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**Feb 28 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lee County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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JOHNNY HAGGINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000176

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BRIEF OF PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in dismissing Petitioner's duly raised constitutional challenges to the validity of his convictions and sentences where Petitioner was tried *in absentia* and without counsel in violation of numerous federal and state constitutional rights and where the PCR Act plainly allows a collateral attack upon a conviction or sentence obtained in violation of the Constitution of the United States or the Constitution or laws of this State?

## STATEMENT OF THE CASE

During the March 2018 term of the Lee County grand jury, Petitioner was indicted for one count of burglary second degree, one count of domestic violence of a high and aggravated nature, one count of assault and battery first degree, and one count of conspiracy. App. 94-95. The charges arose from an alleged assault of Petitioner's wife,<sup>1</sup> Ashleigh Haggins (Haggins), which occurred on August 29, 2017. App. 54, l. 24-App. 25, l. 25.

Haggins alleged that the pair had an initial argument on August 27 and then a disagreement on Facebook on August 29. A few hours after their disagreement on Facebook, Haggins stated that Petitioner and his then girlfriend, Cody Weaver, kicked in the front door of her home. App. 56, l. 25-App. 59, l. 20. According to Haggins, after kicking in the door Petitioner charged at her while yelling, knocked her cellphone from her hand, and began to hit and kick her. App. 60, l. 1-App. 61, l. 19. Haggins' son was home at the time of the incident. App. 64, ll. 8-9.

On June 4, 2018, the State, represented by Paul M. Fata, called the case to trial before the Honorable Kristi F. Curtis and a jury. Petitioner was represented by Kevin Etheridge. App. 1. After calling the case, Solicitor Fata informed the trial court that Petitioner was not present, that the State had noticed him to be present for trial through Counsel Etheridge, and that the State intended to move forward in Petitioner's absence. App. 3, l. 1-App. 4, l. 14. Counsel Etheridge argued that based on State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017), Petitioner had not received notice of the trial date or the fact that he could be tried *in absentia* should he fail to appear because Counsel Etheridge had not had contact with Petitioner despite numerous

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<sup>1</sup> Petitioner and Haggins were married on December 27, 2010. They separated two days after the wedding. Although they lived separately, the pair did not divorce. Petitioner and Haggins also have a seven-year-old daughter in common. App. 55, ll. 2-24.

efforts to find him. Counsel Etheridge stated that Petitioner had been sent two letters that were returned to his office, that Petitioner's phone number had been disconnected, and that he had tried to contact members of Petitioner's family to no avail. Counsel Etheridge requested a continuance of the matter. App. 4, l. 17-App. 6, l. 12.

The State argued that it could only notice Petitioner through his attorney, and because it had served Counsel Etheridge with notice, it had fulfilled its duty. App. 6, ll. 15-18. Counsel Etheridge agreed that the State noticed him, but he confirmed to the court that despite numerous attempts he was unable to notice Petitioner of the trial date and the potential to be tried *in absentia*. App. 6, l. 19-App. 7, l. 22. After confirming that Counsel Etheridge had not had any contact with Petitioner in quite some time, the trial court granted a continuance in the case until the following term of court and issued a bench warrant for Petitioner. App. 10, l. 20-App.14, l. 18.

On July 10, 2018, the State, represented by Paul Fata, called the burglary second degree and domestic violence of a high and aggravated nature charges to trial before the Honorable George M. McFaddin, Jr., and a jury. App. 16. The State asserted that it had placed on the record at the June 4, 2018, hearing that Petitioner would be tried the following term of court and that if he did not appear he would be tried in his absence. The State also emailed Counsel Etheridge after the June 4 hearing to place in writing that Petitioner's case would be first up during the July term of court and that Petitioner would be tried in his absence if he failed to appear. App. 18, l. 11-App. 19, l. 7.

Counsel Etheridge made a motion to be relieved as counsel for Petitioner. Counsel Etheridge stated that Petitioner had failed to maintain any contact with him or his office and that he only met with Petitioner once in September of 2017. Counsel Etheridge further stated that he

had tried to reach Petitioner via telephone, mail, and through family members but had not been successful. He further informed the court that Petitioner had failed to meet his payment obligations. App. 19, ll. 9-21. The court confirmed that Petitioner was a paying client, that the letters sent to Petitioner were “returned to sender” and that no forwarding address had been provided to Counsel Etheridge. When questioned by the court, Counsel Etheridge stated that he had not appeared at any bond or preliminary hearing with or for Petitioner. App. 20, ll. 1-25.

