THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
Michael G. Nettles, Post-Conviction Relief Judge
Kristi L. Harrington, Trial Court Judge

Appellate Case No.: 2017-002121

Norris Steplight,

Respondent,

v.

The State of South Carolina, Petitioner.

RESPONDENT'S RETURN

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The Post-Conviction Relief Judge correctly ruled that because of trial counsel's deficiencies, there was a reasonable probability that the outcome of Respondent's proceeding would have been different. Thus, the Post-Conviction Relief Judge's finding that Respondent be granted a new trial should be affirmed.

STATEMENT OF THE CASE

Procedural Background

On May 27, 2011, Respondent was arrested and charged with Trafficking in Cocaine Base, more than 10 grams, but less than 28 grams, 3rd offense. (R. pp. 279-280). Respondent's case was called for trial on February 4, 2013, and Respondent was found guilty of said offense on February 5, 2013. (R. p. 283). Respondent was sentenced to the mandatory minimum of 25 years and a $50,000.00 fine was imposed. (R. p. 284).

Respondent filed his Notice of Intent to Appeal on February 13, 2013. On April 30, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming Respondent's conviction. (R. pp. 424-425).

On April 27, 2015, Respondent timely filed his Application for Post-Conviction Relief. (R. pp. 427-434). Petitioner's Return to the Application was filed on February 9, 2016. (R. pp. 435-438). Respondent thereafter filed an Amended Application for Post-Conviction Relief on December 16, 2016. (R. pp. 440-445). On January 10, 2017, the Honorable William H. Seals, Jr., entered an Order allowing Respondent to have an expert inspect and/or analyze the drugs that were the subject of Respondent's underlying criminal trial. (R. p. 449). The PCR evidentiary hearing was heard on August 1, 2017. (R. pp. 455-649). Following the hearing, PCR Judge Nettles requested that each side submit proposed orders. (R. p. 647). After proposed orders were submitted, the decision in *State v. Wrapp*, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017) was issued. Judge Nettles then asked both sides to prepare amended proposed orders based upon *Wrapp*. On September 6, 2017, Judge Nettles signed an order granting Respondent post-conviction relief.[1] (R. pp. 657-671). On September 27, 2017, Petitioner submitted a motion to

[1] The order was filed September 18, 2017.

reconsider. (R. pp. 673-684). On October 9, 2017, Judge Nettles issued an order denying Petitioner's motion to reconsider. (R. p. 753). This matter is currently before the Court upon Petitioner's appeal and Petition for Writ of Certiorari.

Factual History

When Respondent's trial court proceedings began at 12:00 p.m. on Monday, February 4, 2013, defense counsel immediately advised the trial Court that his client was not present, that he had "always been available" for past Court appearances, and that affirmative efforts to contact him were already well under way. (R. p. 4:14-17; R. p. 5:15-17) ("I called the bondsman at 8:30 this morning, who said, I'll go get him."). As the discussion progressed, the trial Court was apprised of a series of circumstances that explained Respondent's absence and indicated that it was both unintentional and unlikely to persist for long. Trial counsel explained that he had received "a text saying, 'You just got moved up; you might be going first thing,'" and that his ensuing efforts to summon Respondent had not succeeded due to a recent telephone number change. (R. p. 5:14-15) (internal quotation marks added). The solicitor indicated that Respondent had been sent a letter, which "just ha[d] them coming on Monday morning, and everything says nine o'clock tomorrow [Tuesday]," (R. p. 6:7-9), and defense counsel added that Respondent had "gotten a dozen letters over the last year and a half" and had "showed up every time" (R. p. 6:10-11 and 14-15). When the trial Court inquired about the possibility of issuing a bench warrant, defense counsel responded that he did not "think it w[ould] speed up the process" and that Respondent was not "intentionally avoiding court". (R. pp. 6:25 – 7:1). To the contrary, counsel advised the Court that Respondent had "been anxious to have the case tried". (R. p. 7:1-2). Neither the solicitor nor the trial Court questioned or contradicted any of these representations. Instead, the discussion ended with the trial Court's announcement of the lunch

break, and declaration that "we're going to start [Respondent's suppression] motion at 1:30." (R. p. 10:6-10).

