THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

Opinion No. 2014-UP-348 (S.C. Ct. App. filed Oct. 1, 2014)
Appellate Case No. 2015-000038

State of South Carolina, ... Respondent,

v.

Anthony Jackson, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

I. **Did the Court of Appeals properly affirm the trial court's inquiry into Petitioner's knowing and intelligent waiver of counsel and desire to appear pro se by following the guidelines set forth in Faretta v. California, finding it was within the trial court's discretion to decide when to rule on the Faretta motion?**

II. **Did the Court of Appeals properly affirm the trial court's determination that Petitioner's statement to police was freely and voluntarily given?**

STATEMENT OF THE CASE

Procedural History

An Horry County Grand Jury indicted Petitioner for first-degree burglary. (R. pp.387-88) On April 5, 2012, the Honorable Larry B. Hyman held a pretrial hearing for purposes of arraignment and service of Notice of Intent to Seek Life Without Parole. (R. p.3.) The State offered a plea at that time, and Petitioner asked for more time to speak to his attorney, which the court granted. (R. p.15.) On September 12, 2012, the Honorable J. Derham Cole held a hearing during which another plea was discussed and Petitioner requested a jury trial. (R. p.28.) On October 11, 2012, the Honorable Edward B. Cottingham held pretrial motions, including a Jackson v. Denno hearing where Judge Cottingham ruled Petitioner's statement to police was admissible. (R. pp.31-67.) On November 13-15, 2012, Petitioner proceeded to trial before a jury. J. Eric Fox, Esquire, represented Petitioner, and Martin D. Spratlin, Esquire, and Joshua D. Holford, Esquire, represented the State. The jury found Petitioner guilty, and the Honorable Edward B. Cottingham sentenced him to life in prison without parole. (R. p.384.)

On November 19, 2012, Petitioner filed a Notice of Appeal. On September 10, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. See State v. Jackson, Op. No. 2014-UP-348 (S.C. Ct. App. filed Oct. 1, 2014). Petitioner's request for rehearing was denied on December 12, 2014. A Petition for Writ of Certiorari to the Court of Appeals was submitted on January 12, 2015, and this Return follows.

Factual Background

On November 14, 2011, William G. Thompson and Ronald Kinney traveled to Myrtle Beach, South Carolina, and stayed at a Best Western. (R. p.181, line 10-R. p.182, line 12.) At some point after 12:30 a.m., while Thompson was in bed, he heard the sliding glass door of the

hotel room open and saw a shadowy figure enter his room. (R. p.187, line 20-R. p.188, line 6.) He asked the person what he was doing and the man told Thompson he was Tom, with hotel security. (R. p.188, lines 6-11.) The man appeared to make a call to the front desk to report the room was all clear and then left through the hallway door of the hotel room, grabbing Kinney's pants on the way out. (R. p.188, lines 17-24.) Thompson followed him into the hall and asked him why he had the pants, and the man explained he was looking for marijuana because he had received a report that the men in the hotel room were smoking it, and he needed to come back into the room to check there. (R. p.188, line 24-R. p.189, line 5.) Thompson took the man back into the hotel room, where the man looked around and then left. (R. p.189, lines 5-6.) Afterward, Thompson realized his wallet was missing. (R. p.189, lines 6-8.) Thompson called the front desk to inquire whether the hotel had a security person named Tom, and he called the police when he found out it did not. (R. p.197, lines 10-15.)

Thompson called to cancel his credit cards and discovered one card had just been used at a nearby pancake house. (R. p.199, lines 15-23.) Officer Jeffrey Thomas went to the Pan American Pancake House, where the stolen credit card was used, and spoke to a waitress who was able to provide a description of the suspect. (R. p.220, line 21-R. p.222, line 10.) Officer Thomas detained Petitioner nearby, and after the waitress identified Petitioner as the man who used the credit card, Officer Thomas arrested him and charged him with burglary. (R. p.223, line 9-R. p.226, line 23.)

