No. _____

In the Supreme Court of the United States

ANTHONY JACKSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a criminal defendant unequivocally invokes his right to represent himself, does the Sixth Amendment deprive a state trial court of discretion to delay exercise of this right until after critical stages of the trial, including a Neil v. Biggers[1] hearing, voir dire, and jury selection?

[1] 409 U.S. 188 (1972).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Court of Appeals were Petitioner Anthony Jackson and Respondent State of South Carolina.

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PETITION FOR WRIT OF CERTIORARI

Counsel for Anthony Jackson petitions the Court to issue a writ of certiorari to review the judgment of the South Carolina Court of Appeals affirming Jackson's conviction for first degree burglary.

OPINION BELOW

The opinion of the South Carolina Court of Appeals was unpublished decision No. 2014-UP-348, and is available at 2014 WL 4938028. (App. A1).

JURISDICTION

The South Carolina Court of Appeals issued its opinion on October 1, 2014. (App. A1). Petitioner filed a timely petition for rehearing which was denied on December 12, 2014. (App. A13). Petitioner filed a timely petition for certiorari with the South Carolina Supreme Court which was denied on April 8, 2015. (App. A37). This Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Petitioner Jackson is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI.

INTRODUCTION

This Court has not addressed at what point in a criminal prosecution a trial court must conduct a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975). The Court came closest to discussing this issue in McKaskle v. Wiggins, 465 U.S. 168 (1984), when it addressed a trial court's authority to order standby counsel. The Court recently invited questions on direct review regarding the limits of a trial judge's discretion in its *per curiam* decision in Marshall v. Rodgers, 133 S.Ct. 1446, 1451 (2013).

In this case, petitioner Anthony Jackson ("Jackson") unequivocally demanded to represent himself. Facing a recidivism-triggered mandatory life without parole sentence for stealing thirty dollars and buying breakfast for himself and another homeless man, petitioner told the trial judge, "I'll represent myself, I rather represent myself. If I'm going to get life I rather . . . get life for myself, I don't need no help." R. 77, ll. 13 – 15. Petitioner was ultimately allowed to represent himself at trial after a Faretta inquiry, but the trial judge refused to allow petitioner to represent himself during a substantive hearing, voir dire, and jury selection. Petitioner did not assume his own defense until opening statements.

This case would allow the Court to set forth clear guidelines about when a Faretta inquiry must be held and what limits the Sixth Amendment place on a trial judge's discretion. Since the Court has issued few opinions regarding the right to self-representation, the issue is ripe for decision.

STATEMENT OF THE CASE

The Facts of the Crime

A jury convicted Jackson of burglarizing a hotel room in Myrtle Beach, South Carolina occupied by two golfers from Pennsylvania and Connecticut. R. 377, l. 24 – 378 11, l. 6. R. 181, ll. 1 – 24. R. 182, ll. 7 – 15. The golfers were awakened in their first-floor room by a man entering through the room's sliding glass door. R. 187, l. 20 – 189, l. 8. The man told them he was with hotel security. R. 188 1, ll. 5 – 10. He shined a light and produced a badge. R. 188, ll. 11 – 13. He called the front desk and said everything was "all clear." R. 188, l. 17 – 19. He had the golfer lock the sliding glass door and then left. R. 188, ll. 19 – 22. The golfer noticed that the man picked up a pair of pants as he left the room. R. 188, ll. 22 – 24.

The golfer gave chase. R. 188, ll. 24 – 25. The man told the golfer he suspected marijuana was being consumed in the room and was checking the pants for drugs. R. 188, l. 24 – 189, l. 5. The golfer took the man back to the room. R. 189, ll. 1 – 8. The man looked around and then left. R. 189, ll. 5 – 6. Once the man left, one of the golfers noticed his wallet was missing. R. 189, ll. 6 – 8. Neither golfer could identify Jackson as the man they encountered in their room. R. 200, l. 22 – 201, l. 8. R. 216, ll. 7 – 8.

When the police arrived, the golfer was on the telephone canceling his credit cards. R. 197, l. 18 – 198, l. 1. The company told him the card had just been used at a nearby pancake house. R. 199, ll. 7 – 20. The golfer informed the police. R. 199, l. 21

– 200, l. 3. A police officer went to the pancake house, met with the waitress, and arrested Jackson. R. 221, l. 14 – 223, l. 14.

Jackson was interrogated by the police and admitted taking the credit card from the hotel room. R. 313, ll. 12 – 16. The detective confronted Jackson with two charges made at the pancake house which totaled $28.89. R. 315, ll. 11 – 24. Jackson admitted making the charges on credit cards to buy food for himself and other homeless people. R. 316, ll. 1 – 16. Pursuant to South Carolina's recidivist law, the trial judge sentenced Jackson to life imprisonment without the possibility of parole. R. 382, l. 18 – 384, l. 9.

