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ATTORNEY GENERAL

9286 / 9836

February 2, 2015

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Dear Ms. Frierson:

We are in receipt of your September 11, 2014 opinion request asking whether a defendant who has demanded a jury trial in summary court can waive such a demand by conduct. Specifically, you ask "if a defendant does not appear on the scheduled trial date, can the jury be dismissed and the defendant tried in his absence by a bench trial even though the defendant demanded a jury trial?" Continuing, you note some courts have created forms for use by defendants requesting a jury trial and add that these forms "include a waiver of the jury trial for failure to appear." You also note that some courts "consider a defendant to have waived his jury trial if he fails to appear for a jury strike." In light of this, you further ask "whether these are adequate waivers of a jury trial when a defendant has properly demanded a jury trial" and have attached an example of such a waiver for our review. Our response follows.

I. Law/Analysis

Generally speaking, the right to trial by jury in South Carolina stems from several sources: the United States Constitution; the South Carolina Constitution; and, in some cases, South Carolina statutory law. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (concluding the Fourteenth Amendment extends the Sixth Amendment's Right to Trial by Jury to the States in criminal cases where, if they were tried in federal court, the defendant would be subject to the Sixth Amendment's protections); S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."); S.C. Code Ann. § 22-2-150 (2007) (providing that individuals subject to the jurisdiction of the magistrate's court are "entitled on demand to trial by jury" as provided within Chapter 22); S.C. Code Ann. § 14-25-125 (Supp. 2014) (stating individuals tried before the municipal court may demand a jury trial, but shall be deemed to have waived such a right by failing to make such a demand). However, the question of whether these legal provisions apply in South Carolina's summary courts (i.e. Magistrate and Municipal Court) is largely offense specific.

For example, since the Supreme Court of the United States has found the Sixth Amendment Right to Trial by Jury[1] only applies to "serious crimes" and not "petty offenses," many summary court-level offenses may not be subject to the Sixth Amendment's Right to Trial by Jury. E.g. U.S. v. Jenkins, 780 F.2d 472, 475 (4th Cir. 1986) (finding South Carolina's then-existent D.U.I. first offense statute is a petty offense for purposes of the Sixth Amendment's Right to Trial by Jury). In Baldwin v. New York, 399 U.S. 66, 68 (1970) the Supreme Court found that unlike serious crimes, petty offenses, generally defined as those carrying less than a six month term of imprisonment and a $5000 fine, do not trigger the Sixth Amendment's Right to Trial by Jury. Elaborating on this, the Court, in Blanton v. North Las Vegas, 489 U.S. 538, 543 (1989) announced a bright-line rule and explained that where the maximum term of imprisonment is six months or less and a $5000 fine imposed, an offense is presumed to be petty. Under the rule from Blanton, this presumption can only be rebutted where a defendant "can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a serious one." Id. Thus, since summary court jurisdiction for criminal offenses in South Carolina is generally set at 30 days imprisonment and up to a $500 fine, summary court-level offenses are, pursuant to Blanton, presumed to be petty for purposes of the Sixth Amendment Right to Trial by Jury absent a clear legislative determination to the contrary. See S.C. Code Ann. § 14-25-65 (Supp. 2014) (setting maximum criminal penalties to be imposed by municipal court at 30 days imprisonment and up to a $500 fine); S.C. Code Ann. § 22-3-540 (2007) (providing magistrates with exclusive jurisdiction "of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days" and providing magistrates with concurrent jurisdiction over offenses outside of the court's exclusive jurisdiction where expressly provided by statute); S.C. Code Ann. § 22-3-550(A) (2007) (granting magistrates jurisdiction "of all offenses" subject to up to a $500 fine and imprisonment up to 30 days).

