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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenwood County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE,

APPELLANT,

V.

TERRENCE O'NEIL FRAZIER,

RESPONDENT

APPELLATE CASE NO. 2023-001439

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# FINAL BRIEF OF RESPONDENT

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## COUNTER STATEMENT OF THE ISSUE

Whether the circuit court correctly concluded Frazier's waiver of the right to counsel was not knowingly and intelligently made, since there was a plethora of evidence to support the court's findings that Frazier was neither adequately warned of the dangers of proceeding pro se nor had sufficient background to understand the risks of self-representation?

## STATEMENT OF THE CASE

Terrence Frazier (Frazier) was indicted for carjacking, leaving the scene of an accident, breaking into a motor vehicle, grand larceny of a motor vehicle valued over ten thousand dollars, and trafficking methamphetamine. R. 649 – 161; *State v. Frazier*, Op. No. 2019-UP-371 at 2 (S.C. Ct. App. filed November 27, 2019). Frazier was tried before the Honorable Eugene C. Griffith, Jr., and a jury, from November 16 – 19, 2015. R. 82. Frazier represented himself pro se but was assisted during part of the trial by standby counsel Patricia Bolen and Elizabeth Able. Standby counsel was appointed after jury selection and pretrial motions. R. 146, l. 16 – 75, l. 147. Brian Moroney (Moroney) and Micah Black prosecuted the case. R. 82; R. 148; R. 149, ll. 9-14.

Frazier was found guilty of leaving the scene of an accident, breaking into a motor vehicle, grand larceny of a motor vehicle valued over ten thousand dollars, and trafficking methamphetamine. The jury found Frazier not guilty of carjacking but convicted him of the lesser offense of using a vehicle without permission. R. 635, l. 17 – 636, l. 24. The trial court sentenced Frazier to concurrent terms of twelve months for leaving the scene of an accident, thirty-six months for using a vehicle without permission, sixty months for breaking into a motor vehicle, sixty months for grand larceny, and twenty years for trafficking methamphetamine, second offense. R. 644, l. 25 – 645, l. 6.

Frazier directly appealed his convictions, and on November 27, 2019, this Court issued an opinion in which it found that the record did not demonstrate Frazier's decision to represent himself was made with an understanding of the risks of self-representation. *State v. Frazier*, Op. No. 2019-UP-371 (S.C. Ct. App. filed November 27, 2019). This Court concluded that the record failed to show whether Frazier was adequately warned of the dangers of proceeding pro se

or had sufficient background to understand the risks of self-representation. *State v. Frazier*, Op. No. 2019-UP-371 at 6. This Court remanded the case for an evidentiary hearing on the issue. *Id.* at 7.

On March 3, 2023, the circuit court held a hearing to determine whether Frazier's waiver of his right to counsel was knowingly and intelligently made. R. 12. After taking the matter under advisement, on or about October 3, 2023,[1] the circuit court issued an order in which it determined Petitioner's waiver of counsel was not knowingly and intelligently made. R. 4 – 11.

Due to the procedural posture of the case, Frazier served a notice of intent to appeal to ensure jurisdiction was returned to this Court. However, the State served notice of appeal because the ruling was adverse to the State. The State has referred to itself as Appellant for ease of reference. Therefore, for ease of reference and consistency, Terrence Frazier will refer to himself as Respondent. The State has filed its brief of appellant. This brief of respondent follows.

[1] The order was signed by the court on August 25, 2023, but it was filed with the Greenwood County Clerk of Court's Office on October 3, 2023.

## STANDARD OF REVIEW

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). "Specifically, we review a circuit judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo." *Id.* "Whether a waiver [of the Sixth Amendment right to the assistance of counsel] is valid is a mixed question of law and fact that we review de novo on direct appeal." *Hines v. State*, 443 S.C. 32, 38, 902 S.E.2d 377, 380 (2024). "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012).

## ARGUMENT

The circuit court correctly concluded Frazier's waiver of the right to counsel was not knowingly and intelligently made, since there was a plethora of evidence to support the court's findings that Frazier was neither adequately warned of the dangers of proceeding pro se nor had sufficient background to understand the risks of self-representation.

