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June 4, 2018

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: James L Moore 299403 v State, 2015-CP-10-6985

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Megan Jameson
James L Moore 299043.

Mailing Address: PO Box 1058, Charleston, S.C. 29402
Location: 38 Broad Street, Suite 350, Charleston, S.C. 29401

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Maite Murphy, Circuit Judge

Case No.: 2015-CP-10-06985

James L Moore 299043.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James L. Moore appeals the Honorable Maite Murphy's April 25, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on May 9, 2018. A copy of the order on appeal is attached hereto.

James K Falk
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June 4, 2018

Megan Harrigan Jameson, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

JUN 07 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

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Honorable Maite Murphy., Circuit Judge

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James L Moore 299043.....PETITIONER

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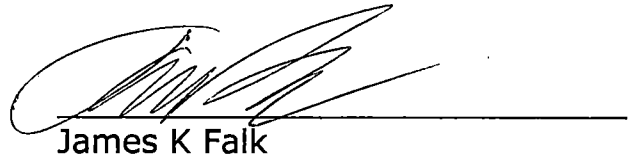
CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Harrigan Jameson Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this June 4, 2018.



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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
James L. Moore, SCDC # 299043, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2015-CP-10-6985 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on December 29, 2015, and amended on December 12, 2017, by James L. Moore (Applicant). On May 9, 2016, the State (Respondent) filed its return requesting an evidentiary hearing. An evidentiary hearing into the matter was convened February 1, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its November 2009 term, the Charleston County Grand Jury indicted Applicant for distribution of cocaine base – third or subsequent offense (2009-GS-10-8446) stemming from a controlled buy of crack cocaine from a confidential informant. He was

represented by Assistant Public Defender Jason King of the Charleston County Public Defender's Office. Assistant Solicitor Stephanie Linder of the Ninth Circuit Solicitor's Office prosecuted the case.

On October 18, 2012, Applicant was tried in his absence in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, circuit court judge. At the conclusion of the trial, the jury convicted Applicant as indicted and Judge Harrington sealed her sentence.

On November 16, 2012, Applicant appeared before Judge Harrington, who unsealed her sentence of seventeen years imprisonment. Applicant, through counsel, filed a motion to reconsider his sentence, and a hearing on this motion was held on November 16, 2012, before Judge Harrington. Applicant was present at this hearing and was represented by counsel. Following the hearing, Judge Harrington denied his motion to reconsider her sentence.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf by Brandon Smith, Esquire. On appeal, Applicant argued he was entitled to a new trial on the following grounds: (1) the trial court abused its discretion in denying his motion *in limine* to redact statements made in video of the drug transactions based on alleged impermissible bad acts pursuant to Rule 404(b), SCRE; (2) the trial court abused its discretion in failing to grant a mistrial following Applicant's objection to testimony from a State's witness that Applicant was guilty; and (3) the trial court improperly tried Applicant in his absence. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. James L. Moore, Op No. 2015-UP-098 (Ct. App. filed March 4, 2015). Thereafter, Applicant filed a petition for rehearing, and following the

State's return to the petition, the Court of Appeals denied Applicant's petition for rehearing. Applicant then filed a *pro se* petition for a writ of certiorari to the South Carolina Supreme Court, which was denied by the Supreme Court on May 19, 2015 for failure to comply with Rule 242, SCACR. Thereafter, Applicant filed a petition to reinstate his appeal, which was denied by the Supreme Court on July 23, 2015. The Remittitur was issued on August 27, 2015.

SUMMARY OF FACTS ADDUCCED AT TRIAL

Applicant was indicted in November 2009 in Charleston County for distribution of cocaine base in relation to a drug transaction that occurred on July 16, 2009. The case was called for trial on Wednesday, October 17, 2012. At the outset of trial, Applicant was not present, and the trial judge inquired about Applicant's location. (R. p. 5). Defense counsel stated Applicant was out on bond and noted that he had been present that Monday, the first day of the term of court. (R. p. 5-7). Counsel indicated he had been unable to reach Applicant on his cell phone Monday and Tuesday, but was able to leave a voice mail message that morning instructing Applicant to be at the courthouse at 1:00 p.m. for his trial. (R. p. 5-6). Counsel also indicated Applicant's bondsman had been unable to locate Applicant at the place where Applicant supposedly worked. (R. p. 6). Counsel indicated he would prefer the court issue a bench warrant for Applicant rather than going forward with the trial in Applicant's absence. (R. p. 7-8). The court issued a bench warrant at that time and continued the case until later in the day. (R. p. 10).