When the proceedings resumed after lunch, the trial Court noted defense counsel's "vehement objection to continuing without [Respondent's] presence", and then immediately directed that the first witness be called. (R. p. 10:19-20). Defense counsel responded by reiterating that Respondent's presence was important, that he "ha[d] shown up at least a half dozen times" during the extended period the case had been on the docket, and that he "kn[e]w Respondent want[ed] to be present." (R. p. 11:11-25). Counsel also continued to emphasize that the difficulty he was experiencing in attempting to reach Respondent was anomalous, and that counsel himself had been caught off guard, having "thought [the case was] going to be second th[at] week ...." (R. p. 12:9-10). Once again, counsel's representations were neither questioned nor contested.

The trial Court went forward with a portion of the suppression hearing. (*See* R. pp. 13-44). During a break, the trial Court noted "We are continuing without your client, but I have heard nothing that indicates to me that [Respondent] was not given notice of today." (R. p. 45:11-13). The Court then proceeded with *voir dire* and jury selection, all of which occurred in Respondent's absence. (*See* R. pp. 46-76).

Respondent entered the courtroom at 3:51 p.m. on Monday, February 4. Consistent with counsel's earlier representations to the trial court, Respondent's absence had been neither intentional nor voluntary. Rather, counsel explained:

> [Respondent] just didn't know. The bondsman found him; he came immediately. He apologizes, even though, I guess, technically, I needed to have gotten in touch with him. He did get a letter from me. But he'd gotten so many of them, he didn't realize this case would be first this morning. We apologize, your Honor.

(R. p. 77:12-17). Respondent's suppression motion was denied. Respondent did not testify, the defense did not present any evidence and the jury convicted Respondent as charged. (R. pp. 230:21 – 231:10). At sentencing, Respondent raised his own objection to the suppression motion and jury selection having been conducted in his absence. (*See* R. p. 257:4-12).

At the PCR hearing, the Respondent testified that he purchased only nine (9) grams of cocaine base for a total purchase price of $300.00. (R. p. 464:4-21). Respondent further testified that he advised his trial counsel, James Smiley, that he had purchased less than ten (10) grams of cocaine base. (R. p. 464:22-25). Although Mr. Smiley testified that he did not recall Respondent advising him as such, he did not refute it. (R. p. 609:2-10; R. p. 625:14-25). Mr. Smiley acknowledged that once the pre-trial motion to suppress was lost, the only defense Respondent would have had at trial was to show that he possessed less than ten (10) grams of cocaine base, such that he would have been entitled to a jury charge on the lesser included offense of possession with intent to distribute. (R. p. 608:6-14; R. pp. 622:23 – 623:16). Mr. Smiley further acknowledged in his testimony that if Respondent told him that he purchased nine (9) grams of cocaine base, that he would have pursued a different trial strategy than the one he employed which would have resulted in the probability of the outcome of the trial being different. (R. p. 608:6-14; R. pp. 624:18 – 625:9; R. p. 629:1-3).

With respect to Respondent's absence at the commencement of the trial and, in particular during the selection of the jury, Respondent's bondswoman, Angelica Desassure-Cooper, testified that she received a telephone call from Mr. Smiley on February 4, 2013, the first day of Respondent's trial. (R. p. 493:12-17). Mr. Smiley asked her to contact Respondent and advise him to go to the courthouse; however, to not let him know that his trial was already underway. (R. p. 493:18-22; R. p. 494:3-14). Mrs. Desassure-Cooper then called Respondent, but,

notwithstanding Mr. Smiley's request, advised him that his trial was, in fact, underway. (R. pp. 494:24 – 495:20). Respondent was easy to reach and was contacted at the same number he always had. (R. p. 487:22-25; R. p. 492:11-13; R. p. 495:3-15). This was Respondent's first notice, from anyone, that his trial was scheduled for that day and that it had already commenced. (R. p. 469:2-10 and 19-25; R. pp. 470:1 – 471:3; R. p. 487:1-8). Upon receiving the phone call from Mrs. Desassure-Cooper, Respondent traveled directly to the courthouse. (R. p. 470:12-15; R. p. 495:16-20). By the time Respondent arrived at the courthouse, his jury had been selected and a substantial portion of the pre-trial motion to suppress had already been heard. (R. p. 599:12-16). Mr. Smiley testified that the notice to Respondent provided by Ms. Desassure-Cooper was, indeed, the first and only notice Respondent received that his case was scheduled for trial that day. (R. p. 618:9-13).

