

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Daniel Dewitt Hall, Circuit Court Judge

2021-CP-04-1938

Philip Wesley Walker, ..... Appellant,

v.

The State, ..... Respondent.

NOTICE OF APPEAL

Philip Wesley Walker appeals the Honorable Daniel Dewitt Hall's Order of Dismissal filed February 19, 2025.

This twenty-fourth day of February, 2025.

s/ Susannah Ross  
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## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Anderson County Clerk of Court. Applicant was arrested on December 16, 2015, following an investigation into an armed robbery that occurred at the Family Dollar on 1402 East River Street. During its March 2016 term, the November 17, 2021, the Anderson County Grand Jury indicted Applicant for armed robbery and possession of a weapon during the commission of a violent crime (2016-GS-04-0594).

On December 5, 2016, the case was called to trial before the Honorable R. Lawton McIntosh and a jury. William G. Yarborough, III, Esquire, represented Applicant. Assistant Solicitors Catherine T. Huey and William E. Stolarski prosecuted the case.

### **PRE-TRIAL**

On the morning of December 5, 2016, the prosecution and defense counsel selected a jury and the trial court heard a motion challenging the victim's identification of Applicant as the robber pursuant to Neil v. Biggers, 409 U.S. 188 (1972). (R. 4). Applicant was not present during the proceedings on that date. Counsel at the beginning of the hearing moved for a continuance, "based on that my client is not here. The best alternative is for the State to wait and try him when he is here." R. p. 4-5. Counsel advised he had been in contact with Walker and did not understand why he was not present in court. R. p. 4, line 25 – p. 5, line 3. Noting that they had previously discussed Applicant's absence back in chambers, Judge McIntosh denied counsel's motion for a continuance. (R. 5). The *Biggers* hearing then proceeded. Judge McIntosh ultimately found the identification admissible. (R. 50).

The court reconvened on December 7, 2016. Counsel Yarborough again informed the trial court that he had not been able to make contact with Applicant. (R. 56). He stated he had

tried to talk with the Applicant that morning without success. He stated that he had received an email from his bondsman who had not heard from him either. R.p. 56. Yarborough stated he had spoken with the bondsman on Monday afternoon who indicated he had been in contact with him.

A hearing then proceeded regarding the admissibility of Applicant's December 16, 2015, statement to law enforcement pursuant to Jackson v. Denno, 378 U.S. 368 (1964). Judge McIntosh found the statement was admissible. (R. 67).

Counsel then asked the court to reconsider a continuance because Applicant was not there which the court denied. (R. 69). The trial court observed, "[W]hen we met in chambers on Monday, I believe you told me that you had spoken with your client several times last week, were supposed to meet with him . . . on the weekend and did show that you were in communication with his father." R. p. 70, lines 2-9. The trial court mentioned counsel "actually had a call from him last night" and counsel confirmed he did and that he attempted to call him back. R. p. 70, lines 8-16. Yarborough stated that he had received a call from him in the middle of the night and tried to call him back. His father told Yarborough that he had still not been able to get in touch with him. R.p. 70, l. 13-18.

Judge McIntosh again denied the motion. (R. 69–70). Solicitor Huey noted, "[W]e certainly noticed the defendant of this trial. We sent a card – a bond card November 18<sup>th</sup>. We mailed that out to him, his bondsman, and then of course Mr. Yarborough." (R. 70). The trial then proceeded *in absentia*.

#### **SUMMARY OF EVIDENCE ADDUCED AT TRIAL**

Applicant entered the Family Dollar store, located at 1402 East River Street, to purchase Pringles and Airheads with an EBT card. (R. 14–15). The cashier, Natasha Oliver (Victim),

rang up the items. (R. 15). Applicant then asked for a pack of Newport cigarettes, and she rang those up as well. (R. 15). She turned around to see Applicant pointing a small and rusty gun at her face. (R. 92). Applicant warned Victim that he would pull the trigger if she screamed. (R. 15). **She assumed the gun worked when he pointed it at her.** R.p. 107, l. 2-4. Fearing for her life, the Victim complied with Applicant's demand for money. (R. 93). She quickly emptied all the cash out of the drawer. (R. 93). With money in hand, Applicant left the store and proceeded down the sidewalk. (R. 96). As soon as Applicant left the building, Victim pushed the panic button. (R. 96).

Sergeant Trevor Simmons and his partner responded to Family Dollar. (R. 114–15). On the way, they observed a man looking straight ahead, intently ignoring the passing vehicles with sirens blaring. (R. 116). They suspected the man was the robber, but he did not have on a brown jacket per Victim's description. (R. 116). After speaking with Victim and receiving a more detailed description, they decided that the man they suspected really was the robber and went back to try and find him. (R. 116–17). They located him in about three or four minutes. (R. 117). He had a wad of cash in his pockets; cigarettes; a Family Dollar bag with a receipt for Pringles and Airheads; and an EBT card. (R. 119–20). Applicant was cooperative, admitted to the robbery, and admitted he had what he described as a "pop gun," but what he also referred to as a .22. (R. 134, 238, 132–33). Thirty minutes after the robbery, law enforcement asked the Victim to verify whether the man they had in custody was the robber. (R. 102–03). Victim immediately recognized Applicant as the man who had robbed the Family Dollar. (R. 103).

Sara Smith worked across the street from Family Dollar. She saw a man throwing clothes in a dumpster and found it suspicious enough to take pictures of him. She notified the officers that had gathered at Family Dollar. (R. 102–03). Detective Ty Blackwell then searched

the dumpster and located a brown jacket and hat consistent with the Victim's description to law enforcement as to what the robber was wearing. Underneath the jacket, they found a small caliber handgun, a .22 type pistol that was rusty and empty. (R. 152, 155, 158, 160).

Throughout the trial, Counsel argued the surveillance did not depict a robbery because Applicant made a purchase. (R. 207).

