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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Spartanburg County
Honorable J. Derham Cole, Trial Judge
Honorable G.D. Morgan, Post-Conviction Relief Judge

Appellate Case No. 2023-001011

STEPHENO ALSTON, SCDC # 00357159,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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 the failure to meet requirements of Rule 16, SCRCrimP, and failing to move for a continuance so that Petitioner could be notified to be present for his trial?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED ON CERTIORARI

Did the post-conviction relief court properly find that Petitioner—who appeared inside the courtroom at counsel table but voluntarily left the courthouse before the pre-trial suppression hearing and never returned despite knowing his trial would be starting either that day or the following day and despite receiving communication from his bondsman that his trial was starting—failed to meet his burden of establishing that counsel was constitutionally ineffective for failing to move for a continuance or otherwise object to Petitioner being tried in his absence where the record established trial counsel did move for a continuance and Petitioner waived his right to be present based on sufficient notice of his trial and that he would be tried in his absence if he failed to appear, and, accordingly, any further motions would have been properly denied by the trial court?

STATEMENT OF THE CASE

On March 28, 2011, Petitioner Stepheno Alston was arrested after deputies with the Spartanburg County Sheriff's Office found a large quantity of cocaine hidden in a space near the steering column of a rental vehicle Petitioner was driving during a routine traffic stop on Interstate 85 in Spartanburg County.[1] Following his arrest, Petitioner, a resident of Georgia, sought release from pre-trial detention and, on March 29, 2011, he was released from custody on bond secured by a professional bondsman. (App. 10-11). As part of his pre-trial release, Petitioner acknowledged and agreed to numerous conditions of his bond, including that a warrant for his arrest would be issued if he violated any condition of his bond order, that a warrant for his arrest would be issued if he failed to appear before the court as required, that he had a right and an obligation to be present for trial, and that he would be tried in his absence if he failed to appear for his trial. (App. 11-12, 102-103). Around this time, Petitioner hired private counsel, Andrew Johnston, to represent him. (App. 465-466). Subsequently, in June of 2011, the Spartanburg County Grand Jury indicted Petitioner for one count of trafficking in cocaine in an amount greater than four hundred grams. (App. 283-284).

On March 18, 2013, Petitioner appeared inside the courtroom alongside counsel Johnston. (App. 8-9). However, prior to pre-trial motions or the selection of a jury, Petitioner left the courthouse without notifying his counsel, the State, or the court. (App. 8-13). When questioned by

[1] A full recitation of the facts leading to Petitioner's arrest can be found in this Court's published opinion affirming Petitioner's conviction. State v. Alston, 422 S.C. 270, 274, 811 S.E.2d 747, 748 (2018) (holding that (1) the deputy's observations of Petitioner's vehicle repeatedly weaving within his lane of travel and repeatedly striking dotted lines marking that lane provided the deputy with the probable cause needed to conduct the traffic stop for failure to maintain lane; (2) evidence supported the trial court's finding that the deputy had reasonable suspicion of criminal activity needed to extend scope of initial traffic stop to continue questioning Petitioner; and (3) evidence was sufficient to support the trial court's finding that Petitioner voluntarily consented to a warrantless search of his vehicle during the lawful traffic stop).

the trial judge, the Honorable J. Derham Cole, about his client's whereabouts, counsel Johnston informed the court that Petitioner knew his case was first on the trial docket and was going to be called for trial that day. (App. 8-13). Judge Cole reviewed Petitioner's bond paperwork, found Petitioner had been properly notified of his rights and obligations, and issued a bench warrant for Petitioner. (App. 11-13). Immediately thereafter, Judge Cole heard Petitioner's motion to suppress, including testimony from the deputy who stopped Petitioner's vehicle. (App. 13-101). Following arguments from counsel regarding the motion to suppress, Judge Cole took the motion under advisement and court recessed for the day. (App. 100-101).

