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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2022-000434

Daniel W. Spade .....Respondent-Petitioner,

v.

State of South Carolina, ...Petitioner-Respondent.

REPLY TO STATE RETURN IN OPPOSITION TO MOTION FOR APPEAL BOND

Daniel W. Spade replies to the State's Return in Opposition to his Motion for an Appeal Bond ("State's Return").

I. INTRODUCTION.

On April 11, 2022, the State filed its notice of intent to appeal the grant of post-conviction relief to Mr. Spade. Later the same day, Mr. Spade filed his notice of cross-appeal. On April 12, 2022, Mr. Spade filed a Motion for an Appeal Bond. On April 27, 2022, the State filed its Return. Mr. Spade replies in order to provide more information about why he is likely to prevail on the merits and to correct misleading statements in the State's Return.

II. RELEVANT LEGAL PRINCIPLES.

A. Probability of Prevailing on Appellate Review.

1. State's Appeal.

The State alleges "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." State's Return, at 14. In reply, Mr. Spade will address the PCR claim, the PCR court's findings of fact, and the State's failure to address whether its Rule 59(e), SCRCP motion preserved its argument for appellate review.

> In the court below, Mr. Spade alleged his trial counsel were ineffective for
>
> > [f]ailing to object to the Special Prosecutor's improper closing argument that appealed 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 the good people." Tr. 305-07.

Third Amended PCR Application, at ¶¶ 10(a)&11(a)(19) (Exhibit A). The special prosecutor's closing argument relevant to this claim is set forth below:

> > You know, several years ago – my daughter is now twenty years old. Several years ago she came home from school and she said "daddy, I know what you do." She said "I know you're a lawyer, daddy, and you tell people stories. That's what you do." And she said "daddy, I know what the police do. They arrest bad people." She said "but what daddy, I'm really scared and concerned." And I said 'well baby what is it?" She said "daddy, who takes care of the good people." And, you know, I'm a pretty well educated person. I have been a dad for a long time, but there are certain things you cannot prepare for. That question was one of those things that I wasn't prepared for, because at that point my daughter was maybe five or six years old. And that question was so deep and do out of my perception of her ability to think. And so me, this well educated lawyer, kind of took a step back and I said "baby, that's a really great question, but you are going to have to give daddy a minute or two to think about that, because I want to give you the right answer." And I did, I thought for a few minutes. Then we

> sat down at the dinner table and it just came to me. And I said "baby, do you remember the question you asked me?" She said "yeah, daddy." I said, "I think I have an answer." I said "you are right, baby. My job is to tell somebody a story," and "I'm telling [the child's] story today. And I said "you are right, the police, they arrest the bad people." And is said "but baby, there is a group of people that take care of the good people." Ladies and gentlemen, that group of people is you. You take care of the good people. I told her "baby, the jury takes care of the good people."

Exhibit B, pp. 305-07.[1] One page later in the transcript, the special prosecutor concluded his closing argument by saying the child put it best "when she was asked 'who is Danny D?' She said 'he's a bad guy.'" *Id.,* at 308. The special prosecutor finished, "Ladies and gentlemen, you are the good people. You take care of the good people. [The child] is in your hands. He's guilty. Thank you." *Id*.

This Court has long held, "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (citing *State v. Copeland,* 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) and *State v. Linder,* 276 S.C. 304, 278 S.E.2d 335 (1981)). This Court "strongly disapprove[s]" of closing arguments calculated "to improperly arouse the passions and prejudices of jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective." *Id*., 360 S.C. at 614, 602 S.E.2d at 746. In *Tappeiner v. State*:

> As her final statement to the jury, the solicitor asserted that in making their decision, the jurors should consider "would you let [Tappeiner] babysit your kids? Your grand kids [sic]? Nieces and nephews? I think the answer to that is why you should find her guilty."