***Relevant facts***

Frazier was accused in a string of incidents that began at Chick-fil-A in Greenwood on July 9, 2015. The State alleged as follows. Frazier took Susannah Chatos's white truck from the parking lot of Chick-fil-A and subsequently crashed the truck into Bessie Williams's Lincoln MKZ, which was parked beside Frank's Carwash down the street. R. 170, l. 2 – 254, l. 20; R. 306, l. 24 – 315, l. 1; R. 342, l. 13 – 343, l. 23. Frazier got into Kimberly Searles's Chrysler 300 that was being dried outside of the carwash, and he drove away. R. 328, l. 2 – 354, l. 23. That car was driven down to World Finance, where it was used to block in Gwendolyn Callaham's Saturn SUV. R. 375, l. 16 – 390, l. 7. When law enforcement arrived, Frazier was seated in the driver's seat of the Saturn. He was arrested and taken to jail. R. 409, l. 3 – 414, l. 10; R. 418, l. 21 – 422, l. 6.

The jail refused to admit Frazier because he appeared to be under the influence, so he was taken to the emergency room. R. 414, l. 11 – 423, l. 14. The hospital has a protocol of stripping and searching the clothing of anyone in a "C-pod" room for staff safety. R. 431, l. 13 – 450, l. 3. During a search of Frazier's right front pants pockets, a security guard found what he believed to be drugs. The guard gave the material to law enforcement. R. 415, l. 1 – 417 l. 22; R. 445, l. 22 – 447, l. 4; R. 455, l. 19 – 476, l. 1. A representative of the South Carolina Law Enforcement

Division testified that the material tested positive as methamphetamine and weighed 19.92 grams without packaging. R. 494, l. 19 – 500, l. 16.

Frazier's first interaction with the trial judge occurred at his October 15, 2015, bond hearing. R. 1. In response to the judge's inquiry as to why he did not have a lawyer, Frazier responded:

> Because my family can't afford a lawyer and I am trying, I look at the cases [as] very frivolous and I understand, I am not saying I am the smartest but I feel like I am smart enough to get through this myself and I know a little about the law to make it through.

R. 77, l. 24 – 78, l. 5. The court responded: "You can represent yourself, I can't force a lawyer on you. These young lawyers are smart." R. 78, ll. 6-7. Frazier agreed but said that he was going to try to get out on bond and then try to retain an attorney. R. 78, ll. 8-18. Frazier noted his desire to have a speedy trial. R. 80, ll. 7-10.

One month later, Frazier appeared for trial without a lawyer. R. 82. The proceedings began with the court asking Frazier: "Are you prepared to represent yourself?" Frazier responded: "Yes, sir." R. 92, ll. 11-12. The court asked: "Now, have you had an opportunity to speak with a lawyer of your choosing to see if you wanted help and assistance in defending yourself in this matter? Are you prepared to go to trial?" and "Are you ready to go trial?" Frazier responded "Yes, sir." R. 89, l. 22 – 90, l. 3.

The court heard Frazier's preliminary motions after jury selection. Framed as a motion to "change venue" and "transfer," Frazier complained that he was uneducated and had not been given access to a law library at the local jail in order to prepare a proper defense. R. 114, l. 22 – 115, l. 19. Frazier asked if he could be granted access to legal books, but the judge said "if it's not available, it's not available." R. 118, ll. 13-16.

Following the conclusion of the preliminary motions, the prosecutor said: "Your Honor, we wanted to do a *Faretta* Warning about -- his rights this afternoon, to get that out of the way." R. 144, ll. 8-10. The court asked who did the *Faretta* warning previously. The prosecutor stated that Frazier was brought before a Judge Miller, but stated: "*It was something that probably took five minutes. I don't think it was near in-depth.*"[2] R. 144, ll. 11-15 (emphasis added). The court asked Frazier about his educational and work background. Frazier was twenty-five years old and completed the ninth grade. He had worked cutting grass and remodeling houses. R. 144, l. 16 – 145, l. 4. Frazier said that he understood the court could appoint him a public defender. R. 145, ll. 5-7. The court responded: "*Do you want one? I mean you are doing fairly well this afternoon pointing out these motions and pretrial matters. You are doing a very nice job of being organized.*" R. 145, ll. 8-11 (emphasis added). Frazier asked if getting a lawyer would "start his case all the way over and take more time?" The judge stated: "It could, but -- now, would you like me to see if I can get a lawyer to sit with you to help advise you on procedural matters, like the Court Rules?" Frazier said: "Yeah, that will work." R.145, ll. 12-19. The court told Frazier that he would still handle the case and witnesses himself, since he was "familiar with the facts." R. 145, ll. 20-21. Frazier responded again: "Yes sir, that will work." R. 145, l. 22. However, Frazier inquired about whether he could seek a bond reduction if he applied for a public defender and the date of trial was pushed further out. The court responded that he "technically" could but said "you probably wouldn't get it." R. 145, l. 23 – 146, l. 3. Frazier responded that he "really want[ed] to get this over with." R. 146, ll. 4-5.