Respondent testified that juror number 373, Shalanda Wright, was a juror that he knew, that he had 'bad-blood' with and that he would have stricken her as a juror had he been present. (R. pp. 472:7 – 473:3; R. p. 488:22-24). Respondent did not tell the Court or Mr. Smiley that he knew Shalanda Wright as he did not recognize her (from her appearance) at the time of trial. (R. p. 490:13-23). The first time Respondent realized that Shalanda Wright was one of the jurors was when he read his trial transcript and saw her name. *Id.* Mr. Smiley testified that if Respondent had told him that he knew Shalanda Wright and that he desired her to be stricken as a juror due to 'bad-blood', he would have stricken her as a juror. (R. pp. 619:8 – 621:2).

During the course of the trial, Mr. Smiley made several motions to continue the case due to Respondent's absence. In continuing with Respondent's trial, the trial judge stated "I have heard nothing that indicates to me that Mr. Steplight was not given notice of today." (R. p. 45:12-13). Mr. Smiley failed to inform the Court at that time that he did not, in fact, give

Respondent notice of the trial. (R. pp. 610:17 – 611:8; R. pp. 612:10 – 613:16; R. p. 614:8-11). To the contrary, Mr. Smiley advised the Court that he had sent Respondent a letter advising him of his trial date (R. p. 77:15). Mr. Smiley acknowledged and testified at the PCR hearing that this was not, in fact, the case and that he had not sent Respondent such a letter. (R. pp. 612:10 – 613:16; R. p. 614:8-11). He further acknowledged that said representation to the Court was erroneous. (R. p. 614:12-16; R. pp. 617:24 – 618:8). Mr. Smiley testified that Respondent had appeared at the courthouse on numerous other occasions when Respondent had been provided written notice to be there. (R. pp. 614:24 – 615:18). Mr. Smiley testified that he had attempted to call Respondent the week before to let him know his case was on the trial docket for the week of February 4, 2013 but did not reach Respondent. (R. p. 612:10-19). Mr. Smiley further testified that he did not think he needed to immediately contact Respondent as Respondent's case was behind a solid week-long murder trial. (R. pp. 627:11 - 618:2). Mr. Smiley admitted in his testimony that he did not reach Respondent, either orally or in writing, to advise him that he was on the trial docket for the week of February 4, 2013, despite the fact that the trial record reflects that Mr. Smiley advised the Court that Respondent had received a letter from him. (R. p. 595:21-24).

With respect to the weight of the drugs, the alleged weight of the drugs and relied upon in the prosecution of the criminal trial, was 12.482 grams. (R. p. 655). The City of Charleston forensic laboratory report for the drugs states that the items submitted for testing were "Plastic bag with rock-like substance." *Id.* Mr. Smiley admitted that he did not consider weighing the drugs prior to trial as his focus was on what happened on the side of the road of Respondent's traffic stop. (R. p. 605:6-9).

Pursuant to a Court order (R. p. 650), Dr. Robert Bennett, engaged by Respondent's PCR counsel, tested the weight of the drugs at the Charleston County Courthouse on February 17, 2017. (R. p. 506:7-14; R. pp. 651 - 654). Dr. Bennett was qualified in the field of chemical analysis. (R. p. 504:16-23). The testing was captured on videotape by private investigator Dick Vance, a retired Lieutenant and former head of the Charleston Police Department Narcotics Division. (R. pp. 541:10 – 544:12). The drugs were contained in two (2) individual packages: the contents of bag 1 revealed a weight of 3.919 grams and the contents of bag 2 revealed a weight of 5.325 grams, for a combined weight of 9.244 grams. (R. pp. 512:14 - 513:2; R. pp. 652-654).