On April 5, 2012, the Honorable Larry B. Hyman held a pretrial hearing for purposes of arraignment and service of Notice of Intent to Seek Life Without Parole. (R. p.3.) The State offered a plea of between seven and ten years' imprisonment, and Petitioner asked for more time to speak to his attorney, which the court granted. (R. p.11, 15.) On September 12, 2012, the

Honorable J. Derham Cole held a hearing during which another plea was discussed, this time between zero and fifteen years' imprisonment. (R. p.27.) The solicitor advised the court Petitioner declined the plea offer and expressed a desire to go to trial. (R. p.19.) Petitioner agreed he rejected the offer. (R. p.21.) After Petitioner told the court he did not understand the plea deal, Judge Cole attempted to explain it. The following exchange occurred:

> The Court: Well[,] let [me] explain [it] one more time, Mr. Jackson, then if not we'll just have a trial on this case. They've offered you zero to fifteen on a burglary second violent; do you understand that?
>
> [Petitioner]: I guess.
>
> The Court: No, sir, you guess, you don't understand what I'm saying, how far did you go in school?
>
> [Petitioner]: I didn't go far.
>
> The Court: You didn't go to school?
>
> [Petitioner]: No, sir.
>
> The Court: Well[,] can you understand English?
>
> [Petitioner]: A little bit.
>
> The Court: Okay, all right, you don't want to accept the offer; you want a trial; you want a jury trial? Take him back and we'll give him a jury trial.
>
> [The State]: Your Honor, if we may, prior to taking him back just serve the notice of life on him.
>
> The Court: Okay, wait a minute, Mr. Jackson, you need to get your notice served.
>
> [Petitioner]: He done [sic] gave me one of them already.

(R.p.27-28.)

On October 11, 2012, the Honorable Edward B. Cottingham held pretrial motions. (R. pp.31-67.) Petitioner asked the trial court to appoint him another lawyer. (R. p.39.) Judge Cottingham gave Petitioner three choices: hire his own lawyer, represent himself, or keep his current lawyer. (R. p.42.) Petitioner stated he did not want his current lawyer on his case, to which Judge Cottingham replied, "Well, I don't care what you want, the decision is mine." (R. p.42.) After that comment, Judge Cottingham again put Petitioner's choices on the record, stating, "Well, let the record be known too, that I've offered you to represent yourself or hire your own lawyer. Absent that, Mr. Fox is going to be your lawyer." (R. p.42.) Petitioner did not tell the trial judge he wished to represent himself. Judge Cottingham then stated Petitioner had the opportunity to plead straight up to Burglary First that day but that Petitioner rejected that opportunity. (R. p.45.)

At that point, the trial court held a Jackson v. Denno hearing where Judge Cottingham ruled Petitioner's statement to police was admissible. (R. pp.46-64.) Detective Steven Clothier testified regarding his interview with Petitioner. (R. p.46.) The State asked whether Detective Clothier made any promises or threats, and Clothier answered, "The only thing that I said was that, you know, if he cooperated, I would let the solicitor know and, you know, I made it a point not to make any leniency promises." (R. p.55, line 24-p. 56, line 4.) The audio recording of the interview was played for the trial court. (R. p. 59.) In its ruling, the trial court stated:

> Let the record reflect that I've had an evidentiary hearing in this matter and I'm convinced beyond a reasonable doubt, first, that he was Mirandized and that he knowingly understood the various elements of the Miranda and that in each instance he initialed the fact that he did know.
>
> I conclude further that this statement was freely, intelligently, knowingly made without duress, hope or promise and conclude that it is absolutely admissible under appropriate instructions by the trial judge.

(R. p.64, lines 9-17.)

On November 13-15, 2012, Petitioner proceeded to trial before a jury and Judge Cottingham. Petitioner informed the trial court he wished to represent himself. (R. p.75, line 2.) When the trial court asked him how far he went in school, he indicated he went through the ninth grade.[2] (R. p.77, line 23-R. p.78, line 3.) The trial judge emphasized to Petitioner how extremely dangerous it was for him to represent himself in this most serious offense, particularly because he was facing life imprisonment. (R. p.78, lines 17-24.) The trial court further explained to Petitioner, "Our Supreme Court has said even though a person is facing the death penalty if after appropriate warning he wants to represent himself he can do so. Now I tell you this, once you start representing yourself you cannot later change your mind . . . ." (R. p.80, lines 21-25.) While giving the State time to locate the Faretta[3] case so it could make appropriate findings on the record, the trial court proceeded with the Neil v. Biggers[4] hearing with Mr. Fox acting as defense counsel, telling Petitioner, "I'll deal with whether you want to represent yourself after this . . . ." (R. p.81, line 9-R. p.83, line 25.) Ultimately, the trial court denied Petitioner's motion to suppress the identification. (R. p.125, line 22-R. p.126, line 6.)