The court found that Petitioner knew there was a charge against him because he had sought out Counsel Etheridge to represent him, that he had a duty to maintain contact with Counsel Etheridge, that there was no “hard core attorney-client” relationship, and that the attorney-client relationship only existed on paper. The court then proceeded to relieve Counsel Etheridge and inform the State that it would proceed with the trial of Petitioner. App. 21, ll. 2-20. After selecting a jury, the State addressed the notice it claimed to have provided to Petitioner.

The State summarized the prior court hearing during which Judge Curtis continued the case. The State maintained that Petitioner was noticed on the record that he would be tried during the July term of court and that if he failed to appear the case would proceed in his absence. Counsel Etheridge “acknowledged receiving” the notice, and the State argued therefore that Petitioner had received proper notice. App. 29, l. 11-App. 30, l. 16. The State next called the bailiff for Lee County Court of General Sessions, Roosevelt Stuckey, to testify that he had called Petitioner’s name three times “from the crier’s porch” and had not received any responses. App. 31, ll. 6-24. The court ruled that the State’s notice requirements had been satisfied and the case proceeded forward. App. 32, ll. 2-4.

The trial of Petitioner began at approximately 1:33 in the afternoon. App. 32, ll. 11-14. The State rested its case at approximately 2:25 p.m., and the case was sent to the jury for deliberations at 3:05 p.m. The jury returned a verdict of guilty as to both charges at 3:15 p.m. App. 69, ll. 17-25; App.84, l. 1-App. 85, l. 4. Judge McFaddin completed the sentencing sheets on both charges and sealed the sentences. App. 85, ll. 15-20.

On September 4, 2018, Petitioner was brought before the Honorable R. Ferrell Cothran to have the sentences unsealed. App. 88. Petitioner appeared *pro se*, and the court at no point questioned whether Petitioner wanted counsel appointed for the sentencing hearing. App. 88-92. Petitioner was sentenced to concurrent terms of twenty years imprisonment on the domestic violence high and aggravated charge and fifteen years imprisonment on the burglary second degree charge. The sentencing court did not advise Petitioner of his right to counsel during sentencing or to his right to appeal his convictions and sentences. App. 92, ll. 12-19.

Petitioner's convictions and sentences were not appealed. Petitioner filed an application for post-conviction relief dated March 13, 2019, alleging,

1. "Ineffective assistance of trial counsel for failing to file a direct appeal pursuant to *White vs. State*, 263 S.C. 1 10."
2. "Ineffective assistance of trial counsel for failing to object to and/or challenge defendant being tried and/or sentenced in absentia."
3. "Ineffective assistance of trial counsel for failing to challenge the indictment in relation to count one in the indictment on the grounds of lack of jurisdiction and/or improper change of venue."
4. "Defendant was denied his Sixth Amendment right to be present at trial and/or sentencing and face accuser."
5. "The trial court abused its discretion[sic] and/or committed reversible error when trying (holding the trial) and/or sentencing defendant in absentia without giving defendant proper notice of hearing date 7-10-18 which was seal [sic] sentence."

6. "Ineffective assistance of trial counsel for failing to notice defendant of waiver of preliminary hearing and future preliminary hearings requested by defendant."
7. "Defendant was denied due process to [sic] fair opportunity of defense."
8. "Defendant didn't have knowledge of being impeach[sic] by convictions to oppose and having fair opportunity to contest the use of such evidence."
9. "Defendant didn't have knowledge of plea offer by solicitor Paul M. Fata for 5 years non-violent unto[sic] after sentenced in absentia and placed in department of corrections."
10. "Defendant didn't have counsel upon the opening and reading of seal [sic] sentencing on date 9-4-18 to represent him and request appeal or/and reconsideration on sentencing on defendant[sic] behalf as well as disposition sentencing sheet for date 7-10-18 shows no proof of defendant or attorney for defendant was present for this hearing dated 7-10-18 which defendant was sentence[sic] in absentia."

App. 98-109; App. 172-173. The State filed a return and partial motion to dismiss dated July 18, 2019. App. 110-120. No amended PCR application was ever filed. An evidentiary hearing was convened before the Honorable Diane S. Goodstein via WebEx on November 17, 2021. Petitioner was represented by Timothy Griffin. The State was represented by Lillian Meadows. App. 121; App 127, ll. 1-15.