Jackson's Protests About His Attorneys at Pre-Trial Hearings

During three pre-trial hearings, Jackson told the court he was unhappy with his appointed attorneys. R. 15, ll. 12 – 22. At an April 5, 2012, hearing, Jackson attempted to plead guilty. R. 11, ll. 6 – 9. Jackson – not his attorney – asked the judge to accept a plea deal offered by the State that would result in a sentence of between seven and ten years, but begged the judge to delay sentencing for two weeks so that he could finish his GED classes at the county jail. R. 8, ll. 7 – 9, l. 12. The trial judge agreed. R. 9, ll. 11 – 12. Unfortunately for Jackson, during the plea colloquy he answered the judge's question honestly that he was dissatisfied with the services of his attorney and the judge stopped the hearing. R. 15, ll. 12 – 23.

Jackson next appeared at a hearing in September 2012, before a different judge with a different appointed lawyer, Eric Fox ("Fox"). R. 20, ll. 8 – 9. Fox was a public defender appointed when Jackson's previous attorney took a position in

another county. R. 22, ll. 2 – 11. The judge told Jackson the State had extended a plea offer. R. 20 l. 14 – 21 l. 13. When asked if he had enough time to confer with Fox about whether to accept the State's offer, Jackson replied, "No, I ain't had that much time; it just came and just proposed it to me and that was it." R. 21, ll. 15 – 20.

By the time of this hearing, the State's offer had changed to a plea that would result in a sentence of zero to fifteen years' imprisonment. R. 23, l. 19 – 24, l. 17. Jackson was confused about the offers and his charges. R. 26, l. 10 – 27, l. 17. The frustrated judge told him, "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." R., 19 23 – 12, l. 2. Before removing Jackson, the State served him with a notice of intent to seek life without parole. R. 28, ll. 5 – 22. Jackson's lawyer never said a single word during the entire hearing.

On October 11, 2012. Fox represented Jackson at a pretrial hearing held before the Honorable Edward B. Cottingham—who would ultimately preside over Jackson's trial. R. 31. The original purpose of the hearing was to determine the admissibility of a statement pursuant to Jackson v. Denno, 378 U.S. 368 (1964). At the beginning of the proceedings, Fox told Judge Cottingham that Jackson wanted to address the court. R. 39, ll. 3 – 9. Jackson first told the court he wanted a different lawyer. R. 39, ll. 19 – 20. Jackson had two pending burglary charges. R. 39, l. 19 – 40, l. 1. Jackson stated, "I was talking to [Fox] out there in the conference room and he don't even know which burglary that I'm going to trial on. . . ." R.39, l. 23 – 40, l. 1. Jackson said, "I'm not satisfied with my counsel." R. 40, ll. 14 – 15.

Judge Cottingham attempted to convince Jackson that Fox was a very capable attorney and that Jackson needed representation. R. 40, ll. 16 – 12, l. 41. Jackson replied, "I don't want him on my case." R. 42, l. 12. Judge Cottingham replied, "Well, **I don't care what you want, the decision is mine.**" R. 42, ll. 13 – 14 (emphasis added). Jackson replied, "Let the record be known that I don't want him on my case." R. 42, ll. 15 – 16. Judge Cottingham responded, "Well, let the record be known too, that I offered you to represent yourself or hire your own lawyer. Absent that, Mr. Fox is going to be your lawyer." R. 42, ll. 17 – 19.

The trial judge then conducted a colloquy with the attorneys and discussed a plea offer. R. 43,l. 21 – 44, l. 45. Judge Cottingham asked Jackson to confirm whether he had declined a previous plea offer. R. 44, ll. 10 – 15. Jackson replied, "I don't even understand what he's still on my case. I don't understand –" R. 44, l. 16 – 17. The judge interrupted, "I'm not asking you now." R. 44, l. 18. Without inquiring further as to whether Jackson wanted to represent himself or conducting a colloquy pursuant to Faretta v. California, 422 U.S. 806 (1975), Judge Cottingham conducted the Denno hearing with Fox representing Jackson. R.45, l. 21 – 46, l. 7.

Fox cross-examined the State's witness at the Denno hearing. R. 60, l. 12 – 62, l. 16. Fox made a limited argument supporting his motion to suppress the statement. R. 63, ll. 13 – 23. The trial court refused to suppress the statement. R.64, ll. 8 – 25. The trial judge concluded the hearing by urging Jackson to cooperate with Fox, but telling him that he was "not entitled to have the benefit of his advice every day between now and date of trial." R. 65, ll. 11 – 24.

Jackson's Demands to Represent Himself at Trial

Jackson unequivocally demanded to represent himself when his case was called to trial on November 13, 2012, before Judge Cottingham. R. 75, ll. 14 – 15. Despite Jackson's demands, the court directed Jackson's attorney, Fox, to handle a Neil v. Biggers, 409 U.S. 188 (1972) hearing, voir dire, and jury selection. Before any of these matters were addressed, Jackson told Judge Cottingham that he did not want Fox representing him. R. 75, ll. 19 – 22. Jackson said, "I'll represent myself." R. 75, ll. 19 – 22.