Later that afternoon, Applicant was still not present. (R. p. 10-11). When the judge asked defense counsel about Applicant's intentions, defense counsel stated "I don't believe he's coming." (R. p. 10, lines 19-21). Counsel then stated he had informed Applicant that he would be "locked up" if he did not show up for court and that "possibly the trial might continue as well."

(R. p. 10, line 25 – p. 11, line 3). Counsel further elaborated "I don't think he's coming from the conversation I had with him." (R. p. 11, lines 3-4). He explained he had a conversation with Applicant over the break wherein Applicant claimed to be in Mount Pleasant looking for a ride but stated he was on his way to court. (R. p. 11, lines 4-9). Applicant also said he was on his way and would be there in fifteen minutes. (R. p. 11, lines 9-11). Subsequent to that, Applicant again told counsel over the phone that he was still looking for a ride. (R. p. 11, lines 14-15). Counsel reiterated, "I don't believe that he's coming. I honestly don't." (R. p. 11, lines 15-16). Counsel again urged the judge to not go forward with the case. (R. p. 11, lines 18-20). The court noted counsel's objection but stated that, at a minimum, the pre-trial hearings were going forward. (R. p. 11-12). The court also noted it hoped the bench warrant would be effectuated some time that day and the trial could proceed with Applicant present the following day. (R. p. 12, lines 15-17).

Thereafter, pre-trial motions were heard, inlcuding defense's motions was to redact portions of the drug transaction video. (See R. p. 17-22). Defense counsel argued statements in the video referring to a location where people were "hollering" at the confidential informant were improper comments on Applicant's character because the statements implied that Applicant was "always out there trying to sell drugs." (R. p. 18-20). Defense counsel also argued certain statements in the video were inadmissible prior consistent statements that would improperly bolster the confidential informant's testimony. (R. p. 20-21). The assistant solicitor responded by pointing out that the statements regarding people "hollering" pertained to multiple people at a particular location and that the statements did not implicate Applicant's character. (R. p. 22; p. 26-27; p. 38-39). Defense counsel then acknowledged "it's not outright stated that [Applicant is] trying to sell – always out there trying to sell drugs" but asserted it was implied that Applicant

was yelling or "hollering" trying to sell drugs. (R. p. 23, lines 6-20). Counsel also argued Rule 403, SCRE, precluded the evidence because there was a danger the jury would "misinterpret" the "hollering" statements and this would unfairly prejudice Applicant. (R. p. 39-40).

After watching the drug transaction video (R. p. 25), the trial judge stated she did not know of any drug-related reference that could be inferred from the use of the word "hollering" and stated she had never heard the word connected with drug use or drug selling. (R. p. 35, lines 20-22). She indicated that she "hollered" at neighbors or passersby when she worked out in her yard. (R. p. 36, lines 15-18). The judge stated that, based upon her review of the video, there was nothing that indicated to her that the "hollering" statements implied that the persons who "hollered" were soliciting drug transactions. (See R. p. 4-8). The judge then ruled as follows:

> I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. And based upon that I do not, in doing – and I'm glad you brought up Rule 403. I do not find that there's any undue prejudice. That [hollering was related to drug transactions] was not my assumption[] even knowing that that's what you were challenging. And so I deny your motion that it's improper character evidence because I do not think that it's a comment on anyone's character, let alone your client. (R. p. 40, lines 9-18).

The judge also addressed defense counsel's second argument regarding improper prior consistent statements and found that statements made by the confidential informant in the video constituted present sense impressions. (See (R. p. 40, line 19 – p. 41, line 3).

After more pre-trial issues were discussed, the case was recessed until the next day. (See R. p. 41-58). The next day, upon prompting from the judge, defense counsel announced Applicant was still not present. (R. p. 58). The assistant solicitor then argued this was a "quintessential TIA" and that Applicant willfully failed to show up for trial. (R. p. 58, lines 9-

21). The trial judge stated she was noting defense counsel's objection that he "did not wish to go forward" but that the trial was going to commence in Applicant's absence because the case had been on the trial docket, Applicant had been informed of this, and Applicant had been in court on Monday of that week and was aware that his case was "second up" for trial. (R. p. 58, line 22 – p. 59, line 1).