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[2] At different times throughout the pretrial hearings and the trial, Appellant gave conflicting answers regarding his level of education. At the September 12, 2012 hearing, he stated he did not go far in school and then answered, "No, sir" when the judge asked him, "You didn't go to school?" (R. p.27.) Here he told the trial court he went through the ninth grade, but on the audio recording of his police interview, he told Detective Clothier he went through the eleventh grade. (R. p.302.) Appellant also told the trial court at the September 12, 2012 hearing that he only understood English a little bit. (R. p.27.) However, he told Detective Clothier during his interview that English was his primary language. (R. p.302.) Additionally, it is apparent from the record that Appellant had a command of the English language when he was able to conduct cross-examination and make his opening and closing statements in English.

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

[4] 409 U.S. 188 (1972).

After the Biggers hearing, the State moved to take up the matter of Petitioner proceeding pro se. (R. p.126, lines 9-10.) The trial court inquired of Petitioner based on State v. Bryant[5] and Faretta v. California. Specifically, the trial court advised Petitioner of his right to counsel and emphasized to Petitioner the dangers of representing himself in such a serious matter. (R. p.128, lines 2-12; R.p.128, lines 15-23; R. p.132, lines 1-24; R. p.134, lines 15-23; R. p.135, lines 19-24; R. p.136, lines 2-11; R. p.140, lines 20-25; R. p.141, lines 4-9.) Particularly regarding his right to counsel, the trial court noted, "Now you've had an opportunity to observe Mr. Fox in examination of these witnesses and obviously you understand that he's a competent[,] capable attorney, prepared to represent you to the best of his ability." (R. p.128, lines 9-12.)

When addressing the jury venire, the trial court pointed out Petitioner's absolute right to represent himself and told the potential jurors there is no adverse inference to be derived from the fact Petitioner represents himself. (R. p.147, lines 9-13.) The trial court proceeded with jury selection, allowing Mr. Fox to assist Petitioner in the selection of the jury. (R. p.148; R. p.154, lines 17-19.) After the jury had been selected, the trial court stated:

> Mr. Fox, with Mr. Jackson's agreement I permitted you to help him with the jury selection process and I permitted you to assist in the other issues before us this morning. I am really concerned about him representing himself and I hope that you can talk to him over lunch, but as you well know the case law clearly says that after warning an individual of the danger that I have no alternative but to let him do it; you understand that?

(R. p.166, line 25-R. p.167, line 8.) (emphasis added.) Petitioner then informed the trial court it was still his intention to represent himself, and the trial court advised Petitioner, "All right, sir, then I accept your judgment. The record will reflect that I've warned you about five times and you insist on representing yourself and you've got that absolute right." (R. p.167, lines 13-24.)

[5] 383 S.C. 410, 680 S.E.2d 11 (2009).

Immediately prior to beginning the trial, the trial court again cautioned the jury that absolutely no adverse inference was to be derived from Petitioner's representing himself. (R. p.172, lines 3-5.)

Thompson testified regarding what happened on November 11, 2011, when he awoke to find Petitioner in his hotel room. (R. pp. 187-192.) He recounted finding out his credit card was missing and discovering it had been used at the Pan American Pancake House. (R. p.193, 199) He testified the police took him to identify Petitioner after he was detained, but Thompson admitted that although the man looked similar to the man who entered his hotel room, he could not make a positive identification. (R. p.200, line 7-R. p.201, line 8.) Ronald Kinney also testified regarding what happened that night. (R. pp.208-211.) He identified clothing shown in court to be similar to what the perpetrator wore that night but admitted he could not positively identify him when the police took him to where Petitioner was detained. (R. p.208, line 10-R. p.211, line 16.)