The trial judge attempted to convince Jackson to keep Fox as his attorney. R. 76, l. 1 – 77, l. 12. Jackson replied, **"I'll represent myself, I rather represent myself. If I'm going to get life I rather get . . . life for myself, I don't need no help."** R. 77, ll. 13 – 15 (emphasis added). The trial judge then asked Jackson several questions about his ability to represent himself and whether he was prepared for trial. R. 77, l. 19 – 81, l. 9. Judge Cottingham warned Jackson that it would be "extremely dangerous in this most serious offense for you to represent yourself." R. 78, ll. 18 – 20. He told Jackson he was facing life imprisonment. R. 78, l. 17 – 24.

The discussion regarding Jackson's self-representation ceased when the trial judge was unable to get a copy of the Faretta decision from the prosecutor. R. 81, ll. 9 – 13. Judge Cottingham said, "Okay, well let's go ahead, be finding it and let's go ahead with the other issue while your staff is finding the case for me. All right let's go forward with the identification matter." R. 81, l. 25 – 82, l. 3. The trial judge said,

"Mr. Fox, I'm going to leave you in the case for this important matter." R. 83, ll. 12 – 13. The court then ruled:

> And **after this after I hear any motions if he still wants to represent himself I'm going to let him do it in his peril.** I would urge him not to do it but the law is clear if he insists he's got that right, **but I do want you [Fox] to stay with him in this important part of the proceedings to protect his interest.**

R. 83, ll. 15 – 20 (emphasis added).

The State's first witness was sworn for the Biggers hearing. Before the State questioned the witness, the following occurred:

> THE COURT: Mr. Jackson, I'll deal with whether or not you want to represent yourself after this but –
>
> DEFENDANT JACKSON: **I still do.**
>
> THE COURT: This is [an] important legal matter that you need your lawyer to look into.
>
> DEFENDANT JACKSON: **I'll represent myself, I don't need him, I don't trust him.**
>
> THE COURT: Well I'll deal with that in a minute.

R. 83, l. 24 – 84, l. 7 (emphasis added). The court then conducted the Biggers hearing with Fox (not Jackson) questioning the witnesses. R. 84, l. 12 – 126, l. 6. After hearing argument from Fox (not Jackson), the court refused to suppress the witness's in-court identification. R. 125, l. 22 – 126, l. 6.

By the end of the Biggers hearing, the judge had copies of several cases to use in questioning Jackson and in advising him regarding the dangers of self-representation. R. 126, l. 9 – 127, l. 21. Judge Cottingham conducted an extended

discussion with Jackson. R. 127, l. 20 – 140, l. 19. After the discussion, the court said it had "exhaustively warned [Jackson] of the dangers" and asked if he still wanted to represent himself. R. 140, ll. 20 – 25. Jackson said, "Yes, sir, I represent, I don't understand what's going on but I, I'll talk for myself." R. 141, ll. 1 – 3. After further discussion, during which Jackson offered to plead guilty even if it meant life without parole, the judge ruled, "No, sir, we are going to trial. I'm going to let you represent yourself." R. 141 l. 4 – 142, l. 21.

The jury entered the courtroom. R. 146, ll. 16 – 19. Judge Cottingham told the jury that Jackson would represent himself and they could not make any adverse inference from that fact. R. 147 ll. 9 – 13. Despite his ruling that Jackson would represent himself and informing the jury of this ruling, the trial judge then had Fox conduct voir dire instead of Jackson. R. 148, l. 2 – 88, l. 20. Jackson did not speak during voir dire. R. 148, l. 2 – 155, l. 20. At no point did the judge ask Jackson whether he wanted to represent himself during voir dire. R. 148, l. 2 – 155, l. 20. Without obtaining Jackson's assent on the record, Judge Cottingham said, "All right, Mr. Fox, I've permitted you to sit here and assist the defendant in the selection of the jury only, but do you have any further inquiry?" R. 154, l. 17 – 19. Fox then proposed an additional voir dire question. R. 154, ll. 20 – 23.

After voir dire, the judge told the jury, "And the defendant is representing himself, I've asked Mr. Fox to assist in the selection of the jury process and the defendant is agreeing to that; is that correct? R. 155, ll. 13 – 16. Fox (not Jackson) replied, "Yes, Your Honor." R. 155, l. 17. The judge did not obtain Jackson's consent

to Fox selecting the jury. Fox then exercised Jackson's strikes and selected the jury. R. 155, l. 18 – 165, l. 18. The trial then began and Jackson made his opening statement and examined the State's witnesses. R. 179, l. 11 – 180, l. 8.

