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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN LEWIS SAMUEL,

APPELLANT

APPELLATE CASE NO. 2024-001380

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether Appellant is entitled to a new trial because he did not knowingly and intelligently waive his right to counsel where the record does not demonstrate that Appellant received adequate *Faretta* warnings, where no judge ruled that he was knowingly, intelligently, and voluntarily waiving his constitutional right to counsel, and where his request for counsel at the start of trial was improperly denied?

STATEMENT OF THE CASE

A Darlington County grand jury indicted Appellant for murder, kidnapping, and assault with intent to commit criminal sexual conduct in the first degree during the August 2021 term. R. (Indictments). The state, represented by Monty Bell, called the case to trial before the Honorable Paul M. Burch and a jury on August 12, 2024. Appellant represented himself *pro se* and was assisted by Jay Ervin as stand-by counsel. Tr. Vol. XI 1.

After a four-day trial Appellant was found guilty as indicted. Tr. Vol. XI 488 – 489. The state had sent notice of its intention to seek a life sentence due to Appellant's prior armed robbery conviction. R. (Notice of Intent to Seek LWOP). Appellant was sentenced to life on the murder with consecutive sentences of thirty years imprisonment on the kidnapping and the assault charges. Tr. Vol. XI 494.

This appeal follows.

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 court's findings of historical fact for clear error; but we review the sufficiency of a waiver of counsel based on those findings of fact de novo. *See Id.* (citing *United States v. Bush*, 404 F.3d 263, 270 (4th Cir. 2005)). “In doing so, [an appellate c]ourt must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit [court] at the time the defendant made his request.” *Id.*

ARGUMENT

Appellant is entitled to a new trial because he did not knowingly and intelligently waive his right to counsel where the record does not demonstrate that Appellant received adequate *Faretta* warnings, where no judge ruled that he was knowingly, intelligently, and voluntarily waiving his constitutional right to counsel, and where his request for counsel at the start of trial was improperly denied.

Relevant Facts

Appellant, an indigent individual, was initially appointed Tonya Little as counsel. On September 12, 2022, the parties appeared before the Honorable Michael S. Holt for a hearing on Counsel Little's motion to be relieved. Counsel Little had filed the motion at the request of Appellant because he wanted a speedy trial motion filed which Counsel Little refused to file for "strategic purposes," despite having represented Appellant for 454 days. Tr. Vol. I. 3, l. 14 – 4, l. 19.¹ Judge Holt agreed to relieve Counsel Little and questioned Appellant as to who would represent him, stating that Appellant could hire a lawyer or have one appointed by the court. Appellant indicated a desire to hire a private lawyer but also asked for appointed counsel. The following colloquy occurred,

THE COURT: No, sir. You say you telling me right now you can go hire a lawyer, I'm going to give you that chance, okay?

MR. SAMUEL: Can I get one secondary until then so that ---

¹ Based on correspondence with stand-by Counsel Ervin there were ten pre-trial hearings held in Appellant's case over the course of almost two years, along with the trial. For ease of reference the transcripts of all hearings, including the trial, will be identified in the initial brief as follows: Vol. I (9.12.22 hearing to relieve Counsel Little); Vol. II (12.13.22 bond motion); Vol. III (1.24.23 speedy trial motion); Vol. IV (4.4.23 motion to relieve Counsel Ervin); Vol. V (5.25.23 motions hearing); Vol. VI (6.28.23 bond motion); Vol. VII (8.16.23 *Blair* and *Schmerber* hearings); Vol. VIII (11.30.23 motions hearing); Vol. IX (2.15.24 motions hearing); Vol. X (7.24.24 motions hearing); Vol. XI (8.12.24 – 8.15.24 jury trial).