Additionally, albeit for different reasons, the determination of whether the South Carolina Constitution conveys a right to a jury trial is also offense driven. Specifically, our Supreme Court has repeatedly interpreted the South Carolina Constitution's Right to Trial by Jury language[2] as merely securing the right as it existed at the time of the adoption of the 1868

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[1] The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

[2] As noted in your request letter, Article I, Section 14 of the South Carolina Constitution states:

Constitution rather than extending such a right. C.W. Matthews Contracting Co., Inc. v. S.C. Tax Comm'n., 267 S.C. 548, 230 S.E.2d 223 (1976) (citing McGlohan v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970); Richards v. Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); State v. Gibbes, 109 S.C. 135, 95 S.E.2d 346 (1915); Smith & Co. v. Bryce, 17 S.C. 538 (1882)). As a result, in order to ascertain whether an individual has a right to trial by jury under the South Carolina Constitution, courts look to whether the underlying action included a right to a jury trial at the time the Constitution was enacted, and if it did not, whether a subsequent form of action is of a like nature to one "triable at common law at the time of the adoption of the Constitution." In re: Stephen W., 409 S.C. 73, 77, 761 S.E.2d 231, 233 (2014). Thus, while some actions within the jurisdiction of a summary court may include a constitutional right to a jury trial pursuant to the South Carolina Constitution, other offenses will not. See Op. S.C. Att'y Gen., 1989 WL 406150 (May 16, 1989) (stating D.U.I. first offense is not an offense subject to the South Carolina Constitutional Right to Trial by Jury); Jenkins, 780 F.2d at 475 (same).

Despite the fact federal and state constitutional rights to trial by jury do not uniformly apply to all summary court level offenses, the Legislature has clearly provided a statutory right to trial by jury in summary courts. In particular, Section 14-25-125 of the South Carolina Code provides defendants in municipal courts with a right to trial by jury. See S.C. Code Ann. § 14-25-125 ("A person to be tried in a municipal court, prior to trial, may demand a jury trial . . . [t]he right to a jury trial shall be deemed to have been waived unless demand is made prior to trial."). The same is true in magistrate's court pursuant to Section 22-2-150 of the Code. See S.C. Code Ann. § 22-2-150 ("Every person arrested and brought before a magistrate charged with an offense within his jurisdiction shall be entitled on demand to trial by jury which shall be selected as provided in this chapter."); Bayly v. State, 397 S.C. 290, 296, 724 S.E.2d 182, 185-86 (2012) (concluding magistrate's court subject matter jurisdiction is statutorily determined and is not premised upon the existence of a uniform traffic ticket or an arrest warrant). With this in mind, we return to you initial question—whether a criminal defendant who has demanded a jury trial may subsequently waive his demand via conduct, namely, by failing to appear for his or her scheduled trial date.

A. Waiver of an Individual's Right to Trial by Jury by Conduct

As touched on above, there are three different sources of law regarding the right to trial by jury and thus three potentially different answers with respect to the question of waiver by conduct.[3] That said, because the Sixth Amendment Right to Trial by Jury is presumed not to

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The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; 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.

[3] Some courts and commentators have preferred to view the concept of waiver by conduct as "deemed waiver" or "forfeiture by misconduct." See Commonwealth v. Francis, 374 Mass. 750, 759, 374 N.E.2d 1207, 1212 appeal

apply to South Carolina's summary courts under the rubric of Blanton, this opinion, while noting the general waiver requirements of such a right and addressing the question of waiver by conduct, will focus primarily on waiver of the State Constitutional and statutory rights to trial by jury.

1. **Assuming it Applies in Summary Court, may an Individual's Sixth Amendment Right to Trial by Jury be Waived by Conduct in State Court?**

As a general matter, once an individual subject to the Sixth Amendment's Right to Trial by Jury has demanded a jury trial, the right may only be waived where a court finds a knowing, voluntary and intelligent waiver of such a right. 21A Am Jur. 2d Crim. Law § 983; Patton v. U.S., 281 U.S. 276, 312 (1930). Nevertheless, a knowing and intelligent waiver of the Sixth Amendment Right to Trial by Jury need not be on the record in order to be valid. Marone v. U.S., 10 F.3d 65, 67 (2nd Cir. 1993); U.S. v. Martin, 704 F.2d 267, 274 (6th Cir. 1983); U.S. v. Scott, 583 F.2d 362, 363-64 (7th Cir. 1978). Instead, the question of whether a valid waiver has occurred depends only upon the unique circumstances of each case. Patton, 281 U.S. at 278. That said, "[t]here is a presumption against the waiver of constitutional rights . . . and for a waiver to be effective it must clearly be established that there was an intentional relinquishment or abandonment of a known right or privilege." Brookhart v. Janis, 384 U.S. 1, 4 (1966) (internal citations omitted) (internal quotations omitted).

