THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Thomas A. Russo, Circuit Court Judge

Opinion No. 5510 (S.C. Ct. App. filed August 16, 2017)
Appellate Case No. 2015-000909

State of South Carolina, ... Petitioner,

v.

Stanley Lamar Wrapp, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

ATTORNEYS FOR PETITIONER

Other Counsel of Record:

Taylor D. Gilliam, Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343
Attorney for Respondent

INDEX

Page

QUESTIONS PRESENTED

Did the Court of Appeals err in ignoring precedent and reversing Respondent's conviction on grounds that: "the circuit court erred in trying Wrapp *in absentia* without making specific findings that Wrapp: (1) received notice of his right to [be] present, and (2) was warned he would be tried *in absentia* if he failed to attend" where: (A) this issue was not preserved for appellate review because Respondent raised no objection to the trial court failing to make findings on the record before proceeding in his absence, and (B) Respondent was in fact given notice of his right to be present for trial and that the trial would proceed without him if he failed to attend? Did the Court of Appeals further err in concluding "we need not undertake a harmless error analysis" where such an analysis was required and where there was overwhelming evidence of Respondent's guilt and a resulting lack of prejudice?

STATEMENT OF THE CASE

Respondent Stanley Lamar Wrapp (Wrapp) was indicted at the February 2014 term of the grand jury for Greenwood County for driving under suspension (2014-GS-24-0368) and trafficking in cocaine base (crack) (2014-GS-24-0369). He was represented by Assistant Public Defender Shane Goranson, of the Eighth Circuit Public Defender's Office. Petitioner (the State) was represented by Assistant Solicitors Elizabeth White and Micah Black, of the Eighth Circuit Solicitor's Office. On September 29-30, 2014, the case proceeded to a jury trial *in absentia* before the Honorable Thomas A. Russo, pursuant to which Respondent was found guilty of driving under suspension and possession with intent to distribute crack as a lesser included offense of trafficking. (App.p.14; p.163-p.164).

On March 30, 2015, Respondent and Assistant Public Defender Patricia Bolen appeared before the Honorable Eugene C. Griffith, Jr., where the previously sealed sentence was unsealed and imposed. Respondent was sentenced to twenty (20) years' imprisonment for possession with intent to distribute cocaine base – second offense, and sixty (60) days' concurrent imprisonment for driving under suspension – second offense. (App.p.170-p.172). Respondent timely filed a notice of intent to appeal his convictions and sentence and the parties submitted briefs addressing the issue raised by Respondent on appeal. (App.p.182-p.217). On August 16, 2017, the Court of Appeals issued a published opinion that reversed Wrapp's convictions for possession with intent to distribute (PWID) cocaine base and driving under suspension, and remanded for a new trial. *State v. Wrapp*, Op. No. 5510 (S.C. Ct. App. filed August 16, 2017). (App.p.218-p.222). The State submitted a petition for rehearing and suggestion for rehearing *en banc* on August 31, 2017, and by order filed January 18, 2018, the petition was denied. (App.p.223-p.245). This

Petition for a Writ of Certiorari to the Court of Appeals, submitted on behalf of the State, now follows.

STATEMENT OF PROCEDURAL FACTS

Wrapp was arrested for trafficking in crack cocaine—10 grams or more but less than 28 grams—second offense, and driving under suspension - third offense. On October 18, 2013, he appeared at a bail proceeding before a Greenwood County magistrate judge who set an appearance recognizance bond with surety in the amount of $25,000, ordered that Wrapp appear in the Greenwood County Court of General Sessions beginning on December 6, 2013, and ordered that, "**If no disposition is made during that term, [Wrapp] shall appear and remain throughout each succeeding term of court until final disposition is made of his case**, unless otherwise ordered by the court." Wrapp signed an acknowledgement stating in part: "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**." On the day of the bail proceeding, Wrapp was released from custody when A1 Bonding Company posted a surety bond on his behalf. (App.p.173-p.174) (emphasis added).