At the hearing, Petitioner's sister, Nyeisha Miller, testified that she knew something was not right with Petitioner during the time his charges were pending because he was always wearing the same clothes. Petitioner would stay with her some nights but was always gone in the morning, and she did not know where he went. She testified that she let Petitioner stay with her on occasion and that she did not think he had a place of his own during that time. App. 128, l. 1- App. 129, l. 13.

Petitioner testified that he had been living with his co-defendant but had to move out and subsequently did not have a place to stay. He stayed with various people but did not have a permanent address where he could have his mail forwarded. He also stated that his phone was in

his co-defendant's name and was disconnected after he moved out. Petitioner testified that if he had he known of his court date he would have appeared, just as he had appeared at every roll call date until April 2018. App. 132, l. 4-App. 133, l. 9.

Petitioner testified that he only met with Counsel Etheridge once, when he initially hired him, and that he was never provided with a copy of his discovery while the charges were pending. App. 133, ll. 12-23. Petitioner stated that he understood that "in a bond they do actually say stuff about if you miss court things going to happen," but that he did not know that language was in there at the time his charges were pending. Petitioner also stated that he did not understand how someone could waive his rights and that there could be a trial in which he was not represented by anyone at all. App. 135, ll. 5-20.

On cross-examination, Petitioner testified that he never discussed the incident or evidence with Counsel Etheridge. They only ever discussed the basics of the charges and the fee arrangement. App. 136, l. 23-App. 137, l. 4. Petitioner stated he learned that he had been offered a five-year plea deal when he received his case file once he was in prison. He testified that he never received any letters or phone calls from Counsel Etheridge. Petitioner acknowledged that Counsel Etheridge had advised him that he could move to be relieved if Petitioner failed to keep in contact with him. Petitioner further stated that he could not provide Counsel Etheridge with updated contact information because he was moving from house to house every day. Petitioner stated that nine out of ten times he would plead to a charge. He acknowledged being told in prior cases that he could be tried in his absence if he did not appear in court but maintained that he would always appear when he knew of the court date. App. 137, l. 5-App.139, l. 24.

Former Solicitor Paul Fata testified that the plea offer he sent to Counsel Etheridge for Petitioner was to plead to burglary second non-violent and domestic violence high and aggravated with a cap of five years. App. 141, l. 12-App. 142, l. 16. Fata testified that Counsel Etheridge had been relieved as counsel and there was no one acting on behalf of Petitioner during the jury selection process or trial. App. 143, ll. 6-17. Fata testified he did not recall seeing Petitioner at roll calls but could only definitively say that Petitioner failed to appear at the June and July terms of court when his case was called to trial. App. 144, l. 8-App. 145, l. 7. Fata testified that the bond form which Petitioner signed directed him to appear at court on October 11, 2017, and that Petitioner was required to appear and remain throughout each subsequent term of court until his case was called. App. 147, ll. 4-14. Fata also testified that Counsel Etheridge never told the Solicitor's office that he had been unable to find Petitioner but only that they were not in contact with each other. App. 150, l. 23-App. 151, l. 8.

Counsel Etheridge testified that he met with Petitioner once in his office, and to his recollection they only had a preliminary discussion about the case. He stated that he received discovery from the State but was never able to share it with Petitioner. Counsel Etheridge did not recall if Petitioner appeared regularly at roll calls but testified that his notes only showed Petitioner being absent three times, two of which he believed were the dates where the case was called to trial. App. 153, l. 21-App. 154, l. 24. Counsel Etheridge confirmed he made numerous calls to two different phone numbers he had for Petitioner, but both numbers were disconnected. He stated his office followed up the phone calls with several letters, but the letters were sent back to his office marked "return to sender." App. 115, ll. 4-12.

Counsel Etheridge assumed that his office had reached out to the co-defendant and to Petitioner's bondsman to locate him, but he did not have anything in his notes showing he took

those actions. App. 155, l. 13-App.156, l. 15. Counsel Etheridge confirmed that he had received a plea offer for Petitioner. However, he was not able to give Petitioner his discovery or convey the plea offer or notify Petitioner of his trial date. Counsel Etheridge testified that, to his knowledge, Petitioner never received actual notice of his trial date. App. 157, ll. 1-12.