The State Appellate Decisions

The South Carolina Court of Appeals issued a short unpublished decision affirming Jackson's conviction. A1. The court used the lack of any specific authority barring a trial judge from delaying a Faretta decision to affirm. (App. A2-A3). The court stated, "we have discovered no cases explicitly prohibiting a trial court from delaying its ruling on a *Faretta* motion." (App. A2). Citing several federal circuit court decisions for the proposition that trial judges have discretion in Faretta hearings, the court concluded that Judge Cottingham acted within his discretion when he refused to allow Jackson to represent himself during the Biggers hearing, voir dire, and jury selection. (App. A2-A3), citing Nelson v. Alabama, 292 F.3d 1291, 1296 (11th Cir. 2002); United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000); United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998). Despite the fact that Jackson pointed out in a petition for rehearing that none of the cases cited by the court supported the notion that a court may postpone a Faretta hearing and force an attorney upon an unwilling defendant, the court of appeals denied the petition. (App. A5-A13). The South Carolina Supreme Court denied certiorari with a two-sentence Order. (App. A37).

REASONS FOR GRANTING THE PETITION

The question of the timing of a trial judge's Faretta inquiry and decision on self-representation is an open question in this Court's Sixth Amendment jurisprudence. The right to self-representation is a fundamental right and whether a trial judge has discretion to delay a defendant's exercise of that right is an important and novel constitutional question. As commentators have noted, trial courts face a "plethora of procedural and doctrinal problems, some perhaps unanswerable" when faced with a defendant's request to represent himself. See John F. Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after Faretta, 6 Seton Hall Const. L. J. 486 (Spring 1996) *cited in* Martinez v. Court of Appeal of California, 528 U.S. 152, 161 n.10 (2000).

The undisputed facts below present the Court with an ideal case to answer some of these questions. Jackson made an unequivocal demand to represent himself. The trial judge ignored his demand and held a Biggers hearing. After finally locating a copy of Faretta, the judge decided Jackson could represent himself, but delayed Jackson's assumption of his defense until after voir dire and jury selection.[2] These

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[2] The state appellate court ignored Jackson's argument that because he had a constitutional right to be present at a Biggers hearing, voir dire, and jury selection, it followed that he had the right to represent himself at these critical stages of the proceedings. See Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); United States v. Wade, 388 U.S. 218, 236-37 (1967) (holding constitutional right to be present extends to post-indictment lineups); United States v. Tipton, 90 F.3d 861, 872 (4th Cir. 1996) (holding defendant's right to be present extends to voir dire and jury selection). See also Jona Goldschmidt, Has He "Made His Bed, and Now Must Lie in It?" Toward Recognition of the Pro Se Defendant's Sixth Amendment Right to Post-Trial Readmonishment of the Right to Counsel, 8 DePaul J. for Soc. Just. 287, 321-26 (2015) (discussing meaning of "critical stage" for representation issues).

facts will allow the Court to decide when a Faretta hearing must be conducted and whether the beginning of a defendant's right to self-representation rests within the sole discretion of a trial judge. The state appellate court held that "the trial court acted within its discretion." (App. A3).

Faretta does not explicitly say when the court must decide whether a defendant will represent himself.[3] The facts of Faretta eliminated the need for any such decision from this Court. "Well before the date of trial" Faretta asked to represent himself. Faretta, 422 U.S. at 807. The trial judge held two hearings on whether Faretta could represent himself before conducting any substantive proceedings. Id. at 807-11. At the second hearing, the court held that Faretta had no constitutional right to represent himself and forced the public defender upon him. Id. at 809-10. This Court reversed. In reviewing lower court decisions, the Court stated, "We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." Id. at 817.

The majority opinion in Faretta hints at when a decision must be made about representation. The majority recognized that decisions on matters of trial strategy are allocated to counsel. Id. at 820. The Court stated this allocation was justified only "by the defendant's consent, **at the outset**, to accept counsel as his representative." Id. at 820-21 (emphasis added). Justice Blackmun's dissent noted

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[3] The benchbook for federal district judges advises that representation issues, including a Faretta colloquy if necessary, should be decided at the defendant's first appearance. See Goldschmidt, 8 DePaul J. for Soc. Just. at 312-13.

"the procedural problems that . . . today's decision will visit upon trial courts in the future." Id. at 852. Among the dissent's list of procedural problems were whether a defendant must be given notice of his right to proceed *pro se* and "when must that notice be given?" Id. Justice Blackmun also asked, "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*?" Id. If the Court grants certiorari in this case, it will answer some of the questions foreseen by Justice Blackmun in Faretta. Those questions still persist. See Iowa v. Tovar, 541 U.S. 77, 90-94 (2004) (declining to mandate specific questions a trial judge must ask when a defendant elects to represent himself at a guilty plea).

The Court's next important decision after Faretta answered questions about the role of standby counsel, but did not provide guidance about the timing of a Faretta decision. McKaskle v. Wiggins, 465 U.S. 168 (1984).[4] Wiggins equivocated on whether he would represent himself and whether he would allow standby counsel to assist him. Id. at 171-72. Standby counsel ultimately played a significant role in the trial. Id. at 171-73. On appeal, Wiggins claimed his right to proceed pro se "was impaired by the distracting, intrusive, and unsolicited participation of counsel throughout the trial." Id. at 176.