On July 14, 2014, Wrapp's case was called for trial before the Honorable William P. Keesley. Wrapp was present and was represented by Assistant Public Defender Shane Goranson. The State was represented by Assistant Solicitor Elizabeth P. White. At the call of the case Wrapp moved for a continuance, arguing he needed more time to track down a potential witness named Eric Ross who may have information on the possible defense of entrapment or sentencing manipulation. The State responded that Ross was not a newly discovered witness and that Wrapp had been on notice of the possible issues regarding Ross since he had first been noticed for trial. The solicitor then described the difficulties her office had in going back and

forth with Wrapp about whether he was going to hire an attorney or apply for a public defender. She noted this had resulted in a three-month delay that was caused by Wrapp himself. Ultimately, Judge Keesley granted Wrapp's motion and continued the trial. (App.p.4-p.13).

On September 29, 2014, Wrapp's case was re-called for trial, this time before the Honorable Thomas A. Russo. (App.p.14-p.17). After the trial court qualified the jury pool and the parties selected a jury, Counsel for Wrapp moved for another continuance. He explained his client was not present for trial and said he had no personal knowledge as to why. Counsel said he did not know whether Wrapp's absence was voluntary or involuntary and requested a continuance so he could try to locate Wrapp. (App.p.36, lines 22-25; p.39, line 14-p.40, line 14). The solicitor responded that she had first noticed Counsel for trial on June 4, 2014, and was going to try the case the week of July 14th; however, Judge Keesley granted a continuance. The solicitor noted Wrapp was present and that she personally had a conversation with him in the courtroom after the continuance was granted. During that conversation she told Wrapp his case would be called for trial the next time they could get to it. The solicitor further noted she had received a telephone call from a private attorney, Andrew Hodges, Esquire, three weeks before the current trial date and she told him the case was on the trial docket. She explained Wrapp had contacted Hodges about possible representation but Hodges ultimately declined to get involved. The solicitor argued there had been adequate notice to Wrapp that his case was coming up for trial and said the State was ready to proceed. (App.p.40, line 16-p.41, line 17).

Counsel responded that he did not know whether Hodges had actually informed Wrapp of a trial date or not and said Counsel's investigator was out looking for Wrapp as they spoke. (R.p.39, lines 5-16). The trial judge acknowledged he did not know whether Wrapp's absence was voluntary or not, but found "he was noticed to be here." The judge said he did not see any

purpose to be served in continuing the case, denied the motion for a continuance, and ruled the trial would proceed whether Wrapp was present or not. (App.p.42, line 17-p.43, line 12). Counsel argued he did not feel that Wrapp had been adequately noticed and objected to proceeding with the trial. He did not object to the trial court's failure to make specific findings of fact about the adequacy of the notice. The trial judge announced the trial would resume at 9:30 **the following morning** and the jury was released for the day. (App.p.45, lines 6-13). The next day the jury was sworn and the case proceeded as a trial *in absentia.*

STATEMENT OF EVIDENTIARY FACTS

The trial judge gave brief preliminary instructions and the parties made opening statements. The solicitor said the jury would hear testimony from several witnesses who would explain why Wrapp was charged with driving under suspension and trafficking crack. He said that on October 17, 2013, several officers were patrolling Main Street when they saw an individual they knew had a suspended license driving a vehicle. Based on this knowledge, the officers followed the vehicle into a parking lot, activated their blue lights, and placed the driver under arrest for driving under suspension. During a search of his person incident to arrest, the officers discovered ten to twelve grams of crack in the individual's pocket. During a subsequent search of the vehicle, the officers found more crack, a set of digital scales, and a knife. Counsel responded that Wrapp was not guilty of trafficking crack because at the end of the case the jury would have many reasons to doubt the evidence presented by the State. (App.p.45-p.57).

The State proceeded to elicit testimony from Lieutenant Jamie Lovett and Agent Ray Pope of the Greenwood Drug Enforcement Unit, the two officers who arrested Wrapp for driving under suspension and then discovered crack during the ensuing search. In the search incident to arrest, Lovett discovered a small clear plastic bag containing an off-white rock-like substance in

Wrapp's front pocket. In the search of the vehicle, Pope discovered a purple Crown Royal bag containing a set of digital scales, some white powdery residue, a knife, and a smaller quantity of an off-white rock-like substance. The rock-like substances were field tested as positive for cocaine. Lovett bagged the evidence collected at the scene and placed it in the evidence locker. (App.p.57-p.73; p.78-p.86; p.90).