[2] Despite consultation with the assistant solicitor, Greenwood County Clerk of Court's Office, and multiple court reporters, prior appellate counsel was unable to procure the transcript of any hearing before a Judge Miller.

The trial judge asked Frazier if he felt comfortable representing himself, to which Frazier responded "Yeah, I feel – I feel comfortable with the facts of the evidence." Frazier asked that a public defender be able to sit with him, and the judge stated he would see if he could get someone. The judge stated that he would speak with Patricia Bolen to see if she or someone else in the office was available, but said that they would "help you with the rules" but have "no responsibility for defending you." R. 146, l. 6 – 147, l. 17. Court was then adjourned for the day. R. 147, ll. 18-23.

When the parties returned the next day, the court advised Frazier that there would be a member of the public defender's office present to help with "advice on procedures" but the jury would be instructed that Frazier was representing himself. R. 149, ll. 2-11; R. 150, ll. 16-24. Trial proceeded.

As seen, this Court remanded this case for a hearing to determine whether Frazier's waiver of counsel was knowingly and intelligently made.

During the remand hearing, the circuit court had before it the appellate court opinion remanding this case for an evidentiary hearing, and the Record on Appeal. It heard testimony from Brian Moroney, who prosecuted the case. The circuit court also heard testimony from Frazier. During the hearing, admitted as exhibits were Frazier's arrest warrant for trafficking methamphetamine, and his indictment for the same offense. The testimony at the remand hearing included the following.

Terrence Frazier testified that at the time of his trial, he was 25 years old. Frazier stated that as a child he had ADHD (Attention-Deficit/Hyperactivity Disorder) and he had been to the Beckman Mental Health Center. Frazier said it took him a long time to grow out of the ADHD and he still had trouble concentrating. R. 37, ll. 4-19. Frazier explained that he took medication

for anxiety, but he did not take that medication at the time of his trial. R. 37, l. 20 – 38, l. 4. Frazier stated that the last grade he completed in school was the eighth grade. Frazier said he did not finish the ninth grade. R. 38, ll. 5-22. According to Frazier, he was a drug user when he was arrested on these charges. R. 47, ll. 1-3.

Frazier stated that he had been to court previously for three or four cases, but most of his prior charges had been "basically thrown out or reduced to a lesser charge." Frazier explained that he had never been in a general sessions trial before this case. Frazier recalled that he had been to court in magistrate's court previously and he pled not guilty and the charge was "thrown out." R. 38, l. 25 – 39, l. 14. Frazier explained the charge was a "30-day charge" against "a female" and he represented himself. Frazier stated it was a "hometown" "situation," and he did not question witnesses. Frazier said the court heard the woman's side of the story and his own side of the story. Frazier did not recall if a jury was present. Frazier stated he had never watched a trial the whole way through, either in person or on television. R. 39, l. 12 – 41, l. 1.

Frazier explained he thought the charges in this case were non-violent, and that he was facing zero to ten years for the trafficking methamphetamine offense. Frazier stated he did not know he would be tried for all the offenses at once. Frazier said he thought the trafficking was non-violent because it was his "first time catching a trafficking charge" and he did not understand the nature of enhancement. Frazier testified he did not know the State was going to use a 2009 possession of cocaine convention to enhance his trafficking charge. Frazier stated he did not know he was facing trafficking, second offense, at trial. Frazier noted that neither his warrant nor his indictment said second offense. Frazier said he had no notification he faced an enhanced trafficking charge until sentencing. R. 41, l. 2 – 44, l. 10; R. 51, ll. 3-6.

