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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORMAN PHILIP BROWNE,

APPELLANT.

APPELLATE CASE NO. 2024-000872

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUE ON APPEAL

1. Did appellant knowingly, intelligently, and voluntarily waive his right to counsel before proceeding to trial *pro se* where the court failed to ensure appellant understood the advantages of counsel and dangers of representing himself?

STATEMENT OF THE CASE

In 2019, the Charleston County grand jury indicted Norman Browne for murder and grand larceny. He initially retained Michael O'Neal to represent him, but O'Neal was relieved as counsel in February 2023 due to ongoing medical problems. R. p. 38. Laree Hensley was appointed to represent Browne that April, and he was then re-indicted on May 16, 2023. R. pp. 208-209; 212-213. On January 18, 2024, Hensley filed a motion to be relieved as counsel and for Browne to proceed *pro se*. R. p. 36. Judge Deadra Jefferson held a hearing on the motion via WebEx on February 7, 2024. R. p. 1. Jennifer Shealy represented the state at that hearing. R. p. 1. One week later, Judge Jefferson entered an order relieving Hensley as counsel and allowing Browne to proceed *pro se*. R. p. 39.

Browne was tried before Judge Jefferson and a jury from April 15–24, 2024, where he was ultimately convicted. R. p. 43, R. p. 189, ll. 3-11. Jennifer Shealy and Elliot Barrow represented the state. R. p. 44. Hensley operated as standby counsel. R. p. 44.

Browne then filed his notice of appeal.

STATEMENT OF FACTS

At the hearing on Browne's motion to relieve counsel, Judge Jefferson stated the court was "very concerned" about his request because "I do not think you . . . meet the requirements to represent yourself." R. p. 25, ll. 16-18. In the order relieving counsel, Judge Jefferson wrote: "the Court finds that the Defendant does not meet the *Faretta* requirements to represent himself." R. p. 40. Nonetheless, the court allowed him to proceed *pro se*. R. p. 41.

At this February 7 hearing, trial was scheduled for (and ultimately held on) the week of April 15, 2024. R. p. 4, l. 19 – R. p. 5, l. 3. Browne informed the court he no longer wanted Hensely to represent him and that he was "trying to seek different counsel." R. p. 11, ll. 10-11. When asked if he did or did not want to represent himself, Browne stated he did want to represent himself. R. p. 11, ll. 14-17. Still, he explained to the court that he was "trying to put together enough money to be able to afford a lawyer." R. p. 11, ll. 20-21. The court then explained to Browne,

> Sir, I need to advise you that you have the right to counsel. If you cannot afford counsel, that we will appoint counsel to represent you in those circumstances. I would also advise you that it is not prudent to represent yourself, and that it would be clearly against your interest. Knowing that, do you still wish to discharge Ms. Hensley?

R. p. 11, ll. 6-12. Browne indicated he did want to discharge Hensley and that he wanted to represent himself. R. p. 11, ll. 13-17. The court then inquired into Browne's age, education level, and employment. R. p. 11, l. 18 – R. p. 13, l. 23. Browne was forty-nine years old, had completed high school and several "automotive educationals" from multiple car manufacturers, and worked for a friend of his selling automotive tools. R. p. 12, l. 18 – R. p. 13, l. 15.

The court then asked Browne about his legal knowledge. R. p. 13, l. 24. Browne informed the court he had no legal training, and the court asked if he understood his constitutional rights.

R. p. 13, l. 24 – R. p. 14, l. 17. At first Browne paraphrased his *Miranda* rights, indicating he thought those were the only constitutional rights relevant to a criminal trial, or, as he put it, "And that's basically the gist of it." R. p. 14, ll. 1-9. When prompted, Browne was able to generally describe the idea of a jury trial. R. p. 14, ll. 10-17. He informed the court he believed the potential sentence for murder is "5 to 20, 25 to life, I believe." R. p. 14, ll. 13-22. The court corrected him that the minimum sentence for murder is 30 years, with a maximum sentence of life in prison, and that it is not subject to parole. R. p. 14, l. 23 – R. p. 15, l. 7.

The trial court next asked Browne if he understood the rules of evidence and to explain them "in a nutshell." R. p. 15, ll. 8-10. He responded,

> Rules of Evidence have to be supplied to the Court and to the other party, the plaintiff, the State in this case, and all the evidence that I have acquired or developed needs to be presented to both. All evidence that the State has acquired I am supposed to have access to and a full, free copy of. And then the questions are asked based upon the evidence in court.