Next, the State presented testimony from the individuals responsible for securing and testing the suspected drugs from the scene to confirm they were crack. Sergeant Kenya Griffin, the crime scene and evidence technician for the Greenwood City Police Department, retrieved the evidence Lovett placed in the evidence locker on the date of the incident and moved it to a safe in the evidence room. Griffin later transported that evidence to the South Carolina Law Enforcement Division (SLED) for testing. (App.p.92-p.96). Amy Stephens, a forensic technician for SLED, logged the evidence submitted by Griffin and transferred it for forensic analysis. (App.p.103-p.108). Willie Smith, a chemical analyst for SLED, was admitted as an expert in drug analysis. He tested the rock-like substances and determined they were both crack. (App.p.108-p.118). The State also called Marie Wearing, a Department of Motor Vehicles employee, to the stand. She testified Wrapp's driving privileges were suspended at the time of the incident and he had been given written notice of the suspension. (App.p.96-p.99).

After the State rested and the trial judge denied Wrapp's motion for a directed verdict, Counsel renewed all objections that had been made throughout the trial and those objections were also denied. During a brief charge conference, the trial judge advised he would charge the jury on Wrapp's failure to appear or testify and that this was not a factor the jury could consider in determining guilt or innocence. (App.p.123-p.126).

During closing arguments, the solicitor went through the evidence that had been presented and the elements of the charged offenses. (App.p.130-p.136). Wrapp's closing argument focused on reasonable doubt and the things counsel argued the police failed to do during their investigation. (App.p.136-p.143). The trial judge then charged the jury on the respective roles of the judge and jury, the State's burden of proof, the presumption of innocence, reasonable doubt, credibility of witnesses, the defendant's right not to appear and testify, direct evidence and circumstantial evidence, and the elements of the crimes. (App.p.143-p.156). Specifically in regard to Wrapp's absence, the trial judge charged:

> Now, I instruct you and I emphasize that the fat [sic] that the Defendant, Stanley Lamar Wrapp, did not appear or testify in this case is not a factor to be considered by you in any way in your deliberations and in your consideration of the question of the guilt or innocence of Mr. Wrapp. It must not be considered by you in any manner whatsoever. It is well established in our law that a Defendant not appearing at his or her trial must not be construed – that this must not be construed as an admission of guilt. A Defendant has the Constitutional right to remain silent. And the assertion of that right must not be considered by you in your deliberations. I repeat, under your oath you are to draw no conclusion whatsoever from the fact that Mr. Wrapp did not appear or testify in this case. The fact that Mr. Wrapp did not testify should not even be discussed in the jury room.

(App.p.148, line 25-p.146, line 15).

The jury found Wrapp guilty of driving under suspension and possession with intent to distribute crack. Following the verdict, the solicitor described Wrapp's criminal history, which included prior charges and convictions in 2003, 2006, 2011, and 2012. Counsel then presented facts in mitigation, and **the trial judge reviewed Wrapp's bond paperwork** before issuing a sentence under seal. (App.p.163-p.168).

On March 30, 2015, Wrapp and Assistant Public Defender Patricia Bolen appeared before the Honorable Eugene C. Griffith, Jr., to have the sealed sentence unsealed and read. Wrapp was sentenced to twenty (20) years' imprisonment for possession with intent to distribute

crack cocaine – second offense, and sixty (60) days' concurrent imprisonment for driving under suspension – second offense. (App.p.170-p.172).

CERTIORARI

The State submits there are special and important reasons for this Court to exercise its discretion to grant certiorari and to review the decision of the Court of Appeals in this matter pursuant to Rule 242(b), SCACR. The Court of Appeals appears to have misapprehended, overlooked, or failed to address several crucial points raised by the parties which bear directly upon its ultimate conclusions that: (A) "the circuit court erred in trying Wrapp *in absentia* without making specific findings that Wrapp (1) received notice of his right to [be] present and (2) was warned he would be tried *in absentia* if he failed to attend"; and (B) "we need not undertake a harmless error analysis when, as here, the trial court erred in failing to make the requisite findings and the record is devoid of facts allowing us to discern whether Wrapp had notice of the term of court." Specifically, the State submits the decision of the Court of Appeals is in conflict with well-established precedent in three specific respects. First, the Court of Appeals appears to have misapprehended existing precedent on error preservation in finding: "We are not persuaded by the State's argument that his issue is unpreserved," where Wrapp made no objection to the alleged error during trial and then raised it for the first time on appeal. Second, the Court of Appeals appears to have misapprehended or overlooked existing precedent on trials *in absentia* and the purpose and function of this State's bond forms in providing the requisite notice when it concluded: "[T]he record is devoid of any fact indicating Wrapp had actual notice of the term of court in which his trial would occur." The bond forms gave the requisite notice. Finally, the Court of Appeals appears to have compounded these two mistakes

and overlooked existing precedent on harmless error when it declined to engage in a harmless error analysis to determine if Wrapp suffered prejudice due to his absence from trial.

