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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from Spartanburg County
Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
Honorable R. Keith Kelly, Trial Judge

Appellate Case No. 2022-000434

DANIEL SPADE,

Respondent-Petitioner,

vs.

THE STATE,

Petitioner-Respondent.

**RETURN IN OPPOSITION TO
MOTION FOR APPEAL BOND**

Respondent the State of South Carolina, through its undersigned counsel, would respectfully show unto the Court as follows:

I. SPADE'S MOTION FOR APPEAL BOND

On April 12, 2022, Respondent-Petitioner Daniel Spade filed a motion seeking for this Court to grant him an appeal bond. In seeking that extraordinary relief, Spade maintains: (1) he is likely to prevail on appeal on the single grant of relief by the post-conviction relief court regarding counsel's failure to object to a portion of the State's closing argument and two issues which the post-conviction relief court denied relief and he intends to raise in a cross-appeal (trial counsel's failure to object to purportedly improper bolstering and the use of "truth seeking" language by the parties and the trial court); (2) the undeniable seriousness of his offense should not be weighed

against him due to a dearth of direct evidence of his sexual assault of his four-year-old biological daughter other than the testimony of the minor victim; (3) he is unlikely to escape or forfeit bond because he has consistently maintained his innocence and voluntarily appeared for his criminal trial despite being released on a \$75,000.00 surety bond that allowed him to live with his family in Maryland; and (4) his circumstances and character support a grant of bond because he will have support from his parents and close family, who will provide him a place to live and ensure compliance with bond, and his certification as a paralegal will allow him to seek employment if released on bond. Furthermore, Spade has indicated he intends to leave the state's borders in the event he is released on bond and reside with family living in Maryland.

II. SPADE'S CURRENT STATUS

At present, Spade is serving a sentence of thirty-five years of imprisonment with the South Carolina Department of Corrections after he was convicted by a jury of his peers of first-degree criminal sexual conduct with a minor.¹ Inmate Search Detail Report for Daniel William Spade, <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000358974>. As reflected by Spade's inmate report accessed on the day of this filing, he appears to have engaged in at least one disciplinary infraction (threatening to inflict harm on an employee) since he has been incarcerated following his conviction. *Id.*

III. PROCEDURAL HISTORY OF GENERAL SESSIONS & DIRECT APPEAL

During its February 2014 term, the Spartanburg County Grand Jury indicted Spade for first-degree criminal sexual conduct with a minor following an investigation into allegations he sexually assaulted his four-year-old biological daughter during an overnight visit at a hotel in Spartanburg

¹ The grant of post-conviction relief to Spade is stayed based on the appeal and cross-appeal filed with this Court. *See* Rule 241(a), SCACR.

County (2011-GS-42-4171). Spade retained the services of Kenneth Shabel, Esquire, who had been representing him in an on-going custody dispute involving the same minor child, and Shabel's law partner Shawn Campbell, Esquire, to represent him in this criminal matter. Seventh Circuit Solicitor Barry J. Barnette, Assistant Solicitors Jennifer Jordan and Kimberly Leskanic, and Special Prosecutor N. Douglas Brannon prosecuted the case. On February 24, 2014, Spade proceeded to a jury trial before the Honorable R. Keith Kelly, circuit court judge. The jury convicted Spade as indicted. Judge Kelly sentenced Spade to imprisonment for thirty-five years.

Spade filed a timely notice of appeal and was represented by C. Rauch Wise, Esquire.² who raised five grounds. The South Carolina Court of Appeals affirmed Spade's conviction by unpublished opinion on July 6, 2016. State v. Spade, Op. No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016). Spade subsequently filed a petition for rehearing, and, following the denial of rehearing, filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On June 16, 2017, the Supreme Court denied the petition for certiorari. The Remittitur was returned to the circuit court on June 22, 2017.

IV. SUMMARY OF FACTS PRESENTED AT TRIAL

Spade's conviction stems from his conviction for the sexual assault of his four-year-old biological daughter during an unsupervised visit at a hotel in Spartanburg County. The victim's mother and Spade met at work and ultimately had a child together, the victim, who was born in

² Trial counsel Kenneth Shabel originally assisted in the appeal but withdrew as counsel for Applicant when he changed law firms and began practicing law with Special Prosecutor Brannon. Counsel Shabel filed a motion to be relieved as counsel with the Court of Appeals on March 21, 2016, and his motion was granted on May 6, 2016.