On cross-examination Counsel Etheridge confirmed that he attempted to relay the plea offer to Petitioner, but the letters were returned to his office and Petitioner's phone was disconnected. App. 159, l. 3-9. He testified he believed they tried to contact Petitioner through his family but were not able to get in touch with them either. App. 160, ll. 18-24. Counsel Etheridge stated he moved to be relieved because he had not had any conversations with Petitioner about the case and did not feel he could effectively represent him at trial. He confirmed he was not present during Petitioner's trial. App. 161, ll. 7-19.

At the conclusion of the hearing, the court requested proposed orders from both parties. The court informed the parties that one of its concerns was that a PCR was a collateral attack, and it felt that many of the issues raised were direct appeal issues. App. 163, l. 15-App. 164, l. 8. Additionally, during the testimony of Fata, the court stated that the question before the court was "what is it that Mr. Etheridge did that was ineffective representation of counsel" and that many of the issues raised were appropriate for direct appeal rather than post-conviction relief. App. 146, ll. 10-22.

An order of dismissal was filed on February 10, 2022. App. 166-184. The PCR court found that claims four, five, seven, eight, and nine were direct appeal issues that were not cognizable under the PCR Act and denied those claims. App. 173-174. As to claims one and ten, the court found them to be without merit because Counsel Etheridge had been relieved and did not represent Petitioner at the time his sentence was unsealed. Therefore, Counsel Etheridge

was not responsible for filing an appeal or motion to reconsider the sentences. App. 179-180. On claim two, the court found that Counsel Etheridge was not ineffective for failing to object or challenge Petitioner being tried *in absentia* because Counsel had been relieved based on Petitioner's behavior in failing to communicate with him. App. 180-181. Claim three was denied because no testimony was elicited at the hearing regarding the validity of the indictments, and the court found the indictments to be facially valid. App. 181. Finally, claim six was denied because there is no constitutional right to a preliminary hearing, and even if Counsel Etheridge was deficient in failing to notice Petitioner of the hearing, there could be no prejudice, as the charges were ultimately indicted by the grand jury. App. 182.

### **STANDARD OF REVIEW**

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

## ARGUMENT

The PCR court erred in dismissing Petitioner's duly raised constitutional challenges to the validity of his convictions and sentences where Petitioner was tried *in absentia* and without counsel in violation of numerous federal and state constitutional rights and where the PCR Act plainly allows a collateral attack upon a conviction or sentence obtained in violation of the Constitution of the United States or the Constitution or laws of this State.

The PCR court found that Petitioner's claims that he was denied due process and that his constitutionally protected rights to be present at trial, to face his accuser, to be represented by counsel, and to present a defense were violated, were not cognizable claims under the PCR Act. Respectfully, the PCR Act allows for claims that a conviction or sentence was obtained in violation of the Constitution of the United States or the Constitutions and laws of our State. Petitioner was improperly tried *in absentia* and without counsel resulting in his convictions being obtained in violation of both the United States Constitution and the South Carolina Constitution. The claims were properly brought under the PCR Act and should have been considered on the merits.

### **I. Petitioner Raised Cognizable Claims Under the PCR Act**

In response to a surge in federal habeas corpus claims, the United States Supreme Court opined in 1949 that the States were required to provide state prisoners with some "clearly defined method by which they may raise claims of denial of federal rights." Young v. Ragen, 337 U.S. 235, 238 (1949). Following Young, Illinois became the first state to enact a modern state post-conviction procedure when it adopted the Illinois Post-Conviction Hearing Act. John H. Blume & Emily C. Paavola, A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina, 4 Charleston L. Rev. 223, 227 (2010). Over the next fourteen years eleven other

states passed similar legislation creating post-conviction procedures which allowed inmates in state custody to raise claims of the denial of federally protected rights. Id. at 227-228.

In 1965 the United States Supreme Court granted certiorari in Case v. State of Nebraska to determine whether “the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for *the hearing and determination of claims of violation of federal constitutional guarantees.*” Case v. State of Neb., 381 U.S. 336, 337 (1965) (emphasis added). During the pendency of the case the Nebraska State Legislature enacted a statute which provided a post-conviction procedure for hearing claims by inmates alleging the denial of federal constitutional rights. The passing of the statute obviated the Court’s need to answer the question. Id. However, in a concurring opinion Justice Brennan wrote that a state’s post-conviction procedure should

[B]e swift and simple and easily invoked. *It should be sufficiently comprehensive to embrace all federal constitutional claims...*it should eschew rigid and technical doctrines of forfeiture, waiver, or default. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts.