#### **DECEMBER 7, 2016 VERDICT & SENTENCING**

At the conclusion of trial on December 7, 2016, the jury convicted Applicant as indicted. During sentencing, Counsel advised the court that he had been in regular contact with Applicant prior to trial and that he had no idea what happened. (R. 220). He noted that they had discussed a plea offer, and Applicant indicated he would plead guilty to strong armed robbery.<sup>1</sup> (R. 220). Counsel asked the court for some leniency, stating that Applicant was cooperative when apprehended. (R. 222). Judge McIntosh replied, "[Y]ou're right, I mean, he just said, 'Okay. Here I am. I give up. I did it.' Give him some credit for that." R. p. 222, lines 20-25. At that time, Judge McIntosh sealed Applicant's sentence to be imposed once found and arrested.<sup>2</sup>

#### **OCTOBER 12, 2017 UNSEALING OF SENTENCE**

On October 12, 2017, Applicant and Counsel Yarborough appeared before Judge McIntosh. At the start of the hearing, Judge McIntosh unsealed the concurrent sentences of twenty years' imprisonment for armed robbery and five years for possession of a weapon during the commission of a violent crime. (R. 226).

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<sup>1</sup> Based upon Senior Solicitor Huey's credible testimony, there was no offer for strong armed robbery.

<sup>2</sup> Counsel filed a notice of appeal on December 14, 2016. The Court of Appeals dismissed the appeal by order dated March 29, 2017, because the sentence remained unsealed at that time. See State v. Washington, 285 S.C. 457, 458, 330 S.E.2d 28, 2899 (1985) ("So long as the sentence remains sealed, no appeal can be taken.").

The court heard further mitigation from counsel Yarborough. (R. 226–30). Counsel explained, “Because he didn’t have the money to pay his light bill, he robbed the store. He confessed to it.” R. p. 227. Counsel admitted Walker “knew he was supposed to be here, . . .” R. p. 228, lines 21-23. However, counsel explained, Walker “decided that he was going to try to get himself together before he had to face this sentence.” R. pp. 228-29. Walker came back to South Carolina and went to DSS to meet his children, even knowing he had the sentence. R. p. 229, lines 7-10. At this point Judge McIntosh asked Walker where he was and he admitted he was in Texas, supposedly to enter a rehabilitation program in Dallas. R. pp. 229-30. Walker admitted, “I did something wrong,” but his wife lost her job and Duke Power cut off their electricity. R. p. 231.

Walker explained “I’d gone into Family Dollar and I didn’t go in thinking I’m going to rob it today. It wasn’t like that.” R. p. 232, lines 1-3. He described how he bought a can of Pringles and Airheads and then sheepishly robbed her, apologizing for the robbery as he committed it. R. p. 232, lines 6-18. Walker recounted how he admitted to the robbery to the officers. R. p. 232, lines 19-24. He stated that that the gun he used was unworkable.

Finally, Assistant Solicitor Huey spoke on behalf of the State and Victim. (R. 234–36). She stated that the State would concede that the gun would not necessarily work, but that he had pointed the gun at the victim and said to her that he would shoot her if she did not hand over the money. She further stated that he was under the influence at the time of the crime and speculate that the theft was not for paying for Christmas gifts but was for his furthering his habit. She also pointed out that he had four robbery convictions in North Carolina from 2001 and 2006.

At the end of the hearing, Judge McIntosh noted that he was interpreting the hearing as a motion to reconsider the sentence. (R. 236). He stated he was taking the matter under

advisement. (R. 236). Later that afternoon, Judge McIntosh issued an order denying the motion to reconsider. (R. 256).

### DIRECT APPEAL

Applicant filed a timely notice of appeal. E. Charles Grose, Jr., perfected Applicant's appeal by briefing the Court of Appeals on the following issue:

Did the trial judge err by denying trial counsel's motion to continue the trial so Phillip Walker could be present at his jury trial when the trial judge did not make findings of fact regarding whether the Mr. Walker had received notice of his right to be present and whether the Mr. Walker had been warned that the trial would proceed in his absence upon a failure to attend court?

Following briefing and oral argument, the Court of Appeals affirmed Applicant's convictions and sentences, finding:

Walker's Rule 16, SCRCrimP objection is not preserved because he did not specifically object to a trial *in absentia* or argue to the trial court that he did not receive notice of the trial or was unaware the trial would proceed in his absence. A motion for a continuance is not in itself enough to preserve a Rule 16, SCRCrimP objection.

*State v. Walker*, Op. No. 2020-UP-290 (S.C. Ct. App. filed Oct. 14, 2020). Applicant's subsequent petition for rehearing was denied by order dated December 9, 2020.

On January 8, 2021, Applicant filed a petition for a writ of certiorari to our Supreme Court on the following issues:

- I. The Court of Appeals erred as a matter of law when it agreed with the State and held Phillip Walker failed to raise this issue to the trial court, and it is therefore unpreserved for appellate review.
- II. The trial judge erred by denying trial counsel's motion to continue the trial so Phillip Walker could be present at his jury trial when the trial court did not make findings of fact regarding whether the Mr. Walker had received notice of his right to be present and whether the Mr. Walker had been warned that the trial would proceed in his absence upon a failure to attend court.

The State filed its return to the petition on January 21, 2021. Applicant then filed a reply to the State's return on February 1, 2021. On August 6, 2021, the Court issued an order denying Applicant's petition. State v. Walker, S.C. Sup. Ct. Order filed Aug. 6, 2021. The remittitur was issued that same day.

### **CURRENT ACTION BEFORE THIS COURT**

In his application for post-conviction relief, Applicant alleged he is being held in custody unlawfully based on the following (excerpted verbatim):

1. Ineffective assistance of trial counsel
  - a. "Trial counsel advised me to reject the State's guilty plea offer of 10 years because of his mistaken belief that the offense should be common law robbery (strong arm 1110.)"
  - b. "Failing to object to the trial court trying me in absentia, in violation of the Sixth Amendment S.C. Const. Art. I, § 14. and Rule 15. SCRCrimP, thereby failing to preserve this issue for appellate review, resulting in prejudice when the Court of Appeals held this issue was not preserved for appellate review because trial counsel "did not specifically object to a trial in absentia or argue to the trial court that [I] did not receive notice of trial or was unaware the trial would proceed in [my] absence."