R. p. 15, ll. 11-17. Recognizing his misunderstanding, the court clarified:

> Sir, I'm asking you about the Rules of Evidence that govern how a trial operates and how you have to utilize those in order to operate in a courtroom, which includes not just entering evidence, but also asking questions of witnesses, making objections, and pretrial procedures and otherwise. Do you understand those rules? Have you studied them? They are about five inches thick.

R. p. 15, ll. 18-24. It became clear Browne had been reading the rules of procedure online and did not realize those are different from the rules of evidence. R. p. 16, l. 1 – R. p. 17, l. 6. Browne then informed the court his only experience with the criminal justice system was "a few small

mistakes" in his twenties in California.[1] R. p. 17, ll. 12-17. Browne "believe[d]" he was represented by counsel then, but he was not certain. R. p. 17, ll. 18-20.

Eventually the court concluded: "I'm very concerned. I do not think you . . . meet the requirements to represent yourself." R. p. 25, ll. 16-18. Despite this finding, the court recognized Browne was "fairly adamant" he represent himself and stated that if it allowed him to proceed *pro se*, it would leave Hensley as standby counsel if he proceeded without counsel or until Browne obtained other counsel. R. p. 25, l. 23 - R. p. 26, l. 2. In doing so, the court told him that the law is not what people "see on television." R. p. 25, ll. 19-20. It said the law "is very complex" and that "[e]very decision has a very significant consequence, and it just is not advisable for you to represent yourself." R. p. 25, ll. 19-21.

Hensley provided Browne with all discovery available at that time, and she did not believe there was any outstanding discovery left to conduct. R. p. 22, l. 8 - R. p. 23, l. 20. She also informed the court she had discussed with Browne his potential defenses. R. p. 27, ll. 22-25. However, Browne disagreed with her statement. R. p. 28, ll. 1-2. The court believed Hensley. R. p. 28, ll. 3-7.

After a discussion about how the solicitor would communicate with Browne as he went *pro se*, the solicitor felt the need to warn Judge Jefferson that this would be a complicated trial:

> I did want to mention one thing to you. In addition to DNA, there's also ballistics testing, and there are a number of videos from Wilmington, North Carolina, that are relevant to the case. I just wanted Your Honor to have the benefit of knowing that there are

[1] At sentencing the solicitor provided the court with the details of Browne's prior legal history. R. p. 198, ll. 10-14, R. p. 199, l. 13. Thirty years before trial Browne received a fine for larceny in Arizona and was convicted of forgery in California. R. p. 198, l. 13 – R. p. 199, l. 12. In 1996 he was convicted of grand theft in California. R. p. 198, l. 25 – R. p. 199, l. 3. The record does not reflect whether those charges were pleas or whether Browne was represented by counsel.

> two scientific arenas that are involved in this, as well as technological . . . .

R. p. 30, ll. 13-20. Despite that notice, the court did not further explain to Browne the dangers of proceeding to trial without counsel:

> Well, I've advised him that I don't think it's advisable that he represent himself. I can't force him to have a lawyer if that's what he wants to do.
>
> I will tell you, sir, however, that I've had a law degree for over 30 years, and I would not represent myself. If I have challenges, I hire somebody, I write them a check, and I sign a retainer agreement. I can't be my own lawyer. I don't have the objective ability to look at my situation. I need somebody to give me, like, cold facts when I need to hear them.
>
> So, however, I've already advised him, Ms. Shealy, that it's not advisable to have a -- be your own lawyer, that you place yourself at significant, significant jeopardy. He's acknowledged that. He tells me he thinks that he's capable.
>
> He also tells me that he plans to hire someone . . . .

R. p. 30, l. 21 - R. p. 31, l. 11. The court explained to the solicitor: "But if he is adamant in representing himself, you know, there are consequences that flow from that, and I've advised him regarding it." R. p. 31, ll. 20-22. The court noted that Browne "doesn't appear . . . to be suffering from any mental disabilities" or to be under the influence of drugs or alcohol. R. p. 31, l. 24 – R. p. 32, l. 2. It asked Browne and confirmed he had never been treated for mental disabilities and had not required substance abuse treatment. R. p. 32, ll. 3-14. Browne was never presented with, nor did he sign, the form *Faretta* warnings developed by Court Administration following the General Sessions Docket Management Order dated May 24, 2023.