The next morning, March 19, 2013, Judge Cole went back on the record in Petitioner's case and asked counsel Johnston for an update on Petitioner's whereabouts. (App. 102). Counsel Johnston informed the court he had not heard from Petitioner and attempts by his staff to reach Petitioner had not been successful. (App. 102). Judge Cole found that Petitioner was properly noticed that his case was to be tried that week, that Petitioner appeared at the courthouse inside the courtroom and then left with knowledge his case was being called for trial, that Petitioner was properly noticed that he had a right to be present for trial and that he would be tried in his absence if he failed to appear, and, based on the foregoing, found that Petitioner had knowingly and voluntarily waived his right to be present for trial. (App. 102-103). Judge Cole then denied Petitioner's motion to suppress and presided over the selection of a jury to try Petitioner's case. (App. 103-123). Following jury selection, counsel Johnston advised the court that a staff member of the Clerk of Court's Office informed him and the court that Petitioner's bondsman spoke with Petitioner that morning and was in the process of locating Petitioner and bringing Petitioner to court. (App. 123). Counsel Johnston then moved for a continuance of Petitioner's trial to determine whether he would appear based on this new information. (App. 123). In response, the State noted

that Petitioner was present at the courthouse the preceding day and asked for the case to proceed to trial. (App. 124-125). Judge Cole heard additional pre-trial matters and then swore in the jury. (App. 125-149). Petitioner still had not appeared and the trial proceeded forward in his absence. (App. 149-266). At the conclusion of trial, the jury convicted Petitioner as indicted. (App. 267). Counsel Johnston noted that the mandatory minimum sentence was twenty-five years of imprisonment and asked the court to impose the minimum sentence. (App. 268-269). Judge Cole sentenced Petitioner and sealed the sentence until Petitioner could be apprehended and brought before the court for sentencing. (App. 269).

Petitioner was subsequently apprehended and on September 19, 2013, Petitioner appeared before Judge Cole for sentencing. (App. 277-281). Counsel Johnston spoke on Petitioner's behalf in mitigation. (App. 278-280). Judge Cole unsealed his sentence and imposed the mandatory minimum sentence of a twenty-five-year term of imprisonment along with a $200,000 fine. (App. 280). Petitioner asked to address the court and said the only reason he did not appear was due to "problems with [his] lawyer since the day [he] hired him." (App. 281).

Petitioner then timely filed and perfected an appeal and was represented on appeal by Appellate Defender Lara M. Caudy of the South Carolina Commission on Indigent Defense-Division of Appellate Defense, who raised three issues related to the trial court's denial of Petitioner's motion to suppress. The South Carolina Court of Appeals issued an unpublished opinion in which it unanimously affirmed Petitioner's conviction. State v. Alston, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). Thereafter, Petitioner petitioned the Court of Appeals for rehearing, and the petition was denied. Petitioner then filed a petition for a writ of certiorari to this Court, and this Court granted the petition. Following briefing and oral argument, this Court affirmed Petitioner's conviction in a published opinion. State v. Alston, 422 S.C. 270, 811 S.E. 2d

747 (2018). Petitioner did not seek rehearing from this Court but instead sought certiorari review from the United States Supreme Court, which denied the petition on October 1, 2018. (App. 286-385).[2]

Petitioner then initiated this underlying post-conviction relief action through the filing of a *pro se* application for post-conviction relief on October 22, 2018, asserting claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel, including the claim raised in this instant appeal that trial counsel was ineffective for failing to move for a continuance of his trial based on his absence.[3] (App. 386-399). Rodney W. Richie, Esquire, was thereafter appointed to represent Petitioner. Petitioner then moved to relieve counsel based on his assertion that counsel had refused to file amendments upon his request. Following a motions hearing on February 14, 2019, this motion was denied. On April 3, 2020, a consent order for substitution of counsel was filed, substituting Susannah Ross, Esquire, as counsel for Petitioner.[4] In response to

[2] The only appellate records Petitioner included in the Appendix are the Brief of Petitioner, Brief of Respondent, and published opinion before this Court. The remaining appellate filings from Petitioner's direct appeal, including the documents filed before the Court of Appeals and the United States Supreme Court, are accessible online through this Court's "South Carolina Appellate Case Management System", https://ctrack.sccourts.org/public/caseView.do?csIID=60595 (last accessed Oct. 2, 2024).

[3] Interestingly, Petitioner argued in this original application that trial counsel was ineffective for failing to move for a continuance or otherwise object to Petitioner being tried in his absence but also simultaneously argued that appellate counsel was ineffective for failing to raise the preserved issue of whether the trial court erred in denying trial counsel's motion to continue the trial based on Petitioner's absence. Petitioner continued to raise both incongruent arguments throughout his amended applications and post-hearing filings.

[4] These records are not included in the Appendix but are accessible online through the Spartanburg County Public Index: https://publicindex.sccourts.org/Spartanburg/PublicIndex/CaseDetails.aspx?County=42&CourtAgency=42002&Casenum=2018CP4203680&CaseType=V&HKey=6966110481035273568312211255868988817666117478653531007583881146772117897410278789971987411643 85 (last accessed Oct. 2, 2024).

the application, Respondent filed a return and requested an evidentiary hearing to resolve the allegations in the application. (App. 400-420). Thereafter, Petitioner, through counsel Ross, filed two amended applications. (App. 421-427).