Applicant requested relief in the form of a new trial.

### **SUMMARY OF THE TESTIMONY AT THE EVIDENTIARY HEARING**

#### **APPELLATE COUNSEL'S TESTIMONY**

On direct examination, Appellate Counsel Charles Grose testified he filled out Applicant's PCR application but was not representing Applicant's in his PCR action because of the potential for him to be called as a witness. Appellate Counsel Grose testified the Court of Appeals found the issue of Applicant being tried *in absentia* not preserved but the record of Applicant's trial *in absentia* did not reflect the trial judge making specific findings in order to

properly try Applicant *in absentia*. Appellate Counsel testified second issue on appeal related to the ten-year plea offer the he was of an understanding that trial counsel advised Applicant to reject. Appellate Counsel stated that there was a directed verdict motion. R. 171-72; Tr.p. 119-120. Appellate Counsel claimed Applicant's charge legally could have been reduced to strong armed robbery. (Trial counsel requested a charge on strong armed robbery or common law robbery that was denied based upon the Applicant stating in the interview that it was a cap gun. R. 172; Tr.p. 120). Appellate Counsel testified that it was his understanding that Trial Counsel reneged on request for reduced charge<sup>3</sup>, and Trial Counsel requested for trial to not go forward in absence based on better practice and not based on lack of notice to Applicant. Appellate Counsel testified pursuant to Rule 16, SCRCrimP<sup>4</sup>, a defendant needs actual notice of trial date, and trial transcript does not evidence that notice was given to Applicant of trial date.

On cross-examination, Appellate Counsel testified he did not recall looking at the clerk's report or records before preparing appeal. Lastly, Appellate Counsel testified he might have consulted with Trial Counsel at beginning of appeal but does not clearly recall.

#### **APPLICANT'S TESTIMONY**

On direct examination, Applicant testified that had he known he would have been at the trial. He testified prior to trial *in absentia* he had been to court about two or three times, and his

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<sup>3</sup> Appellate Counsel referenced Trial Transcript page 120 to 122. See R. p. 172-174. Trial record shows that counsel requested a charge on strong arm robbery which the trial court denied. The court concluded that there was no evidence to support it. Tr.p. 120-124. R. p. 172-176. This Court does not construe this testimony to create an additional ground for post-conviction relief. Counsel was not deficient since he made a request for a jury instruction for strong arm robbery which was rejected by the court. He did not renege on a request for a lesser jury instruction.

<sup>4</sup> "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." Rule 16, SCRCrimP.

father would show him bond card and go to court with him. Applicant testified each time he appeared at court his case was continued. He stated that trial counsel Yarborough advised him he was trying to get Applicant's armed robbery charge reduced to strong armed robbery. Walker testified that he was confident it would be reduced because he found the weapon in his ex-wife's garden and claimed it did not have a firing pin in it. Walker declared that when he told the police that it was wrong to rob, but also that although it was a gun, it was not a dangerous weapon. He wanted the degree of the weapon to be taken into consideration by the solicitor. Applicant stated that his earlier conviction in North Carolina was for common law robbery.

Applicant testified Yarborough seemed confident he could reduce his charge to strong arm robbery. Applicant testified Yarborough advised him his trial strategy was to argue the gun was not dangerous as it was not workable. Applicant testified before Yarborough was retained, the applicant's earlier counsel from the Public Defender's office brought Applicant a ten-year plea offer to armed robbery.<sup>5</sup> Applicant testified his family advised him not to take it but to wait. He stated that Yarborough also advised him to wait based on possibility of obtaining a reduced charge and Applicant was hoping for an eight (8) year offer.<sup>6</sup> Applicant testified prior to this crime he had committed a crime in North Carolina and claimed Solicitor Huey misused his prior record to get trial judge to enhance his sentence.<sup>7</sup> Applicant complained his prior record from 1988 had nothing to do with the charges against him, but it was used against him in sentencing.

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<sup>5</sup> This alleged ten year offer is not consistent with Solicitor Huey's testimony of a 15 year offer from the State.

<sup>6</sup> This would require a lesser offense of strong arm robbery since armed robbery carries a minimum sentence of 10 years.

<sup>7</sup> During the initial sentencing proceeding, Solicitor Huey indicated that the Applicant's criminal history of a 1998 breaking and entering, a 2001 auto breaking and resisting a public officer, fleeing, eluding arrest with a motor vehicle from North Carolina, four counts of common law robbery and from 2005 two counts of common law robbery. R.p. 219. During the October 2017 unsealing of the sentence proceeding, Solicitor Huey indicated that Applicant had he had four

Applicant testified at the time of the incident he was in a custody battle with his ex-wife, and he had a drug problem. Walker claimed he did not go to Texas to avoid the trial but to get help. Applicant testified he went to Dallas, Texas, to get help, and he was in constant communication with his father and sister during that time. Applicant testified his father would notify him of his court dates. Applicant claimed he did not receive any information about his trial date in December while in Dallas and asserted that had he been informed of the date he would have been in court. In hindsight, Applicant also now claimed that if he knew of his trial date he would have taken the original plea offer. Applicant testified he found out about his conviction during a job interview, and he turned himself in once he found out. He stated that he returned to Anderson on August 16, 2017 to visit his children. At that point he was re-arrested by the sheriff.