On February 13, 2024, the trial court issued an order allowing Browne to proceed *pro se* at the trial scheduled to begin two months later. R. pp. 39-41. As mentioned, the court specifically found that "Defendant does not meet the *Faretta* requirements to represent himself." R. p. 40. The

court also found he "has a limited knowledge of the nature and consequences of the charges against him" and "does not have a complete or adequate understanding of the requirements of criminal procedure, evidence and the trial process." R. p. 40. Acknowledging Browne's stated intention to be represented, the court mentioned the possibility of Browne retaining counsel. R. p. 40.

Two months later, Browne represented himself at the seven-day trial held April 15–24, 2024, before Judge Jefferson and a jury. Hensley served as standby counsel. The jury ultimately convicted Browne of murder and grand larceny. R. p. 189, ll. 3-11. The trial court sentenced him to life in prison on the murder charge and to five years for grand larceny. R. p. 207, ll. 5-19. Browne then filed his notice of appeal.

STANDARD OF REVIEW

Whether a defendant validly waived his right to counsel "is a mixed question of law and fact that [appellate courts] review de novo on direct appeal." *Hines v. State*, 443 S.C. 32, 38, 902 S.E.2d 377, 380 (2024) (citing *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018)). Appellate courts "review a circuit judge's findings of historical fact for clear error; however, [they] review the denial of the right of self-representation based upon those findings of fact de novo." *Samuel*, 422 S.C. at 602, 813 S.E.2d at 490 (citation omitted).

ARGUMENT

I. Browne did not knowingly and intelligently waive his right to counsel because he did not adequately understand the dangers of proceeding *pro se* or the potential benefits of counsel at trial.

"[I]n order competently and intelligently to choose self-representation," a criminal defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942)). "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. 128, 133, 838 S.E.2d 501, 504 (2020) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). "So important is the right to counsel that the Supreme Court has instructed courts to 'indulge in every reasonable presumption against [its] waiver.'" *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (alteration in original) (quoting *Brewer*, 430 U.S. at 404). Where a defendant did not "make an informed decision to proceed

without counsel," the remedy is a new trial. *Wroten v. State*, 301 S.C. 293, 295, 391 S.E.2d 575, 577 (1990); *Watts v. State*, 347 S.C. 399, 403, 556 S.E.2d 368, 370 (2001) (citation omitted).[2]

a. Browne was not adequately warned by the trial court because it did not explain any of the advantages of counsel at trial.

"Under *Faretta*, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." *State v. Barnes*, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014) (citing *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998)). "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." *Prince v. State*, 301 S.C. 422, 423–24, 392 S.E.2d 462, 463 (1990). "The pivotal word in this requirement is 'adequately.'" *Hines v. State*, 443 S.C. 32, 45, 902 S.E.2d 377, 383 (2024) (Few, J., dissenting). The "ultimate test" is not the warning itself "but rather the defendant's understanding" of the advantages of counsel and the dangers of proceeding *pro se*. *Wroten*, 301 S.C. at 294, 391 S.E.2d at 576 (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986)). Because of "the enormous importance and role that an attorney plays at a criminal trial," the Supreme Court has "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) (citing *Faretta*, 422 U.S. at 835-36); *see also* 3 Wayne LaFave et al.,

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[2] The voluntariness of a defendant's waiver of counsel can be raised for the first time on direct appeal. *Dial*, 429 S.C. at 132, 838 S.E.2d at 503 (holding issue preservation requirement does not apply to voluntariness of *pro se* defendant's waiver of counsel because "[i]t would be counterintuitive to expect a defendant who requests to go forward unrepresented to challenge the trial court's authority to permit him to do so").

Criminal Procedure § 11.5(c) (4th ed.) (courts must "take special care to advise the defendant as to the pitfalls of self-representation").