416 S.C. 239, 247, 785 S.E.2d 471, 475 (2016). This Court held, "[T]he solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives

[1] Pages 305-08 of the trial transcript are attached as Exhibit B.

improperly appealed to the jurors' emotions, rather than the evidence in the record." *Id.*, 416 S.C. at 252, 785 S.E.2d at 478. This Court further observed:

> Moreover, the emotional plea was the very last thing the jury heard before beginning its deliberations, and connected the jurors personally to the alleged abuse in the case. Thus, the comment was likely at the forefront of the jurors' minds when beginning their discussions.

Id., 416 S.C. at 254, fn. 8, 785 S.E.2d at 479, fn. 8.

Recently, this Court invalidated a murder conviction because of the Solicitor's closing argument in *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019) (prosecutor engaged in prosecutorial misconduct by stating, during closing argument, that it was his job to "present the truth," that he had a statutory duty to screen cases and would have dismissed the case if he had determined defendant was not guilty, and that job of defense attorneys was to manipulate the truth, shroud the truth, and confuse jurors). Although he did not make this precise argument in Mr. Spade's case, the special prosecutor committed similar misconduct by telling the jurors the role of the police is to arrest "bad people," his role as a prosecutor is to tell the child's story, implying the child is a good person, and the jurors' role is to "take care of the good people."

As set for in Mr. Spade's Motion for an Appeal Bond, the PCR court's order included credibility findings regarding the testimony of the Special Prosecutor, which are entitled to difference on appeal. *Mangal v. State*, 421 S.C. 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.").[2] Based on the evidentiary hearing

[2] The State's Rule 59(e) motion takes issue with the PCR court's finding of fact regarding the Special Prosecutor's testimony during the PCR hearing. Exhibit C, at 16-22. As seen *infra*, the PCR court's finding of fact regarding this testimony is supported by the record.

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." Order (11/12/21), at 20-21. 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.

The State contends "the post-conviction relief court improperly determined that Spade met his burden of proof of establishing prejudice to the extent that the result would be different but for counsel's failure to object." State's Return, at 15. In the Motion for an Appeal Bond, at 6, Mr. Spade points out the State did not properly preserve its prejudice argument for appeal. Rather than addressing this concern in response to the motion, 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*[3] are the same, as both require an applicant to establish that trial counsel's error has an impact on his or proceeding and both rely on *Strickland*[4] and its progeny." State's Return, at 15, n. 7. Unlike the PCR court's order, the State's Rule 59(e) motion never considers the "specific impact counsel's error had on the outcome of the trial." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. The PCR court initially observed, "Because no objection was made, the trial record also does not reflect an independent wringing as part of the judges charge on the law to the

[3] *Smalls v. State,* 422 S.C. 174, 810 S.E.2d 836 (2018).

[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

jury that their verdict must not be based on passion or emption." Order (11/12/21), at 22. The PCR Court then reviewed the evidence presented at trial and concluded, "In the context of the required Smalls analysis, the record of the present PCR does not establish that the State's case consisted of "overwhelming evidence of guilt" as defined by *Strickland* and *Smalls*," noting "the only evidence of the Applicant's quilt was the testimony of minor victim." Id., at 23-26. By contrast, the State's prejudice analysis in its Rule 59(e) motion addresses neither *Smalls* nor the evidence presented at trial. Exhibit C, at 23-25.

Mr. Spade, accordingly, is likely to prevail on this issue on appeal.

2. Mr. Spade's Cross-Appeal.

The State argues:

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

State's Return, at 15. In reply, Mr. Spade will elaborate on the two cross-appeal issues he raised in his Motion for an Appeal Bond and raise additional issues that are relevant not only to the cross-appeal but also the victim impact evidence the State attached to its return.

a. Improper Bolstering.