On cross-examination, Applicant admitted he signed the bond form after his initial arrest. He testified his father would notify him about court dates, and he was consistently paying his bond. Applicant testified he notified bond court he was staying at his father's address in Hillsborough, North Carolina. Applicant testified he could not notify court and Solicitor Huey of

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robbery convictions from North Carolina from 2001 and 2006 and asserted that this case “isn’t his first rodeo.” She also indicated he also had mostly breaking and entering from North Carolina. R.p. 235-236. The Applicant has failed to assert how the prosecution misused his prior criminal record. At sentencing, a judge has an obligation to consider information material to punishment. A sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited as to either the kind of information he may consider, or the source from which it may come. Hayden v. State, 283 S.C. 121, 123, 322 S.E.2d 14 (1984). The Applicant has failed to assert how the presentation of his prior North Carolina record was improper. To the extent he may be asserting that this was an ineffective assistance of counsel claim for failing to object, he has failed to prove that counsel was deficient or that he was prejudiced. Cf. State v. Payne, 332 S.C. 266, 504 S.E.2d 335 (Ct. App. 1998) (defendant bears the burden of proof when collaterally attacking a prior conviction which the state seeks to use under a sentence enhancement statute.).

address because he did not get out of county jail until December 17, 2015. Applicant testified after his release he went to live with his family in North Carolina. Applicant testified at time of arrest he lived at 401 Hall Street, Anderson, SC. which was different than his father's North Carolina address where he was actually staying. He claimed he later filled out the North Carolina address on the bond form. Applicant testified the court was responsible for obtaining his address pursuant to bond agreement, and bondsman had previously notified court of agreement. At the time Applicant's case was tried, Applicant testified he was in Texas and acknowledged that he did not notify Yarborough of his move. He claimed that communication with his lawyer was difficult. He claimed he left for Texas a week before Thanksgiving. He stated he entered a rehab program while he was in Texas. Applicant claimed he did not notify his bondsman that he was in Texas either but felt that the bondsman should have known because he wired money to pay bond from Texas. He confirmed that he did not give either his lawyer or the bondsman his address in Texas.

Applicant testified the only plea offer made to him was for ten years, and that he never rejected the offer. However, he also confirmed that he did not choose to plead guilty based upon the offer. He was still trying to get a better offer. Applicant testified his family advised him to hire Yarborough and see if Applicant could get a better offer. Applicant testified he used a 22-pistol with no firing pin. Applicant testified he does not deny committing the crime. Applicant testified he used the 22-pistol and not his other guns to commit the crime because it was the first gun he saw. Lastly, Applicant testified the victim did not know that the 22-pistol was not operable.

#### **APPLICANT'S FATHER'S TESTIMONY**

On direct examination, Applicant's father testified he retained Yarborough, and Yarborough advised Applicant not to take the ten-year plea. Applicant's father testified he paid Yarborough five thousand dollars (\$5000.00), and Yarborough gave Applicant's father the impression he would get gun charge dropped and Applicant's charge reduced. Applicant's father testified he received a telephone call from Yarborough about trial date the day before the trial and the fact Applicant would be tried in absence if Applicant did not show up to court. Applicant's father testified he told Yarborough to contact Applicant, and testified he did not communicate what Yarborough told him to Applicant. Applicant's father testified the bondsman did not call him before trial.

On cross-examination, Applicant's father testified he was not sure how many days before trial Yarborough called him and informed him of Applicant's trial date. Applicant's Father testified he could not call Applicant and tell him because he did not have his phone number and Applicant was at a detention center. Applicant's father testified he did not tell Yarborough Applicant was in Texas but told Yarborough he did not know where Applicant was and had no way to contact him.

#### **SOLICITOR HUEY'S TESTIMONY**

On direct examination by the Respondent, Senior Solicitor Catherine Huey testified she was the lead prosecutor on Applicant's case. Solicitor Huey testified she was involved in scheduling Applicant's trial and notified Yarborough well in advance of trial date, publicly published the trial docket online with the trial date, and also sent a bond card to Applicant, bondsman, and Yarborough. Solicitor Huey testified the bond form was important, as it clearly read Applicant could be tried in his absence and that the Applicant has the duty to notify the court of any address change. Solicitor Huey testified the address on Applicant's bond card was

401 Hall Street, Anderson, S.C. Solicitor Huey presented various documentary evidence to corroborate her testimony: the bond form evidencing that he could be tried in his absence, two bond cards, one of which was sent to Applicant on October 18, 2016 evidencing attempt to resolve case by plea (Exhibit 1); a bond card marked return to sender to Walker's Anderson address, also sent to Yarborough and bondsman (Willis Hollis of Pendleton, S.C.) which clearly stated Applicant could be tried in absence (Exhibit 2); a bond card with trial date, December 5, 2016, that was returned to sender (Exhibit 3); and screenshot of the published trial docket (Exhibit 4). Solicitor Huey testified Yarborough was trying to get Applicant to plead guilty before trial. Solicitor Huey testified she was not aware Applicant did not live at address listed on bond card. Solicitor Huey recalled the previous offer made to the public defender of fifteen (15) years,<sup>8</sup> and both the public defender and Yarborough both tried to have Applicant's charge reduced to strong armed robbery which she rejected. Solicitor Huey testified she informed trial court on the record that she notified Applicant of trial and that Applicant had previously refused plea offer.

On cross-examination, Solicitor Huey testified she understood from counsel Yarborough Applicant had refused the armed robbery plea offer, and Counsel Yarborough was still asking for reduced charge of strong armed robbery after the trial docket published for the December trial.

#### **TRIAL COUNSEL'S TESTIMONY**

On direct examination, trial counsel William Yarborough testified he has been practicing for thirty years, with criminal law encompassing ninety-five percent of practice. Trial counsel testified he previously was employed as a prosecutor as an Assistant United States Attorney and has experience dealing with violent crimes. Trial counsel testified he sent a letter of

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<sup>8</sup> Armed Robbery carries a minimum sentence of ten years nor more than thirty years. S.C. Code Ann. §16-11-330.

representation on April 21, 2016, and Applicant had been previously represented by a public defender. Counsel Yarborough testified reviewed discovery, discussed potential outcomes, and discussed the strength of the State's case with Applicant numerous times while Applicant was still in custody. He recalled Applicant being in jail five or six months before he was out on bond.