The information required before a defendant's waiver will be deemed knowingly or intelligently made "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." *Hines v. State*, 443 S.C. 32, 40, 902 S.E.2d 377, 381 (2024) (citing *Iowa v. Tovar*, 541 U.S. 77, 78 (2004)). In particular, the stage of the proceeding substantially determines the extent of the warning and understanding that is necessary before a waiver is valid. *Hines*, 443 S.C. at 40, 902 S.E.2d at 381 (citing *Tovar*, 541 U.S. at 89-91). A defendant attempting to waive the assistance of counsel at trial must possess superior information and understanding than if the waiver were at an earlier proceeding. *Hines*, 443 S.C. at 40, 902 S.E.2d at 381 (citing *Tovar*, 541 U.S. at 89); *Patterson*, 487 U.S. at 298-300.

The record in this case does not demonstrate that Browne was "aware of the hazards" of proceeding to trial without counsel because the court never explained to Browne why or how counsel is useful *at trial*. *Bridwell v. State*, 306 S.C. 518, 519, 413 S.E.2d 30, 31 (1992). This is why the court's warnings were inadequate—because the waiver analysis "focuses on the usefulness of counsel at a particular stage and the danger of proceeding without counsel." *Hines*, 443 S.C. at 41, 902 S.E.2d at 381 (citing *Patterson*, 487 U.S. at 298). Excepting the vague and general admonishments given—*e.g.*, "it is not prudent to represent yourself"—the trial court did not explain to Browne the advantages of counsel at trial with any particularity. The court's only specific warning was that counsel is helpful because he or she can give the "cold facts" with an objective view. But *at trial*, providing a defendant with an objective view of his situation is one of the least important purposes counsel serves. That is plainly not the "rigorous[]" and "specific

warnings of the pitfalls of going to trial without a lawyer" that *Faretta* requires. *Hines*, 443 S.C. at 40, 902 S.E.2d at 381; *see also Prince*, 301 S.C. at 424, 392 S.E.2d at 463 (explaining *Faretta* requires "a specific inquiry").

A trial judge must explain "the precise dangers trials pose for the uncounseled" because the dangers of proceeding *pro se* at trial are not obvious. *Hines*, 443 S.C. at 41, 902 S.E.2d at 381; *Patterson*, 487 U.S. at 300. At trial, "counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more." *Patterson*, 487 U.S. at 300 n.13. Without an adequate warning, an ordinary person has no knowledge of what awaits him should he proceed to trial unrepresented, and he cannot understand the risks he is taking by waiving the assistance of counsel. *See Williams v. Kaiser*, 323 U.S. 471, 475 (1945) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law." (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932))). Here, the court's only comment about the complexity of trial was in determining if Browne understood the rules of evidence. He clearly did not, yet the court did not explain to him how or even that trial counsel would be more capable of complying with those rules and requiring the state to do the same.[3] Except that counsel can offer an objective viewpoint, the court did not describe a single advantage of representation by counsel or any of the dangers of self-representation. Browne did not understand why counsel is better suited to those tasks necessary for trial nor what

[3] The court almost implied that so long as Browne read the rules of evidence and procedure that he would be capable of representing himself adequately.

the consequences of his potential failures would be.[4] *See Von Moltke v. Gillies*, 332 U.S. 708, 727 (1948) (explaining a defendant's waiver must be made "competently, intelligently, and with full understanding of the implications").

None of the court's other warnings—even taken together—were adequate because they were so general. The court advised him merely that "it is not prudent" and "just is not advisable for you to represent yourself." It warned that the law is "very complex" where "every decision has a very significant consequence." These types of broad warnings are not adequate because they do not explain "the precise dangers trials pose for the uncounseled." *Hines*, 443 S.C. at 41, 902 S.E.2d at 381. Defendants must be warned *of* the dangers of proceeding to trial without counsel, not just *that* there are dangers. *See Tovar*, 541 U.S. at 89 (explaining that waiver of trial counsel requires warnings that rigorously convey "the pitfalls of proceeding to trial without counsel" (citing *Patterson*, 487 U.S. at 298)).

In summary, nothing in the record indicates Browne understood any of the important advantages of counsel. Further, he was not given even the form *Faretta* warnings developed under the Supreme Court's General Session Docket Management Order. That form,[5] while not

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[4] On the first morning of trial, Browne unknowingly fell into one of these pitfalls. The court asked him, "And sir, did you have any requests for voir dire, which is the questions that the Court asks so that you can exercise your preempterory challenges in your jury selection?" R. p. 45, ll. 12-15. He responded: "I was not told about any of that." R. p. 45, ll. 12-18. While no specific warnings are strictly required by the Sixth Amendment, *voir dire* is an example of one of the warnings defendants should be given when they intend to go to trial unrepresented. *See* Wayne LaFave et al., *supra*, § 11.5(c) (explaining that one of the dangers of which a defendant should be warned is that without counsel he "may not make effective use of such rights as the voir dire of jurors" (citing *People v. Lopez*, 71 Cal. App. 3d 568, 572 (Ct. App. 1977))).