First, Mr. Spade's PCR application raised issues of improper bolstering, which the court below addressed in the final order. Motion for Appeal Bond, at 6 (citing Order (11/12/22), at 14-17). The State called three expert witnesses during Mr. Spade's jury trial: (a) Kimberly Roseborough, who was the child's therapist prior to the allegations of sexual abuse (R. 200-226), (b) Tabitha Webber, who conducted five interviews of the child at the Children's Advocacy Center (R. 247-54), and (c) Meredith Thompson-Loftis, who was the child's therapist after the allegations of sexual abuse (R. 254-75). Ms. Roseborough

defines the term "coaching," and the trial court sustained an objection, as improper bolstering, when the State asked her whether she saw any signs of coaching in" the child. Tr. 205-206. The State was not deterred by the trial court's ruling.

Despite this Court's warning in *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), the prosecution questioned Ms. Webber about her expert qualifications, and she explained her center "provides treatment for children" and does "assessments when there has been allegations of sexual abuse, physical abuse, or a child has witnessed a violent crime." Trial counsel did not object to either. Tr. 246-48. The State did not introduce any of the videotaped interviews of the child and, therefore, lacked a legitimate reason to call Ms. Webber as a witness, let alone go into her expert qualifications. Ms. Webber, nonetheless, testified the child disclosed sexual abuse to her. Based on the interviews, which were not introduced into evidence, Ms. Webber contacted law enforcement and recommended the child begin therapy. Trial counsel did not object to this testimony. Nor did he cross-examine Ms. Webber. Tr. 248-50. Based on Ms. Webber's description of the role of the child advocacy center and her purported expertise regarding "[l]ots of issues surrounding children," the jurors undoubtably concluded Ms. Webber believed the child's allegations of sexual abuse, which led her to recommend therapy and contact law enforcement.

Ms. Thompson-Loftis, who is "a licensed professional counselor in private practice in Greenville, was the last witness to testify at trial. The prosecutor questioned her about her training, education, experience, the nature of her practice, whether part of her practice includes making "diagnoses," and that treatment and therapy follows a diagnosis. She testified:

> Being that a majority of my clients are trauma victims, or have been in the past, I have quite an extensive amount of forensic and sexual abuse training, Post-Traumatic Stress training.

The prosecution offered her as an expert in "child abuse diagnosis, treatment, and therapy."

The trial judge qualified her as an expert in "Family counseling and child therapy." Tr. 250-58. After qualification as an expert witness, the following exchange occurred:

> Q. Okay. Is [the child] one of your clients?
>
> A. She is.
>
> Q. When did you first meet [the child]?
>
> A. [The child] first came to my office back in May of 2011.
>
> Q. Okay. Do you have any idea how or why she appeared in your office? Was she referred there?
>
> A. She was.
>
> I used to work for the Children's Advocacy Center in assistance, which means I treat people who qualify for victim services. And since I took that, Ms. Webber referred [the child] to see if I could provide therapy for her under victim assistance and I agreed, and [the child] was brought for her session, first session, in May of 2011.
>
> Q. Okay. And so the lady who just testified before you, Tab Webber, is the one who referred [the child] to you, is that correct?
>
> A. Yes.
>
> [Leading objection overruled.]
>
> Q. All right. Now, in cases where there is abuse of any kind, is it typical for a child after the Children's Advocacy Center interviews to change therapists?
>
> A. I think once a determination has been made or a recommendation has been made, I typically see most forensic interviews results in therapy or further therapy, and I don't think it's unusual for someone to be referred to a different therapist, based upon the type of treatment they provide, or based upon the types of insurance panels there are on. There could be a number of reasons.

> Q. Okay. So what this jury already knows is that [the child] was seeing Kim Roseborough. [The child] then went to the Children's Advocacy Center, and then [the child] came to see you. Is that unusual in the typical case of abuse?
>
> A. No, not at all.
>
> Q. Okay. Thank you.

Tr. 258-60. Ms. Thompson-Loftis next testified about "partial disclosure" (including the role a child's age and personality plays in a "partial disclosure"), "delayed disclosure," "coaching," and that the child was still in treatment. She testified about the child's symptoms, treatment, and disclosure of sexual abuse. Tr. 260-70. Trial counsel's cross-examination is less than one page in the record and confined some of the prosecution's themes about young children. Tr. 271.