An evidentiary hearing was convened April 20, 2022, before the Honorable G.D. Morgan, Jr., circuit court judge. Petitioner testified on his own behalf. When questioned as to why he did not appear for trial, Petitioner responded, "I believe it was just a miscommunication problem. . . . Because I – I wasn't called to go – come up there for roll call. I wasn't called to come for a trial." (App. 438). He then stated that his presence would have helped his trial "because a lot – a lot of things that I – I could've put on the record was not put on the record." (App. 438). However, when directly questioned as to why he appeared at the courthouse and then left, Petitioner acknowledged that his trial counsel mentioned that a trial would be starting imminently, stating that counsel did not specifically tell him that his trial would be starting that day and "it could've been the next day." (App. 454). Counsel Johnston testified after Petitioner. When questioned about Petitioner absence at trial, counsel Johnston testified that he told Petitioner that his case was first on the trial docket for that week and if he did not plead, the case would be called for trial. (App. 476). He unequivocally denied that Petitioner was ever told he would be appearing exclusively for "roll call." (App. 476-477). Appellate counsel testified but was not questioned regarding Petitioner's trial in absentia or why she did not raise the trial court's denial of trial counsel's continuance on appeal. (App. 494-502).

Following the evidentiary hearing, the post-conviction relief court denied Petitioner's application in full, including his allegation that trial counsel was ineffective for failing to move for a continuance or otherwise object to a trial in his absence. More specifically, the post-conviction relief court—while focusing on a lack of prejudice—concluded any motion would have been

denied by the trial court and referenced counsel's testimony that the trial judge focused on Petitioner's earlier presence at the courthouse before he absconded. (App. 534). Petitioner, through post-conviction relief counsel, filed a motion to alter or amend, arguing that the post-conviction relief court erred in denying relief with a focus on the court's purported failure to properly consider the CAD report. (App. 539-542).[5] The post-conviction relief court summarily denied the motion without a hearing.

[5] Petitioner's counsel also attached a copy of Petitioner's *pro se* motion to alter or amend, in which Petitioner again argues that appellate counsel was ineffective for failing to brief whether the trial court erred in denying counsel's request for a continuance, seemingly acknowledging yet again that trial counsel did indeed move to continue his case based on his absence. (App. 544-549).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found that Petitioner—who appeared inside the courtroom at counsel table but voluntarily left the courthouse before the pre-trial suppression hearing and never returned despite knowing his trial would be starting either that day or the following day and despite receiving communication from his bondsman that his trial was starting—failed to meet his burden of establishing that counsel was constitutionally ineffective for failing to move for a continuance or otherwise object to Petitioner being tried in his absence because trial counsel did move for a continuance and Petitioner waived his right to be present based on sufficient notice of his trial and that he would be tried in his absence if he failed to appear, and, accordingly, any further motions would have been properly denied by the trial court.

On appeal, Petitioner asserts trial counsel was ineffective in his handling of Petitioner's absence from trial and that the post-conviction relief court erred in denying relief on this ground. Specifically, Petitioner now asserts that trial counsel failed to object to Petitioner's trial proceeding forward in his absence and failed to move for a continuance, which he argues violated his constitutional rights and Rule 16, SCRCrimP, and warranted a grant of relief. However, this claim fails as Petitioner failed to establish deficiency because trial counsel did indeed move for a continuance based on Petitioner's absence from the courthouse the day of his trial. Moreover, as the trial court correctly found, Petitioner waived his right to be present at trial based on sufficient notice of his trial and the possibility of being tried in his absence if he failed to appear for his trial, and, accordingly, any further objections beyond the motion for continuance would have been fruitless. Additionally, Petitioner further failed to establish prejudice because he cannot show that the result of his trial would have been different but for counsel's purported errors where Petitioner's assertions that he would have provided beneficial testimony had he been present proved inaccurate based on the testimony he provided at the evidentiary hearing and Petitioner's case moving forward on the day it was called for trial resulted in the State's inability to test additional likely inculpatory evidence and present such evidence to the jury. The post-conviction

relief court properly denied Petitioner relief as to this claim and this Court should deny certiorari.

