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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Kristi F. Curtis, Circuit Court Judge

SHELLY FAULLING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000344

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. Petitioner's statutory and constitutional right to be present were violated when he was tried in his absence while in custody without on-the-record warnings.

a. Only hearsay supports the PCR court's finding Petitioner refused transport because no one from the jail ever testified.

No witness with personal knowledge testified that Petitioner refused transport. As they testified, neither the solicitor nor trial counsel were at the jail when the alleged refusal occurred. App. 361:8-11, 370:2-4. For all the PCR court knew, the guards at the jail did not even speak with the right person. Perhaps *someone* refused transport to this trial—but it was not Petitioner, as he testified. App. 342:3-16. The only contrary evidence before the PCR court was hearsay from the solicitor and trial counsel, and trial counsel could not even recall from whom she heard that Petitioner allegedly refused transport. App. 361:12-16. As PCR counsel put it, "basically, the record is devoid of any real evidence of why Mr. Fauling was not at his trial that he got 30 years for." App. 334:9-11. Therefore, the PCR court's factual finding to the contrary is without evidentiary support in the record.

b. Trial courts should be required to provide on-the-record warnings with on-the-record waivers before trying an in-custody defendant in his absence.

While the state insists that Petitioner "refused" transport—a fact at least belayed by the record, even assuming there is some fraction of evidence to support the PCR court's finding—it does not matter "because his presence or absence is not within his own control." *Diaz v. United States*, 223 U.S. 442, 455 (1912). As PCR counsel argued,

> [I]t's our contention that whether he refused or not, that the proper way to move forward in a trial in someone's absence, when they are in custody, is to order that that person be brought before the trial judge and put on the record -- be advised of the dangers of not being there, be advised that he has a right to be there, and get a knowing and intelligent waiver on the record.

App. 333:10-18. The state complains that "PCR is an improper avenue for changing substantive criminal law," and therefore this Court should not accept Petitioner's argument that the trial court should have required Petitioner waive his right to be present on the record. Return to Pet. 7. For the particular issue presented, Petitioner disagrees.

There is no published South Carolina opinion considering an in-custody defendant tried in his absence. In all other cases, as noted in the initial petition, Cert. Pet. 7, the defendants were not in custody but rather out on bond. Thus, Petitioner does not truly seek to change the law but rather asks this Court to recognize that different circumstances justify different rules. Further, the fact that no opinion with similar facts can be found actually supports Petitioner. Apparently, every other court to deal with this situation has recognized that it would be best for all involved to take the simple step of warning the defendant on the record and having them waive their right on the record. That would not even be difficult to do with the technology available today, and in any event a defendant can be forcibly transported or a court reporter can be sent to the jail.

Moreover, even if the Court sees Petitioner's argument as a request to "create a new standard," Return to Pet. 11, it would still be proper. The state relies on *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019), where the Court stated: "a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances." 427 S.C. at 562, 832 S.E.2d at 600 (2019); Return to Pet. 11-12. This broadly stated rule is no hurdle to the relief Petitioner requests for three reasons.

First, requiring on-the-record warnings and waiver is not a "substantive" rule of law. In *Pantovich*, the Court considered whether a jury charge was proper and refused to invalidate it on collateral review. 427 S.C. at 562, 832 S.E.2d at 600. That case is an almost textbook example of

when the rule is appropriate—fact-specific substantive law, like jury charges, should not be singled out and reconsidered after direct review. The issue Petitioner presents is unlike that in *Pantovich* because he raises a concrete question of criminal procedural law untethered from any specifics in his case.

Second, as *Pantovich* continued, the rule is "especially true" when reviewing an ineffective assistance of counsel claim—as the Court considered there. 427 S.C. at 562, 832 S.E.2d at 600. That analysis "seeks to determine whether counsel was ineffective *at the time of the alleged error.* 427 S.C. at 562-63, 832 S.E.2d at 600 (emphasis original). Counsel is not required to be clairvoyant or to fight clear and binding authority. 427 S.C. at 563, 832 S.E.2d at 600. But where there is no binding authority on point—as here, addressing the novel situation of an in-custody defendant—the rationale holds less water. Because Petitioner does not allege trial counsel was ineffective in this regard but that his independent constitutional and statutory right to be present was violated, this principle is of little import.

Third, and finally, the issue raised here is appropriate for the exception noted in *Pantovich*—it is one of "the rarest of circumstances" that justify identifying a new rule. *Id.* In *Pantovich* the Court recognized the exception to the general rule as stated by the United States Supreme Court: "[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review . . . ." 427 S.C. at 562 n.2, 832 S.E.2d at 600 n.2 (quoting *Teague v. Lane*, 489 U.S. 288, 316, 109 S. Ct. 1060, 1078, 103 L. Ed. 2d 334 (1989) (alterations original)). One of the exceptions for retroactivity—and therefore proper for consideration on collateral review—"is when the rule 'requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.'"

Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007) (omission original) (quoting *Teague*, 489 U.S. at 311).

It is fundamentally unfair to hold a trial in a defendant's absence when that defendant is in custody without first ensuring on the record that the defendant truly and knowingly desires to forgo his right to be present.[1] *See United States v. Gordon*, 829 F.2d 119, 125 (D.C. Cir. 1987) ("Where the defendant is in custody, the serious and weighty responsibility of determining whether he wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make an intelligent and competent waiver." (internal quotation marks omitted) (quoting *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963))). A defendant's right to be present at trial is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912). It therefore requires clarity apparent in the record. *Lewis v. United States*, 146 U.S. 370, 374-75 (1892). A defendant's presence at trial can be essential to the effective use of peremptory strikes and cross-examination of fact witnesses, and his absence therefore risks undermining the truth-seeking function of trial. *Lewis*, 146 U.S. at 376. Because the asserted rule "undeniably implicates the fundamental fairness and accuracy of the proceeding," it is "'implicit in the concept of ordered liberty'" and should be applied to Petitioner. *Talley*, 371 S.C. at 544, 640 S.E.2d at 882 (quoting *Teague*, 489 U.S. at 290).

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[1] As a point of historical context, for over a century in this state—beginning in at least 1837—a defendant charged with a felony could *never* be tried in his absence. *State v. Rabens*, 79 S.C. 542, 60 S.E. 442, 445 (1908); *State v. Sessions*, 225 S.C. 177, 179, 81 S.E.2d 287, 288 (1954); *State v. Haines*, 36 S.C. 504, 15 S.E. 555, 557 (1892) ("Unquestionably it is the law that a prisoner on trial for crime, except misdemeanors, shall be present at his trial."); *see generally* 16 Corpus Juris, *Criminal Law* § 2066 (1918) ("[I]t is essential to a valid trial and conviction on a charge of felony that defendant shall be personally present not only when he is arraigned, but at every subsequent stage of the trial . . . .").

As a final point, while Petitioner urges that, if necessary, this rule would and should apply to all similarly situated defendants, it would be quite surprising if many defendants could claim application or violation of the rule suggested. Surely the state is not routinely trying in-custody defendants without bringing them to court and without any on-the-record waiver.

c. No evidence supported the trial court's finding because there was no testimony that Petitioner refused to appear, and the trial court failed to make express findings.

Even if Petitioner refused to appear, to the extent the trial court made any findings about his warnings, they were without evidentiary support. Thus, his conviction "was in violation of the . . . laws of this State" and should be set aside. S.C. Code Ann. § 17-27-20(A)(1) (2014).

No evidence supported the trial court finding petitioner refused to appear because no one with knowledge of his alleged refusal informed the court of it on the record. At the PCR hearing Petitioner questioned the solicitor as follows:

> Q: Would you agree that none of the jail people or anyone with personal knowledge of him refusing to come was on the -- was ever on the record at the trial saying that he refused to come?
>
> A: I don't know what we ever placed it on the record. I do know that there was a conference with Judge Dixon back in chambers where the judge did ask the transport person to tell him what was going on . . . .

App. 370:19-371:2. Thus, the solicitor admitted there was no evidence or testimony in the record to support the trial court's determination Petitioner refused to come to the courthouse. *Cf. State v. Benton*, 443 S.C. 1, 9, 901 S.E.2d 701, 705 (2024) ("[W]e stress the importance of placing on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers." (quoting *State v. Washington*, 431 S.C. 394, 405 n.4, 848 S.E.2d 779, 785 n.4 (2020)); *id.* ("We emphasize that on-the-record arguments and rulings enable judicial review and allow the parties and the public to better understand the rulings.").

Moreover, the trial court did not make any express findings that Petitioner had been adequately warned. That is error. Express findings are required, and whenever the trial court has not made express findings, our appellate courts have reversed. *Compare, e.g.*, *State v. Ritch*, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987) ("The trial judge failed to find that appellant had received notice . . . ."), *and State v. Fleming*, 287 S.C. 268, 269, 335 S.E.2d 814, 814 (Ct. App. 1985) ("It appears from the record that the trial judge did not make a finding of fact . . . ."), *with State v. Ravenell*, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010) ("The trial judge noted for the record that he specifically informed Ravenell that if he did not appear the next day, the trial would go forward without him."), *and State v. Castineira*, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000) ("The record establishes the trial judge made the requisite inquiries and findings . . . ."), *aff'd*, 351 S.C. 635, 572 S.E.2d 263 (2002).

d. Issue preservation

The state argues Petitioner failed to preserve his arguments that the trial court erred by not addressing his absence until after selecting a jury and that the trial court erred by proceeding to trial without expressly making the findings required by rule 16, SCRimP, on the record. It argues he "did not raise either of these arguments in his applications or amended application, at the hearing, or in his motion to reconsider." Return to Pet. 14. It is incorrect, and its attempt to require further specificity, which admittedly could have been possible, is just an attempt to play the "gotcha" game of technicalities.

