

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Dec 23 2025

S.C. SUPREME COURT

—————
Certiorari to Laurens County

Honorable J. Derham Cole, Circuit Court Judge
—————

STEPHEN TRASE FINCHER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001249
—————

PETITION FOR WRIT OF CERTIORARI
—————

JORDAN WAYBURN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED.....1

STATEMENT.....2

STANDARD OF REVIEW.....4

ARGUMENT

 I. Trial counsel was ineffective because he did not object to the trial proceeding
 in absentia and Petitioner did not voluntarily waive his right to be present.5

 a. Trial counsel was deficient by failing to object to the trial proceeding in
 Petitioner's absence because the trial court made no factual findings.5

 b. The PCR court erred in finding Petitioner in fact knew when his trial
 would be and therefore voluntarily waived his right to be present.....7

CONCLUSION.....10

ISSUE PRESENTED

1. Did the PCR court err by holding trial counsel was not ineffective for failing to object to trial proceeding in Petitioner's absence because counsel did not know why Petitioner was absent and Petitioner did not actually know when his trial would be held since he thought it would be continued?

STATEMENT

Petitioner Stephen Fincher was indicted for two counts of first-degree burglary. App. 436. He proceeded to trial before Judge Benjamin Culbertson and a jury on March 27, 2017. App. 1. He was represented by Lawrence Crane. App. 1. Dale Scott and Lyon Bixler prosecuted the case. App. 1. Ultimately, the jury acquitted him of one burglary charge and found him guilty of the other. App. 327:9-18. Judge Culbertson issued a sealed, twenty-five-year sentence which was then issued by Judge Donald Hocker after Petitioner appeared for sentencing. App. 437.

Petitioner appealed, and the Court of Appeals affirmed in an unpublished decision finding the arguments raised had not been properly preserved at trial. *State v. Fincher*, Op. No. 2020-UP-141 (S.C. Ct. App. filed May 20, 2020).

On April 23, 2021, Petitioner filed through counsel an application for post-conviction relief. App. 349. He amended the application twice. App. 352, 355. Judge Derham Cole held an evidentiary hearing on August 20, 2024. App. 377. Petitioner was represented by Tommy Thomas, and Cruise Mitchell represented the state. App. 377. Petitioner alleged trial counsel was ineffective for several reasons, most importantly for failing to object to the trial proceeding in Petitioner's absence and without sufficient findings of fact on the record. App. 352, 439.

At the hearing, Petitioner testified he knew when his trial was scheduled but did not appear because he believed trial counsel was going to obtain a continuance, as counsel had a second trial scheduled for the same week. App. 389:2-18, 398:9-399:8, 406:1-6. He explained he was in Asheville for a job during his trial, trying to earn enough money to pay trial counsel. App. 398:9-399:8. Petitioner testified he sold his phone to try to afford his legal fees, which then made it difficult to contact him at the time of trial. App. 389:2-9, 398:10-20. Petitioner admitted

he signed a bond form which stated that if he did not attend trial he would be tried in his absence. Tr. 405:18-24.

Trial counsel testified Petitioner knew when his case was scheduled for trial and that counsel did not know why Petitioner did not appear. App. 410:4-13. Trial counsel admitted he did not object to the trial proceeding *in absentia*, which is demonstrated by the trial transcript and the Court of Appeals decision finding the issue unpreserved on direct review. App. 415:20-416:22, 39:9-14; *Fincher*, Op. No. 2020-UP-141. The PCR court apparently accepted all of Petitioner's testimony on this point. App. 442. However, it ruled Petitioner was not prejudiced by trial counsel's failure to object to the trial *in absentia* or request a continuance because "Applicant has failed to show he did not voluntarily waive his right to be present at trial." App. 443.

STANDARD OF REVIEW

Whether trial counsel was so ineffective as to deprive petitioner of his Sixth Amendment right to counsel is a question of law that this Court reviews de novo. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); *cf. State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (stating appellate courts review with deference findings of fact but de novo whether those facts legally constitute waiver of right to counsel); *State v. Frasier*, 437 S.C. 625, 632-34, 879 S.E.2d 762, 765-66 (2022) (holding whether given facts constitute a violation of the Fourth Amendment is a question of law); *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (holding whether a statement was voluntarily made to police is a question of law).

ARGUMENT

"The Sixth Amendment guarantees every criminal defendant the reasonably effective assistance of counsel." *Stone v. State*, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017) (citations omitted). A PCR applicant proves ineffectiveness in two prongs: "(1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (first citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); then citing *Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005)).

I. Trial counsel was ineffective because he did not object to the trial proceeding *in absentia* and Petitioner did not voluntarily waive his right to be present.

a. Trial counsel was deficient by failing to object to the trial proceeding in Petitioner's absence because the trial court made no factual findings.

The defendant's presence at trial is of such clear importance that trial counsel is almost always be obligated to object to trial proceeding in the defendant's absence. 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); *see also Lewis v. United States*, 146 U.S. 370, 374-75 (1892) (describing "the peculiar sacredness of this high constitutional right" to be present at trial). There is almost no legitimate strategic reason for not objecting to a trial *in absentia*. *See Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis original) (first citing *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); then citing *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992))). Even if for no other reason, reasonable counsel should always, as this case makes clear, preserve the issue for appeal.

Here, trial counsel did not know why Petitioner was not at trial, even if he knew Petitioner knew trial was scheduled. Trial counsel testified at the PCR hearing:

Q: And coming up to trial -- so he was on the trial docket and then did you contact Mr. Fincher to let him know?

A: He knew about it. I don't know if I contacted him or not, but he knew about it. . . .

Q: And do you know why he didn't show up?

A: I do not.