Frazier recalled meeting with Moroney when Moroney brought him the plea offer. According to Frazier, he did not recall Moroney mentioning anything about not representing himself or representing himself. Frazier clarified that Moroney may have told him it was dangerous to represent himself and he could have a lawyer appointed in the last stages, but not when the plea offer was conveyed. Frazier stated he did not recall a conversation with Moroney about having a charge thrown out in magistrate's court. R. 42, l. 15 – 43, l. 5; R. 46, ll. 14-25; R. 52, ll. 1-21; R. 54, ll. 1-6.

Frazier testified he went to trial about a month after his mother died. Frazier stated his "mind wasn't in the right state" due to her death. Frazier said he did not want the public defender because he was trying to get his family to hire a lawyer. Frazier testified he was not trying to manipulate the courts. R. 45, l. 20 – 46, l. 8; R. 48, ll. 6-9; R. 49, ll. 9-12.

Frazier stated he went in front of Judge Miller and Judge Miller stated "something of the sort like . . . you don't have to represent yourself but if you decide to represent yourself, I can't force a lawyer on you or something." R. 48, ll. 10-15. Frazier said Judge Miller did not go into details about what a lawyer could do for him. Frazier stated he told Judge Miller, "I do not waive my rights."[3] R. 54, l. 14 – 55, l. 10. Frazier testified he thought the charges were "flimflam" because he had two sets of warrants and he did not receive the warrants in a timely manner. R. 48, l. 16 – 49, l. 8. Frazier stated he did not understand that he would have to comply with the criminal procedure rules at trial. R. 49, ll. 18-20. Frazier said that no one had forced him to go to trial pro se or mistreated him in the case. R. 49, l. 22 – 39, l. 2.

Assistant Solicitor Moroney testified that in the course of prosecuting Frazier, he met with Frazier "several times" at the local jail to hand-deliver discovery, since Frazier had filed a

[3] It appears Frazier was referring to a statement he made at his preliminary hearing in front of a municipal judge. *See State v. Frazier*, Op. No. 2019-UP-371 at 2.

speedy trial motion and indicated he wished to represent himself. R. 17, ll. 9-15. Moroney stated he explained the plea offer of a cap of ten years which he was extending and went through a "cost/benefit analysis" of what Frazier was facing at trial versus what he would be facing if he accepted the plea offer. R. 17, ll. 15-23. According to Moroney, he discussed the penalties that Frazier was facing, and the possibility that he could get consecutive, "double digit" sentences. R. 26, ll. 3-17. Moroney said that his meetings with Frazier were approximately 30 minutes long. R. 28, ll. 6-8.

Moroney stated he went through the penalty for each charge with Frazier. Moroney testified he could not recall whether he discussed the fact that Frazier was facing sentencing enhancements, but he said he would have gone over that. R. 29, ll. 4-21. Moroney stated he discussed the fact that there were defenses to the charges. R. 32, ll. 8-11. According to Moroney, he was "deferential" to Frazier by telling him he was a "smart guy," and that the jury would be able to tell Frazier was a "nice guy." R. 30, ll. 21-25.

Moroney testified that Frazier referenced prior success at a magistrate-level trial. Moroney did not recall in which county the magistrate offense trial was held. Moroney stated he tried to explain to Frazier that this case was in a different posture from that case, that the rules of evidence were complicated, and that Frazier needed legal representation. R. 18, ll. 4-24. Moroney stated Frazier was adamant these were "flimflam" charges and he would be able to get himself acquitted. R. 34, ll. 4-8. Moroney said Frazier brought up issues that he saw in this case, such as "scrivener's errors" with his arrest warrants. R. 32, ll. 8-11.

Moroney explained that Frazier wanted a private attorney, and Moroney told him that a public defender could be appointed to him. According to Moroney, Frazier did not want a public defender, and he declined the offer of a public defender. Moroney said he told Frazier that

representing himself was a dangerous prospect because of the time he faced, and that an attorney would help him navigate the case. R. 19, l. 7 – 20, l. 10; 31, ll. 17-19. Moroney stated that an attorney could advise Frazier about his concerns regarding "scrivener's errors" and laboratory weights. Moroney testified that he did not recall if he mentioned the Fourth Amendment. R. 31, l. 22 – 32, l. 17.