The State additionally submits this Court should grant certiorari because: (1) consideration by this Court is necessary to secure and maintain uniformity of the decisions or our appellate courts as a whole, and (2) the proceeding involves a question of exceptional importance. First, the State submits our appellate courts have a long and consistent history of affirming convictions where the trial courts of South Carolina proceeded with trials *in absentia* based on the "actual notice" given in bond forms which are effectively identical to the ones that were before the trial court in Wrapp's case. In addition to the published opinions referenced in the Final Brief of Respondent, this history is also reflected in a number of unpublished opinions issued by various panels of the Court of Appeals. *See, e.g., State v. Barnette*, Op. No. 2014-UP-146 (S.C. Ct. App. filed Apr. 2, 2014) (citing *State v. Ravenell*, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010) (finding that a bond form that informed the defendant of his obligation to appear "at such other times and places ordered by the court" and which provided notice that a defendant can be tried *in absentia* may serve as the requisite warning that he may be tried in his absence should he fail to appear)); *State v. Myers*, Op. No. 2016-UP-123 (S.C. Ct. App. filed Mar. 2, 2016) (citing *State v. Ravenell*, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010) (finding that notice of the term of court in which a defendant will be tried is sufficient notice and a bond form that provides notice that a defendant can be tried *in absentia* may serve as the requisite warning that he may be tried in his absence should he fail to appear)); *State v. Kimble*, Op. No. 2016-MO-011 (S.C. Sup. Ct. filed Apr. 13, 2016) (citing *State v. Fairey*, 374 S.C. 92, 646 S.E.2d 445, 449-50 (Ct. App. 2007) (finding that a bond form providing notice that the defendant can be tried *in absentia* may serve as the requisite notice)); *State v. Bell*, Op. No.

2008-UP-249 (S.C. Ct. App. filed May 7, 2008) (finding it is well-settled a bond form that provides notice that a defendant can be tried *in absentia* may serve as the requisite notice and citing *State v. Goode*, 299 S.C. 479, 385 S.E.2d 844, 846 (1989); *State v. Fairey*, 374 S.C. 92, 646 S.E.2d 445, 449-50 (Ct. App. 2007); and *City of Aiken v. Koontz*, 368 S.C. 542, 547-49, 629 S.E.2d 686, 689-90 (Ct. App. 2006)); *State v. O'Donald*, Op. No. 2008-UP-007 (S.C. Ct. App. filed Jan. 2, 2008) (finding that in addition to appearing in court and telling the judge he did not wish to be present, the bond order Respondent signed acknowledged he had been informed he had a right and obligation to be present at trial and if he failed to attend, the trial would proceed in his absence, and quoting *Fairey*, 374 S.C. at 101, 646 S.E.2d at 449 ("A bond form that provides notice that a defendant can be tried *in absentia* may serve as the requisite notice.")); *State v. Johnson*, Op. No. 10210-UP-373 (S.C. Ct. App. filed July 21, 2010) (citing *State v. Ravenell*, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010) (finding defendant waived his constitutional right to be present at trial after he was notified of his right to attend and instructed his failure to appear would result in being tried in his absence, as well as noting defendant's bond form sufficiently warned him of being tried in his absence for failing to appear)). Because the published opinion from the Court of Appeals appears to be a departure from the historically consistent application of *Ravenell* and other trial *in absentia* cases, consideration by this Court is needed in an effort to maintain uniformity.