Petitioner, like all other defendants, had a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner had the burden of proving the allegations in his post-conviction relief action, and when alleging counsel was constitutionally ineffective, he needed to prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient

before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. The function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance required of a criminal defense attorney." Id. at 690. Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must

be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

Like in the instant case, cases where an applicant asserts that trial counsel was ineffective for failing to properly object to a trial in absence, the same two-pronged standard as set forth in Strickland and its progeny applies. See Morris v. State, 371 S.C. 278, 639 S. E.2d 53 (2006) (employing the two-pronged Strickland standard requiring the applicant to establish both deficiency of counsel and prejudice when asserting a claim of ineffective assistance of counsel for failing to move for a continuance based on an applicant's absence from trial). Here, Petitioner did not and could not meet his burden of proof as to either deficiency or prejudice and, accordingly, the post-conviction relief court properly rejected this claim and denied relief.

Petitioner asserts trial counsel performed deficiently by failing to object to his trial proceeding forward in Petitioner's absence and by failing to move for a continuance so that Petitioner could be notified and present for his trial. This claim patently lacks merit for several reasons. First, the record establishes that trial counsel did, in fact, move for a continuance so that Petitioner could be present for his trial. Following jury selection but before the jury was impaneled, counsel moved to continue the case based on Petitioner's absence:

> THE COURT: All right. Mr. Johnston, any matters we need to address before we begin?
>
> MR. JOHNSTON: No, Your Honor. I do think it noteworthy that I should put something on the record. You and I - - I don't know if Mr. Hunter got it as well, but you and I both received an email from Ms. Parish of the Clerk's Office.
>
> And she reports to us that the bondsman for Mr. Alston has apparently spoken with him this morning, and that he is headed down to where Mr. Alston is at this time to pick him up and try to bring him for court. **I would respectfully, based on that information, ask that this case be continued until we see if he's actually going to appear**.
>
> THE COURT: Well, when will we know?
>
> MR. JOHNSTON: I don't know, Your Honor.
>
> THE COURT: Me neither.

> MR. JOHNSTON: Yes, sir. I understand - -
>
> THE COURT: What the note says or the email this is an email from Ms. Parish, but - - -
> MR. JOHNSTON: Yes, sir.
>
> THE COURT: So she's apparently I'm only assuming from that she's talked to Mr. Stribling. But what it says is [the bondsman] has talked to Mr. Alston this morning, but it doesn't say that he's just going to get him. It says he is going to find him.
>
> MR. JOHNSTON: Yes, sir.
>
> THE COURT: Which tells me that while he's talked to him, Mr. Alston must not have indicated that he was on his way to the courthouse. So I don't know that waiting is going to be of any benefit to the Court or to Mr. Alston or to you.
>
> MR. JOHNSTON: I understand, Your Honor. I just felt that I should put that on the record.

(App. 123) (emphasis added).

As this colloquy between trial counsel and the court unequivocally demonstrates, trial counsel did indeed move for a continuance of Petitioner's trial based on his absence. Petitioner's assertions that trial counsel did not move for a continuance or otherwise object to Petitioner being tried in his absence patently lack merit and are not supported by the record.[6] Trial counsel cannot be deficient when he took the very action that Petitioner now complains should have been taken.

Additionally, as trial counsel correctly noted during the evidentiary hearing, the trial court properly denied the continuance motion and would have similarly and correctly denied any additional motions or objections based on Petitioner's absence because the record firmly establishes Petitioner waived his right to be present for his trial where he had proper notice of his

[6] Again, it is worth highlighting that Petitioner personally appeared to acknowledge that trial counsel did in fact move for a continuance, as he repeatedly asserted that appellate counsel was ineffective for failing to raise the trial court's denial of this continuance motion in his *pro se* filings. (App. 397, 548).

trial and the possibility of being tried in his absence if he failed to appear.

"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. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010); 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." Ravenell, 387 S.C. at 455, 692 S.E.2d at 557-58. "[N]otice 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." Id., 387 S.C. at 456, 692 S.E.2d at 558. "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." Id. "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." Id.

The record is replete with probative evidence that Petitioner had notice that his trial was proceeding that term of court and knowingly left the courthouse despite knowing his trial would be commencing imminently. Counsel informed the trial court that he informed Petitioner his case would be called that term of court:

> THE COURT: And you had - you had informed him that his case was being called for trial this morning?

MR. JOHNSTON: Yes, sir.

THE COURT: And when was he first informed of that fact?

MR. JOHNSTON: Well, I - - -

THE COURT: By you?

MR. JOHNSTON: I spoke with him on the telephone last week, Your Honor, and told him he was very high on the docket.