Despite the existence of general authority indicating a criminal defendant's waiver of the Sixth Amendment's Right to Trial by Jury should be knowingly, voluntarily and intelligently tendered, the Supreme Court, in Ludwig v. Massachusetts, 427 U.S. 618, 622 n.1 (1976) left open the possibility that an individual may waive such a right by conduct. Specifically, the Ludwig Court, assessing the constitutionality of Massachusetts' two-tier court system, a system requiring defendants in certain classes of cases to first participate in a bench trial in district court before exercising their right to trial by jury in an appeal to the superior court, expressly declined to address whether an individual who requests a jury trial, but fails to appear, has waived such a right. Ludwig, 427 U.S. at 618 n.1.

Two years later, the Court, albeit in the form of a summary dismissal, answered this question in Commonwealth v. Francis, 374 Mass. 750, 759, 374 N.E.2d 1207, 1212 (Mass. 1978) appeal dismissed 439 U.S. 805 (1978).[4] In Francis, the Supreme Court, by summarily dismissing

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dismissed 439 U.S. 805 (1978) (discussing a waiver by conduct in terms of deemed waiver); Preston v. Seay, 541 F. Supp. 898, 904 (D. Mass. 1981) aff'd, 684 F.2d 172, 173 (1st Cir. 1982) (same); W. Lafave and J. Israel, 6 Crim. Proc. § 24.2(d) n.39 (3d Ed.) (explaining that because of the difficulty of squaring traditional "waiver-of rights theory" with waiver by conduct, "it would seem preferable to view the matter in terms of forfeiture of a right by misconduct.") (citing People v. Sanchez, 65 N.Y.2d 436, 492 N.Y.S. 577, 482 N.E.2d 56 (1985)).

[4] As noted in Hicks v. Miranda, 422 U.S. 332 (1975) a summary dismissal for want of a substantial federal question is, unlike a denial of certiorari, a ruling on the merits of a case. See id. at 344 ("[V]otes to affirm summarily, and to

the defendant's appeal, effectively affirmed the Massachusetts Supreme Judicial Court's conclusion that one who fails to appear in court after requesting a jury trial is "deemed to have waived his constitutional right to trial by jury." Francis, 374 Mass. at 759, 374 N.E.2d at 1212.

Notably, the Supreme Judicial Court in Francis, relying on evidence in the record showing the defendant's actions—failing to comply with instructions to provide his new address to the clerk of court—resulted in the default and deemed waiver of the defendant's Sixth Amendment Right to Trial by Jury. Id. In so finding, the Supreme Judicial Court concluded a knowing and voluntary waiver of the Sixth Amendment Right to Trial by Jury was unnecessary. Id. The defendant then sought review in the appellate jurisdiction of the Supreme Court arguing in his jurisdictional statement that the application of the Massachusetts default statute and deemed waiver did not "support a finding of a voluntary, knowing and intelligent waiver of the right to a jury trial." Preston v. Seay, 684 F.2d 172, 173 (1st Cir. 1981) (citing Jurisdictional Statement in Francis at pp. 7-9). The Supreme Court, by summarily dismissing the appeal along with a companion case[5] raising the same issue, effectively affirmed the Massachusetts Court's ruling that a defendant's Sixth Amendment Right to Trial by Jury is not violated by a finding of default and deemed waiver. As a result, it appears that under some circumstances, a criminal defendant may be deemed to have waived or forfeited his or her Sixth Amendment Right to Trial by Jury without factual findings indicating the defendant "understood his right to jury trial and intelligently and knowingly relinquished it." Preston v. Seay, 541 F. Supp. 898, 904 (D. Mass. 1981), aff'd 684 F.2d at 173. Thus, Francis stands for the proposition that a criminal defendant may waive his or her Sixth Amendment Right to Trial by Jury by conduct, including failure to appear at trial.[6] See Preston, 684 F.2d at 173 (concluding Francis stands for the proposition that where "the facts support a 'solid default,' the more stringent waiver requirements applicable to other situations need not be met."); see also Hicks, 422 U.S. at 344 ("[U]nless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.").