This opinion testimony was improper under this state's precedent existing at the time of Mr. Spade's jury trial. *See, e.g*., *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). The jurors understood that Ms. Webber determined the child was a victim of child sexual abuse and referred to her to Ms. Thompson-Loftis for treatment "under victim assistance." Despite having objected to Ms. Rosborough offering an opinion about whether she saw evidence the child was coached, trial counsel failed to object to Ms. Thompson-Loftis telling the jurors that Ms. Webber determined child sexual abuse occurred and she "provide[d] therapy for [the child] under victim assistance." Trial counsel were deficient for not objecting to these opinions. *Smith,* 386 S.C. at 568, 689 S.E.2d at 633 ("we can

discern no defensible basis for trial counsel's failure to challenge the forensic interviewer's objectionable testimony"); *see also, e.g., Kromah*, *Douglas*, and *Dawkin*s.

Although unclear whether the State raised this issue in its Rule 59(e) motion, the PCR court observed the State requested footnote 18 be removed from the order dated November 12, 2021. Order (3/11/22), at 3, n. 5. The PCR court reaffirmed footnote 18, reminded the "issue of bolstering [as to Thompson-Loftis and Weber] 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*.

Thus, Mr. Spade will likely prevail on this claim on appeal.

b. Truth Seeking.

As noted in the Motion for Appeal Bond, Mr. Spade alleges his trial counsel were ineffective for "[n]ot 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' and the prosecutor embracing this language in the its opening statement, which impermissibly diminishes and shifts the burden of proof, but also adopting that language in Mr. Spade's opening statement and closing argument, thereby diminishing and shifting the burden of proof." Third Amended PCR Application, at ¶¶ 10(a)&11(a)(2). 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.

c. Dr. Maggie Bruck and Dr. Michael Lamb.

At the PCR evidentiary hearing, Mr. Spade presented the expert witness testimony of Dr. Maggie Bruck[5] and Dr. Michael Lamb.[6] The PCR court found:

> Again, the forensic interviews were material to the PCR. PCR counsel was successful at discrediting the forensic interviews in this case. As part of the review process, the interviews were reviewed by this Court. Certain sections of the video interviews were reviewed several times. The PCR hearing testimony of the Applicant's two expert witnesses and the testimony of the forensic interviewer were all considered. The audio recording of the PCR testimony was also reviewed by this Court post-PCR hearing.
>
> The expert witnesses called by [Mr. Spade] have the highest credentials in their areas of expertise. They both can be considered experts of the highest esteemed. Also, they both appeared credible on the witness stand. Together, they explained what are the "best practices for obtaining information for a

[5] Dr. Bruck's testimony is attached as Exhibit D.

[6] Dr. Lamb's testimony is attached as Exhibit E.

> child in a forensic interview. They both explained how the forensic interviews in this case deviated from the "best practices." They were also critical of the prior sworn testimony of the forensic interviewer when that testimony was compared to what is reflected in the video interviews.
>
> ***
>
> In reaching the conclusion that the applicant['s] PCR counsel was successful in discrediting the video interviews, this Court notes, again, that no witness challenged the credentials of the applicant's expert nor the validity of their methodology. Based on the information presented to this Court, these two witnesses presented the highest levels of expertise in their respective fields. They appeared extremely credible during the hearing, after viewing the videos and applying the standards offered by these experts, this Court agrees with their assessment that the forensic interviews were suggestive.

Exhibit F, at 4.

Based on this expert testimony, Mr. Spade alleged he was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt/innocence phase of his jury trial for the following reasons:

> 11(a)(3) Failing to call available . . . expert witnesses that would have established the unreliability of the child's allegations.
>
> 11(a)(20) 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.
>
> 11(a)(21) 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.

Exhibit A, at 3, 5.

Dr. Bruck also reviewed the records of the 71 counseling sessions Meredith Thompson-Loftis had with the child and opined the techniques utilized were suggestive. Exhibit D, at 101-08.