As to the jury selection issue, in his motion to reconsider the order of dismissal, Petitioner wrote: "There is no mention in the trial transcript of Applicant not being in the courtroom until after the selection of the jury. This is quite significant because that means that there was no finding at all made on the record as to why he wasn't there until after this 'critical stage' of the trial." App.

407. Admittedly, this was written in his procedural history of the case, but that should have been sufficient to present and preserve the issue as a matter of dispute. Further, that explanation followed questioning of trial counsel, "And you told the Court at some point after jury selection that he refused to come?" App. 360:20-21.

As to the trial court's failure to making express findings of fact, PCR counsel argued below, "The standard has been set out that in order to try someone in their absence, *there needs to be a finding on the record* that notice was given, and that they were warned they could be tried in their absence if they didn't show up." App. 332:24-20. Further, in its order of dismissal the PCR court recited the rule: "[t]he judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend." App. 11-12. Perhaps the issue could have been more squarely presented, but it was sufficiently raised to recognize that, on PCR, an issue that goes to the fundamental fairness of the trial ought to be addressed. Further specificity was not necessary because the state conceded the issue was preserved for direct appeal. App. 387:14-16.

II. Petitioner's guilty pleas and *Faretta* waiver were involuntary and not knowingly made.

a. *The solicitor acted like Petitioner's attorney—that is a conflict, regardless of Petitioner's knowledge or understanding.*

Petitioner has never suggested that he was "confused" about his representation or the solicitor's role at the guilty plea. Return to Pet. 19. As recognized in the petition, he knew the solicitor did not actually represent him. Cert. Pet. 17. Nonetheless, the risk that the solicitor would intentionally or unintentionally undermine his rights was so great, his waiver of counsel and his pleas were not truly voluntary. Instead, as he testified at the PCR hearing—and which was not found incredible or otherwise contradicted by the PCR court—he waived his rights and pleaded guilty under threat that if he did not, he would be facing a life sentence under the three-strikes

statute. App. 346:20-347:13. He testified the solicitor "told me if I changed the sentence or said anything other than to go along with the plea, she would make sure that I got life and 180 years." App. 347:5-7. Petitioner testified she told him, "If you challenge me on these sentences . . . I will enhance them, and I'll get you life." App. 348:5-7. The solicitor also testified at the PCR hearing:

> Q: Okay. And that was after you had told him that if he didn't plea, that you would seek life without parole as having three strikes?
>
> A: I informed him that he would be eligible for life without parole, that he was already -- he had a strike on his record already. He was convicted of this. So I was giving him all of these sentencing ranges and stuff.
>
> I would disagree with his (inaudible) that I was threatening him multiple times. In fact, I made it very clear to him that he had every right to challenge these, but I felt that it was my duty to explain to him the potential sentence.
>
> Basically, I went through the whole plea colloquy with him. You know, you understand that you are potentially facing up to this if the judge were to run it -- the same thing Judge Dixon was going to tell him so that he was aware of everything that could happen and would happen. But I did not threaten him that if he didn't take this, he would get life plus 180 years.

App. 376:25-377:20. Regardless of the solicitor's intention, this Court can recognize how easy it would have been for Petitioner to *believe* he was being threatened, even assuming the solicitor was not trying to threaten him. And that is the problem. When the solicitor undertook to so thoroughly discuss the case with Petitioner, she leapt over the line of propriety and landed well inside conflict-of-interest territory. As Petitioner explained with reference to the ethics rules that prevent opposing counsel from extended discussions with unrepresented litigants, this risk is one of the many reasons for preventing such discussions. Cert. Pet. 17-18. That Petitioner knew she was not his attorney is of no moment, and therefore Petitioner's guilty pleas and waiver of counsel were not knowingly made, were tainted by the advice of an attorney with a clear conflict of interest, and were therefore not voluntary.

b. *Petitioner did not understand the nature of the plea and sentencing, and this issue was presented and preserved below.*

Petitioner pleaded guilty to a negotiated thirty-year sentence to run concurrently with the thirty-year sentence he received after his trial. He did so hoping he would be able to convince the trial court to reduce his trial sentence. However, because it was a negotiated plea, even if the trial court did agree to reduce the trial sentence—something it could not have done anyway[2]—it would have been powerless to reduce the plea sentence and vary the terms of the negotiation. No one who understood the real impact of the sentence would ever agree to that, demonstrating Petitioner did not have a sufficient understanding of the consequences of his plea. *See Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999) (explaining that for a guilty plea to be voluntary, "the record should indicate the defendant was fully aware of the consequences of his guilty plea" (citing *State v. Lambert*, 266 S.C. 574, 578, 225 S.E.2d 340, 341-42 (1976))).