[5] The form is available on the court website, www.sccourts.org/court-forms, and has the ID SCCA684.

independently an adequate warning for a defendant heading to trial, warns defendants that there "may be issues . . . that you may not be aware of and it would be your attorney's responsibility to be aware of those issues and how to properly address them before the Court." It advises defendants that counsel can take the steps necessary to "preserve the issues for appellate review." If this is the recommended minimum for defendants that plead guilty, more is clearly required prior to trial. That is why the Docket Management Order requires that if a defendant is given that form without a court reporter present, "A full on-the-record *Faretta* colloquy must be conducted at the earliest opportunity . . . ." The warnings Browne received do not constitute a "full" colloquy as required.

At the hearing on Browne's motion to relieve counsel, the court's first warning of any sort was, "I would also advise you that it is not prudent to represent yourself, and that it would be clearly against your interest." While it was "clear" to the trial court that the assistance of counsel is critical to a defendant receiving a fair trial, it was not so clear to Browne, and that is the essence of the error. *See Patterson*, 487 U.S. at 300. It was the "trial judge's responsibility" to ensure Browne understood the advantages of counsel and dangers of proceeding *pro se*, *Watts v. State*, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001), yet it took no efforts to explain to him what those advantages and dangers are. That is inadequate. *Cf.* 45 Corpus Juris, *Negligence* § 510 (1928) (noting a warning "must be sufficiently definite to inform [someone] of the danger" presented before contributory negligence applies).

b. The trial court misunderstood its responsibility for ensuring Browne understood the right he intended to waive.

At a *Faretta* hearing, the only question is whether the defendant sufficiently understands the right he intends to waive. Here, however, the trial court seems to have felt bound to allow

Browne to represent himself regardless of his understanding. That is likely why it made irrelevant inquiries into his capacity to represent himself rather than his ability to waive his right to counsel.

The trial court's statements at the hearing and in the order relieving counsel indicate it misunderstood its "responsibility" to ensure "that the defendant is informed of the dangers and disadvantages of self-representation." *Barnes*, 407 S.C. at 36, 753 S.E.2d at 550 (citing *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998)). The court focused too heavily on its obligation under *Faretta* to allow a competent defendant to represent himself, but *Faretta* established two rules: the state cannot "force a lawyer on a defendant" *and* "the record [must] establish that 'he knows what he is doing and his choice is made with eyes open.'" 422 U.S. at 834-35 (citation omitted). Those are independent rights under the Sixth Amendment and the South Carolina Constitution. *See Barnes*, 407 S.C. at 35, 753 S.E.2d at 550; *Prince*, 301 S.C. at 424, 392 S.E.2d at 463. Because Browne is competent, the trial court certainly had the obligation to allow Browne to proceed *pro se*; however, it could do so *only after a valid waiver*. *See Barnes*, 407 S.C. at 35-37, 753 S.E.2d at 550 (holding every defendant competent to stand trial can represent himself if he validly waives his right to counsel; declining to institute a higher competency standard to proceed *pro se*). The court had the responsibility to respect both requirements by first ensuring Browne adequately understood his right to the assistance of counsel at trial and only then allowing him to proceed *pro se*. The mere fact Browne was "adamant in his assertion that he represent himself," 2/13/2024 Order at 3, does not indicate he understood the dangers of doing so and intelligently waived his right to counsel. *Cf. Edwards v. Arizona*, 451 U.S. 477, 484 (1981) (explaining that waiver of counsel requires more than mere "voluntariness" but rather the state must prove whether a defendant "understood his right to counsel and intelligently and knowingly

relinquished it"). Only once the record demonstrated Browne had a "full understanding of the implications" could his waiver be valid. *Von Moltke v. Gillies*, 332 U.S. 708, 727 (1948).