Id. at 346-47 (Brennan, J., concurring) (emphasis added).

South Carolina adopted the Uniform Post-Conviction Procedure Act (the Act) in 1969. S.C. Code Ann. §§ 17-27-10 to -160. Pursuant to the Act, any person who has been convicted of, or sentenced for, a crime and who claims:

- (1) *That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;*
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; *may institute, without paying a filing fee, a proceeding under this chapter to secure relief.* Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20<sup>2</sup> (emphasis added).

“In a PCR proceeding, a defendant collaterally attacks his conviction and *may raise any claims of constitutional violations relating to his conviction.*” Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 601 (2008) (emphasis added). While PCR actions are often framed as claims of ineffective assistance of counsel under the Sixth Amendment, a petitioner can allege the denial of any federal constitutional right in a PCR action, except to challenge the sufficiency of the evidence. See Finklea v. State,<sup>3</sup> 273 S.C. 157, 158, 255 S.E.2d 447, 447-48 (1979). (“Our Post-Conviction Procedure Act is designed to incorporate all rights available under federal

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<sup>2</sup> The South Carolina Code contains a scrivener's error in the publication of subsection 17-27-20(A). In the text of Section 1 of the original 1969 Uniform Post-Conviction Relief Procedure Act—which became section 17-27-20 in the 1976 Code—subsection (A)(6) ends with the language “... available under any common law, statutory or other writ, motion, petition, proceeding or remedy;” followed by a line break, with the language “may institute ... a proceeding under this chapter to secure relief” on the next line, in the body of subsection (A). See Act No. 164, 1969 S.C. Acts 158-59. The Code Commissioner made the error in the 1970 Code supplement, in which the Act was first published as part of our Code. See S.C. Code Ann. § 17-601 (Supp. 1970). Thus, the language “*may institute ... a proceeding*” applies to all six subsections of subsection 17-27-20(A). Brown v. State, 423 S.C. 56, 60, 814 S.E.2d 146, 146-147, n.2 (emphasis added).

<sup>3</sup> Implied overruling on other grounds recognized by Brown v. State, 423 S.C. 56, 814 S.E.2d 146 (2018).

habeas corpus” citing Harvey v. South Carolina,<sup>4</sup> 310 F.Supp. 83 (D.S.C.1970)). The Act also “recognizes almost any abridgment of a state created right.” John H. Blume & Emily C. Paavola, A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina, 4 Charleston L. Rev. 223, 236 (2010).

In Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019) our Supreme Court addressed one such instance where PCR was the proper avenue to raise a constitutional challenge to a conviction. Fortune was charged with murder in the shooting death of Anthony Shields. Fortune proceeded to a jury trial during which he maintained that Shields fired the first shot and he only responded in self-defense. Id. at 547-548, 837 S.E.2d at 38-39. During the closing arguments, the assistance solicitor made numerous improper comments which were objected to by defense counsel and addressed by the judge. Id. at 550-551, 837 S.E.2d at 40. Fortune was ultimately found guilty, and his convictions were upheld on direct appeal. Id. at 548-549, 837 S.E.2d at 39. Fortune filed a PCR application alleging ineffective assistance of counsel for failing to request a curative instruction and for failing to move for a mistrial after the assistant solicitor’s statements in closing arguments. He also claimed that the solicitor’s misconduct violated his right to due process and his right to counsel. The PCR court ultimately denied Fortune’s PCR application finding that while the solicitor’s comments were improper, they were not so prejudicial as to deprive Fortune of a fair trial. Id. at 549, 837 S.E.2d at 30.

Fortune appealed the denial of his PCR application. One of the arguments that the State made on appeal was that Fortune’s claim was not properly couched as one of ineffective

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<sup>4</sup> Holding “the South Carolina Act affords all the protections contemplated by our founding fathers. It is designed to afford post-conviction relief of a scope sufficiently broad to comply with the mandates and holdings of the United States Supreme Court relating to federal review of state convictions” (internal citations omitted).

assistance of counsel and was, therefore, not reviewable. Id. at 557-558, 837 S.E.2d at 44. Our Supreme Court found “Fortune’s claim that the assistant solicitor’s misconduct violated his due process rights is squarely before us.” Id. at 557, 837 S.E.2d at 44. The Court acknowledged that “in most instances, a PCR claim is properly presented as a Sixth Amendment claim for ineffective assistance of counsel.” Id. at 558, 837 S.E.2d at 44. “[H]owever, an inmate may present a claim for PCR based on constitutional violations other than ineffective assistance of counsel” pursuant to S.C. Code Ann. § 17-27-20(A). Id. at 559, 837 S.E.2d at 44.