[4] Wiggins, like Jackson, was sentenced to life imprisonment as a recidivist. McKaskle, 465 U.S. at 170.

The Court rejected Wiggins' claims, finding that standby counsel's "unsolicited involvement was held within reasonable limits." Id. at 187-88. Unlike Jackson's case, the trial judge in McKaskle did not force standby counsel to assume control during any particular part of the proceedings. Standby counsel took it upon himself to interject. Here, the trial judge expressly directed Jackson's attorney to conduct the Biggers hearing, voir dire, and jury selection. See generally Anne Bowen Poulin, Ethical Guidance for Standby Counsel in Criminal Cases: A Far Cry from Counsel?, 50 Am. Crim. L. Rev. 211, 237-43 (Winter 2013) (discussing the ethical problems facing standby counsel who acts as an advocate and not merely a source of information for the *pro se* defendant).

McKaskle was decided in January 1984. Later that year, Justice Marshall dissented from the Court's denial of certiorari in Raulerson v. Wainwright, 469 U.S. 966 (1984). His dissent demonstrates that the question presented in this case was not resolved in Faretta or Wiggins. The defendant in Raulerson sent the trial judge a letter unequivocally demanding to represent himself. Id. at 967. The trial judge "provided a copy of the letter to counsel and did nothing more." Id. Justice Marshall wrote that "once a defendant affirmatively states his desire to proceed *pro se*, a court should cease other business and make the required inquiry." Id. at 970. Justice Marshall continued:

> [I]f a trial court judge holds a *Faretta* hearing when the accused clearly asserts his desire to proceed *pro se*, the result will not do harm to the right to counsel. At the same time, the *failure* to hold a *Faretta* inquiry at this time *will* do injury to the right recognized in *Faretta*. Delay in holding a hearing after the right is unequivocally asserted

> undermines that right by forcing the accused to proceed with counsel in whom he has no confidence and whom he may distrust.

Id. at 970 (emphasis in original). Justice Marshall's dissent in Raulerson demonstrates that whether a Faretta hearing must be held immediately after an unequivocal demand to represent oneself was still undecided after Wiggins.

In Martinez, decided in 2000, the Court faced a closely analogous question to the one presented here. Martinez, 528 U.S. at 154. Martinez examined whether an appellate court could force an attorney on a defendant who was convicted after representing himself at trial. Id. at 154-55. The Court decided that Faretta did not apply in the context of an appeal and litigants had no right to proceed *pro se*. Id. at 164.

The Court's opinion Martinez indicates that the question presented here has not yet been decided. In its initial discussion of Faretta, the Court stated that Faretta's holding "arguably embraces the entire judicial proceeding." Id. at 154. Narrowing Faretta, the Court wrote, "Our conclusion in Faretta extended only to a defendant's constitutional right to conduct his own defense." Id. (internal quotations omitted). "Accordingly, our specific holding was confined to the right to defend oneself at trial." Id. Further in its discussion, the Court noted that even "at the trial level, therefore, 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." Id. at 162.

This last sentence quoted from Martinez seems to allow the argument reached by the state appellate court in this case—that the trial judge retains

discretion over the exercise of the right of self-representation rests during some stages of a prosecution. However, three justices wrote concurrences.[5] Justice Scalia's concurrence lends support to appellant's position. Id. at 165-66. Justice Scalia believed no right to represent oneself on appeal existed because no constitutional right to an appeal exists. Id. The inference from Justice Scalia's reasoning is that if a constitutional right to a particular proceeding exists, then the constitutional right to represent oneself attaches. In Jackson's case, the Biggers hearing, voir dire, and jury selection all involve fundamental constitutional rights. Therefore, the facts of this case would pose a question that the differing opinions in Martinez show is undecided.

The closely linked cases of Godinez v. Moran, 509 U.S. 389 (1993) and Indiana v. Edwards, 554 U.S. 164 (2008), when read together, show that states may place some limitations on the right of self-representation. Both of these cases involve a defendant's competence. In Godinez, the Court held that a defendant who wished to waive the right to counsel and plead guilty *pro se* was not required to prove a higher level of competence than his ability to stand trial. Godinez, 509 U.S. at 399. Edwards dealt with a mentally ill defendant who almost lacked the competence to stand trial and wanted to represent himself. Edwards, 554 U.S. at 167-69.

[5] Justices Kennedy and Breyer disagreed with the majority's disparagement of Faretta. Id. at 164-65.