Following jury selection, defense counsel challenged the jury pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), arguing the jury was all-white and the State struck all four black jurors. (R. p. 88). In response, the State gave race-neutral reasons for striking each juror as follows: juror 175 based on a fraudulent check conviction, to which defense counsel poised no pre-text challenge; juror 188 based on her employment at South Carolina Legal Aid which raised impartiality issues towards the public defender's office, to which defense counsel poised no pre-text challenge; juror 243 based on her brother's arrest in North Charleston for dealing crack, for which defense counsel poised no pre-text challenge; and juror 150 based two family member's twenty-five year sentences for federal drug convictions; for which defense counsel poised no pre-text challenge. (R. 88-91). The court found the State had provided race-neutral reasons for all of its preemptory strikes and denied defense counsel's motion. (R. 91).

Thereafter, the State called four witnesses, and the testimony and evidence presented established the following facts: A black male was captured on video engaging in a drug transaction with the confidential informant. The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this particular drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (R. p. 112-13; p.

128-29; p. 132; p. 175-77). One of the detectives, who had known Applicant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Applicant as the black male wearing the cast. (R. p. 117; p. 154-55). Two other officers then obtained Applicant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Applicant was the drug dealer. (R. p. 118, lines 10-16; p. 187, line 20 – p. 188, line 4).

During cross-examination, defense counsel extensively questioned the confidential informant regarding an affidavit he signed relating to a previous case involving a different defendant wherein the confidential informant indicated that he lied on the witness stand about the defendant selling him drugs. (R. p. 141-45). On re-direct, the assistant solicitor asked the confidential informant to explain the circumstances surrounding his signing of this affidavit. (R. p. 145-50). In a lengthy response, the confidential informant explained that he signed the affidavit because his life was threatened by the defendant's family and that the statements in the affidavit were written by someone else and were not true. (R. p. 147-50). In concluding his explanation, he stated as follows:

> Yeah, I did the wrong thing when I signed that paper but [the previous defendant] know[s] he guilty, and his lawyer know[s] he guilty. Just like the guy who supposed to be on trial here, he guilty -- (R. p. 150, lines 7-10).

The assistant solicitor cut him off at that point, and the confidential informant stated "[t]hat's all I got to say." (R. p. 150, lines 11-12).

Defense counsel objected and asked for a curative instruction. (R. p. 150, lines 13-14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way"

during deliberations. (R. p. 150, lines 15-20). Later in trial, defense counsel made a motion for mistrial, stating that he did not believe the curative instruction was "enough to cure any prejudice caused to [Applicant]." (R. p. 161, lines 15-21). The State asserted that the curative instruction given by the judge was sufficient, and the judge denied the mistrial motion but stated that over the break she would review her curative instruction to make sure it was appropriate and would give a further instruction in her charge to the jury if she felt the need to do so. (R. p. 161-62).

Following closing arguments and the final jury charge, the jury returned a guilty verdict after twenty-five minutes of deliberations. (R. p. 223-24). Based on his prior record and the fact that this was Applicant's third or subsequent drug offense, the trial judge sentenced Applicant to seventeen years. (R. p. 225-26; Sentencing Hearing Transcript, p. 6-7).

ALLEGATIONS RAISED

In his application and amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel for failing to properly challenge the jury selection
2. Ineffective Assistance of counsel for allowing him to be tried in his absence
3. Ineffective assistance of counsel for failing to present Tyeka Alston as an alibi witness
4. Ineffective assistance of counsel for failing to move for a mistrial following a comment on Applicant's guilt by a State's witness

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called his trial counsel, Assistant Public Defender Jason King (counsel), to testify. Counsel testified he was appointed to represent Applicant while employed at the Charleston County Public Defender's Office. Counsel testified Applicant was briefly represented by private counsel before he was appointed. He testified he met with

Applicant approximately twelve times and that Applicant was released on bond shortly before trial. He testified that he reviewed all discovery material with Applicant, including the video of the crack transaction with confidential informant. He testified Applicant was identifiable in the video, including a distinctive blue cast that Applicant had at the time. He testified Applicant never gave him any possible defenses and admitted it was him on the video, but denied selling crack cocaine to a confidential informant. He testified his defense strategy was to establish the confidential informant was lying to set up Applicant.