THE COURT: And you talked to him today - - -

MR. JOHNSTON: Yes, sir.

THE COURT: - - about his case was, in fact, up for trial, first up?

MR. JOHNSTON: Yes, sir.

THE COURT: And he was, in fact, - and he was, in fact, present and understood that his case was being called for trial?

MR. JOHNSTON: I believe, yes, sir.

THE COURT: Okay. And well, it was either being called for trial or being called for disposition by way of a guilty plea if he preferred?

MR. JOHNSTON: Yes, sir.

THE COURT: You talked to him about the trial and about pleading guilty?

MR. JOHNSTON: Yes. Yes, sir.

THE COURT: Okay.

MR. JOHNSTON: Absolutely.

THE COURT: So y'all were prepared and ready to proceed with the trial of the case in the event he did not wish to enter a plea of guilty?

MR. JOHNSTON: Yes, sir.

(App. 10-11).

While trial counsel, with the benefit of the hindsight from a trial loss and conviction,

attempted to qualify his answers a bit more during the evidentiary hearing, trial counsel nevertheless admitted that he had informed Petitioner his case was going to be tried that term:

> PCR Counsel: Now, concerning Mr. Alston's failure to appear at trial, did you ever tell him that he could leave after the -the docket call?
>
> TRIAL COUNSEL: No, ma'am.
>
> PCR COUNSEL: What were your discussions after the docket call concerning that?
>
> TRIAL COUNSEL: 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 recollection. 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.
>
> PCR COUNSEL: And did you communicate that to Mr. Alston?
>
> TRIAL COUNSEL: Yes.

(App. 476 lines 1-15).

The record also establishes that Petitioner's bondsman spoke with him the day of his trial—before the jury was impaneled—to let Petitioner know his trial was beginning. (App. 123-125). Moreover, Petitioner's own testimony established that he knew his case would be called to trial either the day he appeared at the courthouse or the next day:

> ASSISTANT ATTORNEY GENERAL: So what happened concerning docket call? You appeared and then you left for your trial?
>
> PETITIONER: 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.
>
> ASSISTANT ATTORNEY GENERAL: Did Mr. –
>
> PETITIONER: So it was just -- I mean, he -- he said he mentioned it, but he didn't spascifas -- 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.

(App. 454 lines 8-19). Based on Petitioner's own testimony, he knew a trial was looming and he

knowingly and voluntarily left the courthouse. The record makes it abundantly clear that Petitioner had sufficient notice of his trial.

Furthermore, Petitioner also had sufficient notice that he could be tried in his absence if he failed to appear, as Judge Cole noted before Petitioner's trial began. (App. 11-12, App. 102-103). Petitioner's bond paperwork unequivocally informed him he could be tried in his absence and he failed to appear. While Petitioner now attempts to argue that bond paperwork is insufficient to provide notice that he could be tried in his absence under Rule 16, SCRCrimP, Petitioner fails to cite to any authority for this proposition (likely because no such authority exists). Petitioner attempts to argue that Ravenell supports such an argument because in Ravenell, the defendant was subpoenaed for the specific term of court and here, Petitioner was not subpoenaed. However, this argument is unpersuasive because the court in Ravenell found that the bond paperwork was sufficient to inform Ravenell that he could be tried in his absence if he failed to appear. See Ravenell, 387 S.C. at 457, 692 S.E.2d at 558 ("Further, the record shows Ravenell's bond form provided the requisite notice to him that he could be tried in absentia should he fail to appear."). Accordingly, the record establishes Petitioner could not establish any deficiency or prejudice because any further motions or objections to a trial in absentia would have been futile.

In his petition, Petitioner does not specifically point to any prejudice he suffered other than a blanket statement that he was prejudiced, and the outcome of his trial would have been different. (PWC 12). However, the record does not support this conclusory statement. At the evidentiary hearing, Petitioner testified that had he been present for his trial, he would have been able to testify in support of suppression. However, Petitioner had that very opportunity to do so at the evidentiary hearing and failed to provide any new probative information that would have resulted in the trial

court granting his motion to suppress.[7] Petitioner failed to establish the result of his proceeding would have been different but for counsel's purported deficiency. The post-conviction relief court properly denied relief and this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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[7] An argument can also be made that Petitioner actually received a benefit from his trial proceeding forward without any further delay, as it prevented the State from testing the white powdery substance found on Petitioner's knife, which the State did not discover until the eve of trial and the court indicated an unwillingness to allow testimony regarding this without additional testing to verify the substance. (App. 133-137).