2. May an Individual's South Carolina Constitutional Right to Trial by Jury be Waived by Conduct?

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dismiss for want of a substantial federal question . . . are votes on the merits of a case.") (citing Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959)). In reaching this conclusion the Court relied on the fact that, unlike its' certiorari jurisdiction, the previous version of 28 U.S.C. 1257(2) "required" the Court, pursuant to its appellate jurisdiction, to deal with the merits of a case. Id. at 344.

[5] See Commonwealth v. O'Clair, 374 Mass 759, 374 N.E.2d 1212, appeal dismissed 439 U.S. 805 (1978).

[6] This is consistent with other authorities explaining a criminal defendant, after initially appearing at trial, but subsequently failing to appear, may be deemed to have waived or forfeited his or her right to be present at trial where such an absence is voluntary. Crosby v. U.S., 506 U.S. 255, 262 (1993); Taylor v. U.S., 414 U.S. 17, 20 (1973); Diaz v. U.S., 223 U.S. 442, 455 (1912); Fed. R. Crim. P. 43(c); U.S. v. Sterling, 788 F.3d 228, 235 (11th Cir. 2013); U.S. v. Muzevsky, 760 F.2d 83, 84 (4th Cir. 1985); U.S. v. Tortora, 464 F.2d 1202, 1207 (2nd Cir. 1972).

While the Sixth Amendment Right to Trial by Jury may, in some circumstances, be waived by conduct, as seen in Francis, we believe the South Carolina Constitutional Right to Trial by Jury requires more in the form of a knowing, voluntary and intelligent waiver. E.g. State v. Arthur, 296 S.C. 495, 497, 374 S.E.2d 291, 292-93 (1988) (overruled in part by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)) (holding a defendant's right to trial by jury must be knowingly, voluntarily and intelligently waived); Rule 14(b), S.C. R. Crim. P. ("A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge."). Thus, to the extent the South Carolina Constitution secures an individual a right to trial by jury in a summary court-level offense under Article I, Section 14, a summary court cannot, without the presence of a sufficient waiver, find that an individual who has previously demanded a jury trial has waived such a right by conduct, even where that conduct is the defendant's failure to appear.

As far back as 1885, our Supreme Court has found one's right to a jury trial cannot be waived by conduct alone. See Sale v. Meggett, 25 S.C. 72 (1885) (reviewing a now-repealed statute and finding one's right to a jury trial cannot be waived by conduct). In fact, our Supreme Court recently reiterated this in the context of a civil case finding that while one's conduct can be a factor in evaluating a waiver, an individual's waiver of the right to trial by jury must still be knowing and voluntary. See Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014) (concluding individuals who demanded a jury trial and later entered into a contractual agreement waiving their right to trial by jury were aware of the contents of the agreement and therefore, despite later claiming they were unaware of the waiver provision, executed a knowing, voluntary and intelligent waiver).

This proposition is especially true within the context of criminal trials in South Carolina where our Supreme Court has explained that although an on-the-record waiver of a constitutional or statutory right is not required, a waiver must still reflect a knowing and voluntary relinquishment of the right. Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) (citing Meyers v. State, 248 S.C. 539, 151 S.E.2d 665 (1966)); see also, State v. Shuck, 278 S.C. 441, 442-43, 298 S.E.2d 95, 96 (1982) (holding a defendant in a non-capital case may waive his right to a jury with the consent of the prosecuting attorney and the trial judge so long as the waiver of that right is knowing, voluntary and intelligent). Indeed, this conclusion is supported by Rule 14 of the South Carolina Rules of Criminal Procedure which explains, "[a] defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge" and adds that the trial court must also, "ensure that the defendant's rights under the state and federal constitutions to a trial by jury are preserved." Rule 14(b)-(c), S.C. R. Crim. P. (2015). In short, assuming the South Carolina Constitution secures an individual a right to trial by jury for a summary court-level offense, there is nothing to indicate that, once asserted, an individual's right to trial by jury under the South Carolina Constitution may be waived by conduct alone.[7]

[7] While we recognize that other constitutional rights, such as the right to be present, have been said to be waived by conduct, we note that even in cases involving a waiver of the right to be present, South Carolina Courts, consistent with Rule 16 of the South Carolina Rules of Criminal Procedure, must find that the accused "voluntarily" waived his