Counsel testified he sent letters and called Applicant prior to the term of court advising him his case would be called for trial. He testified Applicant came to the courthouse Monday morning for jury qualifications. Counsel testified he told Applicant that a jury might be selected for his trial that day, but jury selection did not happen that day. Counsel told Applicant his trial would go that week and that they were second on the trial docket following a status conference with Judge Harrington. He testified he advised Applicant that he needed to be present for trial, and if he failed to appear, his trial would go forward in his absence. He also told Applicant he needed to be near his telephone on standby ready to come to the courthouse within thirty minutes.

Counsel testified that on Wednesday, Applicant's case was called for trial. He testified he tried to reach Applicant numerous times without success. He testified he was finally able to reach Applicant and told him his trial was starting and he needed to come to the courthouse immediately. Counsel testified he "begged" Applicant to come for his trial and Applicant told him he was in Mount Pleasant and would try to find a ride downtown. Counsel testified he later called Applicant again when he still had not appeared, and based on this conversation, Counsel

did not believe Applicant was going to appear for his trial. Counsel elaborated that Applicant stated, "I heard nothing going on," which lead counsel to also believe Applicant had someone at the courthouse informing him of his case's progress. He again pleaded with Applicant that he needed to appear for his trial. Counsel testified Applicant's trial did not start until Thursday, giving Applicant additional time to appear, but he still failed to appear and was tried him his absence. Counsel testified Applicant's mother appeared on Thursday for his trial, and he asked her to try to get Applicant to come without success.

Counsel testified Applicant was not advised by the court that he would be tried in his absence, but that he had told Applicant this numerous times. He also acknowledged Applicant's bond form advised him he would be tried in his absence if he failed to appear. He testified the case had been on the trial docket twice before and Applicant had previously appeared. He testified he did not think Applicant would fail to appear based on his prior experiences with Applicant appearing, but he did not feel like there was anything else he could have done to prevent Applicant from being tried in his absence. He testified he asked the court to issue a bench warrant and continue his case, which the court did initially until eventually denying his continuance and proceeding forward without Applicant. He testified the trial court made findings on the record that Applicant had been properly advised of his trial date. Counsel testified he filed a motion to reconsider the sentence to give Applicant an opportunity to address the court and possible reduce his sentence, which was ultimately unsuccessful following a motions hearing.

Regarding jury selection, counsel testified he raised a Batson issue following jury selection based on an all-white jury and the State's striking of four black jurors. He testified the court conducted a Batson motion, during which the State provided race-neutral reasons for all

four challenged jurors. He testified he believed all four responses from the State were valid race-neutral reasons for striking the jurors, and therefore, he did not argue that these reasons were pre-textual. He testified upon reviewing the record, he believes he could have possibly challenged the State's reasons as to jurors 243 and 150 based on family members being arrested or convicted for drug offenses because another juror (juror 96, a white male) also had a family member with drug convictions but was not struck by the State. However, he testified this would not likely have been successful, as his notes reflect juror 96 had worked for the Department of Defense for decades, which was the reason he struck this juror because he thought this juror would be favorable for the State based on his background and employment history. He testified he believes the State would have been able to establish its reasons for striking jurors 243 and 150 were not pre-textual and his motion would have been denied.

Counsel testified the confidential informant testified and that he had dealt with this confidential informant previously while representing another defendant. He testified he was aware the confidential informant had signed an affidavit post-trial in his other client's case asserting he had lied in his other client's trial. Counsel testified he elicited this testimony during his cross-examination of the confidential informant in Applicant's trial to tarnish his credibility before the jury. He testified the confidential informant became upset and stated that Applicant was guilty. He testified he immediately objected, which was sustained by the trial court. He testified the court advised the jury to strike that testimony and not to consider it at all during deliberations. He testified he later moved for a mistrial, citing a curative instruction would not be enough to cure the prejudice, and that the trial court denied his mistrial motion. Counsel testified he was satisfied with the court's curative instruction and thinks that the confidential informant's

behavior and comments helped his defense strategy of showing Applicant was being set up by the informant.