Mr. Smiley acknowledged that if the drugs were under ten (10) grams, he would have had a different trial strategy and Respondent would have been entitled to a jury charge on the lesser included offense of Possession with Intent to Distribute Cocaine Base. (R. p. 608:6-14). Further, Mr. Smiley acknowledged that, as such, he would have attained a better offer from the State based upon the weight of the drugs being less than ten (10) grams. (R. p. 609:11-20). Additionally, Mr. Smiley admitted it would have been incumbent upon him to have the drugs independently weighed if Respondent had informed him the drugs were less than ten (10) grams. (R. pp. 609:21 – 610:2; R. pp. 622:23 – 623:10). Further, since the drugs were not weighed, the only way to present a defense of less than ten (10) grams, and to get a jury charge on a lesser included offense, was to have Respondent testify, which was not done. (R. p. 623:11-16).

In addition to Dr. Bennett's testimony, his preparation sheet (R. p. 651) and report (R. pp. 652-654) were entered into evidence thereby documenting and corroborating the aforementioned test results. The State presented two expert witnesses at the hearing, Captain Wendy C. Bell, Ph.D., from SLED and Judy Gordon, Forensic Services Director at City of Charleston. Both Dr.

Bell and Ms. Gordon testified that they had no reason to dispute the weight of the drugs as set forth by Dr. Bennett and that there was only a potential difference in the weight, plus or minus two tenths of a gram one way or the other. (R. pp. 568:14 - 569:3; R. pp. 591:22 – 592:14).

In an effort to provide an explanation for the disparity (decrease) in the weight of the drugs between the originally tested weight and Dr. Bennett's tested weight, Dr. Bell and Ms. Gordon set forth the hypothetical theory that if the cocaine base was "wet" or contained a solvent, then the weight of the cocaine base could decrease over time. (R. p. 553:22-25; R. p. 585:8-20). Dr. Bell went on to state that it is not a common occurrence for crack cocaine to lose weight. (R. p. 555:17-22). However, neither Dr. Bell nor Ms. Gordon could testify that the cocaine base in this case was "wet" or contained a solvent at the time of the original testing to possibly cause a decrease in the weight. (R. pp. 564:21 – 565:1; R. p. 571:9-16; R. pp. 573:22 – 574:1; R. p. 588:2-10). Further, the State did not present any witnesses regarding either the original testing of the drugs or the condition of the drugs at the time of the original testing (i.e., whether the cocaine base was "wet" or contained a solvent). (R. pp. 562:22 – 563:19). Moreover, Petitioner's experts could not testify that proper protocol was used by the City of Charleston in the original weighing of the drug evidence in this case. (R. pp. 563:20 - 564:13; R. p. 586:2-18; R. pp. 587:23 – 588:1).

STANDARD OF REVIEW

In a PCR proceeding, the Respondent bears the burden of establishing that he is entitled to relief. *Caprood v. State,* 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR Respondent must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80

L.Ed.2d 674, 693 (1984); *Alexander v. State,* 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Second, Respondent must show there is a reasonable probability, but for counsel's unprofessional errors, that the result of the proceeding would have been different. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Alexander,* 303 S.C. at 541-42, 402 S.E.2d at 485. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. The findings of the post-conviction relief ("PCR") judge will be upheld when there is any evidence of probative value to support them. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000).

ARGUMENT

1. The PCR Court was correct in ruling that there was a reasonable probability that had Respondent been provided notice by trial counsel that his trial was scheduled and had he been present, the outcome of the proceeding would have been different.

Petitioner asserts that the Court of Appeals has already decided this matter in Respondent's direct appeal from his conviction. However, the Court of Appeals was not presented with all of the facts at that time. The Court of Appeals only had the benefit of the trial Court record. Now, the Court has the benefit of testimony from Respondent, Respondent's bondswoman and Respondent's trial counsel which present the true and accurate picture – Respondent did not have notice of his trial (and thus did not have the opportunity to participate in jury selection or a portion of his pre-trial motion to suppress) until the actual day of the trial when his bondswoman called him. While the trial Court record states that Respondent received a letter from his trial counsel Mr. Smiley, Mr. Smiley refuted that testimony at the PCR hearing by unequivocally acknowledging, and admitting that, he never sent such a letter. Further, Respondent testified he never received a letter from the Solicitor's office and no letter from the Solicitor was ever introduced into evidence.