THE COURT: I just said, no, sir. I'm going to -- I'm not going to give you two lawyers. You say you're going to hire a lawyer ---

MR. SAMUEL: I will take -- I will take one from the public defender's office 'cause I don't, I don't want to sit for another two, three years inside that county jail and not being able to do what I have to do as far as I express and exhaust the remedies that I have and what's already there. So *I would like to have one appointed as a secondary source and I would like to ask the Court to allow me to petition the Court as a primary with the assistance of counsel.* I -- I ---

THE COURT: I don't understand what that means but let me say this, if you can't afford a lawyer I'll appoint one to represent you.

Tr. Vol. I 6, l. 4 – 7, l. 6 (9.12.22) (emphasis added). Though the request was unclear, this was the first time that Appellant had indicated a potential desire to represent himself. The hearing ended with Judge Holt appointing the public defender's office to represent Appellant. Tr. Vol I. 8, ll. 13-16.

Appellant next appeared before the Honorable Paul M. Burch on a motion to set bond on December 13, 2022. He was represented by newly appointed counsel Jay Ervin. Tr. Vol. II. 1-2. There was no mention of self-representation made at the December hearing on bond. On January 24, 2023, Appellant again appeared before Judge Burch for a hearing on a motion for a speedy trial. Tr. Vol. III. 1 – 3. Counsel Ervin informed Judge Burch he had filed a standard motion for a speedy trial as the matter had been pending for over a year and Appellant was anxious to proceed to trial.² Vol. III 3, ll. 11-16. He further explained that Appellant had filed a lengthy

² Judge Burch did not grant Appellant's speedy trial motion. Due to the scheduling backlog that arose during COVID, Judge Burch ruled "as soon as the schedules come out for the additional six months, we will make every attempt to try to get it scheduled. And if we don't get it scheduled within this calendar year then we will have to review some bond motions that might be forth coming." Tr. Vol. III, 9, ll. 6-18.

pro se motion to dismiss without consulting him. He had explained to Appellant that the court would not proceed on the motion because he had appointed counsel and further told Appellant that while “occasionally” courts let people proceed *pro se* that it “was not recommended” because there were “certain dangers inherent in that.” Counsel Ervin stated he had “been over that with” Appellant. Tr. Vol. III 3, ll. 16-24.

Counsel Ervin advised Appellant that if he “persisted in doing so” that the court could allow him to proceed *pro se* but that Appellant “probably would want an attorney to be there in an advisory capacity.” Tr. Vol. III Tr. 3, l. 24 – 4, l. 10. He stated he was willing to file any motion by Appellant that had “any validity whatsoever” but that the motions must come through him first. Judge Burch informed Appellant that any motions he wanted heard had to come through Counsel Ervin who would review the motion to ensure it was not frivolous before filing. Tr. Vol. III 4, ll. 2-15. Appellant eventually addressed Judge Burch stating “[Counsel Ervin] was already hired through the – he *was contracted as an assistant*, okay, ‘cause I asked for assistant through, ah, -- what was the judge – Mr. Holt --- Mr. Holt allowed for me to have an assistant counsel to what you just said to actually file my motion but go through the counsel... ‘*cause I am technically pro se.*” Tr. Vol. III 8, l. 8 – 9, l. 3 (emphasis added). This was inaccurate – Judge Holt had *not* allowed Appellant to proceed *pro se* but instead had appointed Counsel Ervin to represent him.

Appellant clearly requested to represent himself for the first time as the hearing before Judge Burch was ending. Judge Burch responded “You can wind up just like a gentleman did the other day, now. You don’t – don’t – don’t mess yourself up.” Tr. Vol. III. 10, ll. 3-9. Judge Burch continued,

You will mess right around and what's gonna happen you gonna have to represent yourself and if you're lucky you might get me or another judge to have a standby counsel that will sit behind you and possibly answer questions for it. Don't put yourself in that position... You got one of the most experienced attorneys that there is the PD.

Tr. Vol. III. 10, ll. 10-23. As appellant was being escorted from the courtroom Judge Burch encouraged him to "think about what you are saying." Tr. Vol. III 11, ll. 6-7.