September of 2006. (R. p. 149-51)³. Spade, who lived in Virginia at the time of conception and birth, first saw the victim in January or February of 2007. (R. p. 151). Sometime in the year 2007, Spade filed an action in South Carolina family court seeking visitation with the victim. (R. p. 151-52). Meanwhile, the victim's mother married her husband David in December 2007. (R. p. 151, lines 20-21). The victim referred to David as "daddy." (R. p. 151, lines 23-24). In 2008, the victim's mother and her husband filed an action in family court seeking to terminate Spade's parental rights. (R. p. 152-53). The action was not successful, Spade was awarded visitation with the victim, and a visitation schedule was thereafter established. (R. p. 153). In the summer of 2010, the victim, then almost four years old, went to Virginia for an extended visit with Spade, who lived with his fiancée and their children. (R. p. 154). The next two visitations took place in South Carolina in September 2010 and October 2010. (R. p. 155-59).

The September 2010 visit took place at a Holiday Inn Express in Spartanburg County. (R. p. 126-27; p. 157). During this visit, Spade took the victim to the hotel's pool. (R. p. 138-40). At one point, he took the victim into the private bathroom near the pool area and "stuck his private part in [her] mouth." (R. p. 138, lines 5-15). Spade told the victim that if she "didn't do it," he wouldn't take her home to her mother. (R. p. 140, lines 1-2).

Following the September visit, the victim's mother noticed regressive behavioral changes in the victim. (R. p. 157). The victim wet herself in her car seat, which was unusual for her as she was potty-trained at this time. (R. p. 157-58). After having a bath, the victim started crying uncontrollably. (R. p. 158). She pulled away from her mother, hid herself in the corner, and wet herself again. (R. p. 158, lines 2-4). The victim was unable to control herself and was almost

³ As an appendix has not yet been filed in this matter, the State uses cites from the Record on Appeal from Spade's direct appeal, which was before the PCR court and will be part of the appendix when ultimately filed along with the State's petition for writ of certiorari.

making herself sick. (R. p. 158, lines 3-5). When the victim's mother asked what was wrong, the victim said, "I don't know." (R. p. 158, lines 5-6). Thereafter, the victim developed problems sleeping and was suddenly terrified of the dark. (R. p. 160). One night the victim's mother found her barricaded under a small play table in her room, asleep. (R. p. 161, lines 1-9). The victim also began to complain of stomach aches and headaches and would sometimes revert back to speaking like a two year old. (R. p. 160, lines 4-6). Sometimes she would "break down completely" and there was no consoling her. (R. p. 160, lines 6-8). Sometimes she would hide behind a door and not come out for anywhere from five to thirty minutes. (R. p. 160, lines 8-10). When she finally did come out, she wanted her mother to hold her. (R. p. 160, lines 10-12). After the October 2010 visit with Spade, the victim's mother decided to seek counseling for the victim. (R. p. 163).

That same month, the victim began counseling with Kimberly Roseborough. (R. p. 163-64). At the time counseling began, the victim's mother had no idea that sexual assault was a possible issue. (R. p. 164, lines 11-16). Instead, the goal of the counseling was to figure out the cause of the victim's anxiety and to try to ease any anxiety she may have had regarding her visits with Spade. (R. p. 165). Following the commencement of counseling, the victim had no further in-person visits with Spade. (R. p. 166, lines 14-18). Also following commencement of counseling, the victim's mother noticed an improvement in the victim's anxiety symptoms. (R. p. 166, lines 1-3 & 23-24).

The victim disclosed the sexual abuse to her grandmother in late March of 2011. (R. p. 238-39). The grandmother was in shock regarding the disclosure and waited a day or two to tell her husband about it. (R. p. 239-40). Her husband, the victim's grandfather, reported the disclosure immediately to the victim's family court guardian ad litem Alexandria Wolfe. (R. p. 242, lines 24-25). He also called Kimberly Roseborough, the victim's counselor at that time, and

reported the disclosure. (R. p. 203-204). In response, Ms. Roseborough referred the victim for a forensic interview at the Child Advocacy Center. (R. p. 204, lines 1-12). The victim's mother found out about the allegation from her parents around this time. (R. p. 166-67).