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *see also, e.g., Rushen v. Spain*, 464 U.S. 114, 117 (1983), *overruled on other grounds*; *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (citing *Allen*) ("[T]he Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial, and is applicable to the States by reason of the Fourteenth Amendment. . . ."); S.C. Const. art. I, § 14 ("[A defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.").

The Supreme Court of the United States has made clear that a defendant's right to be present extends to jury selection, because his presence at that critical stage "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) *overruled on other grounds by Mallory v. Hogan*, 378 U.S. 1 (1964); *see also id.* (observing that "it will be in [the defendant's] power, if present, to give advice or suggestion or even to supersede his lawyers altogether." (citing *Lewis v. United States,* 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)); *Gomez v. United States*, 490 U.S. 858, 873 (1989) (affirming that jury selection is "a critical stage of the criminal proceeding during which the defendant has a constitutional right to be present," and recognizing that it is "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability."); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (observing that defendant's presence at jury selection has a "reasonably substantial" relation to his "opportunity to defend against the charge.").

It is equally well established that a proceeding on the admissibility of evidence against the accused constitutes a critical stage at which the defendant's presence is guaranteed. *See, e.g.*, *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004) ("The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process."); *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *overruled on other grounds* (Sixth Amendment right to effective assistance of counsel mandates competent representation in connection with motions to suppress unlawfully obtained evidence); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed 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.").[2]

An accused's right to be present at both jury selection and a pretrial motion to suppress derives from the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and S.C. Const. art. I, § 14, which provides that: "[a defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both."

In *Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 369, 983 N.E.2d 1227 (2013), Campbell appealed from his convictions contending that he was deprived "of his right to be present at a critical stage of the proceedings, specifically at a hearing on the motion to suppress."

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[2] *See also, e.g.*, *Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 374, 983 N.E.2d 1227 (2013) (citing *Stincer, supra*) ("The United States Supreme Court has made clear that when a hearing involves evidence that is going to be used against the defendant at trial to prove his guilt, he has the right to a fair and just hearing under due process and his presence assures that result -- because he can consult with his lawyer, listen to the evidence, and assess the credibility of the witnesses (and the evidence) against him. In addition, his ability to have the full assistance of counsel may turn on his opportunity to see the evidence against him, with counsel, and to consult with counsel about the evidence and to better defend himself at trial.").

In deciding whether Campbell's deprivation of his right to be present at the pretrial motion to suppress was harmless beyond a reasonable doubt, the Court noted that in a pretrial motion to suppress, the defendant "has the opportunity to listen to the strength (or weakness) of at least a part of the government's case and to assess the witnesses. He has the ability to consult with his attorney and, as a participant in the event under examination, offer a unique perspective." *Id.* At 373-74. In finding that the Commonwealth had not met its burden proving that the error was harmless beyond a reasonable doubt, the Court stated that "the motion to suppress concerned evidence that was used against the defendant at trial and was the basis for his conviction. In these circumstances it is not for an appellate Court or a motion judge to determine how a defendant's presence at a critical stage which concerns the evidence against him could have assisted his over-all defense. *Id.* at 374. *See also State v. Grey*, 256 N.W.2d 74, 77 (Minn. 1977) (defendant's absence at a hearing on a motion to suppress, a critical stage, was not harmless beyond a reasonable doubt because it is impossible on the record to determine what contribution or assistance to counsel defendant could have rendered had he been present to hear the oral testimony of the officer).

