STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

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STEPHENO ALSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001011

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PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the trial proceeding in Petitioner's absence based on a violation of the Sixth Amendment right to be present at every stage of trial as well as a failure to meet the requirements of Rule 16, SCRCrimP, and failing to move for a continuance so that Petitioner could be notified to be present for his trial?

## STATEMENT

In June of 2011, the Spartanburg County Grand Jury indicted Petitioner, Stepheno Alston, for trafficking in cocaine, indictment #2011-GS-42-3090. (App. pp. 283-284). On March 18, 2013, the case was called for jury trial before the Honorable J. Derham Cole. Petitioner was not present for trial. Andrew J. Johnston represented Petitioner at trial. J. Edward Hunter prosecuted the case. The jury found Petitioner guilty. On September 19, 2013, Petitioner appeared before Judge Cole for sentencing. Andrew J. Johnston again represented Petitioner and J. Edward Hunter again represented the State. The judge announced the twenty-five year sentence imposed after trial. (App. p. 285).

A timely notice of intent to appeal was filed and the direct appeal perfected. On July 29, 2015, the South Carolina Court of Appeals, after hearing oral argument, affirmed the conviction and sentence. State v. Alston, Op. No. 2015-UP-381 (S.C.Ct. App. filed July 29, 2015). A timely petition for rehearing was filed and then denied on September 15, 2015. On October 26, 2015, a petition for writ of certiorari was filed with the South Carolina Supreme Court. The State filed a return on November 24, 2015. On July 18, 2016, the Court granted the petition for writ of certiorari and additional briefs were filed. (App. pp. 286-367). On March 7, 2018, after hearing oral argument, the South Carolina Supreme Court affirmed as modified the opinion by the Court of Appeals. State v. Alston, 422 S.C. 270, 811 S.E.2d 747 (2108). (App. p. 368-385). A petition for writ of certiorari was filed with the Supreme Court of the United States. On October 1, 2018, the Court denied the petition for writ of certiorari.

On October 22, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 386-399). The State filed a return on February 25, 2019. (App. pp. 400-420). On July 6, 2021, Petitioner filed an amended PCR application. (App. pp. 421-424). On April 15,

2022, Petitioner filed a second amended PCR application. (App. pp. 425-427). On April 20, 2022, an evidentiary hearing was held before the Honorable G.D. Morgan. Susannah Ross represented Petitioner at the PCR hearing. Chelsey Marto represented the State. In a written order signed March 16, 2023, Judge Morgan denied relief and dismissed the application. (App. pp. 516-538). A timely motion to alter or amend was served on April 7, 2023. (App. pp. 539-550). The State served a return on May 5, 2023. (App. pp. 551-562). On June 7, 2023, Judge Morgan denied the motion to alter or amend. (App. p. 563). A timely notice of intent to appeal was served on June 22, 2023. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the trial proceeding in Petitioner's absence based on a violation of the Sixth Amendment right to be present at every stage of trial as well as the failure to meet the requirements of Rule 16, SCRCrimP, and failing to move for a continuance so that Petitioner could be notified to be present for his trial.**

Petitioner was not present when his case was called for trial on March 18, 2013, at 12;35 PM. (App. p. 8, lines 6-23). When the judge asked if trial counsel knew where his client was trial counsel answered, "No, sir. I can report to you that he was present here earlier, and as recently as, I want to say, 11:30, 12:00, something like that, I'm not sure exactly what time it was." (App. p. 8, line 25- p. 9, lines 1-3). The judge asked if Petitioner was the gentlemen seated at the table with trial counsel when the judge was first notified the case was for trial. (App. p. 9 lines 4-7). Trial counsel answered yes and the judge again asked if Petitioner was present. (App. p. 9, lines 8-9). Trial counsel told the judge, "No, sir, Your Honor. We - - I was outside speaking with him as to the possibility of entering a guilty plea and when I returned, after I came back into the courtroom to take up some matters with the Court and when I'd went back outside, he had gone." (App. p. 9, lines 10-14).

The judge asked trial counsel if he told Petitioner the case was being called for trial. (App. p. 9, lines 15-16). Trial counsel responded, "I did not tell him that specifically, Your Honor, but I believe it was implicit what was happening." (App. p. 9, lines 17-19). The judge then again asked trial counsel if he informed Petitioner that his case was being called for trial this morning. (App. p. 10, lines 5-6). Trial counsel answered, "Yes, sir." (App. p. 10, line 7). When asked when Petitioner was first informed of the fact that his case was up for trial counsel stated, "I spoke with him on the telephone last week, Your Honor, and told him he was very high on the

docket." (App. p. 10, lines 12-14). Trial counsel told the judge that he believed Petitioner understood that his case was being called for trial. (App. p. 10, lines 20-23).