Moroney stated he had numerous discussions with Frazier in which Moroney cautioned Frazier about the perils of proceeding pro se. Moroney said he brought Frazier in front of Judge Edward Miller so that Judge Miller could provide Frazier with *Faretta*[4] warnings. R. 19, l. 21 – 20, l. 25. According to Moroney, Judge Miller had a conversation with Frazier in the "small courtroom" and explained that these were serious charges, that attorneys had gone to law school and had legal training for several years, that Frazier did not have the benefit of that, and that Frazier could benefit from having someone to aid him in his defenses and assist with the case. Moroney stated Judge Miller told Frazier he would appoint counsel free of charge, but Frazier was adamant that he wanted to represent himself. Moroney believed Frazier's appearance before Judge Miller took place a term or two before his trial.[5] R. 21, l. 1 – 22, l. 20; 24, ll. 17-24.

Moroney was recalled after Frazier testified. R. 60, ll. 17-22. Moroney stated he did recall telling Frazier about enhanced sentencing provisions and Frazier was advised numerous times about the perils of proceeding unrepresented. R. 61, l. 7 – 64, l. 1. Moroney said he did mention concepts such as the Fourth Amendment and suppression, topics about which a lawyer could advise Frazier. R. 64, l. 23 – 65, l. 1.

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[4] *Faretta v. California*, 422 U.S. 806 (1975).

[5] A transcript of this hearing could never be located.

The circuit court took the matter under advisement. It later issued an order in which it concluded Frazier's waiver of the right to counsel was not knowingly and intelligently made. The circuit court's order included the following findings of fact and conclusions of law.

The circuit court found Frazier's testimony that he was unaware he faced enhancement for trafficking methamphetamine, second offense, to be credible. It found his testimony was supported by his arrest warrant and indictment, neither of which indicated that he faced enhancement. The circuit court found credible Frazier's testimony that he did not realize a possession charge could enhance a trafficking charge. The court also found credible Moroney's testimony that he did meet with Frazier and did at some point mention enhancements. However, it found Moroney's own difficulty recalling this fact indicated any discussion of enhancements was not lengthy or detailed. (As seen, Moroney initially testified he did *not* recall discussing sentencing enhancements with Frazier.)

The circuit court found Moroney's testimony about the importance of Frazier's appearance before Judge Edward Miller for *Faretta* warnings was overstated in the context of the entire record. For example, on the first day of trial, Moroney stated to the trial court that Frazier's appearance before Judge Miller for *Faretta* warnings was brief and was not "near in depth," and he requested the trial court do additional *Faretta* warnings. *See* R. 144, ll. 8-16.

In applying the *Cash* factors,[6] the circuit court concluded as follows.

(1) "[T]he accused's age, educational background, and physical and mental health." The circuit court found this factor cut both ways. Frazier was 25 years old, with an eighth-grade education, and he had ADHD and anxiety. His anxiety was untreated at the time of his decision

6 *State v. Cash*, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992).

to represent himself. His mother died while he was in pretrial detention. However, the court observed that Frazier is intelligent.

(2) "[W]hether the accused was previously involved in criminal trials." The circuit court found this factor weighed in favor of the defendant, since Frazier had no prior involvement in general sessions trials, although he had once represented himself in magistrate court.

(3) "[W]hether he knew of the nature of the charge and of the possible penalties." The circuit court found this factor also weighed in favor of the defendant. It was undisputed Frazier was aware of most of the offenses and punishments he faced. However, Frazier was not aware that he faced trafficking methamphetamine, second offense, and its enhanced penalty.

(4) "[W]hether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case." The circuit court found this factor weighed in favor of the defendant, since it was undisputed Frazier was never represented by counsel during the pendency of the case.

(5) "[W]hether he was attempting to delay or manipulate the proceedings." The circuit court found this factor weighed in favor of the defendant. Frazier was not attempting to delay or manipulate the proceedings.

(6) Whether the court appointed stand-by counsel. The circuit court found this factor weighed neutrally. Standby counsel was not appointed until after jury selection and pretrial motions were completed.

(7) "[W]hether the accused knew he would be required to comply with the rules of procedure at trial." The circuit court found this factor weighed in favor of the defendant. This Court found the colloquy at trial was inadequate to warn Frazier of the dangers of proceeding without counsel. *State v. Frazier*, Op. No. 2019-UP-371 at 6. Moroney did not testify that there

was any caution by Judge Miller about needing to comply with criminal procedure rules. Frazier also testified at the remand hearing he did not know he would be required to comply with the criminal procedure rules.