Edwards concluded that the Constitution does not bar a state from imposing a higher level of competence for a criminal defendant who wants to represent himself than the familiar standard of Dusky v. United States, 362 U.S. 402 (1960) and Drope v. Missouri, 420 U.S. 162 (1975).[6] The Court said in Edwards that "*Faretta* itself and later cases have made clear that the right of self-representation is not absolute." Edwards, 554 U.S. at 171. Therefore, at least when dealing with mentally ill defendants, judges do retain discretion when dealing with a Faretta request.

Finally, the Court's *per curiam* decision in the AEDPA[7] case of Marshall v. Rodgers, 133 S.Ct. 1446 (2013) demonstrates that the question of a trial judge's discretion with respect to the right of self-representation is not clearly established federal law. In Rodgers, the state criminal defendant vacillated between representing himself and asking for an attorney. Id. at 1448. He ultimately represented himself at trial and was convicted. Id. The defendant then asked for an attorney to help him file a motion for a new trial, which the judge denied without giving any reason. Id. The state appellate court found the decision to be within the trial judge's discretion. Id.

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[6] South Carolina rejected the notion of imposing a higher standard of competence in the death penalty case of State v. Barnes, 753 S.E.2d 545, 550 (2014). Because the trial judge had used a higher standard of competence to deny Barnes his right to represent himself, the state supreme court reversed his conviction and remanded for a new trial. Id. Prior to his new trial, Barnes requested an attorney. State v. Barnes, ___ S.E.2d ___, 2015 WL 4002389 (July 1, 2015). The state asked the supreme court to reinstate Barnes' conviction and death sentence because he asked for an attorney, a position that was soundly rejected by a 4-1 majority of the court. Id.

[7] 28 U.S.C. § 2254(d)(1).

The Ninth Circuit reversed the district court's denial of habeas relief on the defendant's Faretta claim. Id. at 1448-49. The Ninth Circuit held the defendant had the absolute right to counsel upon demand and the California trial judge lacked discretion. Id. This Court reversed, finding that the Ninth Circuit erred in relying on federal circuit court precedent to determine "clearly established Federal law" under the strictures of AEDPA. Id. at 1449-51. In its conclusion in Rodgers, the unanimous Court wrote, "The Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." Id. at 1451.

The issue presented in this case is the mirror image of the merits in Rodgers. Instead of the denial of counsel, this case presents the denial of the right to self-representation at points in the trial other than the trial itself. But the issue for the Court to decide remains the same substantial question: the limits of a trial judge's discretion in deciding questions of representation. This Court in Part III of Rodgers unanimously asked for a case on direct review that would allow it to answer such a question.

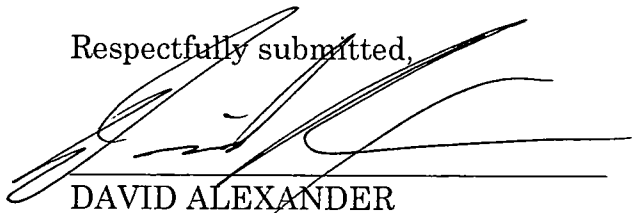
This case has the qualities that will allow the Court to decide this issue. Jackson never equivocated on his request to represent himself. No issue regarding the timeliness of Jackson's request exists. No messy questions of Jackson's mental competency exist, so this Court will not be retreading the ground of Edwards and Godinez. It is undisputed that the trial judge delayed the Faretta hearing and

required counsel to represent Jackson during critical pre-trial stages, but not the trial itself. The state appellate court decided the trial judge had discretion because of the lack of federal authority. The characteristics of this case match the direct review case contemplated in Rodgers. A decision in this case would be the next logical step in this Court's evolving Faretta jurisprudence. The Court should grant certiorari and decide the question created by the tension between a trial judge's discretion and a defendant's Sixth Amendment right to represent himself.

CONCLUSION

For the reasons stated above, the Court should grant the writ of certiorari and decide this substantial and novel Sixth Amendment question.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

July 7, 2015

No. _____

In the Supreme Court of the United States

ANTHONY JACKSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel for Respondent, the State of South Carolina, Jennifer Ellis Roberts, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 7th day of July, 2015.

DAVID ALEXANDER
Counsel of Record

SWORN TO BEFORE me this 7th day of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

No. _____

In the Supreme Court of the United States

ANTHONY JACKSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

APPENDIX

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ATTORNEY FOR PETITIONER

APPENDIX

1. South Carolina Court of Appeals Opinion A1

2. Petition for Rehearing to the South Carolina Court of Appeals A5

3. South Carolina Court of Appeals Order Denying Rehearing A13

4. Petition for Certiorari to the South Carolina Supreme Court A14

5. South Carolina Supreme Court Order Denying Certiorari A37

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Anthony Jackson, Appellant.

Appellate Case No. 2012-213445

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Unpublished Opinion No. 2014-UP-348
Heard September 10, 2014 – Filed October 1, 2014

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

PER CURIAM: Anthony Jackson challenges his conviction for first-degree burglary, arguing the trial court (1) violated his constitutional right under the Sixth

Amendment to proceed pro se at two pretrial hearings and during voir dire and jury selection, and (2) erred by refusing to suppress statements he made to police.