3. Type of Relief Mr. Spade will Receive.

The PCR court has already ordered a new trial. Although this ruling is stayed during the State's appeal, Section II(A)(1) illustrates why Mr. Spade is likely to prevail on appeal. Section II(A)(2) illustrates why Mr. Spade is likely to prevail in his cross-appeal. Of course, if this Court denies the State' petition for a writ of certiorari, then Mr. Spade's cross-appeal will be moot. Based on the testimony of Dr. Bruck and Dr. Lamb, Mr. Spade likely will prevail during a taint hearing, which would lead to suppression of the child's testimony and dismissal of the charge.

B. Seriousness of Crime Involved.

The State stresses the seriousness of the crime of criminal sexual conduct with a minor and argues its lack of evidence corroborating the statement of the minor child should not be considered. State's Return, at 16-17. As seen, the PCR court addressed the lack of corroborating evidence of the child's statements as part of the prejudice analysis under *Strickland* and *Smalls.* Under the standard of review for post-conviction relief cases, the lack evidence of corroborating the child's testimony speaks to the likelihood Mr. Spade will prevail on appeal. For purposes of considering an appeal bond, the lack of evidence corroborating the child's statement should be considered with the testimony of Dr. Bruck and Dr. Lamb regarding the evidence of suggestibility or the child, the probability of a false memory, and the unreliability of the child's statements. *See* Section II(A)(3)(c), *supra.*

The State also argues, "even if Spade's post-conviction relief process is ultimately resolved in his favor, Spade would still be facing 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." State's Return, at 17. This Court should

reject this argument for three reasons. First, prior to his jury trial, Mr. Spade was released on bond for three years with little to no stipulations, had no violations, and appeared for trial even though he was facing a potential penalty of thirty years to life without the possibility of parole. Second, after the grant of post-conviction relief, Solicitor Barry Barnette approached undersigned counsel about the possibility of reaching a plea agreement prior to the State filing its notice of appeal. Mr. Spade declined to engage in plea negotiations. He has always maintained his innocence, and he expects this case to be resolved by dismissal or acquittal by a jury following a retrial. Mr. Spade, accordingly, is strongly incentivized to appear for his retrial. Third, this Court could impose conditions of bond to ensure that Mr. Spade is not a flight risk.

C. Possibility of Escape and Mr. Spade's Character.

To question Mr. Spade's character, the State relies on a single disciplinary infraction on Mr. Spade's South Carolina Department of Correction's ("SCDC") record. State's Return, at 2, 17. This sole infraction involved SCDC employee Sgt. Vanessa Fox. On June 14 and 21, 2019, undersigned counsel wrote SCDC to express concerns about whether SCDC provided Mr. Spade due process when adjudicating this allegation. Exhibit G. On June 21, 2019, undersigned counsel requested a copy of Sgt. Fox's personnel file pursuant to the Freedom of Information Act. *Id*. According to the records provided by SCDC, multiple inmates have complained about Sgt. Fox, and she has been subject to corrective action by SCDC. Exhibit H. Mr. Spade is informed and believes that Sgt. Fox was terminated from employment by SCDC.

In his victim impact statement, David Jolley states Mr. Spade "is a flight risk with his resources and clearance to be in other countries. He wasn't even born in the United

States." This statement is misleading. Mr. Spade's father is minister. Mr. Spade and his sister were born in Indonesia while their father was a missionary there. Mr. Spade and his sister are United States citizens and have continuously resided in the Unites States since Mr. Spade was six years old and his sister was four years old. The State asserted this same argument at Mr. Spade's pre-trial bail proceedings, and the circuit court rejected this argument.

III. VICTIM IMPACT STATEMENTS.

Although not one of the factors listed in Rule 243(K), SCACR or the relevant case law, this Court is allowed to consider victim impact statements in this context. S. C. Const. Art. I, § 24; S.C. Code Ann. § 16-3-1505, *et. seq*. Mr. Spade responds to the unsworn statements attached to the State's Return.