(8) "[W]hether he knew of legal challenges he could raise in defense to the charges against him." The circuit court found this factor did not weigh in favor of either party. It appeared Frazier was both aware and unaware of various defenses he could raise. For example, Frazier did mount a successful defense to the offense of carjacking, but he did not attempt to suppress the drugs on Fourth Amendment grounds.

(9) "[W]hether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions." The circuit court found this factor cut both ways. The trial court's exchange with the defendant at trial on his desire to proceed pro se was not merely pro forma answers and questions. However, the colloquy may have made Frazier feel more confident that he could represent himself because the Court told Frazier he was doing a "nice job" of being organized and doing "fairly well" with pretrial motions. R. 145, ll. 8-11. Moroney's comments to Frazier that he was "smart" and a "nice guy," which would "come across to the jury" were not helpful in this regard.

(10) "[W]hether the accused's waiver resulted from either coercion or mistreatment." The circuit court found this factor weighed in favor of the State. The waiver was not caused by coercion or mistreatment.

The circuit court found the balancing of the above factors favored the defendant, and his waiver of the right to counsel was not knowingly and intelligently made. R. 9 – 11. The circuit court concluded Frazier was neither adequately warned of the dangers of proceeding pro se nor had sufficient background to understand the risks of self-representation. R. 11.

***Discussion***

The Sixth and Fourteenth Amendments guarantee an accused's right to the assistance of counsel. U.S. Const. amend. VI; U.S. Const. amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963); *Faretta v. California*, 422 U.S. at 807. "A defendant may waive his right to counsel, but he must do so knowingly and intelligently." *State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020). To establish a valid waiver of the right to counsel, the accused must be advised of his right to counsel and adequately warned of the "dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open." *Faretta v. California*, 422 U.S. at 835.

The "test is what the defendant understands about the scope of the right he wishes to discard[.]" *Hines v. State*, 443 S.C. 32, 40, 902 S.E.2d 377, 381 (2024). It is the defendant's "understanding of the right—not the incantations of the trial judge or the words on a printed form—that controls [the] inquiry into whether the waiver is good." *Id.*, 443 S.C. at 39, 902 S.E.2d at 380–81. "[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). "A defendant's waiver of his right to counsel on the eve of trial . . . is good only if he knows of the precise dangers trials pose for the uncounseled." *Hines*, 443 S.C. at 41, 902 S.E.2d at 381. "As to waiver of trial counsel, we have said that before a defendant may be allowed to proceed pro se, he must be warned specifically of the hazards ahead." *Iowa v. Tovar*, 541 U.S. 77, 88–89 (2004).

"To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. In the absence of a specific inquiry by the trial judge addressing the disadvantages of a pro se defense as required by the second *Faretta* prong, this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." *Prince v. State*, 301 S.C. 422, 423–24, 392 S.E.2d 462, 463 (1990). "If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." *Wroten v. State*, 301 S.C. 293, 294-95, 391 S.E.2d 575, 576 (1990). "The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n. 12 (1993) (emphasis in original).

Factors the courts have considered in determining if an accused had sufficient background to understand the disadvantages of self-representation include: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether he knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers

to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. *State v. Cash*, 309 S.C. at 43, 419 S.E.2d at 813.

"[T]o establish waiver of the right to counsel, it is incumbent upon the state to prove an intentional relinquishment or abandonment of the right." *State v. Cash*, 309 S.C. at 47, 419 S.E.2d at 815 (citing *Brewer v. Williams*, 430 U.S. 387 (1977)). "The burden is on the State to demonstrate the validity of a defendant's waiver of his right to counsel." *State v. Dial*, 429 S.C. at 133, 838 S.E.2d at 504.

There was a plethora of evidence to support the remand court's decision that the State did not meet its burden. As to its findings on the *Cash* factors, as seen, the court found five of the *Cash* factors to favor Respondent; one of the *Cash* factors to favor the State; and the remaining four *Cash* factors to favor neither party.

The court's finding that the second *Cash* factor (whether the accused was previously involved in criminal trials) weighed in favor of Respondent was supported by the record. Frazier had no prior involvement in general sessions trials. Frazier had never watched a criminal trial the whole way through, either in person or on television. R. 38, l. 25 – 39, l. 14; R. 39, l. 12 – 41, l. 1.