We first address Jackson's assertion that the trial court violated his right to proceed pro se when it did not conduct an inquiry pursuant to *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975), before it proceeded with the pretrial *Jackson v. Denno*[1] hearing. *See Faretta*, 422 U.S. at 819-21, 95 S. Ct. at 2533-34 (holding the Sixth Amendment guarantees a criminal defendant the right to waive appointed counsel and proceed pro se); *State v. 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"). We find Jackson did not unequivocally assert his right to proceed pro se at this time, and thus, no violation occurred when the court did not conduct a *Faretta* inquiry. *See State v. Winkler*, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (stating "[t]he request to proceed pro se must be clearly asserted"); *see also Raulerson v. Wainwright*, 469 U.S. 966, 970-71, 105 S. Ct. 366, 369 (1984) (Marshall, J., dissenting from denial of cert.) ("If a request [for self-representation] is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel."); *United States v. Holmes*, 376 F. App'x 346, 348-49 (4th Cir. 2010) (concluding defendant "did not clearly and unequivocally invoke his right to self-representation" when he "voiced complaints concerning counsel's performance, but when asked . . . whether he wanted to represent himself, [he] only reiterated his request for new counsel"); *State v. Sims*, 304 S.C. 409, 414-15, 405 S.E.2d 377, 380-81 (1991) (holding the defendant "gave no indication of a desire to proceed pro se" when he asked the court to appoint another attorney).

Jackson next argues the trial court erred by deferring its ruling on his request to proceed pro se before the *Neil v. Biggers*[2] hearing because it deprived him of the right to represent himself during that hearing. While South Carolina courts have not ruled on this specific issue, we discovered no cases explicitly prohibiting a trial court from delaying its ruling on a *Faretta* motion. Instead, we found cases supporting a trial court's ability to exercise discretion in deciding when to rule on a *Faretta* motion; thus, we hold that, under the circumstances presented in this case, there exists no legal authority to support Jackson's position. *See Nelson v.*

---

[1] 378 U.S. 368, 84 S. Ct. 1774 (1964).

[2] 409 U.S. 188, 93 S. Ct. 375 (1972).

Alabama, 292 F.3d 1291, 1296 (11th Cir. 2002) ("The Supreme Court in *Faretta* did not set out any fixed time frame for the holding of the *Faretta* hearing . . . ."); *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (stating "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'" (quoting *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 162, 120 S. Ct. 684, 691 (2000))); *Swan v. Commonwealth*, 384 S.W.3d 77, 94-95 (Ky. 2012) ("[I]nvocation [of the right to self-representation] does not set into motion rigid, mechanical procedures that must be followed to the letter to avoid an error. The invocation of the right and whether the proper procedures were followed must be evaluated in the context of a given case. Otherwise, any hint of an invocation of the right, even if immediately withdrawn, would require a *Faretta* hearing. But the law does not require such empty process."); 384 S.W.2d at 95 ("[W]hile the right is a structural right, it must still be applied in the real world, which sometimes requires a practical approach, not an absolute and unbending one."); *State v. Madsen*, 229 P.3d 714, 717 (Wash. 2010) ("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."); 229 P.3d at 722 (Fairhurst, J., concurring) ("[A] court's discretionary decision to defer ruling on a motion to proceed pro se should be upheld if the deferral was based on tenable grounds and tenable reasons.").

Jackson also asserts that even though the trial court later determined he validly waived his right to counsel under *Faretta*, the court erred by refusing to allow him to represent himself during voir dire and jury selection. First, we find the record does not support this assertion—that the trial court refused to allow Jackson to represent himself. After concluding Jackson "freely and voluntarily" waived his right to counsel, the court asked trial counsel to "stand by" and provide assistance to Jackson. When members of the jury panel entered, the court explained Jackson "desire[d] to represent himself," and stated, "I've permitted [trial counsel] to sit here and assist the defendant in the selection of the jury only." The court never prohibited Jackson from participating during these proceedings and did not otherwise limit his involvement. Second, to the extent Jackson argues the trial court erred in appointing trial counsel to the position of "standby counsel" to provide assistance to Jackson during voir dire and jury selection, we find the trial court acted within its discretion. *See Faretta*, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46 (recognizing a trial court "may—even over objection by the accused—appoint a 'standby counsel'" to assist a defendant in presenting his defense); *United*

States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998) (stating a trial court has "broad discretion to guide what, if any, assistance standby . . . counsel may provide to a defendant conducting his own defense").