Second, the State submits the published Court of Appeals' opinion involves a question of exceptional importance because magistrates, judges in the courts of general sessions, solicitors, and other participants in the criminal justice system in South Carolina routinely use and rely on the standard bond forms for the specific purpose for which the Court of Appeals, in what is

essentially the announcement of a new rule,[1] discounted out-of-hand. Based primarily on the historically consistent case law described above, all parties in the criminal justice process, including the defendant, have come to understand and rely on the knowledge that the actual written notice given to a defendant in the standard bond forms is sufficient to notify a defendant: that when he is released on bond he has a right and obligation to be present at trial; of the term or terms of court for which he needs to be present; and that if he fails to attend, the trial might proceed in his absence. If, as the Court of Appeals has now decided, the bond form is insufficient to provide the requisite notice, then the advisement about the term of court only serves a purpose if the defendant's trial actually goes forward on the particular term of court identified. The Court of Appeals has effectively declared the additional language on the form that: "If no disposition is made during that term, the defendant shall appear and remain throughout each succeeding term of court until final disposition is made of his case," to be pointless. Indeed, it appears the Court of Appeals concluded a defendant must be given specific notice of the particular date of the term of court in which the trial will actually proceed or his waiver of the right to be present is invalid, and a trial *in absentia* always constitutes reversible error. *But see State v. Jackson*, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986) ("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."); *Ellis v. State*, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) ("In our courts of general sessions, defendants are generally only given

[1] The Court of Appeals states: "It seems logical that for one to voluntarily fail to attend trial or otherwise waive his trial appearance, one must actually know when trial is to occur." Standing alone, the State takes no issue with this statement. However, to the extent it means this Court has concluded Wrapp did not "actually know" when his trial was to occur despite his signing and acknowledging a bond order which directed him to appear in the Greenwood County Court of General Sessions beginning on December 6, 2013, and that, "If no disposition is made during that term, [Wrapp] shall appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court," this statement and the conclusion for which it stands announces a new rule which heretofore did not exist in South Carolina. Announcing a new rule with far-reaching implications raises an issue of exceptional importance.

notice of the term of court in which they will be tried and do not know the exact date and time of their trial until shortly before the trial begins. We think such notice is sufficient to enable a defendant to make an effective waiver of his right to be present at his trial."). Not only is this conclusion not supported by existing precedent, it also would create a system that encourages defendants who are released on bond to abscond in order to avoid trial and avoid receiving notice of subsequent terms of court. A defendant who could not be located after release on bond would never face the prospect of a trial unless his case was called for trial at the first term of court. This result would be absurd and would lead to intentional obstruction of the orderly process of justice. The effects of such a ruling would be profound and would require criminal courts in South Carolina to alter the way they do business, not only in regard to trying to give notice to every defendant of each and every term of court, but also in regard to whether the State would seek higher bond amounts in an attempt to curb the number of defendants released on bond in the first place. The State respectfully submits these potential consequences render this proceeding exceptionally important and particularly compelling for a grant of certiorari and review by this Court.

For these reasons, and the reasons argued below, the State respectfully asks this Court to grant this petition for a writ of certiorari, reverse the Court of Appeals, and issue an opinion affirming Respondent's convictions and sentence.

ARGUMENT

The Court of Appeals erred in ignoring precedent and reversing Respondent's conviction on grounds that: "the circuit court erred in trying Wrapp *in absentia* without making specific findings that Wrapp: (1) received notice of his right to [be] present, and (2) was warned he would be tried *in absentia* if he failed to attend" because: (A) this issue was not preserved for appellate review where Respondent raised no objection to the trial court failing to make findings on the record before proceeding in his absence, and (B) Respondent was in fact given notice of his right to be present for trial and that the trial would proceed without him if he failed to attend. The Court of Appeals further erred in concluding "we need not undertake a harmless error analysis" where such an analysis was required and where there was overwhelming evidence of Respondent's guilt and a lack of prejudice.

In his appeal to the Court of Appeals, Wrapp argued the trial judge erred in denying his motion for a continuance and holding his trial in his absence because the record does not support the required findings of fact that he knowingly and voluntarily waived his right to be present. He contended his right to be present at all critical stages of the proceedings against him, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated when the trial court, over Counsel's objection, proceeded with the trial *in absentia*. Specifically, Wrapp argued the trial judge "never made the required findings of fact" that Wrapp (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. He further claimed, "nor could the record have supported such findings."

The State argued Wrapp's challenge to the trial court's failure to make specific factual findings regarding whether Wrapp knowingly waived his right to be present was not preserved for appellate review because it was never raised to the trial court. The State further argued that even if preserved the trial court did not err in denying Wrapp's continuance motion and proceeding with the trial *in absentia* because the judge did make a factual finding that Wrapp had

received adequate notice. The State also argued Wrapp's acknowledgement and signature on the bond court's "Order Specifying Methods and Conditions of Release" showed he had notice of when his trial would begin and was warned of the consequences of his failure to appear. Finally, the State argued that even if the trial court somehow erred in proceeding with the trial, any error was harmless in light of the overwhelming evidence of Wrapp's guilt and a lack of prejudice from the trial proceeding in his absence. The State continues to stand by these arguments and submits that for all of these reasons, Wrapp's convictions should have been affirmed by the Court of Appeals.

