hearing testimony is quoted in an effort to explain the State's disagreement with this Court's finding that the argument made at trial was not unconstitutional. [sic]. Having witnessed and heard this testimony of the Special Counsel during the PCR hearing, the more reasonable and accurate conclusion of the 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.

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.”). The PCR court’s order on this issue is well reasoned and, as seen above, consistent with this Court’s precedent. As noted by the PCR court, “the State did not challenge [the PCR court’s] finding that the Special Prosecutor’s motivation for his closing argument was to appeal to the jury’s sympathies.” Order (3/11/22), at 5-6. The PCR court further noted the State’s Rule 59(e) motion was inadequate regarding the finding of *Strickland* prejudice on this issue. During the hearing on Mr. Spade’s Rule 59(e) motion, the State “agree[d] that *Smalls* is the appropriate analysis” to assess *Strickland* prejudice, but the State’s Rule 59(e) “motion is void of any reference to *Smalls* or the requested *Smalls* analysis.” *Id.* The State, accordingly, is foreclosed from challenging the *Smalls* prejudice analysis on appeal. *See, e.g., Burgess v. State*, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013) (State failed to preserve for appellate review its claim that PCR court failed to undertake prejudice analysis with respect to petitioner’s ineffective assistance claim).

Second, Mr. Spade’s PCR application raised issues of improper bolstering, which the court below addressed in the final order. Order (11/11/22), at 14-17. Regarding the deficient performance prong of *Strickland*, the PCR court concluded:

This Court’s opinion is that trial counsel was not constitutionally deficient based on South Carolina jurisprudence that existed at the time of his trial for not objecting to the testimony [Mr. Spade] asserts. Our Supreme Court has made it clear, trial counsel should object to this type of testimony when it is presented before a jury as a means to indirectly bolster testimony. *State v. Anderson* was not decided until 2015. 413 S.C. 212, 776 S.E.2d. *State v. Anderson*, set for better practice to be used by prosecutors. The better practice is not to have the individual who treated the alleged victim testify, but rather to call an independent “blind” expert. Also, *see State v. Makin*, 343 S.C. 949, 860 S.E.2d 666 (2021) where the Supreme Court explained

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Order (3/11/22), at 6, n. 8.

that an expert who testifies as a treating expert and an expert as to general characteristics of abuse is not per se improper. However, the Supreme Court warns against this practice.

*Id.*, at 17. The PCR court, however, noted:

As in the *Makin* case, the present PCR is a close call on the bolstering issue. *Id.* at 17-18, n. 18. In the event this Court’s decision on this issue is reversed, based upon *State v. Douglas*, 380 S.C. 499, 505 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissent) and *Infra* the *Smalls* analysis . . ., trial counsel’s failure to object to improper bolstering would meet the Strickland standard of prejudice. Again, this Court notes that no physical evidence was presented to establish guilt.

*Id.*, at 17-18, n. 18. Although unclear whether the State raised a second issue in its Rule 59(e) motion, the PCR court observed the State requested footnote 18 be removed from the order dated November 11, 2021. Order (3/11/22), at 3, n. 5. The PCR court reaffirmed footnote 18, reminded the “issue of bolstering [as to two of the State’s witnesses at trial] is a close call,” and observed, “For clarity purposes, [the PCR] Court found prejudice existed in the event [the PCR] court was incorrect that Trial Counsel should have objected to the presentation of either or both of these witnesses.” *Id.*

Returning to the deficient performance prong of *Strickland*, Mr. Spade’s Rule 59(e) motion noted the order dated October 8, 2020 concluded, “This Court can find no error for PCR purposes by trial counsel *under the South Carolina jurisprudence that existed at the time of the trial* in the manner in which he objected.” Exhibit A, at 16 (emphasis added).

Mr. Spade argued:

This statement implies a finding of fact that trial counsel failed to object to improper bolstering based on South Carolina current jurisprudence regarding improper vouching. Perhaps this Court reached this conclusion because our Supreme Court decided *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) after Mr. Spade’s jury trial—which appears to be incorporated into the order of dismissal, at 43-44. If so, then this Court overlooked *State v. Kromah*, 401 S.C. 340, 37 S.E.2d, (2013), *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), *Smith v. State*, 386 S.C. 562,

689 S.E.2d 629 (2010), *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), and *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001). *See also* [*Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017) and *Thompson v. State*, 423 S.C. 235, 243, 814 S.E.2d 487, 491 (2018)].