In *State v. Irby*, 170 Wn.2d 874, 877, 246 P.3d 796 (2011), the issue before the court was whether the trial court violated defendant's right to be present at trial by conducting a portion of the jury selection process by e-mail in defendant's absence. The court determined that the State did not meet its burden proving that the error was harmless beyond a reasonable doubt as the State could not show that the jurors excused in Irby's absence had no chance to sit on Irby's jury. *Id.* at 886. Likewise, in *USA v. Gordon*, 829 F.2d 119, 122-23, 264 U.S. App. D.C. 334 (1987), the Court had to determine whether the trial court's impaneling a jury in Gordon's absence violated Gordon's rights. The Court found that Gordon had a Fifth Amendment right to be

present at voir dire and noted that " 'what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use to his defense.' " *Id.* at 124. In finding that the government did not meet their burden of showing that the error was harmless beyond a reasonable doubt, the Court noted that Gordon did not observe a prospective juror, did not hear a single response to the Court's questioning of jurors and did not participate in a single peremptory challenge. *Id.* at 128. The Court further stated that "A defendant [] who does not make his appearance until midway through the first day of his trial is surely noticed by the jury, and it is not beyond a reasonable doubt that 'the jury speculated adversely to the defendant about his absence from the courtroom.' " *Id.* (citation omitted).

While Mr. Smiley moved for a continuance because Respondent was not present, the trial Court was not presented with the fact that Respondent had neither received oral nor written notice from Mr. Smiley to be present for trial. To the contrary, the trial Court record clearly shows that Mr. Smiley told the Court that he had given Respondent a letter to be in court. Mr. Smiley acknowledged and admitted at the PCR hearing that he did not give Respondent a letter or oral notice and thus that he had not, in fact, provided any notice to Respondent. The trial Court's denial of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. *State v. Williams,* 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996).

In Respondent's direct appeal from his conviction, the Court of Appeals affirmed in an unpublished opinion dated April 30, 2014, on the basis that Respondent's absence from trial was harmless. The Court cited the cases of *State v. Fairey,* 374 S.C. 92, 100, 646 S.E.2d 445, 448 (2007), *State v. Shuler*, 344 S.C. 604, 626, 545 S.E.2d 805, 816 (2001), *State v. Gillian,* 360 S.C. 433, 455, 602 S.E.2d 62, 74 (Ct. App. 2004) and *State v. Whaley*, 290 S.C. 463, 465, 351 S.E.2d

340, 341 (1986). These cases stand for the basic proposition that: (1) a defendant cannot voluntarily absent himself from the hearing and later claim error; and, (2) unless a defendant can show prejudice from his absence from the hearing, the error is harmless.

On August 16, 2017, the Court of Appeals issued an opinion in *State v. Wrapp*, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017). The issue was whether Wrapp voluntarily waived his right to be present at trial and to be tried in his absence. Neither the State nor defense counsel provided any direct evidence indicating Wrapp had notice of the term of court in which his case would be tried. *Wrapp*, 421 S.C. at 537, 808 S.E.2d at 824. Notably, the Court of Appeals held: "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." *Id.* Further, the Court of Appeals stated that it "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." *Id.*; *See State v. Jackson*, 290 S.C. 435, 436–37, 351 S.E.2d 167, 167 (1986) (remanding for a new trial because there was no evidence in the record that the defendant was given notice of his trial and neither defendant nor his counsel were present at trial); *State v. Simmons*, 279 S.C. 165, 166–67, 303 S.E.2d 857, 858–59 (1983) (remanding for a new trial because the record was devoid of facts showing defendants had notice of their trial); *see also State v. Ritch*, 292 S.C. 75, 354 S.E.2d 909; *State v. Fleming*, 287 S.C. 268, 335 S.E.2d 814 (1985).

In the instant case, the issue is not whether the trial Court made the adequate findings, but whether the trial Court had been provided accurate information to properly determine whether Respondent voluntarily waived his right to be present. While trial counsel represented to the trial Court (R. p. 77:15) that Respondent had been sent a letter advising him of the trial date, that was,

in fact, not true. To the contrary, Mr. Smiley testified that he had not, in fact and in truth, provided Respondent with written notice or oral notice. The fact that Respondent did not have notice of the trial was further corroborated by the testimony of Respondent and the bondswoman, Angelica Desassure-Cooper, whose testimony was that her phone call to Respondent was the first notice he had been provided of the trial. Respondent immediately arrived at the court house upon notice that his trial was underway. Had the trial Court been provided with accurate information, namely, that Respondent had not been provided any notice of his trial, the trial would have been continued thereby affording him the opportunity to participate in the selection of his jury and his pre-trial motion to suppress. Based upon the foregoing, the evidence is clear that Respondent did not voluntarily absent himself from his trial.