Tabitha Webber, then a forensic interviewer at the Child Advocacy Center, conducted forensic interviews with the victim on five different dates in April and May of 2011. (R. p. 247-48). During the course of these interviews, the victim made a disclosure of sexual abuse that occurred "at a hotel with a pool" in South Carolina.⁴ (R. p. 248-49). Following the interviews, Ms. Webber made a report to law enforcement. (R. p. 249). The victim thereafter began counseling with Meredith Thompson-Loftis in May of 2011. (R. p. 259). The victim disclosed sexual abuse during the counseling sessions and provided a specific time period and location. (R. p. 270). Although the victim started out having a variety of symptoms of anxiety, she exhibited a great deal of improvement over the course of the counseling sessions. (R. p. 268-70).

Spade's parental rights were terminated in family court in November of 2012, and the victim's last name was subsequently changed to that of her adoptive father. (R. p. 177, lines 2-8).

IV. SUMMARY OF POST-CONVICTION RELIEF PROCEEDINGS BELOW

On July 13, 2017, Spade filed a *pro se* application for post-conviction relief, initiating this current action. Spade then retained E. Charles Grose, Jr., to represent him in this action, and, through counsel, filed three subsequent amendments to his application on October 2, 2017, December 24, 2018, and May 14, 2019. The State filed a return to the application and requested an evidentiary hearing.

⁴ The victim also made several other disclosures of sexual abuse during these interviews, but only this one limited instance of sexual abuse was presented to the jury during Spade's trial. (Trial. Tr. 137-40; Forensic Interviews).

An evidentiary hearing on this action was convened May 15, 2019⁵, before the Honorable J. Mark Hayes, II, circuit court judge. Spade was present and was represented by counsel Grose. The State was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson and Assistant Attorney General Johnny Ellis James, Jr. At the start of the hearing, Spade also filed and submitted a “Memorandum in Support of Application for Post-Conviction Relief,” which had not previously been provided to the State or the court. At the hearing, Spade proceeded forward on the following claims from his third amended application, absent allegation number 15, which Spade expressly withdrew.

A. Ineffective assistance of counsel during the guilt phase for:

1. “Failing to request a continuance in order to have time to review and evaluate the child’s mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information.”
2. Not only failing to object to the trial judge instructing the jurors that their role is to “search for the truth” and make sure “justice is done,” which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof.”
3. “Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child’s allegations.”
4. “Failing to investigate, develop, and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case.”
5. Failing to request a ruling on Mr. Spade’s contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor’s commission pursuant to S.C. Code Ann. § 1-7-470.
6. “Failing to move for disclosure of exculpatory information in the possession of the [Special] Prosecutor, N. Douglas Brannon.
7. “Failing to investigate, develop, and present evidence that would have established that testimony about the child’s panic attacks were not related to Mr. Spade, which

⁵ The court convened for a motion hearing related to this matter on May 14, 2019.

would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony.”

8. “Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child’s credibility.”
9. “Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep’t of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011).”
10. “Failing to admit the videotaped interview from the Children’s Advocacy Center that contained exculpatory information.”
11. “Failing to investigate, develop, and present evidence that venue was not in Spartanburg County.”
12. “Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County.”
13. “Failing to request a jury instruction on venue.”
14. “Failing to object to the Special Prosecutor’s improper closing argument that appealed to 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 good people.’ Tr. 305-07.”
15. “Advising Mr. Spade not to present any evidence, including but not limited to his own testimony.”
16. “Excluding evidence from the forensic computer examination that was exculpatory.”
17. “The cumulative effect of trial counsel’s errors denied Mr. Spade his right to a fair trial.”
18. “Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records.”
19. “Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony.”

20. "Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."
 21. "Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."
 22. "Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner."⁶
- B. Ineffective assistance of counsel during the sentencing phase for:
23. "Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing."
 24. "Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed."
- C. Ineffective assistance of appellate counsel, in that
25. "Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County."
- D. Denial of due process because of prosecutorial misconduct, in that:
26. "Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."
 27. "Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."
 28. "Eliciting false testimony regarding venue."
 29. "Failing to correct false testimony regarding venue."