The court's finding that the third *Cash* factor, (whether the accused knew of the nature of the charge and of the possible penalties) weighed in favor of Respondent was also supported by the record. "The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, *the complex or easily grasped nature of the charge*, and the stage of the proceeding." *Iowa v. Tovar*, 541 U.S. at 88 (emphasis added). Frazier's waiver was not knowing and intelligent in part because he did not understand the consequences he faced.

Frazier mistakenly thought he faced a less severe sentence for trafficking than he actually faced. *See* S.C. Code Ann. § 44-53-375(C)(1) (providing penalty for first offense trafficking in methamphetamine, 10 – 28 grams, is imprisonment of not less than three years nor more than ten years and a fine of twenty-five thousand dollars; penalty for second offense trafficking in methamphetamine, 10 – 28 grams, is imprisonment of not less than five years nor more than thirty years and a fine of fifty thousand dollars). The court found Frazier credible that he was not aware he faced trafficking methamphetamine, second offense, and its enhanced penalty. The court noted this testimony was corroborated by Frazier's arrest warrant and indictment, neither of which indicated he faced enhancement. R. 8; R. 660; R. 653 – 654. Frazier testified he thought that he was facing up to ten years for the trafficking methamphetamine offense. Frazier stated it was his "first time catching a trafficking charge" and he did not understand the nature of enhancement. Frazier testified he did not know the State was going to use a 2009 possession of cocaine convention to enhance his trafficking charge. Frazier stated he did not know he was facing trafficking, second offense, at trial. Frazier said he had no notification he faced an enhanced trafficking charge until sentencing. R. 41, l. 2 – 44, l. 10; R. 51, ll. 3-6.

The record also supported the court's finding that the fourth *Cash* factor (whether the accused was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case) weighed in favor of Respondent. It was undisputed Frazier was never represented by counsel during the case. Moreover, Moroney, an attorney and Frazier's adversary, remarked to Frazier that he was a "smart guy," and that the jury would be able to tell Frazier was a "nice guy." R. 30, ll. 21-25). Similarly, during the court's colloquy with Frazier, the court told Frazier he was doing a "nice job" of being organized, and was doing "fairly well" with pretrial motions. R. 145, ll. 8-11. *See, e.g.*, *United States v.*

*Williams*, 641 F.3d 758, 767 (6th Cir. 2011) (model *Faretta* inquiry "must be followed by a strong admonishment that the court recommends against the defendant trying to represent himself or herself"). Thus, instead of warning against self-representation, both the solicitor and the court at times made comments which encouraged Frazier to waive his right to counsel.

The record supported the court's finding that the fifth *Cash* factor (whether the accused was attempting to delay or manipulate the proceedings) weighed in favor of Respondent. It was undisputed that Frazier was not attempting to delay or manipulate the proceedings. Frazier was tried less than a week after he was indicted, approximately four months after the incident date. R. 82; R. 649 – 658. Frazier's trial was held about a month after his mother died, and he testified his "mind wasn't in the right state" due to her death. Frazier testified he was not trying to manipulate the courts. R. 45, l. 20 – 46, l. 8; R. 49, ll. 9-12.

The record supported the court's finding that the seventh *Cash* factor (whether the accused knew he would be required to comply with the rules of procedure at trial) weighed in favor of Respondent. In this Court's initial opinion during Frazier's direct appeal, this Court found the colloquy at trial was inadequate to warn him of the dangers of proceeding without counsel. *State v. Frazier*, Op. No. 2019-UP-371 at 6. Moreover, Moroney did not testify that there was any caution by Judge Miller about needing to comply with criminal procedure rules. Frazier stated he did not understand that he would have to comply with the criminal procedure rules at trial. R. 49, ll. 18-20. Additionally, the court's remarks to Frazier at trial about standby counsel's role regarding the court rules were confusing as to whether Frazier would be responsible for complying with the court rules or whether standby counsel would be responsible. R. 147, ll. 5-13; R. 149, ll. 9-14.

The record supported the court's decision that the first *Cash* factor (the accused's age, educational background, and physical and mental health) did not favor the State. (The court found this factor cut both ways.) Frazier was 25 years old, with an *eighth-grade* education, and he had ADHD and anxiety. His anxiety was untreated at the time of his decision to represent himself. His mother died while he was in pretrial detention. However, the court found Frazier to be intelligent. R. 37, ll. 4-19; R. 37, l. 20 – 38, l. 4; R. 38, ll. 5-22; R. 9.