The *Wrapp* case further sets forth that a harmless error analysis need not be undertaken. Respondent can, nonetheless, show prejudice from his absence. The Court of Appeals did not have the benefit of Respondent's testimony that a juror was chosen with whom he had 'bad-blood' and whom he would have desired stricken and advised Mr. Smiley accordingly. Mr. Smiley testified that if Respondent had told him that, he would have stricken that juror. Further, Mr. Smiley acknowledged that there may have been different jurors stricken or selected had the Respondent been present to participate in jury selection. In addition, Respondent did not have an opportunity to observe, or participate in, the first phase of his motion to suppress. Indeed, if Respondent had seen the first portion of the pre-trial motion to suppress, he would, at the very least, have been in a better position to understand and evaluate the ten-year plea offer which had been proposed by the State, as well as to determine whether he should testify in his own defense.

Moreover, as in *Irby*, jurors were excused in Respondent's absence. (R. pp. 51:6-53:11; R. pp. 57:16-59:14; R. p. 62:18–25; R. p. 63:3-9; R. p. 66:9-16; R. pp. 66:19-67:1; R. p. 70:6-

13). Furthermore, like *Gordon*, Respondent did not observe a single juror, did not hear the Court's questioning of the prospective jurors or their responses, nor did Respondent have the opportunity to participate in a single peremptory challenge in his trial. Finally, Respondent did not make his first appearance in front of the jurors until the day after jury selection.

Respondent was prejudiced by the denial of the continuance as he was not allowed to participate in the selection of his jury and he was not allowed to participate in the entirety of the pre-trial motion to suppress. If the trial Court had been informed that Respondent had not, in fact, been notified of his trial date, there is a reasonable probability that the trial would have been continued. As such, Respondent was prejudiced by his trial counsel's failure to notify him, either orally or in writing, that his case was up for trial. Further, had the trial Court been fully and accurately informed of the facts regarding notice of Respondent's trial date, the Court would have in all probability continued the trial or not commenced the trial until Respondent appeared. Respondent would have thus been present and therefore able to observe and participate in the selection of his jurors and fully participate in the pre-trial motion to suppress.

2. The PCR Court was correct in ruling that there was a reasonable probability that had trial counsel sought and presented expert testimony as to the weight of the cocaine base, the outcome of the proceeding would have been different.

Petitioner asserts that Respondent failed to establish that the evidence weighed below the ten-gram threshold for trafficking at the time of his arrest. That is exactly Respondent's point in asserting that his trial counsel was ineffective. Had Respondent's trial counsel had the evidence weighed, he would have learned that the evidence weighed less than ten grams and would have been able to procure a better offer prior to trial or a charge on a lesser included offense at the close of the evidence.

Respondent was charged and convicted of trafficking in cocaine base, more than 10 grams but less than 28 grams, and sentenced to a mandatory minimum of 25 years and a fine of $50,000.00. S.C. Code § 44-53-375(C)(1). The sentence for possession with intent to distribute, more than 1 gram but less than 10 grams, is no less than ten years nor more than thirty years, or a fine of no more than fifty thousand dollars, or both. S.C. Code § 44-53-375(B). The additional difference between the two crimes is also significant in that trafficking cocaine base is classified as a violent offense.

"The test for determining when a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *State v. Bland,* 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995) (internal citations omitted). There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense. *State v. Mathis,* 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). Possession with intent to distribute is a lesser included offense of trafficking.