The judge then referenced bond paperwork that had been signed two years earlier by Petitioner. (App. p. 11, line 12 – p. 12, lines 1-3). The bonding company was notified and the judge issued a bench warrant for Petitioner's arrest. (App. p. 12, line 4 -p. 13, lines 1-7). Trial counsel failed to object to the issuance of the bench warrant. The judge recessed for lunch and after lunch heard the defense motion to suppress based on a Fourth Amendment violation. (App. pp. 13-101). Trial counsel failed to object to the trial proceeding in Petitioner's absence and failed to move for a continuance. After hearing testimony at the suppression hearing, the judge took the matter under advisement and adjourned for the day. (App. p. 100, line 23 – p. 101, lines 1-5).

The trial resumed the next day and Petitioner was again not present. The trial judge found that Petitioner received notice that his case was being called for trial, received notice by the bail proceeding form that he would be tried in his absence if he failed to appear, and found that Petitioner knowingly and voluntarily waived his right to be present at trial. (App. p. 102, lines 3 – p. 103, lines 1-9). Trial counsel did not object to the findings by the judge and again did not move for a continuance. The trial judge additionally denied the defense motion to suppress. (App. p. 103, lines 10-20). Petitioner was tried and convicted in his absence.

The trial judge's failure to suppress was challenged on direct appeal. In affirming the conviction the South Carolina Supreme Court wrote, "While Alston's unusual travel plans and deviations from the rental agreement provide evidence of reasonable suspicion, we question how other seemingly innocuous factors identified by Deputy Gilbert justified extending the traffic stop." State v. Alston, 422 S.C. 270, 286, 811 S.E.2d 747, 755 (2018).

In the PCR application Petitioner alleged ineffective assistance of counsel for failing to move for a continuance or object to the trial in Petitioner's absence. (App.pp. 393-394). In the amended application Petitioner alleged that trial counsel was ineffective for "failing to request continuance after a bench warrant was issued in the case or object to a trial in absence arguing that his ability to effectively try the case hinged on Mr. Alston's presence and that given the serious nature of the charge with its mandatory sentence fundamental fairness and due process required allowing a continuance." (App. p. 422). The second amended application also included this allegation. (App. p. 426).

During the PCR hearing Petitioner was asked what happened at the docket call when he appeared but then left for the trial. (App. p. 454, lines 8-9). Petitioner testified, "Yes. I – when I – when I was told to come to South Carolina – because I'm from Georgia, I mean, it was basically for roll call. I didn't know I was going to trial." (App. p. 454, lines 10-13). Petitioner also testified:

> So it was just – I mean, he – he said he mentioned it, but he didn't spascifas [sic] – sacifically (as spoken) say that it was gonna be that day, which it could've been the next day. I don't know. All I – the only thing I remember, him – me and him talking about a plea deal. He offered me a plea deal, 15 years. I told him I didn't want it. He walked off. He said something about, well, I'm the one that gotta do the time. He walked off. I left. I didn't – I didn't know the trial was – I mean plus it was pretty much – it was almost afternoon, so I knew it couldn't have been no trial going on that day.

(App. p. 454, lines 15-25).

Trial counsel testified at the PCR hearing that he did not tell Petitioner he could leave after the docket call. App. p. 476, lines 1-4). When asked about the discussions with Petitioner after the docket call trial counsel testified, "I don't know that we had a docket call that day. You know, we've – we've done this different ways over my career. He was number one on the trial docket from my recollections. And I was confident that

if he did not plead, that the case was going to trial. He was not summoned over here just to show his face for a roll call. He was number one on the trial docket." (App. p. 476, lines 7-13). Trial counsel testified that he communicated this with Petitioner. (App. p. 476, lines 14-15). When questioned about why Petitioner left, trial counsel surmised, "I guess he was scared." (App. p. 476, lines 16-17). Trial counsel was asked if he moved for a continuance and trial counsel testified, "Once the judge heard that he had been here and left, that was the end of it." (App. p. 476, lines 18-20). Trial counsel testified that in his opinion the judge would not have continued the case based on the fact that Petitioner appeared and then left. (App. p. 476, line 21 – p. 477, lines 1-10). Trial counsel believed that a continuance would have been granted if Petitioner had not appeared that day. Trial counsel testified, "I – I can tell you that trial in the absence are – are not common in this circuit because you often get into these issues about, "Was the person notified? Did they understand?' that sort of thing. If he had just not shown up, I don't think he would have been tried in his absence." (App. p. 476, line 24 – p. 477, lines 1-4).

As to whether Petitioner was notified that he could be tried in his absence, trial counsel testified:

> Now, whether or not he understood the concept of could he be tried in the absence, I have – I can't say about that. There are some letters in my file. I don't know if I make reference to that specifically in my letters to him. I do know that from time to time when I send out letters notifying people of trial, I do say that if you don't appear, you can get a bench warrant – or a bench warrant may be issued for you, or you may be tried in your absence. But I'd have to review my file and see – see specifically what was said to him about that. The – I – and – and I would not have given those letters to the court unless ordered to.