Similarly, the court's inquiry into Browne's understanding of the rules of evidence or his constitutional rights demonstrates it failed to appreciate its responsibility to warn Browne of the dangers ahead. By asking Browne about *his* knowledge of the rules of evidence and procedure the trial court incorrectly focused on Browne's capacity to represent himself rather than his understanding of the right he wished to waive. But his knowledge and capacity to represent himself is irrelevant. *Samuel*, 422 S.C. at 603, 813 S.E.2d at 491 ("[W]hether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation" (citing *Godinez v. Moran*, 509 U.S. 389, 400 (1993)); *Faretta v. California*, 422 U.S. 806, 836 (1975) ("[H]is technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."). What matters is his ability to waive the right of self-representation, not his ability to represent himself. *Samuel*, 422 S.C. at 603, 813 S.E.2d at 491 (emphasis omitted) (citing *Godinez*, 509 U.S. at 399).

These two misunderstandings explain how the trial court could made two seemingly inconsistent decisions. Because Browne was not adequately warned and did not otherwise demonstrate an understanding of the right he intended to waive, the court could correctly find he "does not meet the *Faretta* requirements to represent himself." R. p. 40. Because it believed his "adamant" request required he be allowed to proceed *pro se*, the court granted his motion. R. p. 41. That belief—its focus on his right to ultimately represent himself—was wrong, and it led the court to conduct an irrelevant inquiry into his understanding of the rules of evidence rather than adequately warn him of the dangers he faced.

c. The trial court's warnings almost mirror those required for a guilty plea, and they were therefore insufficient to warn someone of the dangers presented by waiving the assistance of counsel at trial.

The trial court here did little more than warn Browne that "some general, undefined danger lurks ahead." *Hines*, 443 S.C. at 41, 902 S.E.2d at 381 (citation omitted). The court advised Browne "it is not prudent" to represent himself and it would be "clearly against" his interest. It explained merely that the law "is very complex" and decisions at trial have "significant consequences." Rather than adequately explaining the advantages of counsel at trial and the dangers of proceeding *pro se*, the court's warnings more closely reflects those necessary for a defendant to waive his right to counsel when pleading guilty, even though the state never offered him a plea deal.

In *Hines v. State*, 443 S.C. 32, 902 S.E.2d 377 (2024), the Court—relying on *Iowa v. Tovar*, 541 U.S. 77 (2004)—held that in general a defendant can waive his right to counsel *at the plea stage* "so long as he is warned that some general, undefined danger lurks ahead." 443 S.C. at 41, 902 S.E.2d at 381 (citing *Tovar*, 541 U.S. at 88)).[6] This was because "*Tovar* held that in Sixth Amendment cases, '[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.'" *Hines*, 443 S.C. at 40, 902 S.E.2d at 381 (alteration original) (quoting *Tovar*, 541 U.S. at 81). As required for

[6] Justice Few dissented from the majority emphasizing "the specific facts and circumstances preceding and surrounding Hines's guilty plea." *Hines v. State*, 443 S.C. 32, 46, 902 S.E.2d 377, 384 (2024) (Few, J., dissenting). Hines, like Browne, had previously hired and lost both private and appointed counsel. *Hines v. State*, 443 S.C. 32, 36, 902 S.E.2d 377, 379 (2024). Like Hines, Browne indicated his intention to seek private counsel rather than proceeding *pro se* unless necessary. 443 S.C. at 37, 902 S.E.2d at 379.

a defendant to waive his right to plea counsel, Judge Jefferson informed Browne of his charges, the range of potential punishments, and his right to counsel. But the court did no more. Those "general" warnings are not enough for a defendant to waive his right to the assistance of counsel at trial. *Hines*, 443 S.C. at 40, 902 S.E.2d at 381. Not once did the court explain to him any advantage to having counsel *at trial*.[7] The court's advice that counsel can provide a more objective view is also more appropriate to the plea stage where such advice could actually be heeded. At trial without a plea offer, counsel's advice about the "cold facts" is irrelevant.