Issue Preservation

Initially, the State submitted Wrapp's arguments were not preserved for appellate review because they were not specifically raised to and ruled upon by the trial court. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). If an error is not presented to and ruled upon by the trial court, it cannot be raised for the first time to the appellate court. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Indeed, the appellate court will not consider any issues that were not presented to or passed upon by the trial court. *State v. Fleming*, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). In regard to trials *in absentia*, this Court has instructed:

> In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal.

State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (emphasis added).

Here, Wrapp's primary claim was that the trial court erred in denying his continuance motion and proceeding with a trial *in absentia* because it did not make specific factual findings regarding his waiver of his right to be present for trial. However, because Wrapp raised no

objection to the trial court's failure to make specific factual findings, Wrapp was precluded from raising such an objection for the first time on appeal. *See State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); *State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."). As this Court instructed in *Ravenell*, Wrapp was required to object at his first opportunity to do so in order to preserve any challenge to his trial *in absentia* based on the trial court's failure to make factual findings. Where, as here, Wrapp failed to do so, the issue should not have been considered by the Court of Appeals for the first time on appeal. The trial court was not given the opportunity to address the alleged deficiency. Wrapp should not have been permitted to seek reversal of his conviction based on the trial court's failure to make specific factual findings Wrapp **never** asked the trial court to make. Wrapp's issue on appeal was not preserved for review and his conviction should have been affirmed.

In its opinion, when finding it was not persuaded by the State's argument that the issue was unpreserved, the Court of Appeals equated Wrapp's circumstances to those in *Ravenell* and found that in *Ravenell* the Court "[addressed] the merits when trial counsel moved for a continuance but did not specifically object to a trial *in absentia* and never asserted that his client failed to receive adequate notice or warnings." However, in *Ravenell*, counsel moved for a continuance due to his client's absence and the trial court specifically "found Ravenell was given notice the trial would proceed without him and he would be tried *in absentia* if he failed to appear." *Ravenell*, 387 S.C. at 453, 692 S.E.2d at 556. Here, Wrapp's counsel similarly moved for a continuance due to Wrapp's failure to appear, but, as complained about by Wrapp in this appeal, the trial judge "never made the required findings of fact." Thus, the circumstances are quite different. In *Ravenell* counsel would have had no basis to object to the trial court's failure

to make the required findings of fact because the trial court actually made those findings. Here, Wrapp had every reason and every opportunity to object if he believed the trial court's factual findings were not sufficient. He failed to do so at the first opportunity; thus, under basic issue preservation principles, his argument is not preserved. A defendant should not be permitted to seek reversal of his conviction based on the trial court's failure to make specific factual findings that he **never** asked the trial court to make. *See State v. Vang*, 353 S.C. 78, 84-85, 577 S.E.2d 225, 228 (Ct. Ap. 2003) (finding that to preserve an issue of juror misconduct for appellate review a party must object at the first opportunity at trial).

Standard of Review

A decision on whether to grant or deny a motion for continuance rests in the sound discretion of the trial court. *State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). Appellate courts in South Carolina typically show great deference to the trial court regarding these decisions. *State v. Colden*, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. *Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006); *Ravenell*, 387 S.C. at 455, 692 S.E.2d at 557. "The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of Respondent. . . . [R]eversals of refusal of continuance are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

Waiver of Right to be Present for Trial

"A criminal defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."

State v. Shuler, 344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001) (citations omitted). However, this right may be waived. *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). The South Carolina Rules of Criminal Procedure provide that a defendant "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 defendant's exclusion, or absence, will be reviewed in light of the whole record." *Shuler*, 344 S.C. at 624, 545 S.E.2d at 815. Although the right to be present is a substantial one, no presumption of prejudice arises from a defendant's exclusion. *Id.*; *State v. Williams*, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (absence from trial is subject to harmless error analysis). "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 process of justice." *Ellis*, 267 S.C. at 261, 227 S.E.2d at 306.