The Court explained that trial counsel had made a general objection that was sustained and “[n]othing, therefore, was subject to direct review.” Id. The Court continued,

To the extent the trial court did not rule, and counsel did not insist on a more specific ruling, the claim would be cognizable under the Sixth Amendment for ineffective assistance of counsel. The full extent and effect of the assistant solicitor’s misconduct in this case, however, is now subject to review only in a claim for a Fifth and Fourteenth Amendment due process violation. Under these circumstances, we find this is one of the cases we contemplated in Al-Shabazz and other cases in which a claim not based on ineffective assistance of counsel is cognizable for PCR.

Id. at 559, 837 S.E.2d at 44–45. Our Court ultimately held that the solicitor’s comments violated Fortune’s Fifth and Fourteenth Amendment due process rights and granted him a new trial. Id. at 562, 837 S.E.2d at 46.

Our Supreme Court again considered a constitutional challenge to a conviction arising in PCR that was not presented as an ineffective assistance of counsel claim in Jones v. State, 440 S.C. 14, 889 S.E.2d 590 (2023). Jones was charged with first-degree burglary and armed robbery. Jones was sixteen and seventeen years old, respectively, at the time he committed the crimes. Id. at 18, 889 S.E.2d at 593. After pleading guilty he alleged in PCR that S.C. Code Ann. 63-19-20(1), which automatically transferred him from the jurisdiction of family court to circuit court as an adult, was unconstitutional. Id. at 18-19, 889 S.E.2d at 593. After a hearing

the PCR court dismissed Jones' application finding the constitutional challenge was not a cognizable PCR claim, and even if it were, the statute at issue was constitutional. Id. at 19, 889 S.E.2d at 593.

Citing S.C. Code Ann. § 17-27-20(A)(1), our Supreme Court held that the PCR court's dismissal of Jones' constitutional claim as "a trial court error, not cognizable for PCR" was error. The Court wrote that it had "indirectly distinguished constitutional PCR claims and claims that the parties *could have* addressed before trial, during trial, or on direct appeal in Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which *could have been reviewed on appeal* may not be asserted for the first time, or reasserted, in post-conviction proceedings." (citations omitted) (emphasis added)). Jones at 23-24, 889 S.E.2d at 596. Our Supreme Court recognized that Jones was precluded from raising the issue of the constitutionality of the statute during the plea because South Carolina does not allow conditional guilty pleas. Additionally, our Court wrote that pursuant to 17-27-20(A)(1) the PCR court had jurisdiction over the claim which was distinct from an ineffective assistance of counsel claim under Strickland.<sup>5</sup> Id. at 24, 889 S.E.2d at 596. Our Court found that Jones had presented a cognizable PCR claim and considered the claim on the merits, ultimately determining the statute to be constitutional. Id. at 31, 889 S.E.2d at 600.

Petitioner raised valid, constitutionally based challenges to his convictions and sentences. He argued he was denied due process, the opportunity to confront his accuser, the right to be present at trial, the right to counsel, and the right to present a defense. These claims fell squarely under S.C. Code Ann. § 17-27-20(A)(1). Tellingly, the PCR court twice informed the parties that the question at issue was solely the alleged ineffective assistance of Counsel Etheridge and

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<sup>5</sup> Strickland v. Washington, 466 U.S. 668 (1984)

that the matters raised by Petitioner were matters for direct appeal.<sup>6</sup> That, however, was not a proper statement of the law. Again, while most PCR actions are framed as claims of ineffective assistance of counsel, the Act specifically allows a collateral attack challenging the validity of the conviction obtained in violation of federal constitutional law and State constitutional and statutory law. Importantly, because Petitioner was tried without counsel, no objections were made on his behalf during trial. Therefore, nothing was preserved for direct appellate review. Much like the applicants in Fortune and Jones, *supra*, Petitioner's claims were properly pursued under the PCR Act as he was convicted of crimes, alleged that the convictions were invalid due to violations of his constitutional rights and due process, and had no other opportunity to raise the claims to a higher court for review.