Counsel Yarborough recalled Applicant's Father calling him about moving to have Applicant released on bond. Counsel Yarborough was aware Applicant had relocated from Anderson. Counsel Yarborough testified he spoke with Applicant regularly, including several times a week before Applicant's trial. Counsel Yarborough testified the record reflected he spoke with Applicant personally before his trial by phone. Counsel Yarborough testified he scheduled appointment with Applicant and Applicant's father the day before trial was to start, but neither of them came to the meeting.

Counsel Yarborough testified he notified Applicant of trial date, as he received letter with date. He stated Applicant had met with Yarborough a month or two before date, and the trial date was number one on the trial docket. Counsel Yarborough testified he was sure Applicant was aware of the trial date.

Counsel Yarborough testified he learned Applicant moved to Texas after his trial. Counsel Yarborough testified he attempted to get in contact with Applicant during the trial, but Applicant did not answer his call. Counsel Yarborough testified he thought Applicant attempted to call him Yarborough around midnight before his trial started. Counsel Yarborough testified Applicant never indicated he would not be at court, but Applicant failed to meet with Counsel Yarborough before trial as he indicated he would to prepare for the trial. Counsel Yarborough testified Applicant made it seem like he would be at trial, and said Applicant was trying to get everything lined up. Counsel Yarborough testified he moved for a continuance, referencing page

four of the trial transcript. R.p. 4. Counsel Yarborough testified he does not recall specifically informing Applicant he could be tried in his absence, but he did inform Applicant's father, and Applicant had never indicated he was not aware of trial date in their earlier communication.<sup>9</sup>

Concerning plea offers, Counsel Yarborough testified all the plea offers were for armed robbery, and he tried to convince Solicitor Huey to reduce it to strong armed robbery. Counsel Yarborough testified that in their discussions, Applicant indicated he did not wish to take the plea offer.

On cross-examination, Counsel Yarborough testified his communications with Applicant were always on the phone, except when Applicant appeared at court several times while on bond. Counsel Yarborough testified he met in person with Applicant at court with Applicant's father earlier when they were at court and communicated with Applicant about this trial date over phone. Counsel Yarborough testified he spoke many times with Applicant's father, and he had Applicant's father's phone number, and another phone number Applicant would use at times. Counsel Yarborough testified Applicant's father would never call at midnight, and the number that had called him day before Applicant's trial was a number he had seen before. Counsel Yarborough testified he informed trial court he could be wrong, and it was possible the number that called at midnight was not Applicant's number. Trial Counsel confirmed the original bond form did not notify Applicant of his specific trial date. Counsel acknowledged he did not specifically notify Applicant of fact he could be tried *in absentia* after the date was set.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these

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<sup>9</sup> This is consistent with what Yarborough told Judge McIntosh. R. p. 4, 70.

claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

#### STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act<sup>10</sup> (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

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;

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<sup>10</sup> S.C. Code Ann. §§ 17-27-10 to -160.

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[.]

S.C. Code Ann. § 17-27-20(A).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence – the mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

#### *INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, GENERALLY*

The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. Strickland v. Washington, 466 U.S. 668 at 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687-88; Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624,625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[without proof of both deficient performance and prejudice to the defense... it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

#### *INITIAL FINDINGS*

As a matter of general impression, this Court finds Counsel Yarborough's testimony at the evidentiary hearing **credible** and **persuasive**, where he presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court further finds applicable the strong presumption that at all stages of Counsel Yarborough's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

***INEFFECTIVE ASSISTANCE OF PLEA COUNSEL ALLEGATIONS ON THE MERITS***

**Allegation (a):**        **Trial Counsel misadvised Applicant he could reduce Applicant's charge from Armed Robbery to Common Law Robbery (Strong Arm Robbery) and advised Applicant to not accept the ten-year plea offer.**

Applicant alleged Counsel Yarborough advised him to wait and not accept the ten-year plea offer, because Counsel Yarborough promised he could reduce Applicant's charge from Armed Robbery to Common Law or Strong Arm Robbery. This Court finds that the Applicant has failed to prove that counsel was deficient in his attempts at plea negotiation in this matter. This Court finds credible Senior Solicitor Huey's testimony that the only offer made was to armed robbery with a cap of 15 years and the necessary statutory minimum of 10 years. This Court further finds that counsel Yarborough was diligent in attempting to get the prosecution to agree to a lesser charge of strong arm robbery, but that the prosecution was firm it would not offer a different offer. This Court rejects that there was a promise from counsel Yarborough to

either the Applicant or his father that there would be a lesser offer. This Court finds that the Applicant rejected the state's offer prior to trial to plead guilty by failing to plead guilty at the earlier trial date and desired counsel to seek further, albeit unsuccessful negotiations.

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996)); Lafler v. Cooper, 566 U.S. 156, 162 (2012) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Misadvising a defendant such that he rejects a plea offer and instead proceeds to trial may constitute deficient performance. See, e.g. Lafler, 566 U.S. at 161 (counsel misadvised defendant "that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist."); Lee v. United States, 582 U.S. 357, 137 S.Ct. 1958 (2017) (counsel misadvised a noncitizen defendant that he would not be deported as a consequence of his guilty plea). To show prejudice from the improvident rejection of a plea offer based upon the misadvice of counsel, an applicant must show (1) that but for the ineffective advice there is a reasonable probability the plea offer would have been presented to the court, (2) that the court would have accepted its terms, and (3) that the conviction, sentence, or both would have been less severe under the terms of the plea than was in fact imposed. Lafler, 566 U.S. at 164.

The Applicant was charged with armed robbery involving the use of a gun during the theft. S.C. Code Ann. §16-11-330(A) sets forth in pertinent part:

(A) A person who commits robbery **while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon**, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended

or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence.