Officer Jeffrey K. Thomas testified he responded to a call on November 11, 2011, got a description of the suspect from the victims, and watched the hotel surveillance video of the perpetrator, which matched the description he got from the victims. (R. p.218, line 6-p.220, line 11.) After he discovered Thompson's stolen credit card was used at the Pan American Pancake House, he went to that location and questioned the waitress who interacted with Petitioner. (R. p.220, line 20-R. p.221, line 20.) The waitress provided a description of the man who used the credit card, which closely matched the description Officer Thomas already had. (R. p.222, lines 3-10.) After talking to the waitress, Officer Thomas spotted Petitioner, who fit the description, walking nearby and detained him. (R. p.223, lines 6-23.)

Tara Maenner, the waitress, testified next. (R. p.238.) She recounted Petitioner's coming into the pancake house that night and ordering several meals using the stolen credit card. (R.

p.238, lines 11-19; R. p.239, line 7-R. p.242, line 25.) She recognized Petitioner from other times he had been in the restaurant. (R. p.238, line 20-R. p.239, line 6.) Maenner testified Petitioner waited about thirty minutes for the food and that the restaurant was not very busy at the time he was there. (R. p.243, line 11-R. p.244, line 1.) Police took Maenner to an area about one hundred yards from the pancake house to make an identification, and she was able to positively identify Petitioner as the man who used the stolen credit card. (R. p.244, line 12-R. p.246, line 23.) She testified he had on the same clothing at the time of the identification that he did when he was at the pancake house. (R. p.244, line 22-p.245, line 25.)

Detective Steven Clothier testified regarding his interview with Petitioner after his arrest. (R. p.287.) Clothier audio recorded the interview, and the State played it for the jury. (R. p.290, lines 1-6; R. p.301, line 6-p.317, line 3.) During the interview, Clothier told Petitioner, "There's a point where I tell the Solicitor, yeah, he cooperated. I wouldn't mind you[r] helping him out for, for whatever reason. I can't promise you that, but that's what I put in there. Okay. Or I put in there – refused to cooperate. There's a difference, okay?" (R. p.306, line 22-R. p.307, line 1.)

In its jury instructions, the trial court twice charged the jury that it was up to it to determine if Petitioner's statement was voluntary. The trial court gave the following charges:

> Now there has been introduced into evidence a[n audio recording] regarding an alleged statement by this defendant and I have provided for you during the playing only, a certified transcript of the testimony. I charge you with regards to that as follows: a statement alleged to have been made by the defendant has been admitted into evidence in this case. While this Court has determined that the statement is admissible for your consideration I instruct you that you make the ultimate decision of whether or not the defendant made this statement; that's your decision. If you conclude that the defendant made the statement you must determine whether the statement was made by the defendant voluntarily and of his own free will. This means that the statement was not caused by pressure, force, fear, threats, coercion, or

> intimidation, or by hope or promise of leniency or reward of any kind. In determining whether the statement was voluntarily made you should consider both the character, the characteristics of the defendant, and the details of the questioning.
>
> Some of the factors that you may consider are the age of the defendant, the defendant's decision or lack thereof. You may consider the defendant's mental ability or alertness, his capacity or intelligence. You're entitled to consider the defendant's background and environment, the place and length of the detention, the nature of the questioning, the advice or lack thereof to the defendant of his constitutional rights including but not limited to the right to remain silent, that any statement could be used against him in a court of law, the right to have a lawyer present, that he could not, if he could not afford a lawyer a lawyer would be appointed by [sic] him at no cost to him, and that he could stop making that statement at any time. You must carefully consider all of the surrounding circumstances before you give any weight to an alleged statement.
>
> The State has the burden of proving beyond a reasonable doubt that the alleged statement was voluntarily made. If you determine it was, I must say advisedly, if you determine it was, you may give that statement any further consideration that you, the jury, deem proper and appropriate. You must decide what weight, if any, you should be given [sic] to the alleged statement. If you determine the alleged statement was not the free and voluntar[y] statement of the defendant you must not consider the statement at all.

(R. p.341, line 7-R. p.343, line 1.) Later, after the jury asked that the audio recording of the statement be played again, the trial court gave the following instruction:

> Let me say this to you, I charged you the law with regards to the statement and advise that the Court has found it admissible for your consideration. You, of course, are charged with responsibility to determine whether it was freely, voluntarily made without hope, promise, duress, or reward, and whether or not his constitutional rights were charged to him. Those are decisions for you to make and the State must prove it beyond a reasonable doubt. I've ruled it admissible but you make these determinations for yourself.