The record supported the court's decision that the sixth *Cash* factor (whether the court appointed stand-by counsel) did not favor the State. (The court found this factor weighed neutrally.) Standby counsel was not appointed until after jury selection and pretrial motions were completed. R. 149, l. 9 – 150, l. 20.

The record supported the court's decision that the eight *Cash* factor (whether the accused knew of legal challenges he could raise in defense to the charges against him) did not favor the State. (The court found this factor did not weigh in favor of either party.) Frazier was both aware and unaware of various defenses he could raise. Frazier did mount a successful defense to the offense of carjacking, but he did not attempt to suppress the drugs on Fourth Amendment grounds. R. 636, ll. 17-18; R. 114, l. 20 – 144, l. 4.

The record supported the court's decision that the ninth *Cash* factor (whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions) did not favor the State. (The court found this factor cut both ways.) The court's exchange with Frazier at trial on his desire to proceed pro se was not merely pro forma answers and questions. However, the colloquy made Frazier feel more confident that he could represent himself because the Court told Frazier he was doing a "nice job" of being organized and doing "fairly well" with pretrial motions. R. 145, ll. 8-11. As seen, Moroney's comments to Frazier

that he was "smart" and a "nice guy," which would "come across to the jury" were not helpful in this regard. R. 30, ll. 21-25.

Finally, the record supported the court's finding that the tenth *Cash* factor (whether the accused's waiver resulted from either coercion or mistreatment) weighed in favor of the State. It was undisputed that the waiver was not caused by coercion or mistreatment.

The circuit court's conclusion, that Frazier's decision to represent himself was not made with a sufficient understanding of the risks of self-representation, was the correct conclusion. The record did not show that Frazier was adequately warned of the dangers of proceeding pro se or had sufficient background to understand the risks of self-representation. Frazier did not understand the "significance and consequences" of the decision. *Godinez v. Moran*, 509 U.S. at 401 n. 12. He did not know the "precise dangers trials pose for the uncounseled." *Hines*, 443 S.C. at 41, 902 S.E.2d at 381. The State did not meet its burden to show the waiver of counsel was knowingly and intelligently made. Frazier is entitled to a new trial. U.S. Const. amend. VI; U.S. Const. amend XIV; *Faretta v. California*, 422 U.S. at 835; *Cash*, 309 S.C. at 47, 419 S.E.2d at 815.

## CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court affirm the decision of the circuit court that his waiver of the right to counsel was not knowingly and intelligently made, and remand the case to the Greenwood County Court of General Sessions for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR RESPONDENT

This 5th day of November, 2024.

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**CERTIFICATE OF COUNSEL**

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

November 5, 2024.

Joanna K. Delany
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenwood County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE,

APPELLANT,

V.

TERRENCE O'NEIL FRAZIER,

RESPONDENT

APPELLATE CASE NO. 2023-001439

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# CERTIFICATE OF SERVICE

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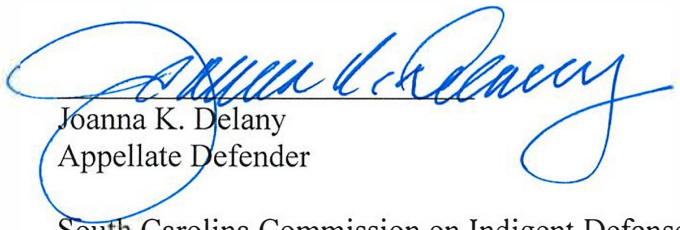
Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Brief of Respondent in the above-referenced case have been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 5th day of November, 2024.



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ATTORNEY FOR RESPONDENT

**From:** Mcinnis, Sara
**To:** Josh Edwards
**Cc:** Susan Spencer; Delany, Joanna
**Subject:** 2023-001439 The State v. Terrence O. Frazier Final Brief of Respondent
**Date:** Tuesday, November 5, 2024 2:52:00 PM
**Attachments:** 2023-001439 The State v. Terrence O. Frazier Final Brief of Respondent.pdf
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Good Afternoon Mr. Edwards,

Please find attached for service in the above-referenced case the final brief of respondent, which will be filed with the Court of Appeals today, November 5, 2024, via email filing.

Thank you,

**Sara McInnis**
Administrative Assistant
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