Discussion / Analysis

First, the State submits that contrary to Wrapp's claim on appeal to the Court of Appeals, the trial judge **did** make a factual finding that Wrapp received sufficient notice for the trial to proceed in his absence. Indeed, the trial judge found Wrapp "was noticed to be here," a conclusion which encompasses the findings that Wrapp had notice of when his trial would begin and that Wrapp was warned he could be tried in his absence. When both longstanding precedent and the Rules of Criminal Procedure in South Carolina require such findings, and the trial court specifically finds that notice to the defendant was sufficient and proceeds with a trial *in absentia*, it necessarily constitutes a finding that the defendant made a voluntary waiver of his or her right to attend trial. This is particularly true where the defendant makes no objection to the adequacy

of the court's finding at the time it is made. In its opinion, the Court of Appeals narrowly interpreted the trial court's findings to hold that even if they constituted a finding that Wrapp received notice of his right to be present, there was no finding that Wrapp was informed he could be tried in his absence. Under the standard of review, the Court of Appeals should have given greater deference to the trial court's factual findings by giving them a broad interpretation that encompassed all required aspects of notice where the court found "[Wrapp] was noticed to be here."

Second, the State submits the trial court's finding that Wrapp received adequate notice was supported by the record. 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 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.* On appeal, this 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.*

Here, the trial court likewise did not abuse its discretion in denying Wrapp's continuance motion and proceeding with the trial in Wrapp's absence because the record shows Wrapp knowingly waived his right to be present for trial by not appearing at trial when he had awareness of the fact he had a right to be present, his trial was scheduled to begin, and he would be tried in his absence if he failed to appear. *See State v. Goode*, 299 S.C. 479, 481, 385 S.E.2d

844, 845 (1989) ("[T]he right to be present at trial can be waived if done knowingly and voluntarily."). The solicitor, an officer of the court, advised the trial judge that she personally had a conversation with Wrapp in the courtroom the day the first continuance was granted and told Wrapp his case would be re-called for trial the next term it could be called. The solicitor further noted that three weeks before the trial she called a private attorney Wrapp was attempting to retain and told that attorney the case was on the trial docket. (Tr.p.27, line 16-p.28, line 17). These statements alone constitute sufficient evidence to support the trial court's finding. Yet, the solicitor's comments did not stand alone.

Instead, the trial court was also aware that Wrapp received **written notice** of when his trial would begin and of his right to be present. On October 18, 2013, the magistrate who set Wrapp's bond ordered that Wrapp appear in the Greenwood County Court of General Sessions beginning on December 6, 2013, and further ordered that "[i]f no disposition is made during that term, [Wrapp] **shall appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court.**" Wrapp signed an acknowledgement stating in part: "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.**" (App.p.173-p.174) (emphasis added). This bond form was before the trial court and was reviewed by the trial judge during the sentencing proceedings. (App.p.163-p.168). Through his signature on the acknowledgement form, Wrapp unequivocally demonstrated his full understanding of the consequences of his failure to appear at the scheduled time of his trial. *See 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."). Additionally, the form demonstrates Wrapp was aware he was expected to appear in court each

weekly term until otherwise notified rather than simply wait for additional notification from the court or the State before appearing.

In its opinion, the Court of Appeals found "the record is devoid of any fact indicating Wrapp had actual notice of the term of court in which his trial would occur." This finding flies in the face of the specific notice given to Wrapp in the bond form that his case would be called at the December 6, 2013, term of court and that if no disposition was made, it would be called at each succeeding term of court until final disposition was made. How this does NOT constitute a fact indicating Wrapp had actual notice of the term of court in which his trial would occur is beyond comprehension.

Also supporting the trial court's finding was Wrapp's substantial prior experience with the criminal justice system, which included four prior convictions over the course of a ten-year criminal career. This experience provided him with sufficient knowledge to understand the consequences of his failure to attend his trial. *Cf. Graves v. State*, 309 S.C. 307, 310, 422 S.E.2d 125, 127 (1992) (considering Graves' "extensive criminal background" when reviewing a determination of whether Graves validly waived his right to counsel); *State v. Cash*, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992) (listing the factors different courts have considered in determining whether a defendant had a sufficient background to waive his right to counsel, which included whether the defendant was previously involved in criminal trials).