⁶ Spade did not introduce transcripts of the depositions of Cara Lintner and John Hall during the proceedings. Neither deposition is part of the lower court record and, accordingly, will not be before this Court on appeal.

30. Failing to disclose relevant Department of Social Services records obtained by Spartanburg count Sherriff Investigator Nicki Cantrell
31. Failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded.

At the evidentiary hearing, Spade presented the following witnesses:

-Dr. Maggie Bruck, Ph.D, who was admitted as an expert in child abuse disclosure, forensic interview techniques, treatment of child sexual abuse victims, and suggestibility;

-Meredith Thompson-Loftis, who was the victim's counselor;

-Appellate counsel C. Rauch Wise;

-Seventh Circuit Solicitor Barry Barnette;

-Dr. Michael Lamb, Ph.D., who was admitted as an expert in psychology with a specialty in child interviews;

-Trial counsel Kenneth Shabel;

-Spade's brother-in-law Josh Trumpower;

-Spade's close friend Michael Mizak;

-Alexandria Wolf, the victim's former guardian ad litem in the family court proceedings, and

-Special Prosecutor Douglas N. Brannon.

The State presented the following witnesses:

-Investigator Nicki Cantrell, formerly with the Spartanburg County Sherriff's Department;

-Trial counsel Shawn Campbell

-Tabitha Weber, MSW, LISW-CP, the Clinical Director and Forensic Supervisor of the Children's Advocacy Center of Spartanburg, Cherokee, and Union Counties who was admitted as an expert in the field of child abuse assessment and treatment.

Numerous exhibits were also introduced during the hearing, including the videotaped forensic interviews of the victim conducted by Weber.

Following the hearing and on Spade's motion, the court issued an order requiring the South Carolina Department of Social Services (DSS) to provide the court with a complete copy of any file or records regarding the underlying custody action involving Spade, the minor victim, and her parents (mother and adoptive father) within ten days of receipt of the order. On June 11, 2019, the DSS file was hand-delivered to the court by a DSS attorney.

Upon receipt the file from DSS, the court instructed both parties to conduct an in-camera review of the DSS file, which occurred in chambers at the Spartanburg County Courthouse on July 3, 2019, with counsel Grose and Senior Assistant Deputy Attorney General Jameson. Thereafter, both parties requested the Court release the records, subject to a protective order. On July 30, 2019, the Court conducted a telephone status conference on this request, with counsel Grose and Senior Assistant Deputy Attorney General Jameson appearing on behalf of the parties and DSS represented by Robert Rhoden, Esquire and. By order signed and filed August 16, 2019, the court issued an order releasing the DSS file to the parties, with special instructions that DSS was to redact any personal identifying information before providing a copy to the parties, that counsel for the parties shall maintain the file subject to the strictest confidence and not make any copies other than as needed for litigation, and that the parties shall not give copies of the file to anyone absence approval of the court.

On October 31, 2019, following the issuance of this order and the delivery of the DSS file to the parties, the court requested the parties submit any additional memorandums on the DSS file and the issues raised at the PCR hearing on or before December 17, 2019. On that date, the State submitted its "Post-Hearing Memorandum in Support of the Denial of Post-Conviction Relief",

and Spade submitted a “Supplemental Memorandum of Law regarding the DSS Records.”

On May 7, 2020, the court issued a ten-page Form 4 denying post-conviction relief on all grounds and instructing the State to prepare a proposed order in accordance with the Form 4 within thirty days. On June 8, 2020, the State submitted a proposed order pursuant to the court’s instructions. On the same date, Spade’s counsel requested time to review the proposed order with Spade and submit written objections to the proposed order and the court granted this request. On July 7, 2020, Spade submitted “Objections to Attorney General’s Proposed Order and Proffer of Attorney General’s Proposed Order.”

On October 8, 2020, the court issued an order of dismissal, denying and dismissing the post-conviction relief action in full.

On October 19, 2020, Spade served a timely Rule 59(e), SCRCF motion. The State made its return to the motion on January 13, 2021. On March 29, 2021, the court convened a hearing on Spade’s motion. Spade was present and represented by counsel Grose. The State was represented by Senior Assistant Deputy Attorney General Jameson. Following the hearing, the court took this motion under advisement.