First, the child's statement refers to her "memories." As seen in Section II(A) above, Mr. Spade presented the testimony of two expert witnesses who testified about the suggestive nature of the child advocacy center interviews and subsequent therapy, explained how children can form false memories, and opined that this child might have false memories. The PCR court found these expert witnesses to be credible. Exhibit F. Based on the testimony of these two expert witnesses, there is a strong probability that the child's memories are false.

Second, the victim impact of the child's mother and adoptive father contain salacious allegations. Before responding to these allegations, Mr. Spade notes the child's Guardian ad Litem and two judges raised substantial concerns about the Jolleys actions in relation to the court cases. Attorney Alexandria Wolf, who served as the child's Guardian ad Litem in the Family Court proceedings, testified at the PCR hearing and explained how

the Jolleys blocked her access to the child during the Family Court proceedings. Exhibit I. The PCR court observed:

> Part of the GAL's testimony included that she was closed off from the minor by the mom and soon-to-be adoptive father. The Court easily concluded the GAL felt strong hostility from the mom and soon-to -be adoptive father. The conduct and attitude towards the GAL materially interfered with her work as GAL for the minor.

Exhibit F, at 4.

Additionally, during a hearing regarding Mr. Spade's Rule 60, SCRCP motion (Exhibit J) in the Family Court, the Honorable James F. Fraley, Jr. addressed the Jolleys' avoidance of service of process:

> [Mr. Spade] the voiced his dismay that the [Jolleys] were not present at this hearing despite his attempts to serve them personally with subpoena[s] for their appearance. Based on the fact that the [Jolleys] did not appear, the unusual message on [the Jolleys'] house, and [Mr. Spade's] attempt tp serve subpoenas on [the Jolleys], this case shall be continued.

Exhibit K, at 2. Judge Fraley then ordered "that the Respondents Heather Jolley and David Jolley shall be present for the trial of this matter." *Id*.

Judge Fraley's order also provides contest for Mr. Jolley's statement, "Today I had to pay another $5000.00 because [Mr. Spade] wants to ask my, in a full day of questioning in family court, if she made a mistake and really wants him to be the father of her daughter." This statement misrepresents the nature of motion. *See* Exhibit J. Judge Fraley did set this matter for a "full day" hearing (Exhibit K, at 2), but a full day hearing does not mean Ms. Jolley will be a witness for a full day.

Finally, Heather and David Jolley make a number of salacious allegations that are responded to below.

They claim Ms. Jolley rode to a Family Court hearing on the floorboard of a SLED vehicle, wearing a bulletproof vest, while subject to a death threat. The State did not provide any documentation of this allegation. The State has never charged Mr. Spade with this allegation, raised it in a bond hearing, or even asked to interview him about it.

Mr. Jolley claims investigators took pictures of the family through the window of their house, followed them everywhere, and sat at the end of their street at night, and went through their trash. Again, the State did not provide any documentation supporting this allegation. Undersigned counsel is informed and believes that neither Mr. Spade nor his family hired an investigator to conduct surveillance on the Jolleys.

Mr. Jolley claims, "There have been times that we were so scared that we were all four in a closet in a hotel room sleeping." Again, the State did not provide any documentation of this allegation. Nor did the State identify a hotel with closets in the hotel rooms large enough for four people to sleep inside the closet at the same time.

The Jolleys clearly do not want to have any contact with Mr. Spade. Mr. Spade is confident that this Court can fashion conditions of bond that will ensure Mr. Spade and the Jolleys do not have any contact outside judicial proceedings. That Mr. Spade request to live with his family in Virginia—just as he did prior to his jury trial—will put distance between the parties.

IV. CONCLUSION.

For the reasons set forth in Mr. Spade's Motion for an Appeal Bond and this reply, this Court should grant an appeal bond with appropriate conditions.

(signature on next page)

Respectfully Submitted,

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