Appellant next appeared in court on April 4, 2023, before Judge Holt on a motion to relieve Counsel Ervin. Tr. Vol. IV 1 – 3. Counsel Ervin informed Judge Holt that Appellant was "insistent that he wants to represent himself," that he had "explained to him the dangers of self-representation" and had advised against it. Tr. Vol. IV. 4, ll. 9-18. When Judge Holt asked Appellant why he wished to relieve Counsel Ervin, Appellant responded by beginning to read a three-page letter he had written requesting to be removed from the "client assistant program" into the record. Tr. Vol. IV 5, l. 21 – 7, l. 10.

Ultimately Appellant stated he wanted Counsel Ervin relieved because he would not file the motions that Appellant wanted filed. Appellant stated his main issue was being unable to "object to those charges because I know they are not right. And I understand that it may not be comfortable to deal, to deal with. I mean, I've been in jail for two years and absent any of these procedures to be able to express the falsity behind these charges. I've been accused." He complained that he was not afforded a preliminary hearing and stated the lawyer he had hired to represent him at the preliminary hearing told him "due to the State forfeiture to have the preliminary hearing I was never allowed to object to any statements or any type of evidence that was said against me" – a statement that unsurprisingly caused Judge Holt confusion. Tr. Vol IV. 9, l. 2 – 10, l. 3.

After Appellant stated he wanted to pursue a motion under the speedy trial act, the following exchange occurred,

THE COURT: What you gonna do about a lawyer?

MR. SAMUEL: I would like to present myself on doing so. I mean, I *actually trying, reaching out right* ---

THE COURT: Mr. Samuel?

MR. SAMUEL: --- *to get an attorney* ---

THE COURT: ---- how far did you go in school?

MR. SAMUEL: I went to graduation.

THE COURT: You graduated ---

MR. SAMUEL: And I also went to college three times.

THE COURT: Okay. So you have a high school diploma?

MR. SAMUEL: Yes, sir.

THE COURT: And then you've got some college credits?

MR. SAMUEL: I do.

THE COURT: Okay. You've been charged with murder.

MR. SAMUEL: Right.

THE COURT: And you're gonna tell me you want to be your own lawyer?

MR. SAMUEL: Yes, sir. Because, I mean, it is --if -- *if I didn't -- if I didn't do* ---

THE COURT: That's not the point.

MR. SAMUEL: That's not the point, right.

THE COURT: The point is that you have a trial lawyer representing you who knows the process and you don't know it and that's not -- and how could anybody expect you to know because you gonna come in here and you gonna sit at that table by yourself. The State's gonna call its case. You're gonna have to cross-examine witnesses.

MR. SAMUEL: Right.

THE COURT: That's a difficult thing to do even for very good lawyers.

MR. SAMUEL: Right.

THE COURT: You're gonna have -- you're gonna have to talk to a jury. There's just a lot of procedural obstacles that you have to ---

MR. SAMUEL: Right. I understand ---

THE COURT: --- overcome. You have evidentiary issues. This is a murder trial.

MR. SAMUEL: If -- if -- if -- I'm not to cut you off, I'm sorry. Pardon my ---

THE COURT: No! No! You're not cutting me off.

MR. SAMUEL: If -- if -- if my attorneys that have been appointed if they're not able or willing to file these motion or talk with me or discuss with me about filing these motion for evidence and doing these thing, then it puts me back further just as it has occurred before. And the proof is in the record. The proof is in the pudding. This is my what, second, third time coming in front of you, maybe three or four times coming in front of the other, um, Judge Burch about this very same issue that I've been having about not being able to file my motions with the Court and have these motions heard.

Tr. Vol. IV 11, l. 1 – 13, l. 10 (emphasis added). The state expressed concern over being “placed on the clock unless we know that the judge is going to be okay with [Appellant] representing himself.” The state was also “concerned for [Appellant] as well of [sic] proceeding *pro se*, but if that’s what he wants we just want to make sure we got a clear understanding from the bench that that’s what’s going to happen and we’ll be ready to go ahead and get him tried.” Tr. Vol. IV 14, ll. 5-20.