Moreover, and unlike the Commonwealth of Massachusetts' court system in Francis, South Carolina law does not currently recognize that either deemed waiver or forfeiture concepts apply to a criminal defendant's request for a jury trial. In other words, South Carolina law, unlike Massachusetts law, does not equate an individual's failure to appear after demanding a jury trial as a forfeiture of that individual's right to a jury trial. In fact, as noted in footnote seven above, while South Carolina does recognize that an individual may forfeit his right to be present at trial by his failure to appear, even then South Carolina law still requires a trial judge to determine that "a criminal defendant *voluntarily* waived his right to be present at trial in order to try the defendant in his absence." Ravenell, 387 S.C. at 455, 692 S.E.2d at 557-58 (emphasis added) (citing State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006)). Furthermore, because making such a finding requires the court to make findings of fact that: (1) the defendant received notice of his or her right to be present; and (2) the defendant was warned that he or she would be tried *in absentia*, as required under State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986), it seems South Carolina still, even with respect to the right to be present, does not truly equate an individual's mere conduct in failing to appear at trial as a true forfeiture of the right to be present.

Additionally, South Carolina is not alone in finding a criminal defendant who has made a timely demand for a jury trial does not forfeit his or her state constitutional right by mere conduct. Indeed, once an individual has timely demanded a jury trial, many states require a knowing and voluntary waiver of that individual's state constitutional right to trial by jury. For instance, North Dakota, like South Carolina, entrusts its trial courts to preserve a criminal defendant's right to a jury trial. See City of Grand Forks v. Thong, 2002 ND 48, 640 N.W. 721, 725 (N.D. 2002). As part of that duty, North Dakota requires its trial courts to obtain an express waiver of a criminal defendant's state constitutional right to a jury trial and thus does not permit a waiver of such a right by conduct alone. Id. Similarly, Oklahoma law also requires an "express voluntary waiver" where an individual has previously asserted their state constitutional right to a jury trial and subsequently fails to appear.[8] See In re: State ex rel. K.W., 2006 OK CIV APP 40, 134 P.3d 911, 912 (Okla. Civ. App. 2006) (finding an individual in a termination of parental rights action who had previously asserted her state constitutional right to trial by jury did not waive such a right by her failure to appear, as a waiver of her state constitutional right to a jury trial required "an express voluntary waiver."); In re: S.B., 2000 OK CIV APP 11, 996 P.2d

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right to be present and may only be tried *in absentia* 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 trial would proceed in his absence upon a failure to attend the court." Rule 16, S.C. R. Crim. P.; see also State v. Ravenell, 387 S.C. 449, 455-56, 692 S.E.2d 554, 557-58 (Ct. App. 2010) ("A trial judge must determine a criminal defendant voluntarily waived his right to be present" and "must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence.").

[8] By contrast, Oklahoma does permit an individual to waive their state constitutional right to trial by jury by conduct in a purely civil matter, but only where such an individual is present at trial and fails to object to a bench trial. Federal Sur. Co. v. L.B. Adams Lumber Co., 170 Okla. 445, --, 40 P.2d 1057, 1059 (1935).

493, 494 (Okla. Civ. App. 1999) (same); In the Matter of N.P. and R.M., 1999 OK CIV APP 8, 974 P.2d 187, 188 (Okla Civ. App. 1998) (same). In fact, even Montana, despite recognizing that an individual timely demanding a jury trial *may* be deemed to waive such a right by failing to appear,[9] does not "permit a categorical rule of automatic waiver whenever a defendant fails to appear for a mandatory hearing." City of Missoula v. Girard, 370 Mont. 443, 449, 303 P.3d 1283 1287 (Mont. 2013). Instead, Montana's Supreme Court, recognizing the fundamental nature of the right to trial by jury, has advised its trial courts to "remain mindful" of circumstances indicating a criminal defendant's failure to appear may not be entirely voluntary or intentional. Girard, 370 Mont. at 449-50, 303 P.3d at 1287-88. Thus, we believe that in the types of summary court cases in which Article I, Section 14 of the South Carolina Constitution operates to preserve a right to trial by jury as interpreted in C.W. Matthews Contracting, McGlohan, Richards, Gibbes and Smith & Co., the waiver of such a right should not be the product of conduct alone, but must, consistent with South Carolina law, be the product of a knowing, voluntary and intelligent waiver.