The state asserts Petitioner has not preserved his argument that the "he did not understand that his plea sentence would run concurrent to his PWID methamphetamine sentence from trial" and did not allege this ground for relief at the PCR hearing. Resp. Br. 17. Although Appellant did not expressly claim the plea itself was involuntary as an individual ground for relief, despite the state's misunderstanding the issue was squarely presented below.

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[2] It is important that the trial court would not have had jurisdiction to reduce the sentence in any event: "[A] judge is without authority to alter, amend or modify a sentence imposed by him . . . after the expiration of the term of court at which the sentence was imposed . . . ." *State v. Smith*, 276 S.C. 494, 497, 280 S.E.2d 200, 201 (1981). Generally, each week of court is considered a separate term. *Id.* (citing *Ex parte Attardo*, 272 S.C. 1, 2, 249 S.E.2d 771, 772 (1978)). Here, Petitioner's trial-sentence was made final on December 14, 2017. App. 193:1-17, 204:1-8; *see Smith*, 276 S.C. at 497, 280 S.E.2d at 201 (citation omitted) ("A sealed sentence does not become the judgment of the court until it is opened and read to the defendant."). His plea was not until January 11, 2018. App. 208, 221:17-21. Therefore, the plea court was without authority or jurisdiction to alter the trial sentence. Thus, even the bargain Petitioner struck was illusory.

The issue is most clearly preserved because in the call of the case at the PCR hearing, the state—opposing counsel herself—described Petitioner's issue on this point as "basically . . . an involuntary guilty plea." App. 329:9-11. Petitioner then testified, in part, as follows:

> Q: What did you think was going to happen if he gave you ten years on the trial instead of the 30, because you had just pled to a negotiated 30 years on the other charges.
>
> A: I thought all of this was combined. That's what I understood that everything would be combined as one.
>
> Q: So did anyone explain to you that that's not the way it was?
>
> A: No, sir. . . .

App. 348:14-23. Petitioner then questioned the solicitor if his request to reconsider the sentence "seem[ed] like possibly a red flag that he didn't understand what was happening?" App. 382:1-7. In her final argument at the PCR hearing, the state—again, opposing counsel personally—argued expressly on this issue: "in terms of the plea itself, we would just submit that it was a knowing and voluntary plea, that the judge went though all of the constitutional rights, the sentences, the things he was giving up." App. 387:18-22. Thus, the parties understood Petitioner claimed that his plea was not knowingly and intelligently entered and therefore needed to be invalidated. Finally, in the motion to reconsider, Petitioner was again very clear:

> There is no clearer indication that Applicant did not fully understand what was happening than when he pled to a negotiated thirty-year sentence and then immediately moved for a reconsideration of the thirty year sentence he received from Judge Dickson after the trial in his absence. He asked Judge Dickson to reconsider and give him 10 years. Even if the Judge had obliged, Application had just pled to thirty years, so he would see no benefit.

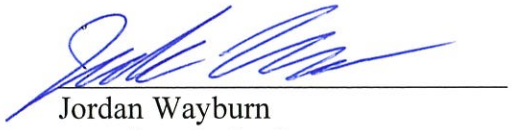
App. 410. This is the same argument he has advanced now, Cert. Pet. 13-14, and thus the issue and argument are preserved.

If this Court cannot find the order of dismissal sufficiently addressed this ground, then a remand for specific findings is proper pursuant to *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589-90 (2019).

CONCLUSION

For the reasons stated above and in the initial Petition, Petitioner respectfully requests this Court issue a writ of certiorari to review the PCR court's decision. This case raises novel questions appropriate for review by an appellate court, and certiorari is at least necessary to enable his belated appeal.

Petitioner also asks this Court to see justice done. He was tried in his absence without recorded warning or waiver despite being involuntarily housed just miles from the courthouse. His counsel then abandoned him, and he proceeded *pro se* with the advice of the solicitor to a guilty plea no one who fully understood it would have entered. For these reasons, the PCR Court erred and Petitioner requests this Court reverse that decision.



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This 3rd day of December, 2025.