(R. p.375, line 25-R. p.376, line 9.)

Ultimately, the jury found Petitioner guilty, and Judge Cottingham sentenced him to life in prison without parole pursuant to section 17-25-45.[6] (R. pp.378, 384.)

[6] In 1993, Appellant was convicted of burglary in the first degree, a most serious offense. (R. p.19.)

ARGUMENT

I.

The Court of Appeals properly affirmed the trial court's inquiry into Petitioner's knowing and intelligent waiver of counsel and desire to appear pro se by following the guidelines set forth in Faretta v. California[7] and found it was within the trial court's discretion to decide when to rule on the Faretta motion.

Petitioner argued to the Court of Appeals that the trial court erred when it refused to let Petitioner represent himself during the Denno hearing, the Biggers hearing, voir dire, and jury selection. In his petition for certiorari, Petitioner maintains the Court of Appeals erred in deciding that a trial judge may postpone the Sixth Amendment right to self-representation. Contrary to Petitioner's contentions, neither the Court of Appeals nor the trial court committed any error in deferring ruling of Petitioner's right to represent himself. No requirement exists that a trial court must grant a defendant the ability to proceed pro se immediately. The trial court diligently advised Petitioner of his right to counsel, warned him about the dangers of representing himself, and gave him numerous opportunities to observe his appointed attorney in action before accepting his decision to represent himself. The Court of Appeals correctly affirmed its decision on appeal.

As the Court of Appeals noted in its opinion, the trial court has the ability to exercise discretion in deciding when to rule on a Faretta motion. Petitioner attempts to distinguish every case the Court of Appeals cited in its opinion. Petitioner argues Nelson v. Alabama, 292 F.3d 1291, 1296 (11th Cir. 2002), does not support the proposition that "when the right to self-representation has been asserted, it can be postponed." However, the Court of Appeals cited it as part of a list of cases it found supporting a trial court's ability to exercise discretion in deciding

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

when to rule on a Faretta motion, specifically for the proposition: "The Supreme Court in Faretta did not set out any fixed time frame for the holding of the Faretta hearing . . . ." Nelson, 292 F.3d at 1296.

The Court of Appeals also cited a case from Washington that found a trial court may defer ruling on a motion to proceed pro se. State v. Madsen, 229 P.3d 714 (Wash. 2010). While Petitioner argues Madsen's holding "runs expressly counter to the language quoted in the opinion," the State disagrees. In Madsen, the trial court twice deferred Madsen's requests to proceed pro se. The Supreme Court of Washington found the first deferral was correct but the second was error. Our Court of Appeals quoted language from Madsen pertaining to why the trial court's decision to defer the first request was proper based on the court's not being prepared to rule at that time. The Supreme Court of Washington pointed out that its Court of Appeals properly noted "a trial court must be allowed the flexibility and discretionary authority to properly manage its own affairs." Id. at 718. To the extent our Court of Appeals cited Madsen to support a trial court's ability to exercise discretion in deciding when to rule on a Faretta motion, a careful reading of Madsen reinforces that position rather than running counter to it as Petitioner contends.

Petitioner argues Swan v. Commonwealth, 384 S.W.3d 77 (Ky. 2012), actually supports his position because it states that the trial court is required to hold a Faretta hearing once a defendant invokes his right to proceed pro se. He points out the defendant in Swan did not make an unequivocal assertion of the right to represent himself, nor did the trial court force an attorney on him. However, these distinctions do not mean Swan does not apply to this case. The Court of Appeals cited Swan to simply show there are no "rigid, mechanical procedures" that must be

followed when a trial court considers a motion to proceed pro se; rather, each case must be individually evaluated instead of requiring "empty process." Swan, 384 S.W.3d at 94-95.