On November 12, 2021, the court issued an amended order, reversing its previous denial of post-conviction relief and granting Spade a new trial in the court of general sessions. This order made new substantive findings of fact and conclusions of law pursuant to Section 17-27-80 and determined Spade received constitutionally deficient representation during trial based on trial counsel’s failure to object to a portion of the State’s closing argument and that this failure to object likely changed the outcome of the trial, i.e., that Spade would have been acquitted of the sexual assault of his four-year-old daughter but for trial counsel’s decision not to object to a story told by the prosecutor in his closing argument.

Because the court's new order was an amended order with new substantive findings and changed the ultimate outcome of this case, the State moved to reconsider, alter, or amend this new order pursuant to Rule 59(e), SCRCR. The State's motion was summarily denied without the opportunity for additional argument which was previously afforded to Spade on his motion to reconsider. This order was issued on March 11, 2022, and filed on the same date.

V. APPEAL AND CROSS-APPEAL BEFORE THIS COURT

At present, the State is appealing the lower court's grant of post-conviction relief, with the notice of appeal timely served and filed on April 11, 2022. On the same date, Spade filed his notice of cross-appeal. By letter dated April 13, 2022, the Court notified the parties that the appeals had been consolidated.

VI. STANDARD FOR THE *EXCEPTIONAL* GRANT OF APPEAL BOND

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 Spade'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).

VII. SPADE’S LIKLIHOOD TO PREVAIL ON APPEAL

Looking to the first of the pertinent factors in Spade’s case, the State strongly believes it will prevail on appeal and the grant of post-conviction relief and a new trial will be reversed for several reasons. First, the post-conviction relief court improperly isolated a portion of the State’s closing argument, gave it the worst possible interpretation in violation of case law, and improperly determined this commentary so infected the trial with unfairness that the result could not be relied upon. See Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (admonishing that “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.”); Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010)

(“The relevant question is whether the solicitor’s comments [in closing argument] so infected the trial with unfairness as to make the resulting conviction a denial of due process.”); State v. Durden, 264 S.C. 86, 212 S.E.2d 587, 590 (1975) (internal citations omitted) (in setting forth examples of proper closing arguments, this Court stated, ““So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and it may employ any legitimate means for impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and for enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury’s duty to convict.””).

Second, the post-conviction relief court improperly determined that Spade met his burden of establishing prejudice to the extent that the result of his proceeding would have been different but for counsel’s failure to object. ⁷ Donnelly, 416 U.S. at 643 (holding a criminal defendant or convicted person seeking collateral review is not entitled to relief based upon the closing argument

⁷ In the lower court’s order summarily denying the State’s motion to reconsider and now in Spade’s motion or an appeal bond, the argument is made that the State somehow altered its position on the correct standard for analyzing prejudice in a post-conviction relief action because the State did not cite a *single* case (Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)) in its motion to reconsider pursuant to Rule 59(e), SCRPC. The State intends to address this issue in its petition for writ of certiorari and maintains that the standard for establishing prejudice cited in the State’s motion and Smalls are the same, as both require an applicant to establish that trial counsel’s error had an impact on his or her proceeding and both rely on Strickland and its progeny. The State agrees with the lower court that the standard that this Court set forth in Smalls is the correct standard for analyzing prejudice, which still requires a review of the record as a whole to determine whether the result of the proceeding would have been different but for counsel’s errors. Id.

of a prosecutor unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process). See also Humphries, 351 S.C. at 373, 570 S.E.2d at 166 (“Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument”). The State believes it will prevail on appeal.

Because Spade has not yet filed his petition for writ of certiorari, it is impossible to discern exactly what Spade will raise in his cross-appeal. However, the State firmly believes it the remaining issues previously denied by the lower court will be upheld on appeal.