Judge Holt relieved Counsel Ervin but declined to take up any other motions because “this is a big jump to relieve your lawyer. I know he wants to be, he wants to argue his motion but the dust needs to settle from this, see if he's going to have another lawyer representing [him].” He requested Counsel Ervin remain as standby counsel for the purposes of trial. Judge Holt informed Appellant, “I think you need to, you need to determine whether you gonna be your

own lawyer or you're gonna have another represent you." Tr. Vol. IV 14, l. 21 – 15, l. 9. After hearing from the alleged victim, Appellant attempted to address another motion but was stopped by Judge Holt and again told, "I think you need to see if you have another lawyer to represent you or not." Tr. Vol. IV 18, ll. 22-25. Judge Holt did *not* make any findings of fact or law that Appellant had knowingly, voluntarily, and intelligently waived his right counsel and could proceed *pro se*.

On May 25, 2023, Appellant appeared before The Honorable Ferrell Cothran, Jr. for a motions hearing where he attempted to make a speedy trial motion, a motion to quash the indictments, and a motion to impeach the witness testimony "because of fraudulent reports was made to the police officer in real time and there was no evidence to substantiate the arrest warrants." Tr. Vol. V 1 – 3; Tr. Vol. V 7, l. 25 – 8, l. 25; Tr. Vol V. 10, l. 12 – 11, l. 11. At the start of the hearing the state informed Judge Cothran that Counsel Ervin had been appointed as standby counsel by Judge Burch and stated,

The State's position, of course, we would like [to] respond to any motions that he makes. The State is very much still concerned as far as trying Mr. Samuel. *We just want to make sure that the Court is going to prepare for the State moving forward with him absolutely moving pro se.* We -- the State is concerned about having to try this case multiple times. *We just want to make sure we get a clear understanding of who's going to be in what role for Mr. Samuel* before we go forward with scheduling his trial.

Tr. Vol. V. 4, ll. 4-14 (emphasis added). The state continued it would be ready to call the case to trial "when I know who's going to represent him." The state was prepared to call the case for trial before the end of the year when Counsel Ervin was attorney of record, however with Counsel Ervin in "the advisory role the State just needs some guidance..." Tr. Vol. V. 5, ll. 1-11.

In response to Judge Cothran's questions Counsel Ervin asserted that Judge Burch had placed him in an advisory position and ensured Judge Cothran that Judge Burch went over Appellant's *Faretta* warnings with him and found he could represent himself. Tr. Vol. V 5, ll. 12-17. This was incorrect as Judge Holt had been the judge to relieve Counsel Ervin and make him standby counsel. Further, Judge Holt had not conducted a *Faretta* hearing and had not found Appellant had voluntarily, knowingly, and intelligently waived his right to counsel, but had instead encouraged Appellant to figure out whether he would seek representation or not. Counsel Ervin again asserted that he had discussed the "dangers of self-representation, all the relevant concerns that the Court and counsel would have in that situation, but he still wanted to represent himself *pro se*." Counsel Ervin did not believe that Appellant proceeding *pro se* was in his best interest. Tr. Vol. V 6, ll. 1-8

Judge Cothran then addressed Appellant and the following exchange occurred,

THE COURT: Okay. What about that, Mr. Samuel, you want to represent yourself at trial?

MR. SAMUEL: Yes, sir, I do. Because of the levels that contain --- there was false police reports made to a police officer. It did not substantiate any of those, those grounds on what they are alleging. And also here is proof is in the record, okay, by Brianna Graham from what she was saying to the police officer and it, was it was a collage of lies, honestly. I mean, I have the evidence here ---

THE COURT: I understand that ---

MR. SAMUEL: ---- to substantiate this claim but --- sir?

THE COURT: The fact that -- that fact that you think that the police had lied or the police supposedly lied, that has nothing to do with you represent [sic] yourself.

MR. SAMUEL: Right. Correct.

THE COURT: That's what comes out at trial.

MR. SAMUEL: Right.