Petitioner seems to argue United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000), also does not apply here because it concerns a complete denial instead of postponement of the right to self-representation. Petitioner distinguishes Frazier-El from this case because "[Peitioner] never made any such frivolous statements[;] his request to represent himself was unequivocal and ultimately granted, albeit too late." (Pet. p. 16.) First, Petitioner's request was not unequivocal from the beginning, as he started out by simply complaining about his attorney rather than actually stating he wanted to represent himself. However, whether Petitioner made any frivolous statements or was unequivocal about his request has no bearing on the reason the Court of Appeals cited Frazier-El, which was to point out "the Faretta right to self-representation is not absolute and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" Frazier-El, 204 F.3d at 559.

South Carolina appellate courts have made clear one can waive one's right to counsel based on Faretta. State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). "The right to proceed *pro se* must be clearly asserted by the defendant prior to trial." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (emphasis added). "It is the trial court's responsibility to determine whether there was a knowing and intelligent waiver by the accused." Bryant, 383 S.C. at 414, 680 S.E.2d at 13. "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation." Id. This Court has held a trial court did not err in accepting an Appellant's waiver of his right to counsel where the trial judge held several hearings to determine whether

the appellant understood what it meant to represent himself and informed the appellant of the dangers of self-representation. Reed, 332 S.C. at 41-42, 503 S.E.2d at 750.

Here, the trial judge addressed Petitioner's concern that he was not satisfied with his current attorney at the pretrial hearing held on October 11, 2012. (R. p. 39-40.) At that time, Petitioner did not clearly assert a desire to represent himself. However, the trial judge made clear to him that he had three choices: hire his own lawyer, represent himself, or keep his current lawyer. (R. p.42.) By the end of the hearing, Petitioner still had not clearly asserted a specific request that he be permitted to represent himself, and the trial court advised him to cooperate with his current attorney in the thirty-one days between the hearing and the trial date. (R. p.65.)

Petitioner argued to the Court of Appeals that the trial court erred by not inquiring into his desire to represent himself, but the Court of Appeals correctly found the trial court was not required to make a Faretta inquiry when Petitioner had not clearly asserted his desire to proceed pro se. See Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (interpreting Faretta as requiring a trial court to "ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel").

At the beginning of the trial on November 13, 2012, Petitioner told the trial court, for the first time, that he wished to represent himself.[8] (R. p.75, line 2.) The trial judge emphasized to Petitioner how extremely dangerous it was for him to represent himself in this most serious offense, particularly because he was facing life imprisonment. (R. p.78, lines 17-24.) The trial court did not immediately make a decision to permit Petitioner to proceed pro se because it gave

[8] It is worth noting that because Petitioner waited until the beginning of trial to inform the trial court he wished to represent himself, it is questionable whether his request was even timely. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 ("The right to proceed *pro se* must be clearly asserted by the defendant prior to trial." (emphasis added)).

the State time to locate the Faretta case so it could make appropriate findings on the record. During that time, the trial court proceeded with the Neil v. Biggers hearing with Mr. Fox acting as defense counsel, telling Petitioner, "I'll deal with whether you want to represent yourself after this . . . ." (R. p.81, line 9-R. p.83, line 25.) Of course Petitioner was with Mr. Fox during the entire proceeding and was able to participate fully. As the Court of Appeals pointed out in its opinion, "no cases explicitly prohibit[] a trial court from delaying its ruling on a Faretta motion." The Court of Appeals cited Madsen for the following propositions: 229 P.3d at 717 ("Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling if the court is reasonably unprepared to immediately respond to the request."); 229 P.3d at 718 ("The trial court was within the bounds of proper discretion to delay ruling on the matter until it could properly prepare to rule on the issue.").

Similarly, Reed demonstrates appropriate inquiry under Faretta takes time and diligence on the part of the trial judge to make an informed determination regarding an appellant's decision to represent himself. As noted by the Court of Appeals, nothing in Reed or any other case law indicates a trial judge must accept an appellant's waiver quickly. On the contrary, Reed emphasizes the trial judge's important responsibility to ensure a defendant is informed of the dangers of self-representation and makes a knowing and intelligent waiver of his right to counsel. The fact that the trial judge here took time to obtain the Faretta case so that he could follow its guidelines demonstrates his adherence to proper procedure rather than showing any error on his part in delaying his decision. See Madsen, 229 P.3d at 717-18 (stating a trial court may defer ruling until properly prepared to respond).