S.C. Code Ann. § 16-11-330. In South Carolina a gun used in a robbery is a deadly weapon regardless of its alleged inoperability. State v. Henderson, 286 S.C. 465, 472, 334 S.E.2d 519, 523 (Ct. App. 1985); State v. Bailey, 273 S.C. 467, 257 S.E.2d 231, 8 A.L.R. 4th 145 (1979), cert. denied, 444 U.S. 1083, 100 S.Ct. 1039, 62 L.Ed.2d 768 (1980) (claim that gun used was unloaded). We further note that the offense of armed robbery occurs in this state when a person commits a robbery “while armed with a pistol.” S.C.Code of Laws § 16–11–330 (1976); see State v. Lawrence, 266 S.C. 423, 223 S.E.2d 856 (1976). See State v. Heck, 304 S.C. 345, 404 S.E.2d 514 (Ct.App.1991) (a BB gun is capable of producing great bodily harm and therefore it is a jury question as to whether it qualifies the incident as armed robbery). In State v. Tasco, 292 S.C. 270, 272, 356 S.E.2d 117, 118 (1987), we held “[w]hen a person perpetrates a robbery by brandishing an instrument which appears to be a firearm ... in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represented it to be, a firearm....” (emphasis added). Strong arm robbery or common law robbery is defined as the “felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.” State v. Drayton, 293 S.C. 417, 361 S.E.2d 329, 335 (1987); State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996).

The Applicant’s assertion that the weapon the Applicant allegedly brandished was inoperable does not remove the legal possibility that the crime was armed robbery. As stated at trial the weapon used, under the Applicant’s theory was a .22 caliber pistol which he claims lacked a firing pin. However, it was not a toy but an actual weapon. As the victim testified, she

feared for her life. She turned around to see Applicant pointing a “small little gun, rusty looking” at her face. (R. 92, 95). Applicant warned Victim that “if I screamed he would pull the trigger” and she believed that. R.p. 104-105. She assumed the gun worked when he pointed it at her. R.p. 107, l. 2-4. Fearing for her life, the Victim complied with Applicant’s demand for money. (R. 93). She quickly emptied all the cash out of the drawer. (R. 93). Under these facts, like the trial court, this Court must conclude that there was factual basis to support the charge on armed robbery and to reject a charge on strong arm robbery.

At this hearing, counsel Yarborough credibly testified that all the plea offers made to Applicant were for armed robbery consistent with Solicitor Huey’s testimony. This Court must find that he attempted throughout his representation to get the State to reduce it to a common law robbery based upon the assertion that the weapon was inoperable. However, Solicitor Huey consistently rejected the request. However, this Court cannot find counsel was deficient in failing to succeed in those negotiations where a factual basis existed for the greater charge.

This Court finds **credible** the testimony of Counsel Yarborough and Solicitor Huey and finds **not credible** the testimony of Applicant and Applicant's father that there was a promise of success of a lesser plea offer. Counsel Yarborough advised him there was a *possibility* of obtaining a reduced charge for Applicant and Applicant did not testify counsel Yarborough promised him a reduced charge. Counsel Yarborough **credibly** testified Applicant did not wish to plead to armed robbery under the plea offer, and Solicitor Huey **credibly** testified Counsel Yarborough attempted to convince Applicant to plea and Applicant refused the plea offer to armed robbery. Counsel Yarborough and Solicitor Huey's testimony shows Applicant's decision not to plea was not prompted by any misadvice by counsel Yarborough. Applicant is unable to overcome the strong presumption that at all stages of Counsel Yarborough's representation, he

rendered adequate assistance and exercised professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). Therefore, Applicant's allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

**Allegation (b): Trial Counsel failed to object to trial court trying Applicant in *absentia*, and thereby failing to preserve the issue for appeal.**

Applicant alleged Counsel Yarborough was ineffective for failing to object to his trial proceeding in his absence. Specifically, Applicant alleged Counsel Yarborough failed to object on the basis that Applicant has not received notice of his trial date or that Applicant was unaware of the trial date. This Court must find that the Applicant has failed in his burden of proof. First, based upon counsel Yarborough credible testimony, this Court must find that the Applicant was aware of his trial date in December 2016 based upon his communications with counsel and he avoided coming to court with that knowledge. This Court must further find that the counsel was credible when he advised the trial court at sentencing that “he knew he was supposed to be here.” R.p. 228. This Court finds not credible the Applicant’s testimony that he was not aware of the trial based upon the communications with counsel and his failure to come to the scheduled meeting for trial preparation Sunday before the during trial week. This Court further notes persuasive that he was aware in the prior months while out on bond that he had to show up to court and did do so, yet from the time of actual trial date from December until August 2017 he did not return to South Carolina nor communicate with counsel, the court or presumably his bondsman who he had failed to indicate his location, until after his re-arrest.

The Applicant claims that had he been notified to appear in December 2016 for court, he would have appeared. This Court must find that testimony by Applicant is not credible. First, counsel Yarborough credibly testified that he had communicated with the Applicant by telephone

about the trial date and that he was supposed to meet before that date for trial preparation but refused to show up as well as his father. Applicant's self-serving assertion is also not credible because he never communicated with counsel his location in Texas before or after the trial when he was aware of his obligations to appear in court or be tried in his absence. This knowledge was based upon his bond form as well as the earlier notices that went to him as well as his lawyer and bondsman, who was also unable to locate him because he had not advised him of his location in December 2016. Although the bond postcard notices to Applicant's Anderson address from the Solicitor was returned to sender from the October 13, 2016 and December 5, 2016 appearance date, this Court finds that he was aware of those matters and had appeared at the October 2016 appearance.

Applicant's testimony is that he went to Texas right before Thanksgiving. The December 6, 2016 appearance postcards were mailed out November 21, 2016 and the public trial docket was published Friday November 18, 2016 showing the Walker trial set for December 6, 2016. (Exhibit 4). The appearance postcard went to counsel and the bondsman. The Applicant had indicated that he went to the rehabilitation facility in Texas to get himself together (off drugs, before he had to face the sentence. R. 228, 230 233.