VIII. THE SERIOUSNESS OF THE CRIME INVOLVED

Beyond that, looking to the remaining factors identified as relevant to an appeal bond analysis, Spade’s charge of first-degree criminal sexual conduct with a minor is an exceedingly serious offense, and the fact a jury unanimously convicted him of that heinous crime supports a conclusion he—in the judgment of his community—poses a legitimate danger to society. See Nichols, 202 S.C. at __, 25 S.E.2d at 155 (“[A]fter conviction the law presumes [a defendant] to be guilty.”). Moreover, the seriousness of Spade’s crime should in no way be considered to be diminished by the fact no witness testified to directly observing him inflict the sexual abuse on his four-year-old biological daughter in light of the very nature of child abuse, which is ordinarily a secretive crime committed outside the view of potential witnesses. See State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484-485 (2008) (Toal, C.J., dissenting) (“Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one’s home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves,

and often too young to alert anyone to their horrendous plight or ask for help. It is also not uncommon for child abuse victims to be so young that they are incapable of offering testimony against the abuser.”). Additionally, even if Spade’s post-conviction relief process is ultimately resolved in his favor, Spade would still be facing a retrial and the very real prospect of another lengthy sentence up to life without parole, which would strongly incentivize flight if he ever happened to be released from custody. See S.C. Code Ann. § 16-3-655 (mandating a sentence of no less than twenty years up to life without parole for an offender convicted of first-degree criminal sexual conduct with a minor). Furthermore, notwithstanding the fact he was convicted of a despicable offense, Spade has engaged in acts that suggest he does not possess a character or attitude warranting the extraordinary relief of being released on an appeal bond following the imposition of a lengthy sentence. See Nichols, 202 S.C. at ___, 25 S.E.2d at 156 (recognizing a defendant’s character, reputation, and attitude toward society and government are relevant considerations when determining whether to grant an appeal bond to a convicted offender). Specifically, Spade has engaged in at least one disciplinary infraction (threatening to inflict harm on an employee) in the Department of Corrections since his conviction which reflects poorly on both his character and his ability to conform his conduct to the requirements and expectations of the law.

IX. VICTIM IMPACT STATEMENTS

Finally, the State asks this Court to consider the impact granting bond would have on the victims of Spade’s crime. The victims of Spade’s reprehensible behavior strongly oppose his request for bond. See Attachment A.

XI. REQUEST FOR DENIAL OF MOTION FOR APPEAL BOND

For all the foregoing reasons, the collective circumstances of Spade’s case—when properly considered—do not warrant the extraordinary relief of a grant of an appeal bond. Therefore, this Court should exercise the extreme caution warranted by the circumstances, deny Spade’s motion for an appeal bond, and decline to grant a release from custody to an offender who was convicted of sexually abusing his four-year-old biological daughter and was justifiably sentenced to a lengthy sentence in prison for that utterly indefensible crime.

XII. REQUEST FOR STRINGENT CONDITIONS SHOULD APPEAL BE GRANTED

Finally, although the State firmly believes this Court should deny Spade’s motion for an appeal bond, this Court should impose reasonable bond conditions to protect the community and ensure Spade does not abscond in the event it determines Spade’s case is so exceptional it warrants the grant of an appeal bond. Cf. 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 fact Spade has been convicted by a jury of his peers of the “violent” and “most serious” offense of first-degree criminal sexual conduct with a minor in connection to the sexual assault of his four-year-old biological daughter, this Court should—at a minimum—set bond in a dollar amount this Court believes will be sufficient to ensure compliance with all bond conditions, order Spade to remain on home detention during the pendency of this appeal, preclude Spade from leaving his residence for any purpose other than obtaining medical treatment or attending religious services, direct Spade not to have any contact in any form with any member of the victim’s family, preclude Spade from living or staying at any residence in which a child resides, bar Spade from having any in-person contact with any children at any location, require Spade to submit to electronic monitoring at his own expense, preclude Spade from changing his address without prior court approval, direct Spade to

surrender any passport she may have to the Spartanburg County Clerk of Court, and mandate Spade refrain from applying for any new passports until his case is finally resolved. See S.C. Code Ann. § 16-1-60 (identifying first-degree criminal sexual conduct with a minor as a “violent” crime); S.C. Code Ann. § 17-25-45(C)(1) (classifying first-degree criminal sexual conduct with a minor as a “most serious” offense).

WHEREFORE, Respondent prays this Court will deny Spade’s Motion for Appeal Bond; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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