Petitioner cites many cases to support his proposition that the portions of the trial process the trial court allowed Petitioner's attorney to conduct were critical stages. However, in all the

cited cases, the issue was the absence of a defendant and/or his attorney. See U.S. v. Tipton, 90 F.3d 861, 871 (4th Cir. 1996) ("The principal challenge is to the district court's having conducted portions of the jury voir dire out of the immediate presence of the Petitioners."); U.S. v. Hamilton, 391 F.3d 1066, 1069 (9th Cir. 2004) ("Hamilton argues for the first time on appeal that the district court violated his rights under the Sixth Amendment by permitting the presentation of evidence against him during the suppression hearing while neither Hamilton nor his counsel was present."); People v. Williams, 726 N.E.2d 641, 643 (Ill. App. Ct. 2000) ("Defendant appeals, contending that the trial court abused its discretion by denying him the right to be present at the discharge hearing."); McGinnis v. State, 430 S.E.2d 618, 622 (Ga. Ct. App. 1993) ("Therefore, we hold that it constitutes prejudicial error to conduct an evidentiary suppression hearing in the defendant's absence."); U.S. v. Wade, 388 U.S. 218, 223-24 (1967) ("In contrast, in this case it is urged that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined."). Thus, these cases are not applicable to the situation at hand. Petitioner was present for all the above portions of the trial process and was able to assist or be assisted by his attorney at all times. Thus, the type of prejudice contemplated in the trial in absentia cases cited by Petitioner is simply not present in the current case.

Finally, Petitioner cites State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014), to support his argument that "[n]o prejudice inquiry or harmless error analysis may be conducted because the erroneous denial of a Faretta request is a structural error." (Pet. p.14.) Petitioner makes much of the fact this Court in Barnes reversed summarily once it determined a Faretta error had occurred. However, upon a close reading of Barnes, the issue there "is whether South Carolina

will adopt the higher competency standard permitted by Edwards and thus alter the traditional Faretta threshold inquiry which permits any defendant competent to stand trial to waive his right to counsel." Id. at 35, 753 S.E.2d at 549. The reason this Court reversed was because it chose not to adopt the higher standard and consequently invalidated the trial judge's denial of the appellant's request to proceed pro se because his decision was based on the Edwards standard. Id. The facts of this case are not at all related to standard of competency. Thus, Barnes has no bearing on the case at hand, and it was conspicuously absent from the Court of Appeals' opinion.

To the extent Barnes has any impact on the case before this Court, it is limited to Faretta being the proper standard in a case in which an appellant desires to represent himself. Here, the trial judge correctly inquired based on Faretta and, thus, did not err. The trial court was correct in allowing Petitioner to represent himself in light of a thorough and appropriately delayed Faretta inquiry, and the Court of Appeals properly affirmed the decision. Accordingly, Petitioner's petition for writ of certiorari should be denied.

II.

The Court of Appeals properly affirmed the trial court's determination that Petitioner's statement to police was freely and voluntarily given.

Petitioner argued to the Court of Appeals that the trial court erred in finding the defendant freely and voluntarily gave a statement to law enforcement after the police officer threatened the defendant that "there would be a difference" in his treatment if he failed to cooperate. In his petition for certiorari, Petitioner maintains the Court of Appeals erred in affirming because the detective's threat was not "slight." (Pet. p.20.) The Court of Appeals correctly found evidence supporting the trial court's ruling that Petitioner's statement to police was freely and voluntarily given. Thus, the trial court's initial determination was proper, it correctly permitted the jury to make its own further determination regarding the statements, and the Court of Appeals properly affirmed Petitioner's conviction.

"Our courts have recognized that the appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency." State v. Dye, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009). The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to constitute an abuse of discretion. State v. Franklin, 390 S.C. 535, 539, 702 S.E.2d 568, 570 (Ct. App. 2010). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. When reviewing a trial court's ruling concerning voluntariness, the appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. Id. at 539, 702 S.E.2d at 570-71.