Counsel Yarborough credibly testified that he had telephone communication with the Applicant concerning preparation for the December trial. This Court has found that to be credible. This Court finds credible counsel Yarborough's testimony about his communication with the Applicant prior to the trial. This Court finds as a fact that Counsel Yarborough spoke with Applicant regularly, including several times a week before trial. Additionally, this Court finds that Yarborough spoke with Applicant personally before his trial. (App. pp. 58-59); (App. pp. 123-124) (Counsel Yarborough renewing his motion for continuance, and informing the

court he notified Applicant of his trial date and spoke with him the week of his trial)). This Court further finds that Yarborough notified Applicant of his December trial date. Counsel Yarborough credibly testified Applicant made it seem like he would be at trial, but he never showed up for their meeting the Sunday before trial and did not answer when Counsel Yarborough attempted to contact him. It appears the reason he allegedly returned to South Carolina was he became aware that the existence of the South Carolina conviction became an issue in a job interview in Texas and he wanted to see his children.

Although the Sixth Amendment of the Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived. State v. Bell, 293 S.C. 391, 401, 360 S.E.2d 706, 711 (1987); Ellis v. State, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). Rule 16 of the South Carolina Rules of Criminal Procedure provides:

[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.

Rule 16, SCRCrimP. A waiver of this right is only permitted in limited circumstances. City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (2006). Therefore, before a defendant may be tried *in absentia*, the trial court must determine a defendant voluntarily waived his right to be present at trial, making findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned that the trial would proceed in his absence. 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.” Ellis v. State, 267 S.C. 257, 227 S.E.2d 304, 306

(S.C.1976). A bond form that provides notice that a defendant can be tried *in absentia* may serve as the requisite notice. Id.; see also State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (S.C.App. 2007).

The State satisfied the notice requirements as Walker, by signing the bond paperwork, was on notice that he had the right to be present at his trial and could be tried in his absence if he failed to appear. See State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010) State v. Fairey, 374 S.C. 92, 101, 646 S.E.2d 445, 449 (Ct. App. 2007) (“A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice.”). Also, Walker did not receive actual notice of his trial date because of his own actions as the State attempted to serve Walker via the mail and in person to no avail because Walker failed to notify the court of his current address, despite his acknowledgement of his obligation to do so. See id. at 100, 646 S.E.2d at 448 (“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.” (quoting City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006))); see also State v. Wrapp, 421 S.C. 531, 537, 808 S.E.2d 821, 824 (Ct. App. 2017) (“It 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.”); Fairey, 374 S.C. at 101, 646 S.E.2d at 449 (holding the defendant received adequate notice when the State mailed the notice to the last official, permanent address he provided to the court and the State, and he failed to keep the court or the State informed of his change in address); Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) (“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.”).<sup>11</sup>

In the direct appeal, the South Carolina Court of Appeals found:

Walker’s Rule 16, SCRCrimP objection is not preserved because he did not specifically object to a trial *in absentia* or argue to the trial court that he did not receive notice of the trial or was unaware the trial would proceed in his absence. A motion for a continuance is not in itself enough to preserve a Rule 16, SCRCrimP objection.

*State v. Walker*, Op. No. 2020-UP-290 (S.C. Ct. App. filed Oct. 14, 2020).

The Applicant before this Court essentially asserts that counsel was ineffective because 1) he did not raise an objection or argue that that the Applicant did not receive notice of the pending trial in December 2016 and 2) that Applicant was not aware or advised that if he did not appear the trial would proceed *in absentia*. This Court must find as a fact that counsel did advise the Applicant that the trial was proceeding on December 6, 2016. Contrary to the assertion in this proceeding, counsel could not assert the Applicant was not aware of the trial when counsel had direct communications with the Applicant about the trial date. This Court does find credible that trial counsel was not aware of the Applicant’s alleged location in Texas because the Applicant and his family had kept that location information from counsel as well as the court and his bondsman,<sup>12</sup> assuming that he was in fact in Texas at the time of the trial.<sup>13</sup> The

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<sup>11</sup> This Court further finds credible Senior Solicitor Huey’s testimony. She testified the bond form clearly notified Applicant he could be tried in his absence and it was Applicant’s duty to notify the court of an address change. Solicitor Huey testified Applicant’s bond card listed Anderson, South Carolina as his address and it was mailed to the address that Applicant had advised the Court. Solicitor Huey presented a screenshot of the publicly published trial docket with Applicant December trial date on it. (Exhibit 4). Solicitor Huey testified she was not aware Applicant lived at another address than the one listed on the bond card, and she informed Counsel Yarborough of the trial date well in advance.

<sup>12</sup> The Applicant testified that he had wired money to his bondsman from Texas as a condition of his obligations on his bond suggesting that his bondman could have known where he was located. It is unclear to this Court when and where or if those alleged wired payments from

Court finds the Applicant's protestations before this Court to the contrary without merit.

This Court further finds that while counsel Yarborough could not recall whether he specifically advised the Applicant that if he did not appear for trial that he would be tried in his absence, he was aware that Applicant was aware that he would be tried in his absence if he did not appear. Counsel was aware that Applicant had been put on notice of this when he signed the bond form, which justified counsel's statement to the trial court. On the August 8, 2016 bond form that authorized his release, he acknowledged: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." State v. Walker, Order Specifying Methods and Conditions of Release, filed August 16, 2016, p. 2. (Acknowledgement by Defendant). This Court also notes that the bond notices sent out by the Solicitor's office included the language about trial in absence. The Applicant acknowledged in his PCR testimony that when he did appear in court his father showed him the bond card that had been sent out for those matters. This Court notes that the postcard included the trial in absence information.