In Al-Shabazz, *surpa*, this Court "re-emphasized the core purpose of the PCR Act" and held that "PCR is proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* as authorized by Section 17-27-20(A)." Al-Shabazz at 367, 527 S.E.2d at 749. Petitioner mounted a constitutionally based attack that challenged the validity of his convictions. Moreover, because Petitioner was wholly unrepresented during trial there were no issues that could have been raised on direct appeal. Accordingly, the PCR court was required to rule on each claim raised and dismissing the claims as not cognizable under the Act was improper.

## **II. Petitioner's Constitutionally Based Claims are Meritorious**

Turning to the merits of Petitioner's claims, the record reflects that Petitioner was not afforded any due process of law and his rights under both the United States Constitution and the

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<sup>6</sup> Additionally, PCR Counsel Griffith seemingly conceded this point in agreeing with the PCR court that the claims Petitioner raised were better suited for a direct appeal than a PCR action. App. 164, ll. 1-8.

South Carolina Constitution were violated. Not only was he improperly tried in his absence, but he was not represented by counsel, which meant that the State's case was never subjected to any form of adversarial testing. Petitioner's most fundamental rights, to be present at trial, to be represented by counsel, to face his accuser, and to present a defense were wholly disregarded. The convictions and sentences the State obtained against Petitioner were unconstitutional and should be reversed.

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” State v. Thompson, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003) *quoting* Faretta v. California, 422 U.S. 806, 807 (1975) *accord* Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963). Furthermore, “the Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial, and is applicable to the States by reason of the Fourteenth Amendment.” Ellis v. State, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (per curiam); *see also* State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) (“Apodictically, a criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial.”).<sup>7</sup>

The State has a stringent burden to prove a valid waiver of a constitutional right.

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<sup>7</sup> *See generally* Snyder v. Com. of Mass., 291 U.S. 97 (1934) (Accused has a right under “Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge,” and “defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.”).

*[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.*

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted) (emphasis added).

Importantly, “[a] defendant's knowing and voluntary waiver of a . . . constitutional right *must be established by a complete record*; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both.” State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) (emphasis added).

#### **A. Trial in Absentia**

Before a defendant may be tried *in absentia*, the trial court must first determine that the defendant voluntarily waived his right to be present at his trial. Additionally, “[t]he 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.” State v. Wrapp, 421 S.C. 531, 535, 808 S.E.2d 821 (Ct. App. 2017).

There is nothing in the record of the case *sub judice* that supported a finding that Petitioner had actual notice of his trial date and voluntarily waived his presence. Further, the trial court did not make the necessary findings of fact as required by Wrapp, *supra*. After relieving Counsel Etheridge, the court informed the State that “the trial will go forward.” App. 21, ll. 18-19. After a recess and testimony from the bailiff that Petitioner’s name had been called without response, the court stated, “I find that the State’s reached, notice has been satisfied, and we’ll move forward.” App. 32, ll. 2-4. This cursory ruling did not contain any factual findings

to support the court's conclusion that Petitioner had received actual notice of his trial date and voluntarily waived appearing.

The facts in the record do not support a conclusion that Petitioner received actual notice of his trial date. The State provided notice to Counsel Etheridge, but he was unable to convey that notice to Petitioner because Petitioner was homeless and did not have an address or phone number. Further, the trial court found that no "hard-core" attorney-client relationship existed between Petitioner and Counsel Etheridge because they had only met once, almost a year prior to the trial, and Counsel Etheridge had not appeared at a bond hearing or preliminary hearing on behalf of Petitioner. It would be inapposite to conclude that Petitioner received notice through counsel when the court ruled no attorney-client relationship existed and Counsel Etheridge repeatedly confirmed that he had not been able to inform Petitioner of his trial date.

Much like the defendant in Wrapp, supra, the record in Petitioner's case is devoid of any fact indicating that Petitioner had actual notice of the term of court in which his trial would occur. As our Supreme Court wrote in Wrapp "[i]t seems logical that for one to voluntarily fail to attend trial or otherwise waive his trial appearance, one must actually know when the trial is to occur." Id. at 537, 808 S.E.2d at 824. The trial of Petitioner in his absence was improper as he could not have voluntarily waived his presence without actual notice, and because the trial court failed to make the necessary findings under Wrapp, supra.