Applicant testified next on his own behalf. Applicant testified he was originally represented by retained counsel, but eventually was represented by trial counsel who was appointed. He testified he only met with counsel a few times and they never discussed trial strategy. He testified counsel showed his the video of the drug transaction and then told him he needed to plead guilty. He testified he never informed counsel it was him in the video. Applicant testified he told counsel that he had an alibi witness—his child's mother.

Applicant testified he appeared Monday morning for jury selections after receiving a call from counsel. He testified he arrived within fifteen minutes of counsel's call. He testified when he arrived, counsel told him they would not pick his jury that day but that his case was on the docket for that week. He testified counsel never told him it was second on the docket. He testified he never received any letters or calls from counsel the week before trial and his first communication with counsel regarding his trial date was the Monday morning phone call from counsel. He testified he was downtown at his child's mother's house the entire week of his trial and denied ever telling counsel he was in Mount Pleasant.

Next, the State presented testimony from the prosecuting Assistant Solicitor, Stephanie Linder. Linder testified she was the solicitor assigned to Applicant's case and recalled his trial. Additionally, she reviewed her notes and file from Applicant's case. She testified counsel raised a Batson motion regarding four jurors she struck, all of whom were black. She testified she provided race-neutral reasons for striking all four jurors, including jurors 150 and 243. Specifically, Linder testified she struck juror 150 because she had two family members who

were currently serving lengthy federal sentences for crack convictions, which was important because these were recent convictions or current incarcerations and involved the same drug as Applicant—crack. Linder testified she struck juror 243 because this juror had responded that her brother was arrested for "the exact same thing," i.e., dealing crack, by a local law enforcement agency (North Charleston), as well as this juror's two prior convictions for shoplifting. When questioned as to why she did not strike juror 96, a white male who also responded that he had a family member who had prior drug arrest, she testified his situation was different because the arrest was much older (twenty years ago) and the drug type and whether he was convicted was unknown. She also testified she believed this juror would be favorable based on his forty-year career with the Department of Defense. She testified her standard practice is to take into account the occupational history of potential jurors during jury selection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v.

Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof and had not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Allegation: Ineffective assistance of counsel for failing to properly challenge the jury selection

Applicant asserts counsel was ineffective for failing to properly challenge his jury pursuant to Batson. Specifically, Applicant contends counsel should have challenged the Sate's

race-neutral reasons for striking jurors 150 and 243 based on family member's arrests for crack convictions as pre-text based on the State's failure to strike juror 96, a white male.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a juror on the basis of race. Batson, 476 U.S. at 89; State v. Inman, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014); State v. Cochran, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006). "Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing and adhere to the procedures set forth in Purkett v. Elem, 514 U.S. 765, 767 (1995), and adopted by our Supreme Court in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996)." Cochran, 369 S.C. at 314, 631 S.E.2d at 297-98. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. Inman at 26, 760 S.E.2d at 108; See Purkett, 514 U.S. at 767-68 (1995).

First, the [party asserting the Batson] challenge must make a prima facie showing that the challenge was based on race. Inman at 26, 760 S.E.2d at 108. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the Batson] challenge to provide a race neutral explanation for the challenge. Id. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. Id. The ultimate burden always rests with the [party asserting the Batson challenge] to prove purposeful discrimination. Id.

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. Purkett, 514 U.S. at 768; Inman at 26,

760 S.E.2d at 108. The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it. Inman at 26, 760 S.E.2d at 108. In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. Id. (emphasis added); see also Batson, 476 U.S. at 93-94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Inman at 26, 760 S.E.2d at 108-09. When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo. Cochran at 315, 631 S.E.2d at 298.