In State v. Wright, 304 S.C. 529, 531, 405 S.E.2d 825, 826 (1991), Wright was not present for his trial on a charge of distributing cocaine. At the outset of trial, Wright's defense counsel moved for a continuance, asserting he had recently been in contact with Wright and believed Wright could be located. Id. at 532, 405 S.E.2d at 827. The trial court denied the

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Texas were made before or after the December 2016 trial which occurred shortly after his alleged relocation to Texas. Nevertheless, Applicant testified that he never advised his bondsman of his exact location in Texas. Applicant's testimony appears to claim that since his bondsman was allegedly receiving wired money at some time from Applicant through a bank in Texas, he should have figured out his actual location. However, his counsel advised the trial court that his bondsman had not been able to locate the Applicant at the time of the trial. R.p. 56, 69-70.

<sup>13</sup> It is not without notice to this Court that the Applicant's extended trip to Texas from November 2016 to August 2017 occurred at the time that notice of the December 2016 trial was sent out before Thanksgiving.

continuance motion and proceeded with a trial *in absentia*. Id. Following his conviction, Wright appealed, arguing the trial court erred in denying the continuance motion. Id. The Supreme Court affirmed the trial court's ruling, finding the trial court did not abuse its discretion in denying Wright's continuance motion because the record reflected Wright was aware of the term of court in which he was set to be tried and knew he would be tried in his absence if he failed to appear. Id.

In the present case, based on counsel's representations and the notice the prosecution mailed to Walker, Walker was aware of the term of court he was to be tried, differentiating the case from State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017). In Wrapp, the defendant signed bond paperwork advising his court date was December 6, 2013. The case was scheduled for trial, but continued at defense counsel's request, on July 14, 2014. The prosecution told Wrapp the case would go to trial "the next time we could get to it." The case was called for trial again on September 29, 2014. Counsel moved for a continuance, unaware of why the defendant was not present. Id. at 533-34, 808 S.E.2d at 822. Following the trial court's denial of his motion for continuance, Wrapp's trial counsel explained, "For the record . . . I don't feel like Mr. Wrapp has been adequately noticed and we object to going to trial." Id. at 534-35, 808 S.E.2d at 822-23.

Unlike Wrapp's attorney, Walker's counsel could not object to notice because he had given the Applicant notice and conceded Walker knew he was supposed to be present. Further, unlike the facts explained in Wrapp, the record is clear Walker knew what term his case was going to be tried, which undoubtedly prompted his alleged flight to Texas. Wright, supra.

Counsel was not deficient in failing to assert that the notice that he would be tried *in absentia* when he had been duly advised of this risk in the paperwork he had received. Similarly,

counsel was not deficient in noting whether or not he had readvised Applicant that his case could proceed in his absence if he does not appear for trial. It is important to note that the Applicant did not testify that he was unaware that he could be tried in his absence if he did not appear. He assertion was only that he was not aware of the trial date, which this Court has expressly found that he was aware through trial counsel.

In summary, this Court finds a combination of the trial record, credible testimony of Counsel Yarborough and Solicitor Huey, and documentary evidence admitted show Counsel Yarborough notified Applicant of his trial date. First, this Court finds as facts that based upon Yarborough's credible testimony that Counsel Yarborough was in constant communication with Applicant, personally made him aware of his trial date, and Applicant never indicated to Counsel Yarborough he would not appear in court for his trial. Based on this, Counsel Yarborough had no basis to object or assert that Applicant had not received notice of his trial date. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective)); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel).

Second, Applicant was aware that if he failed to appear he would be tried in his absence. As the bond form exhibits show and as Solicitor Huey credibly testified, the bond form notified Applicant he could be tried in his absence if he failed to appear. Moreover, Solicitor Huey credibly testified she sent bond cards to the appropriate address listed on the form and the trial docket was available to the public.

Applicant's testimony at the evidentiary hearing only served to hurt him. Applicant

admitted he never informed his bondsman, court, or Counsel Yarborough he had moved to Dallas. Applicant's testimony indicated he relied on his father to notify him of his court dates and claimed that while he was in Dallas he was in constant communication with his father. However, Applicant's Father testified he had no way to contact Applicant while he was in Dallas, and thus was unable to notify him of his court date. Applicant's contention Counsel Yarborough was deficient for not objecting to his trial in absentia on an erroneous basis is untenable, especially where the record reflects Counsel Yarborough informed the court he spoke with Applicant the week of his trial, and Solicitor Huey notified the court she sent a bond card to Applicant notifying him of the date. Applicant's obvious neglect to inform the court and Counsel Yarborough of his location, and failure to appear in court on his trial date even though numerous avenues of notification cannot impute deficiency on part of Trial Counsel. Therefore, Applicant's allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

#### **SROKA / WHETSELL ALTERNATIVE FINDING**

As an alternate ground, this PCR action must be dismissed because of the Applicant's sworn testimony before this Court acknowledging his guilt of armed robbery and the use of a pistol. He testified before this Court that he did use a gun although he claimed it did not have a firing pin in the robbery and admitted that it was wrong. He also admitted that the robbery victim did not know that it was inoperable. State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) ("Any doubt about the correctness of [affirming the appellant's conviction] is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge that he had participated in the robbery . . . . Further review of the record, therefore, is rendered unnecessary."). In Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981), the Court found that because petitioner admitted his guilt, his PCR application should be denied.

In Whetsell, the petitioner pled guilty to the crimes. On PCR, he alleged ineffective assistance of counsel in failing to make a motion to suppress evidence. The Court found that the petitioner's admission of his guilt, as well as his testimony that he would plead guilty again if granted a new trial, rendered a review of trial error unnecessary. The rule set forth in Whetsell applies only where the applicant is not prejudiced by any allegations of the PCR application because of the admission of guilt. Here, the Applicant admitted that he used a .22 pistol in the robbery and that the victim did not know it was inoperable. This alternate ground should similarly deny relief.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED with PREJUDICE**.

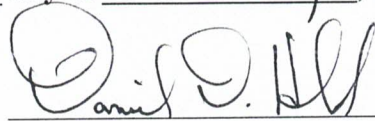
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### **IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 13<sup>th</sup> day of February, 2025



THE HONORABLE DANIEL DEWITT HALL  
Presiding Judge Daniel Dewitt Hall  
Tenth Judicial Circuit

York, South Carolina