### **B. Right to Counsel**

Not only was Petitioner tried in his absence, but he was tried without counsel. "It is well established that a defendant may be tried in his absence. However, to try a defendant without counsel is a completely different matter." State v. Thompson, 355 S.C. 255, 206-261, 584 S.E.2d 131, 134 (Ct. App. 2003) (internal citations omitted). "Of all the rights that an accused

person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” Thompson, at 261, 584 S.E.2d at 134 *quoting* United State v. Cronic, 466 U.S. 648, 654 (1984). “The erroneous deprivation of a defendant’s fundamental right to the assistance of counsel is *per se* reversible error. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” Id. (internal citations omitted). “A defendant may surrender his right to counsel through 1) waiver by affirmative, verbal request; 2) waiver by conduct; and 3) forfeiture.” Id. *citing* State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996).

Waiver is most commonly understood as an affirmative, verbal request. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134–35 (Ct. App. 2003) *citing* United States v. Goldberg, 67 F.3d 1092, 1099 (3d Cir.1995); State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct.App.1996). To effectuate a valid waiver of the right to counsel, the two-pronged Faretta test must be met in which the accused is (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Id. (internal citations omitted).

Similarly, “[a] defendant may waive his right to counsel through his conduct.” Thompson at 263, 584 S.E.2d at 135 (internal citations omitted). “Most courts have held that the defendant must first be warned that his misconduct will thereafter be treated as a waiver.” Id. “[T]o the extent that the defendant's actions are examined under the doctrine of ‘waiver,’ there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings.” Id. Any subsequent misconduct will be treated as a “waiver by conduct.” Id.

Lastly, “[s]ome courts recognize forfeiture as a means to waive the Sixth Amendment right to counsel. A defendant can forfeit his right to counsel irrespective of his knowledge of either the consequences of his actions or the dangers of self-representation.” Thompson at 267,

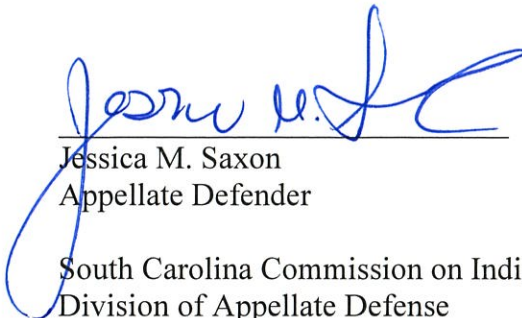
584 S.E.2d at 137. “[B]ecause of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a ‘waiver by conduct’ could be based on conduct less severe than that sufficient to warrant a forfeiture.” Id. Situations where a defendant's own conduct forfeits his right to counsel are unusual, typically involving a manipulative or disruptive defendant. Id.

None of the three situations in which a defendant can waive their right to counsel was present in Petitioner’s case. Most obviously, Petitioner did not make an affirmative verbal request to waive his right to counsel. His absence from trial logically precludes the finding that he made a verbal waiver of his right to counsel. Secondly, Petitioner’s conduct did not waive his right to counsel. He regularly appeared at roll calls through April of 2018, despite being homeless, indicating his desire to comply with the conditions of his bond. His failure to appear at trial, by itself, cannot be considered a knowing waiver of the right to counsel, particularly when Petitioner had no notice of the date of trial. Additionally, there was never an occasion where Petitioner was advised of his right to counsel and the dangers of proceeding *pro se* as required Faretta. Finally, Petitioner did not engage in any extreme dilatory conduct, nor was his manipulative or disruptive – he simply was homeless and had no way to communicate with his originally retained counsel. Such conduct does not trigger the extreme sanction of forfeiture of his right to counsel.

Petitioner was denied due process of law when he was tried *in absentia* and without counsel in violation of his federal and state constitutional rights. Due to the severity of the deprivation of his rights, Petitioner was foreclosed from raising these issues through any mechanism other than PCR. The PCR court erred as a matter of law in dismissing Petitioner’s claims as not cognizable under the Act.

**CONCLUSION**

Based on the foregoing arguments, Petitioner respectfully requests that this Court reverse the PCR court and remand this matter to the Court of General Sessions of Lee County for a new trial. In the alternative, Petitioner requests this Court remand the matter to the lower court for a fuller determination of the merits of his constitutionally based claims.



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This 28<sup>th</sup> day of February, 2024.