In light of the representations of the solicitor regarding Wrapp's awareness of when his trial was set to begin, Wrapp's act of signing the acknowledgement form before he was released on bond, and Wrapp's prior criminal experience, the record was replete with facts indicating Wrapp had notice of the term of court in which he was going to be tried. He was fully aware of his right to be present for his trial, the scheduled date of his trial, and the consequences of his

failure to appear for trial. Accordingly, the trial court did not abuse its discretion in denying Wrapp's continuance motion and proceeding with the trial *in absentia* after Wrapp failed to appear at the courthouse for the beginning of his trial. *See Wright*, 304 S.C. at 532, 405 S.E.2d at 827 (1991) (finding no abuse of discretion in the denial of Wright's continuance motion raised before Wright's trial *in absentia* because the record reflected Wright was aware of the term of court in which his case was set to be tried and was aware the trial would proceed in his absence); *Ellis*, 267 S.C. at 261, 227 S.E.2d at 306 ("In our courts of general sessions, defendants are generally only given notice of the term of court in which they will be tried and do not know the exact date and time of their trial until shortly before the trial begins. We think such notice is sufficient to enable a defendant to make an effective waiver of his right to be present at his trial."); *see also State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion."). Wrapp's convictions should have been affirmed by the Court of Appeals.

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Wiley*, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584

(1989). Thus, when overwhelming evidence of guilt has been presented, any trial error may be harmless. *State v. Gathers*, 295 S.C. 476, 480-81, 369 S.E.2d 140, 143 (1988).

In Wrapp's case, even if the trial court erred in conducting the trial without Wrapp in attendance, any error was entirely harmless in light of the overwhelming evidence of Wrapp's guilt. *See State v. Williams*, 292 S.C. 231, 233, 355 S.E.2d 861, 862 (1987) (finding errors resulting from a trial *in absentia* are subject to a harmless error analysis). Even if Wrapp had been present for trial, the result would have been no different. Thus, any error from the trial proceeding without Wrapp does not warrant reversal of Wrapp's conviction and resulted in no actual prejudice to Wrapp. *See Shuler*, 344 S.C. at 625, 545 S.E.2d at 815 ("Although the right to be present is a substantial one, no presumption of prejudice arises from a defendant's exclusion.").

In its opinion, the Court of Appeals found it did not need to undertake a harmless error analysis because "the trial court erred in failing to make the requisite findings and the record is devoid of facts allowing [the Court] to discern whether Wrapp had notice of the term of court." As noted above, the State contends the record is **not** devoid of facts showing Wrapp had the requisite notice; therefore, the Court's reason for declining a harmless error analysis is not supported by the record. In any event, the precedent determining this issue is subject to a harmless error analysis does not suggest such analysis hinges solely on the defendant's absence from trial and the absence of notice. Instead, it depends on whether that absence was prejudicial. Thus, regardless of whether the trial court failed to make the requisite findings or the record failed to include evidence of adequate notice, this Court should have conducted a harmless error analysis to determine if Wrapp was in fact prejudiced by his absence from trial. For the reasons above, the State submits he was not, and that his conviction should have been affirmed.

CONCLUSION

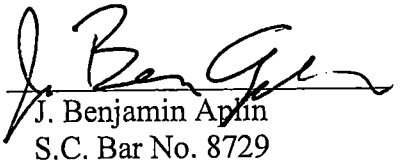
For all of the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and issue an order reversing the decision of the Court of Appeals and affirming Respondent's convictions and sentence. If the Court grants the petition for a writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR PETITIONER

Columbia, South Carolina
January 24, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Thomas A. Russo, Circuit Court Judge

Opinion No. 5510 (S.C. Ct. App. filed August 16, 2017)
Appellate Case No. 2015-000909

State of South Carolina, ... Petitioner,

v.

Stanley Lamar Wrapp, ... Respondent.

PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Petition for a Writ of Certiorari*, and the *Appendix*, both dated January 24, 2018, on Respondent by depositing two copies of the Petition and one copy of the Appendix in the United States mail, postage prepaid, addressed to his attorney of record:

Taylor D. Gilliam, Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 24th day of January, 2018.

Angela Bennett
Administrative Coordinator

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

January 24, 2018

Taylor D. Gilliam, Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

The State, Petitioner, v. Stanley Lamar Wrapp, Respondent
Appellate Case No. 2015-000909

Dear Mr. Gilliam:

I am enclosing two (2) copies of the Petition for a Writ of Certiorari and one (1) copy of the Appendix in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Daniel E. Shearouse (original and six copies of Petition enclosed)
Victim Services