3. May an Individual's Statutory Right to Trial by Jury in Summary Court be Waived by Conduct?

As detailed above, even if the Federal and State Constitutions do not convey a constitutional right of trial by jury to an individual subject to the jurisdiction of South Carolina's summary courts, it appears a statutory right to trial by jury still exists. Specifically, Section 14-25-125 of the South Carolina Code provides defendants in municipal courts with a right to trial by jury. See S.C. Code Ann. § 14-25-125 ("A person to be tried in a municipal court, prior to trial, may demand a jury trial . . . [t]he right to a jury trial shall be deemed to have been waived unless demand is made prior to trial."). The same is true in magistrate's court pursuant to Section 22-2-150 of the Code. See S.C. Code Ann. § 22-2-150 ("Every person arrested and brought before a magistrate charged with an offense within his jurisdiction shall be entitled on demand to trial by jury which shall be selected as provided in this chapter."). Thus, we must address whether criminal defendants who have previously demanded a jury trial in summary court may waive their statutory right to trial by jury by conduct alone. We believe they cannot.

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[9] See City of Missoula v. Cox, 346 Mont. 422, 424, 196 P.3d 452, 454 (Mont. 2008) (concluding a defendant who requested a jury trial and failed to appear for a mandatory pre-trial conference after having been warned by court form that his failure to appear would result in a bench trial, was deemed to have waived his state constitutional right to trial by jury); State v. Trier, 365 Mont. 46, 49, 277 P.3d 1230, 1232 (Mont. 2012) (stating a defendant that requested a jury trial and then failed to appear after receiving a written warning indicating his failure to appear would result in a bench trial, was deemed to have waived his state constitutional right to trial by jury); State v. Loberg, 375 Mont. 555, unpub. slip op. at 1, 2014 WL 2609289 (Mont. June 10, 2014) (finding a criminal defendant who demanded a jury trial and subsequently failed to appear at a mandatory pre-trial hearing after having received a court form warning him that his failure to appear would result in a bench trial, was deemed to have waived his state constitutional right to trial by jury).

Waiver of the statutory right to trial by jury in summary court is governed by the same state law principles of waiver as those laid out in Section I(A)(2) above. See Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) (indicating the standard for waiving a statutory right in South Carolina is the same as waiving a constitutional right). In particular, a criminal defendant waiving a statutory right, like a criminal defendant waiving a state constitutional right, must waive such a right knowingly, voluntarily and intelligently. Id. However, the waiver need not be on the record in order to be valid. Id. Further, because a statutory right to trial by jury is defined by the terms of the statute (or statutes) at issue, the statute granting such a right may also determine the means of waiving such a right.

Here, it is clear Sections 14-25-125 and Section 22-2-150 both convey individuals subject to the jurisdiction of South Carolina's summary courts with a right to trial by jury. Further, it is obvious that because your question involves a scenario in which a criminal defendant has demanded a jury trial prior to trial, South Carolina's laws regarding waiver apply and thus, the statutory right to trial by jury cannot be waived by conduct alone.[10] As a result, while conduct, such as failure to appear for trial, may be a factor when considering whether a defendant knowingly and voluntarily waived their right to trial by jury, the totality of the circumstances must reflect the waiver of a criminal defendant's right to trial by jury is both knowing and voluntary. Brown, 317 S.C. at 272, 453 S.E.2d at 252; c.f. Spoone v. State, 379 S.C. 138, 143, 665 S.E.2d 605, 608 (2008) (explaining that where an individual waives his statutory rights to appellate and collateral review, the circumstances surrounding the waiver of these rights should include: (1) the background, experience and conduct of the accused, (2) the text of the agreement, and (3) the transcript of the plea hearing). Indeed, this practice is consistent with a variety of other states which explain that a statutory right to trial by jury, once invoked, functions like other rights, and thus should not be deemed waived by conduct alone, and should instead be the product of a knowing and voluntary waiver. See People v. Delahanty, 173 Mich. App. 487, 490, 434 N.W.2d 431, 432 (Mich. Ct. App. 1988) (holding the trial court committed reversible error in trying criminal defendant *in absentia* and via bench trial without a knowing and voluntary waiver of defendant's previously demanded right to jury trial); Wilson v. State, 453 N.E.2d 340, 342 n. 3 (Ind. Ct. App. Div. 1, 1983) (finding trial court's failure to honor criminal defendant's request for statutory right to jury trial on the sole basis that he was deemed to waive