THE COURT: Now, if you don't know the rules of evidence you gonna be in [sic] a huge disadvantage representing yourself. You understand that?

MR. SAMUEL: Yes, sir.

THE COURT: When you go to trial the judge is not going to be to help you.

MR. SAMUEL: Right.

THE COURT: And so if you don't -- you may not know when to object and you may not know how to get evidence in, so you're taking a huge risk by representing yourself. You have a right to.

MR. SAMUEL: Right.

THE COURT: But once you pull that trigger and say I'mma represent myself ---

MR. SAMUEL: Yes, sir.

THE COURT: --- you go to trial, you stuck with the results. You understand that?

MR. SAMUEL: Yes, sir, I do.

THE COURT: And that's what you want to do?

MR. SAMUEL: Yes, sir.

THE COURT: Okay.

Vol. V 6, l. 9 – 7, l. 24. Judge Cothran explained that some of what Appellant wanted heard that day was appropriate for trial and that Appellant would need to object to and move to suppress evidence that he believed was falsified. He stated that one problem Appellant would have is that he did not know the rules of evidence or when to make the proper motions. After further discussing the trial process and what would occur Judge Cothran stated “[t]hat’s why it’s a huge help to have a lawyer who understands rules of evidence and knows what you can do when...”
Tr. Vol. V 11, l. 16 – 13, l. 18. He continued,

At this point, they ready — you want a speedy trial, they ready to give you a speedy trial. But *the question that they had is whether you gonna be representing yourself or Mr. Ervin is gonna be representing*. And I can tell you, you can do that, you have a constitutional right to represent yourself, whether that's smart or not I don't know. It seems to be in my career that ninety-nine percent of the time that people who represent themselves think it's a bad idea. But that's your, your life. You know, murder carries 30 to life, day for day.

Tr. Vol. V 14, ll. 5-15 (emphasis added). At the end of the hearing Judge Cothran advised Appellant that the state was proceeding as if he was representing himself and should he change his mind, he needed to let everyone know he wanted counsel. The last thing he said to Appellant was “I can tell you right now that's a bad idea because you don't know -- you think you're gonna get all this evidence suppressed you're gonna need a lawyer to help you. Okay.” Tr. Vol. V. 17, l. 22 – 18, l. 5.

Appellant next appeared before Judge Holt on June 28, 2023, where he moved for a bond which was denied. Tr. Vol. VI 1 – 4; Tr. Vol VI 15, l. 25 – 16, l. 1. On August 16, 2023, Appellant appeared before Judge Burch where the state entered the competency findings of Appellant without objection and moved under Schmerber for a buccal swab of Appellant. Tr. Vol. VII 1; Tr. Vol VII 4, l. 12 – 5, l. 14. Appellant objected to the giving of a buccal swab and testimony was taken from Investigator John Guterrez. Vol. VII 5, ll. 15 – 6, l. 4; Vol. VII 7, ll. 3-4. During Appellant's cross-examination of Guterrez Judge Burch attempted to direct Appellant to ask relevant questions. Vol. VII 12, l. 20 – 14, l. 3. After the state objected to an irrelevant question Judge Burch ended the cross-examination and granted the states motion stating “[t]here's no point in going any further with this if he's not going to ask the appropriate questions.” Tr. Vol. VII 14, ll. 21-23. Appellant's competency report was entered as an exhibit. Notably, during the evaluation Appellant voiced a desire to possibly represent himself. It was discussed at the evaluation and while Appellant “acknowledge the risks of self-representation,

particularly given the severity of the charges against him, and he indicated *he would request an attorney if he felt he needed to while representing himself.*” R. (Competency Report pg. 8)

Appellant appeared *pro se* before the Honorable George McFaddin, the Honorable Patrick C. Fant, III, and the Honorable R. Kirk Griffin to have various motions heard on November 30, 2023, February 15, 2024, and July 24, 2024, respectively. Tr. Vol. VIII 1-3; Tr. Vol IX 1-3; Tr. Vol. X 1-3. Appellant’s right and ability to proceed *pro se* was not discussed at these hearings. On May 14, 2024, the state sent notice of its intention to seek a life sentence due to Appellant’s prior armed robbery conviction. R. (LWOP notice).