Here, the record establishes counsel properly challenged the jury pursuant to Batson, arguing the jury was all-white and the State struck all four black jurors. (R. p. 88). In response, the State gave race-neutral reasons for striking each juror as follows: juror 175 based on a fraudulent check conviction, to which defense counsel poised no pre-text challenge; juror 188 based on her employment at South Carolina Legal Aid which raised impartiality issues towards the public defender's office, to which defense counsel poised no pre-text challenge; juror 243 based on her brother's arrest in North Charleston for dealing crack, for which defense counsel

poised no pre-text challenge; and juror 150 based two family member's twenty-five year sentences for federal drug convictions; for which defense counsel poised no pre-text challenge. (R. 88-91). The court found the State had provided race-neutral reasons for all of its preemptory strikes and denied defense counsel's motion. (R. 91).

Applicant's contention that counsel was ineffective for failing to challenge the State's race-neutral reasons for striking jurors 150 and 243 in light of juror 96 is without merit. Both counsel and Assistant Solicitor Linder explained why juror 96 was not similarly situated to jurors 150 and 243 and this Court finds these are valid, race –neutral, non-pretextual reasons for striking jurors 243 and 150, and therefore, there was no Batson violation. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for allowing Applicant to be tried in his absence

Applicant asserts counsel was ineffective for allowing him to be tried in his absence. This Court finds this allegation is without merit, as Applicant had proper notice of his trial date, that he would be tried in his absence if he did not appear, and waived his right to be present. Moreover, this Court finds counsel made a considerable effort to persuade Applicant to appear and that Applicant knowingly and voluntarily elected not to be present for his trial.

Although the Sixth Amendment guarantees a defendant's right to be present at trial, it is well established that this right may be waived. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 688 (Ct. App. 2006). Rule 16, SCRCrimP, provides that a defendant may waive his right to be present, and may be tried in his absence, upon the court's finding that the defendant received notice of his right to be present and that he was warned the trial would proceed in his absence if he failed to appear.

State v. Fairey, at 99-100, 646 S.E.2d at 448. Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Also, 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. Fairey, 374 S.C. at 101, 646 S.E.2d at 449. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306. A trial judge must determine that the defendant voluntarily waived his right to be present in order to try the case *in absentia*. Aiken v. Koontz at 547, 629 S.E.2d at 689.

Recently, in State v. Wrapp, the Court of Appeals held that before a defendant can be tried in his absence, the circuit court must make 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), reh'g denied (Jan. 18, 2018).[1]

In the present case, Applicant had notice of his trial date, that he would be tried in his absence if he did not appear, and waived his right to be present by refusing to show up for his trial despite considerable and diligent efforts by his counsel. The record shows counsel continuously contacted Applicant in an effort to secure his presence at trial and asked the court to continue the case rather than proceed in Applicant's absence numerous times. Moreover, once

[1] This Court acknowledges that Wrapp was decided years after Applicant's conviction, but nonetheless finds the specific findings required for trying a defendant in his absence as set forth in Wrapp were fulfilled in Applicant's case.

Applicant was convicted, counsel moved for sentence reconsideration to allow Applicant an opportunity to address the trial court in hopes of securing a more lenient sentence. This Court finds counsel's performance was not deficient in any regard as to his absence at trial. This Court finds this allegation is without merit and must be denied and dismissed.

Allegation: Ineffective assistance of counsel for failing to call an alibi witness

Applicant asserts counsel was ineffective for failing to call an alibi witness, Tyeka Alston, in Applicant's defense. Counsel testified credibly that Applicant never denied it was him in the video and never provided him with any alibi witnesses. Moreover, Applicant failed to produce Ms. Alston or any other alibi witnesses at the hearing. Therefore, this Court finds this allegation must be denied and dismissed. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

Allegation: Ineffective assistance of counsel for failing to move for a mistrial following a comment on Applicant's guilt by a State's witness

Applicant asserts counsel was ineffective for failing move for a mistrial following a comment by the confidential informant that Applicant was guilty. This Court finds this allegation is wholly without merit. The record establishes counsel immediately objected to this testimony, his objection was sustained, the court struck the testimony and instructed the jurors not to consider it during deliberations, and counsel moved for a mistrial. (Tr. p. 149-150, 161). Counsel

did all of the things that Applicant is now alleging he should have done. This allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this allegation is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 25 day of April, 2018.

Maite Murphy

MAITE MURPHY
Presiding Judge
Ninth Judicial Circuit

Orangeburg, South Carolina

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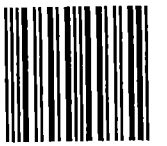

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