"On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). "Once a voluntary waiver of the *Miranda* rights is made, that waiver continues until the individual being questioned indicates that he wants to revoke the waiver and remain silent or circumstances exist which establish that his 'will has been overborne and his capacity for self-determination critically impaired.'" Id. at 200, 391 S.E.2d at 246 (citation omitted). "An officer may suggest broadly that it would be 'better' for a suspect to tell the truth, may indicate that the person's cooperation would be brought to the attention of the public officials or others involved, or may state in general terms that cooperation has been considered favorably by the courts in the past." Id. at 201, 394 S.E.2d at 247. However, "the confession may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence.'" Id. at 200, 391 S.E.2d at 246 (citation omitted). "A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." Id. at 200, 391 S.E.2d at 246-47 (citing State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987). "The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of 'the totality of the circumstances' surrounding the waiver." Id. at 200, 391 S.E.2d at 247 (citation omitted). Merely "a promise to bring cooperation to the attention of the prosecutor or the court, without more, is not coercive as a matter of law." United States v. Pelton, 835 F.2d 1067, 1073 (4th Cir. 1987); United States v. Foley, 595 F.Supp.2d 171 (D. Mass. 2009).

In Rochester, the appellant argued the trial court erred in denying his motion to suppress his confession, arguing it was improperly induced by a promise by the polygraph examiner that it

would be in his best interest to tell the truth. Id. at 199, 391 S.E.2d at 246. This Court found the confession was freely and voluntarily made and, therefore, admissible. Id. at 200, 391 S.E.2d at 246. This Court determined the polygraph examiner's statement was not an inducement or hope of lighter punishment. Id. at 200-01, 391 S.E.2d at 247. This Court distinguished it from Peake, in which the appellant was "told by the interrogating officers that the State would not seek the death penalty if he gave a statement." Id. at 200, 391 S.E.2d at 247. Because Peake's inculpatory statement was the product of that promise of leniency, this Court reversed his conviction and sentence. Id. at 200, 391 S.E.2d at 247. In Rochester, this Court pointed out the investigating officers did not at any time promise the appellant anything in exchange for his giving a statement. Id. at 200, 391 S.E.2d at 247. This Court also considered the totality of the circumstances, including evidence the appellant was not worn down by interrogation tactics and his confession was not induced by force or threats. Id. at 201, 391 S.E.2d at 247.

Here, as in Rochester, Petitioner's statement was not given in exchange for a promise of leniency. Detective Clothier merely told Petitioner he would make a note of his cooperation for the solicitor's office. This was nothing like the promise in Peake that the State would not seek the death penalty if Peake gave a statement. There was no discussion of the penalty in this case at all. Furthermore, Detective Clothier made a point of stating to Petitioner, "I can't promise you that, but that's what I put in there." (R. p.306, lines 24-25.)

Petitioner maintains the Court of Appeals erred because Clothier's statement that there is a difference between cooperating and refusing to cooperate was a threat. State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), is instructive in determining what constitutes a threat in the context of a confession. In Corns, the Court of Appeals found the trial court erred in admitting the statement because officers coerced Corns's confession by means of veiled threats

against his family that his wife could be arrested and his children taken by the Department of Social Services. In the case at hand, no threats were made against Petitioner or his family. Telling Petitioner there is a difference between cooperating and refusing to cooperate certainly does not rise to the level of a threat.

Because Detective Clothier did not threaten Petitioner when he said there was a difference between cooperating and refusing to cooperate, and because the appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence, the Court of Appeals properly affirmed the trial court's decision to initially admit the statement and allow the jury to make its own determination. Accordingly, Petitioner's petition for writ of certiorari should be denied.

CONCLUSION

Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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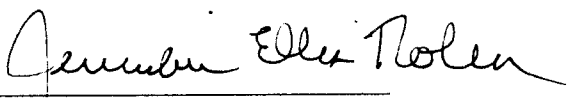
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

February 5, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
FEB 05 2015
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

Opinion No. 2014-UP-348 (S.C. Ct. App. filed Oct. 1, 2014)
Appellate Case No. 2015-000038

State of South Carolina, ... Respondent,

v.

Anthony Jackson, ... Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 5th day of February, 2015.

Angela Bennett

ANGELA BENNETT
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 05 2015
SC Court of Appeals

February 5, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Anthony Jackson
Appellate Case No: 2015-000038

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
S.C. Bar No: 79818

JER/ab
Enclosures

cc: David Alexander, Esquire
Ms. Trisha Allen