At the start of trial Appellant requested that he be appointed counsel informing the court he could not handle the evidence and trial on his own. Appellant also stated that he had been given new discovery materials that he did not understand. He repeatedly asked the court to appoint him new counsel. Tr. Vol. XI 7, l. 1 – 10, l. 20. Judge Burch asked the state to comment on Appellant’s motion for counsel stating he “remember[ed] very distinctly having some comments made to him about him relieving or seeking to relieve Mr. Ervin at that time.” Tr. Vol. XI 13, ll. 19-24. The state opposed the motion to appoint counsel and asked that the trial proceed. Vol. XI 17, ll. 10-13. Judge Burch denied the motion ruling

You’ve already had two attorneys, apparently. You saying you’re not attempting to stall this matter, you’re the one that moved for a speedy trial. No! We’re going forward with this trial. I’ll give you time to meet with your standby attorney and discuss any issues with the solicitor about any possible resolution of this. But, no, I am not going to step in at this time and appoint further counsel. It’s obvious to the Court that that would be futile to even attempt that. ... We’ve got a jury ready to go. We’re not gonna have any further stalling. I went over with you ad nauseam at that last hearing I had about this representation issue.

Tr. Vol. XI 23, l 3 – 24, l. 1. Appellant questioned what hearing Judge Burch was referring to and Judge Burch responded a hearing that occurred before him “several weeks ago.” In response,

Appellant informed Judge Burch that he had not appeared before him several weeks ago. Tr. Vol. XI 24, ll. 2-10.

Discussion

Appellant appeared before six different circuit court judges for pre-trial hearings and not one of those six judges engaged in a fully *Faretta* colloquy nor did any of them rule that Appellant was knowingly, intelligently, and voluntarily waiving his right to counsel. The failure of the lower court to hold an adequate *Faretta* hearing and truly weigh whether Appellant had the competency to waive the right to counsel was *per se* reversible error.

The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel; it also guarantees a defendant the right to represent himself. A defendant must necessarily choose between these guarantees." *Hines v. State*, 443 S.C. 32, 902 S.E.2d 377 (2024). "[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).

"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*, 443 S.C. at 45, 902 S.E.2d at 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)). "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *State v. Samuel*, 422 S.C. 596, 603, 813 S.E.2d 487, 491 (2018). "In other words, whether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation." *Id.*

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., *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 reveals that Appellant was not given specific warnings about the dangers of self-representation. None of the six circuit court judges that Appellant appeared in front of performed full *Faretta* hearings and none ruled that Appellant could proceed *pro se* based on a knowing, intelligent, and voluntary waiver of counsel. Further, the record does not support a finding that Appellant waived his right to counsel in a knowing and intelligent manner nor that he had full understanding of what it meant to proceed without counsel. The failure to adequately warn Appellant of the dangers of self-presentation, the benefits of counsel, and to ensure Appellant's understanding of the same was reversible error. At a minimum, this court should reversed and remand the matter to the circuit court for a hearing wherein the trial court can make a factual determination as to whether the waiver was knowingly and intelligently made. *State v. Dial*, 429 S.C. 128, 838 S.E.2d 501 (2020).

When a trial judge fails to mention the dangers of self-representation, this Court must look to the record to determine if the Appellant had sufficient background to comprehend the dangers of self-representation. *Gardner v. State*, 351 S.C. 407, 412, 570 S.E.2d 184, 186 (2002). In making this determination, this Court considers a variety of factors, including:

- (1) the accused's age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
- (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
- (5) whether the accused 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 the accused knew of the legal challenges he could raise in defense to the charge(s) 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.