Pursuant to a Court order, Dr. Robert Bennett, Respondent's expert, inspected and analyzed the drugs on February 17, 2017. His testing revealed that the weight of the drugs totaled 9.244 grams, less than the 10 or more grams required for the offense of trafficking cocaine base. Mr. Smiley testified that he could have had the drugs weighed, but he admitted that he did not. The Petitioner's witnesses set forth a theory that the drugs could have decreased in weight if they had been "wet" or contained a solvent. However, none of the Petitioner's two expert witnesses could testify that the specific drugs in this case were "wet" or contained a solvent at the time they were originally tested and weighed. Further, none of the original

analysts of the drugs were presented as witnesses. As such, no testimony was presented that the drugs were "wet" or contained a solvent as hypothesized by the Petitioner's two expert witnesses. Further, the Petitioner presented no forensic evidence to account for the discrepancy in weights. Finally, the Petitioner's witnesses did not disagree with the weight of the drugs as determined by Dr. Bennett.

As the weight of the drugs was a key issue in the underlying case, it would have been reasonable for trial counsel to have the drugs independently weighed by an expert. Respondent was prejudiced by trial counsel's failure to have the drugs weighed as there is a drastic disparity between a conviction for trafficking cocaine base versus possession with intent to distribute cocaine base. Respondent would have been entitled to a jury charge on the lesser included offense of possession with intent to distribute cocaine base.

3. The PCR Court was correct in ruling that had trial counsel presented evidence that Respondent possessed less than 10 grams of cocaine base, the outcome of the proceeding would have been different.

As actual or constructive possession was not an issue in the underlying criminal trial, the only defense trial counsel had would have been to challenge the weight of the drugs. Respondent testified at the PCR hearing that he purchased nine (9) grams of cocaine base. Mr. Smiley did not refute Respondent's assertion. Had Mr. Smiley presented evidence, through the testimony of Respondent and/or an expert witness, that the weight of the drugs possessed by Respondent was less than 10 grams of cocaine base, Respondent would have been offered a better plea deal prior to trial or would have been entitled to a charge on the lesser included offense of possession with intent to distribute cocaine base.

Respondent was therefore prejudiced by trial counsel's failure to introduce evidence or testimony that the weight of the drugs was less than ten (10) grams, as there are drastic

distinctions between a conviction for trafficking cocaine base versus possession with intent to distribute cocaine base. Based upon the above, there is a reasonable probability that the result and outcome of the trial would have been different.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that the Court affirm the PCR Court's ruling and remand for a new trial as there is evidence of probative value to support the PCR Court's findings.

Respectfully submitted,

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May 16, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
Michael G. Nettles, Post-Conviction Relief Judge
Kristi L. Harrington, Trial Court Judge

Case No. 2017-002121

Norris Steplight,

Respondent,

v.

The State of South Carolina,

Petitioner.

DESIGNATION OF MATTER TO BE INCLUDED IN THE APPENDIX

In addition to those matters set forth in the Appendix, Respondent proposes the following be included in the Appendix:

1. Respondent's Exhibit 5 – Video of Dr. Bennett weighing the evidence

I certify that this designation contains no matter which is irrelevant to this appeal.

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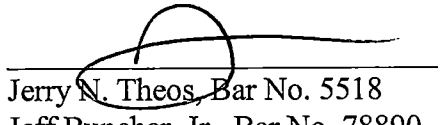
The State of South Carolina, Petitioner.

PROOF OF SERVICE

I certify that I have served one (1) copy of Respondent's Return and Designation of Matter on Megan H. Jameson, Esquire, and the original and six (6) copies of Respondent's Return and Designation of Matter on The Honorable Daniel E. Shearouse by depositing a copy of it in the United States Mail, postage prepaid, on May 16, 2018.

URICCHIO HOWE KRELL JACOBSON
TOPOREK THEOS & KEITH, P.A.



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May 16, 2018

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: Norris Steplight v. State of South Carolina
Appellate Case Number: 2017-002121

Dear Mr. Shearouse:

Enclosed please find the original unbound and six (6) stapled copies of Respondent's Return, Designation of Matter and Proof of Service in the above matter. By copy of this letter, I am serving one (1) stapled copy of the same upon Petitioner's counsel.

With kindest personal regards, I am,

Sincerely,

URICCHIO HOWE KRELL JACOBSON
TOPOREK THEOS & KEITH, P.A.

Jeff Buncher, Jr.

c: Megan H. Jameson, Esquire
SC Attorney General's Office
PO Box 11549
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