App. 410:4-13. Petitioner testified he did not appear for trial because he believed trial counsel would obtain a continuance: "I was trusting the fact that he was a hired attorney and he was a good attorney, from what I know, and I figured that he would get it put off." App. 408:2-4. Trial counsel was also practically unable to contact Petitioner at the time of trial since Petitioner did not own a phone. App. 389:2-12, 442.

Given that context, trial counsel was obligated to object to the trial proceeding in Petitioner's absence because he did not know why Petitioner was not present and had led Petitioner to believe trial would be postponed. Rule 16, SCRCrimP, 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.

Before proceeding with a trial *in absentia* the trial court is obligated to "mak[e] specific findings that [the defendant] (1) received notice of his right to present, and *necessarily*, of the term of court for which he needed to be present, and (2) was warned he would be tried *in absentia* if he failed to attend. *State v. Wrapp*, 421 S.C. 531, 536, 808 S.E.2d 821, 823 (Ct. App. 2017) (emphasis added). Even if a defendant had signed paperwork informing him trial would proceed

in his absence, that alone does not satisfy the Rule unless the trial court expressly relied on that warning in reaching its decision to proceed. *Wrapp*, 421 S.C. at 536 & n.1, 808 S.E.2d at 823 & n.1.

Trial counsel was deficient because reasonable trial counsel will always attempt to avoid a trial *in absentia* and will require the trial court to make satisfactory factual findings on the record before proceeding, as the Rule requires. Counsel failed to do so. Considering the critical importance of a defendant's right to be present at trial, reasonable counsel should always object unless he knows for certain a defendant simply does not want to attend, something which trial counsel never indicated was the case.

Further, Rule 16 by its express terms permits only a *voluntary* waiver of his right to be present, which necessarily requires actual knowledge of when trial will be held. *See Wrapp*, 421 S.C. at 536, 808 S.E.2d at 823. Petitioner did not attend trial because he believed it would be continued. Although the PCR court found "Applicant's own testimony demonstrates he was voluntarily out of the state at the time of trial despite receiving adequate notice of the trial date," App. 443, that does not alone render his absence from trial voluntary. While he knew when trial was *scheduled*, he did not believe it would actually *occur* at that time, and therefore his absence was not truly voluntary. Because trial counsel did not know Petitioner deliberately did not appear, he should have objected and required the factual findings necessary under Rule 16.

b. The PCR court erred in finding Petitioner in fact knew when his trial would be and therefore voluntarily waived his right to be present.

The PCR court held Petitioner did not demonstrate prejudice because it concluded Petitioner voluntarily waived his right to be present:

Applicant has failed to show he did not voluntarily waive his right to be present at trial. Applicant admitted that he was aware of his trial date and he signed a bond form stating he would be tried in his absence if he failed to appear. Applicant's own testimony

demonstrates he was voluntarily out of the state at the time of trial despite receiving adequate notice of the trial date. Furthermore, Applicant was warned on his bond sheets that he would be tried in his absence if he failed to appear. Counsel credibly testified Applicant had notice of his trial date.

App. 443. The PCR court erred because it conducted the wrong analysis. The court incorrectly believed mere *notice* was key rather than Petitioner's actual knowledge of when the trial would occur. It then ignored the fact Petitioner believed the trial would be continued.

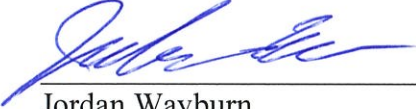
Petitioner was absent because of a mistaken belief trial counsel would have the case continued since counsel had another trial that same week. Although he knew trial was *scheduled* for that term of court, he did not believe it would actually be held at that time. Rather, he believed it would occur later. In that way, he did not know his trial date—he believed it to be some point in the future. Therefore, the PCR court erred in finding Petitioner knew when his trial would be held.

Further, an absence based on such a mistake of fact is not truly voluntary because it was not an intelligently made decision, particularly when the mistake was the result of trial counsel himself. *See City of Aiken v. David Michael Koontz*, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) ("While Rule 16 permits a knowing *and intelligent* waiver of the right to be present, such a waiver is permitted only in limited circumstances." (emphasis added) (quoting *State v. Patterson*, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006))). Petitioner did not *actually* know when his trial was to be held and did not voluntarily waive his right to be present. *See 67 Corpus Juris, Waiver* § 2, at 300-01 (1934) ("[K]nowledge of his right and of facts which would have enable him to take effectual action for its enforcement, on the part of the party claimed to have made the waiver is an essential prerequisite to the relinquishment of his right, benefit, or advantage.").

At trial, the burden would have been on the state to demonstrate Petitioner voluntarily waived his right to be present. *See Wrapp*, 421 S.C. at 536 & n.1, 808 S.E.2d at 823 & n.1; *cf. State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) ("If a defendant was advised of his *Miranda* rights, but nevertheless chose to make a statement, the 'burden is on the State to prove . . . that his rights were voluntarily waived.'" (quoting *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988))). Had trial counsel objected as he should have, the state would have been required to satisfactorily demonstrate Petitioner in fact voluntarily waived his right. There is a reasonable probability the state would have been unable to do so, particularly had trial counsel—as he should have—informed the court of the clear reason for Petitioner's absence: he believed the case would be continued.

CONCLUSION

Petitioner respectfully requests this Court grant his petition for a writ of certiorari to review the PCR court's ruling. Review is proper to ensure defendants' right to be present is waived only by a voluntary, knowing, and intelligent decision.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of December, 2025.

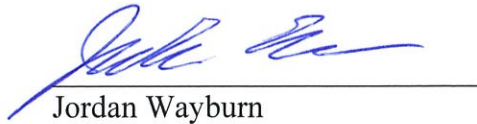
RECEIVED

Dec 23 2025

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Jordan Wayburn
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 23rd day of December, 2025.