Id. 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)). Application of the Gardner factors in this case cannot support a finding that Appellant's waiver of his right to counsel was knowing and intelligent. See Gardner v. State, 351 S.C. 407, 413-14, 570 S.E.2d 184, 187 (2002). Taking each factor in turn:

- 1) Appellant was approximately thirty-three at the time of the incident and thirty-seven at the time of trial. He had finished high school and attended some college but had not finished a college degree. From the record it does not appear that Appellant suffers any mental or physical ailments.
- 2) While Appellant had one prior involvement with the criminal justice system – a 2006 guilty plea to armed robbery – he had no experience with criminal trials.
- 3) Appellant was never informed about the nature of the kidnapping and attempted CSC charges, nor of the penalties those charges carried. While he was informed of the penalty for murder, no one informed Appellant of the nature of that charge.
- 4) Appellant was represented by Counsel Ervin for seven months prior to having him relieved. While Counsel Ervin asserted he advised Appellant of the dangers of self-representation,

there is no clarification as to what the substance of that advisement was and if it went beyond anything other than a generic warning.

- 5) Appellant was not attempting to delay or manipulate the proceedings and in fact requested a speedy trial in many of the hearings he had before circuit court judges.
- 6) The court did appoint stand by counsel who, despite the bar on hybrid representation, lodged some objections to evidence and argued the directed verdict motion for Appellant. Tr. Vol XI 103, ll. 5-21; Tr. Vol. XI 334, l. 23 – 335, l. 8.
- 7) There is evidence in the record that Appellant was told that there were procedures and rules, but not that he would be required to follow them.
- 8) Appellant did not appear aware of any challenges or defenses he could raise to combat the charges and consistently stated he simply did not commit the crimes.
- 9) The exchanges between Appellant and Judges' Holt, Burch, and Cothran were merely *pro forma* answers given to *pro forma* questions – while the relevant hearings took place a year before trial the court was still required to give case specific warnings and fully instruct the Appellant on the dangers of self-representation and the benefits of counsel.
- 10) There is no evidence of coercion or mistreatment.

Appellant did not receive full *Faretta* warnings from a circuit court and based on the record one can only assume he received generic warnings from counsel. Critically, he had never experienced a criminal trial before, was not informed of the nature and penalty of all the charges he was facing, expressed no knowledge of any defenses to the crimes, was not informed that he would be bound by the rules of evidence and procedure, and was not trying to delay or manipulate the proceedings by requesting to proceed *pro se*. The greater weight of the *Gardner*

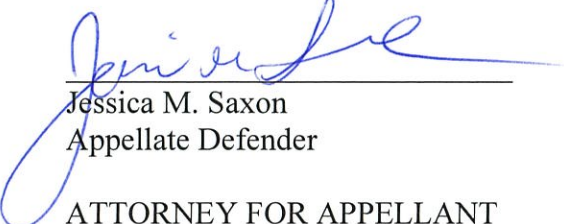
factors lends support to the finding that Appellant did not knowingly and intelligently waive his right to counsel.

Finally, Appellant asserted before trial that he required counsel and could not handle the case by himself. The court declined to appoint counsel or continue the case citing to its own warnings of Appellant. However, there is no record of Judge Burch giving Appellant *Faretta* warnings – he merely told Appellant early on to think about what he was saying. Thus, the denial of counsel was not proper, particularly when the court could have reappointed Counsel Ervin to the case as he had, at the time, been involved for over a year.

“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984). The erroneous deprivation of a defendant’s fundamental right to the assistance of counsel is *per se* reversible error. State v. Boykin, 324 S.C. 552, 555, 478 S.E.2d 689, 690 (Ct. App. 1996) (citing Chapman v. California, 386 U.S. 18, 23 n. 8, 87 S.Ct. 824, 828 n. 8 (1967)). “Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) (quoting Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 (1984)). The trial court improperly denied Appellant counsel at the start of trial. This was an error of law. The failure to ensure Appellant was aware of the dangers and disadvantages of self-representation, so that he knew what he was doing and his choice was made with eyes open, was an error of law. Appellant is entitled to a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse and remand his convictions and sentences for a new trial.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of June, 2026.