(App. p. 477, lines 12-23). Trial counsel did not testify, however, that he sent Petitioner a letter notifying him of his trial date or that he could be tried in his absence if he did not appear. Trial

counsel testified that the judge relied on the bond paperwork from two years earlier but testified, "Now, I can tell you from many experiences over the past that people don't understand all of the stuff contained in a bond paper. So what he knew and recognized about being tried in the absence, I can't say. He may have been on notice, but whether or not he really knew or understood that concept, I can't say." (App. p. 478, lines 3-8). At trial, counsel, however, failed to object based on Petitioner not understanding that he could be tried in his absence.

PCR counsel asked trial counsel, "You've – you basically answered this already, but your testimony is that you didn't feel that it would've made a difference to tell the judge that you needed your client with you to try the case?" (App. p. 490, lines 12-15). Trial counsel answered, "No. In – in retrospect, I – I probably should have, but at the time, it seemed like that was – it was a foregone conclusion of what was gonna happen." (App. p. 490, lines 16-18). On re-direct the State asked trial counsel, "And again, you don't think arguing that Mr. Alston would help you in your, I guess, trial, -- that would've made a difference when it came to Judge Cole and determining to proceed in abstentia, correct?" (App. p. 492, lines 13-16). Trial counsel answered, "I'm confident that would not have made any difference, but perhaps I should've argued it for purposes of the record." (App. p. 492, lines 17-19).

In the order of dismissal the PCR judge wrote, "Applicant claims Counsel was ineffective for failure to request a continuance. Counsel credibly testified that the judge was unwilling to continue the case because Applicant was at the courthouse and then left, seemingly knowing he was slated for trial that day. This Court finds that even if Counsel requested a continuance, it would not have been granted. Accordingly, relief is denied." (App. p. 534). The PCR judge erred. Trial counsel was ineffective for failing to object to the trial proceeding in Petitioner's

absence and failing to move for a continuance so that Petitioner could be notified to be present for his trial. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In State v. Ravenell, 387 S.C. 449, 455–56, 692 S.E.2d 554, 557–58 (Ct. App. 2010), the South Carolina Court of Appeals wrote:

> It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct.App.2007); State v. Goode, 299 S.C. 479, 481, 385 S.E.2d 844, 845 (1989). See also Rule 16, SCRCrimP ("Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given

> that the trial would proceed in his absence upon a failure to attend the court."). A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence. State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct.App.2006) (citing State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986)). The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend. Id.
>
> In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). Additionally, notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Further, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306.

Petitioner did not waive his right to be present at trial. While the trial judge found that Petitioner had been noticed that his case was being called for trial, Petitioner testified that he did not know his case was being called for trial. Trial counsel first testified that he did not tell Petitioner specifically that his case was being called for trial. (App. p. 9, lines 17-19). Trial counsel only told the judge that he informed Petitioner that his case was being called for trial that morning after a second questioning by the judge. (App. p. 10, lines 5-6). Trial counsel told the judge that he "believed" Petitioner understood that his case was being called for trial. (App. p. 10, lines 20-23), but also told the judge that he only told Petitioner that his case was "very high

on the docket." (App. p. 10, lines 12-14). The record fails to show that Petitioner was given notice of the term of court in which he would be tried. " 'Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present.' City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct.App.2006). However, if the record does not reveal that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand. State v. Jackson, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986)." State v. Fairey, 374 S.C. 92, 100, 646 S.E.2d 445, 448–49 (Ct. App. 2007). Petitioner's resulting conviction in absentia cannot stand.

The present case is distinguished from State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010), where the Court of Appeals found that Ravenell clearly received notice of his right to be present at trial because. the record showed Ravenell was subpoenaed to appear for that particular week of court. There is nothing in this record that shows that Petitioner was subpoenaed to appear for that particular week of court. Petitioner was not provided notice of his right to be present for trial as required by Rule 16, SCRCrimP. Trial counsel was ineffective for failing to object to the trial proceeding in Petitioner's absence based on a lack of notice and failing to move for a continuance so that Petitioner could be notified to be present for his trial.

Additionally, Petitioner was not warned that he could be tried in his absence as required by Rule 16. The bond paperwork, signed two years earlier, was not sufficient to warn Petitioner that he would be tried in his absence if he did not appear for court when Petitioner was not given proper notice of when his case would be called for trial. The case is distinguished from State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007), and Ravenell because, again, Petitioner was not subpoenaed to appear for a particular week of court. Trial counsel testified that based on his experience clients do not always understand all of the information in the bond paperwork.

(App. p. 478, lines 3-8). Trial counsel admitted that he should have objected to proceeding in Petitioner's absence. (App. p. 490, lines 16-18; App. p. 492, lines 17-19). Petitioner was prejudiced by trial counsel's failure to object as it prevented Petitioner from exercising his Sixth Amendment right to be present at all stages of trial. There is a reasonable probability that, but for trial counsel's deficient performance, the outcome of the proceedings, either the trial or direct appeal, would have been different.

## CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of January, 2024.