[10] However, had an individual subject to the protections of either § 14-25-125 or § 22-2-150 simply failed to timely request a jury trial, it appears a waiver by conduct may be appropriate in light of the fact both statutes require a criminal defendant to actually demand a jury trial. E.g. Affatato v. Considine, 305 Ga. App. 755, 759, 700 S.E.2d 717, 721 (Ga. Ct. App. 2010) (concluding a litigant failed to exercise his statutory right to trial by jury and thus waived his right to complain about it on appeal); Wilson v. Wilson, 282 Ga. App. 728, 734, 653 S.E.2d 702, 707 (Ga. Ct. App. 2007) (deciding an individual's failure to timely request a jury trial and subsequent participation in a bench trial resulted in a waiver of the statutory right to trial by jury); City of Renton v. Willard, 44 Wash. App. 525, 527, 723 P.2d 10, 11-12 (Wash. Ct. App. Div. 1, 1986) (holding a defendant who was advised he must request a jury trial and was warned that his failure to do so would result in the waiver of such a right, was deemed to have waived his right to trial by jury by failing to demand a jury trial); State v. Brown, 14 Ohio Supp. 63, 64, (Ct. Common Pleas, Cuyahoga Cty. 1944) (finding an individual who, despite having a statutory right to trial by jury, failed to demand a jury trial was deemed to have waived his right to trial by jury).

such a right by his failure to appear at two pre-trial hearings was reversible error); Barker v. Barker, 166 A.D. 863, 864, 152 N.Y.S. 356, 357 (N.Y. App. Div. 1915) (stating trial court erred by denying appellant's motion to strike case from non-jury docket because despite receiving two continuances prior to making jury demand, the continuances did not amount to a waiver by conduct and appellant therefore never waived his statutory right to trial by jury). Accordingly, we believe that once a criminal defendant has demanded his statutory right to a jury trial in summary court, that individual cannot subsequently be deemed to have waived or forfeited his or her right to trial by jury by conduct alone, even by failing to appear, as South Carolina law requires a knowing and voluntary waiver of a statutory right.

B. Whether the Use of Forms are an Adequate Waiver of a Jury Trial when a Defendant has Properly Demanded a Jury Trial

Your next question asks us to address the propriety of a summary court utilizing a jury demand form which includes language indicating a criminal defendant's failure to appear will be construed as a waiver of the right to a jury trial.[11] While it is true that a waiver of a statutory or constitutional right need not appear "on the record" in order to be valid under Brown, because South Carolina law does not permit a deemed waiver or forfeiture of an individual's constitutional and statutory right to trial by jury, but instead requires a knowing and voluntary relinquishment of such a right, we believe sole reliance on such a form is at odds with South Carolina law.

A similar issue was addressed recently in State v. Brannon, 407 S.C. 293, 295-96, 755 S.E.2d 117, 118 (Ct. App. 2014). There, the Court of Appeals, after reviewing the record in a probation revocation matter, concluded the record contained no factual finding supporting the defendant's waiver of his statutory right to a hearing and remanded the matter to the circuit court to determine whether "Brannon knowingly and voluntarily waived his right to a probation revocation hearing." Id. at 296, 755 S.E.2d at 118. In remanding, the Court voiced its displeasure with the lack of fact-finding in the record stating, "we are troubled by the absence of any finding whatsoever in the appealed order that Brannon knowingly and voluntarily relinquished his right to a hearing." Id. Continuing, the Court highlighted that "pre-printed language in the form order revoking Brannon's probation states the circuit court found Brannon violated various conditions of his probation '[a]fter hearing the evidence and being duly advised' in Brannon's absence." Id. As a result, the Court, after acknowledging that Brown did not

[11] The form language states as follows:

> INITIALS: I FURTHER UNDERSTAND IF I FAIL TO APPEAR FOR MY JURY STRIKE, MY FAILURE TO APPEAR IS TO BE CONSTRUED BY THE COURT AS MY EXPRESSED WAIVER OF MY RIGHT TO A JURY TRIAL AND THAT MY CASE WILL THEN BE HEARD BY A JUDGE IN MY ABSENCE WITHOUT MY JURY

See Sample Court Form.

require an "on-the-record" waiver of his right to a hearing, nevertheless instructed the circuit court to look to the "complete record" of the proceedings[12] to determine whether Brannon's right to a hearing had been the product of a knowing and voluntary waiver. Brannon, 407 S.C. at 296, 755 S.E.2d at 118.

Thus, to return to your question, since South Carolina law does not recognize deemed waiver or forfeiture of an individual's right to trial by jury by conduct alone, a summary court's sole reliance on the form mentioned above without inquiry in the facts of a defendant's failure to appear would be inconsistent with South Carolina law. Similarly, we believe sole reliance on such forms for purposes of determining a knowing and voluntary waiver of the right to trial by jury is also inconsistent with the obligations South Carolina law places on judges tasked with determining whether a criminal defendant has executed a knowing and voluntary waiver. See Brannon, 407 S.C. at 296, 755 S.E.2d at 118 (citing Moore, 399 S.C. at 647, 732 S.E.2d at 873) (explaining South Carolina law requires a trial judge to look to the "complete record" to determine whether a criminal defendant has knowingly and voluntarily waived his or her constitutional and statutory rights); Moore, 399 S.C. at 647, 732 S.E.2d at 873 (explaining South Carolina law instructs judges to look to the totality of the circumstances in a case, including the background, experience and conduct of the accused, when determining whether a defendant has knowingly and voluntarily relinquished his or her right to trial by jury). This is especially true in cases where either the state or federal constitutional right to trial by jury applies, as sole reliance on a form waiver would be inconsistent with a trial judge's role under Rule 14(c) of our Rules of Criminal Procedure as the rule entrusts judges with preserving a "defendant's right . . . to trial by jury." Rule 14(c), S.C. R. Crim. P. Indeed, our law remains clear that a summary court judge, like any trial judge, must look to the totality of the circumstances of the "complete record," rather than one form, when ascertaining whether a criminal defendant has knowingly and voluntarily waived his or her right to trial by jury. Brannon, 407 S.C. at 296, 755 S.E.2d at 118; Moore, 399 S.C. at 647, 732 S.E.2d at 873. Accordingly, while a summary court judge may consider such a form in determining whether a criminal defendant has knowingly and voluntarily waived his or her right to trial by jury by failing to appear, it should not be the sole factor in such a determination in light of our appellate court's recent rulings in both Brannon and Moore.

II. Conclusion

In conclusion, it is the opinion of this Office that assuming it applies to summary court offenses, the Sixth Amendment Right to Trial by Jury may be deemed to be waived or forfeited by a criminal defendant's failure to appear in certain circumstances consistent with those in Francis. Nevertheless, because South Carolina law does not recognize that either the South Carolina Constitutional Right to Trial by Jury or the summary court right to trial by jury embodied in Sections 14-25-125 and 22-2-150 can be waived by conduct alone, we believe a

[12] See Moore v. State, 399 S.C. 641, 647, 732 S.E.2d 871, 873 (2012) ("A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record.").

criminal defendant's failure to appear, by itself, cannot be deemed a waiver or forfeiture of such a right. Instead, in offenses where a criminal defendant's state constitutional right to trial by jury is preserved, such a right, like the statutory right to trial by jury in summary courts, can only be waived where a review of the complete record demonstrates, by a totality of the circumstances, that a knowing and voluntary waiver has occurred. In light of this, we further believe that the forms alluded to in your request are, by themselves, inadequate to demonstrate a knowing and voluntary waiver of an individual's right to trial by jury. As a result, while such waiver forms may be reviewed as part of the "complete record" we believe that summary courts, like other trial courts, must continue to look to the totality of the circumstances to determine whether a criminal defendant who fails to appear for trial has knowingly and voluntarily waived his or her right to trial by jury.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General