*Id.* (footnote omitted). Mr. Spade, accordingly, believes he will prevail on the merits of the deficient performance prong of *Strickland* regarding the improper bolstering issue.

Third, Mr. Spade’s PCR application raises trial counsel’s failure to object to the trial judge instructing—and trial counsel arguing—the jurors should “search for the truth.” The PCR court agreed with Mr. Spade “that ‘the trial court’s statement and his attorney’s statement crossed into the [*State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018)] sphere of improper statements” because “these statements ‘shifted the jury’s focus away from the State’s obligation of meeting its burden of proof.’” Order (11/12/21), at 12-13. The PCR court denied Mr. Spade relief because *Beaty* was not decided at the time of his jury trial. *Id.* This Court, however, decided *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2103) prior to Mr. Spades jury trial. *See also* *Teamer v. State*, 416 S.C. 171, 182-83, 786 S.E.2d 109, 114-15 (2016) (recognizing *Daniels* decided this issue). The PCR court further concluded, “[B]ecause trial counsel failed to object to the trial court’s use of a ‘search for the truth’ terminology and because trial counsel erred in using the same terminology when explaining the purpose of a criminal trial, the significance or weight of the Special Prosecutor’s improper closing argument when performing a *Smalls* analysis, increased the prejudicial effect of the improper closing argument.” *Id.*, at 13, n. 14. The PCR court ultimately found and concluded, “[T]he presentation of evidence in the trial was ‘bookended’ with unconstitutional statements that altered the jury’s role from being an impartial factfinder when determining if the State had met its constitutional obligations of

proving guilt.” *Id.*, at 27. Mr. Spade, accordingly, believes he will prevail on the merits of this issue.

**B. The Seriousness of the Crime Involved.**

Although the alleged crime is very serious, the PCR court determined there was not overwhelming evidence of Mr. Spade’s guilt when performing the prejudice analysis under *Smalls*. Order (11/11/21), at 23-27. In doing so, the PCR court expressly found, “At trial, the only evidence of [Mr. Spade’s] guilt was the testimony of the minor.” *Id.*, at 24. As noted above, the State did not challenge the PCR court’s *Smalls* analysis in its Rule 59(e) motion. The PCR court also noted the “bitterly fought private Family Court [custody] dispute.” *Id.*, at 1.

**C. The Possibility of Escape and Character of Mr. Spade.**

Mr. Spade, who does not have a prior criminal history, has consistently maintained his innocence and, therefore, has a vested interest in appearing at his new trial. On July 15, 2011, the Court of General Sessions released Mr. Spade on a \$75,000.00 surety bond that allowed him to live with his family in Maryland. Exhibit B, C, and D. Mr. Spade appeared for his jury trial. Mr. Spade’s parents, Rodney and Carole Ann Spade, and his sister and brother-in-law, Joshua and Christine Trumpower, are willing to provide Mr. Spade a place to live and ensure his compliance with the conditions of bond. Exhibits C and D. Mr. Spade’s parents and the Trumpowers live near each other. *Id.* Undersigned counsel is informed and believed they live in the same neighborhood.

During his confinement, Mr. Spade earned his certification as a paralegal and served as a law clerk in the law libraries at Lee Correctional Institution and Broad River Correctional Institution. Mr. Spade, accordingly, has a skill that will allow him to seek

employment if released on bond. Additionally, during his confinement, Mr. Spade voluntarily instructed fellow inmates and helped them obtain their GEDs.

During his initial confinement post-arrest, Mr. Spade was denied seeing the birth of his youngest child. During the pendency of his appeal and five-year PCR proceedings, Mr. Spade lost his closest uncle, two aunts, another close uncle, and his favorite cousin. Not being able to attend their funerals or be with his parents during their loss/struggles has been very difficult on him. Also, Mr. Spade's father is recovering from triple bypass surgery, and Mr. Spade could assist his family care for his father.

### **III. CONCLUSION.**

For the foregoing reasons, this Court should grant Daniel Spade an appeal bond with appropriate conditions.

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*

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Greenwood, South Carolina