A defendant must better understand his right to counsel in order to waive assistance at trial because before that point "the risks and disadvantages of acting as one's own lawyer are 'less substantial and more obvious to an accused.'" *Hines*, 443 S.C. at 41, 902 S.E.2d at 381 (quoting *Tovar*, 541 U.S. at 90). Thus, in approving those minimal warnings prior to pleading, the Court was clear that before a defendant can waive his right to the assistance of counsel at trial, "the trial court must rigorously convey specific warnings of the pitfalls of going to trial without a lawyer." 443 S.C. at 40, 902 S.E.2d at 381; *see Tovar*, 541 U.S. at 88-89 ("[B]efore a defendant may be allowed to proceed *pro se*, he must be warned specifically of the hazards ahead."). The trial court did not do so here, and therefore Browne's Sixth Amendment right to the assistance of counsel was violated.

[7] In fact, the court's statement that the rules of evidence are a "five inch" book almost implied that so long as Browne felt he could learn those rules, there was no advantage to being represented by counsel.

d. Browne was not otherwise aware of the dangers he faced.

When the trial court inadequately warns a defendant of his right to counsel and the dangers of proceeding *pro se*, appellate courts "will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." *Watts v. State*, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001) (quoting *Prince*, 301 S.C. at 424, 392 S.E.2d at 463). In *Gardner v. State*, 351 S.C. 407, 570 S.E.2d 184 (2002), the Court identified ten factors to consider when evaluating whether a defendant "has a sufficient background to understand the dangers of self-representation." 351 S.C. at 412-13, 570 S.E.2d at 186-87 (citing *State v. Cash*, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992)). However, *Gardner* was a guilty plea case, 351 S.C. at 409, 570 S.E.2d at 185, so some of the factors are less applicable in this case.

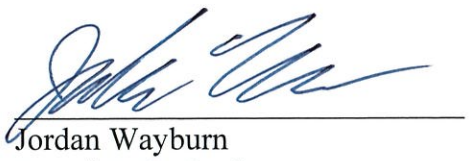
Here, the most important factor is Browne's prior experience and understanding with the assistance of counsel, particularly at trial. As the solicitor informed the court before sentencing, Browne's only experience with the legal system was decades before involving significantly less severe charges than murder. At the time the court granted Browne's motion, it knew only what he stated: he had "made a few small mistakes" decades before. While Browne "believed" he was represented at counsel at that time, the record does not affirmatively establish he was. Further, the record does not reflect whether he pleaded guilty or went to trial in those few encounters. Most importantly, Browne's prior legal troubles were all nearly three *decades* before. It cannot be reasonable to conclude he was sufficiently aware of the dangers he faced or the advantages he forfeited based on those experiences.

Some of the other factors identified in *Gardner* do weigh against Browne—such as the appointment of Hensley as standby counsel—but those are not as important because they indicate only his *capacity* for understanding or representation rather than the actual knowledge required for

a valid waiver. Only prior legal experience or adequate warnings can demonstrate the knowledge and understanding necessary for a valid waiver. There is no such evidence in this case. Moreover, it is the state's burden to prove a valid waiver, *i.e.* that Browne actually understood the right he wished to waive. *State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020) ("The burden is on the State to demonstrate the validity of a defendant's waiver of his right to counsel.") (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). Because it cannot do so on this record, his convictions must be reversed and his case remanded for a new trial.

CONCLUSION

For the reasons stated above, Browne respectfully requests this Court reverse his convictions and remand for a new trial.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of April, 2025.

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SC Court of Appeals

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."

Jordan Wayburn
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This 17th day of April, 2025.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

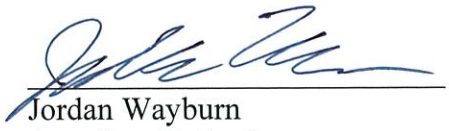
NORMAN PHILIP BROWNE,

APPELLANT.

APPELLATE CASE NO. 2024-000872

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Brian H. Gibbs, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 17th day of April, 2025.



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ATTORNEY FOR APPELLANT

From: Stock, Chris
To: Brian Gibbs; Grace Sommer
Cc: Wayburn, Jordan
Subject: 2024-000872 - The State v. Norman Philip Browne - Final Brief of Appellant
Date: Thursday, April 17, 2025 11:43:00 AM
Attachments: 2024-000872 - The State v. Norman Philip Browne - Final Brief of Appellant.pdf

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Mr. Gibbs,

Attached for service is the Final Brief of Appellant for Norman Philip Browne's appeal which will be filed with the Court of Appeals today.

If you have any questions, please let me know.

Thank you,

Chris Stock
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