Finally, Jackson argues the trial court erred when it admitted in evidence statements he made to police because the officer who conducted his interview made threatening comments regarding the consequences of Jackson's refusal to cooperate. *See State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) ("The test of admissibility of a [defendant's] statement [to police] is voluntariness."); *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (stating police may not extract a defendant's statement by using threats or exerting improper influence). We find there is evidence to support the trial court's ruling that Jackson's statements to police were freely and voluntarily given. *See State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (stating an appellate court reviews a ruling concerning voluntariness under an "any evidence" standard); *Rochester*, 301 S.C. at 199-201, 391 S.E.2d at 246-47 (finding a polygraph examiner's statement to defendant that "it would be in [his] best interest to tell the truth" was not improper); *State v. Simmons*, 384 S.C. 145, 164, 682 S.E.2d 19, 29 (Ct. App. 2009) (finding an officer's statement to defendant "that if [he] cooperated, 'it would be considered at sentencing'" was permissible); *State v. Arrowood*, 375 S.C. 359, 368-69, 652 S.E.2d 438, 443 (Ct. App. 2007) (finding "officers' offer[s] to attest to [defendant]'s cooperation" were not improper). *Cf. State v. Osborne*, 301 S.C. 363, 366-67, 392 S.E.2d 178, 179-80 (1990) (holding defendant's statement inadmissible where officers threatened to charge defendant with an additional crime if she remained silent); *State v. Hook*, 348 S.C. 401, 413-14, 559 S.E.2d 856, 862 (Ct. App. 2001) (holding defendant's statement to his probation officer was inadmissible because a probation agent threatened to revoke defendant's probation if he refused to cooperate); *State v. Corn*, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992) (holding defendant's statement inadmissible because it was "made in response to threats that his wife could be arrested and his children taken by D.S.S.").

For the reasons stated above, Jackson's conviction is **AFFIRMED**.

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ANTHONY JACKSON,

APPELLANT

APPELLATE CASE NO. 2012-213445

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 2014-UP-348

PETITION FOR REHEARING

Appellant Anthony Jackson ("Jackson") petitions this Court for rehearing on both issues in his appeal. Respectfully, the Court misapprehended Jackson's arguments and erred its decision.

Issue 1 – Right to Self-Representation

The Court correctly understood that the right to self-representation is a fundamental right, but erred in concluding that the lack of controlling authority for this exact situation equated to discretion for the trial judge to postpone Jackson's exercise of his fundamental right. This does not constitute an adequate reason to deny appellant relief. The opinion does not contain any authority

for the proposition that a defendant's right of self-representation may be impaired because of a lack of precedent. This reasoning is similar to the good-faith exception to the exclusionary rule in Fourth Amendment cases, which exists to regulate the behavior of police officers. See Davis v. United States, 131 S.Ct. 2419 (2011). Such reasoning does not apply to judges or how they ensure the rights of litigants are protected.

The cases cited by the Court do not support the proposition that when the right to self-representation has been asserted, it can be postponed. In Nelson v. Alabama, 292 F.3d 1291 (11th Cir. 2002), the defendant sent the trial judge a letter informing the court that he wished to represent himself at a capital sentencing proceeding. Id. at 1294. The trial judge allowed the defendant to represent himself without conducting a Faretta hearing. Id. The issue on appeal was whether a Faretta hearing was required, not the postponement of the defendant's right to self-representation. Id. at 1295. At no point did the Court force a lawyer upon the defendant. Id.

United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000) does not concern postponement of the right to self-representation, but a complete denial. In Frazier-El, the trial judge denied the defendant's request to proceed *pro se* because of the defendant's vacillation and dilatory tactics. Id. at 560. The court found the defendant was more interested in "a manipulation of the system than an unequivocal desire to invoke his right of self-representation." Id. The defendant told the court he wanted a new attorney who would argue the court lacked jurisdiction over him because he was a member of the "Moorish Science Temple." Id. Jackson never made any such frivolous statements, his request to represent himself was unequivocal and ultimately granted, albiet too late.

Much of the language in Swan v. Commonwealth, 384 S.W.3d 77 (Ky. 2012) supports appellant's position. The court stated, "Perhaps more importantly, once a defendant invokes his

right to proceed *pro se*, in whole or part, the trial court is required to hold the Faretta hearing and allow the defendant to exercise the right, if at all possible." Swan at 93. The defendant in Swan did not make an unequivocal assertion of his right to represent himself and he abandoned the claim. Id. at 94. At no point of the proceedings did the court force an attorney on the defendant after an unequivocal assertion of the right to self-representation. Id.

Even more supportive of Jackson's case is State v. Madsen, 229 P.3d 714 (Wash. 2010). In Madsen, the trial court deferred the defendant's first request to represent himself to give him the opportunity to consult with another attorney. Madsen at 716. The opinion does not reflect that any proceedings were held after this deferral and the next hearing, which was held for the express reason of determining the defendant's right to proceed pro se. Id. In fact, the Madsen court's holding was that the trial court **erred in deferring ruling** at this hearing after the defendant's second request because the defendant's request was unequivocal. Id. at 718-19. The court's holding, which runs expressly counter to the language quoted in the opinion, was:

> Although the trial court's duties of maintainiung the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. **The value of respecting this right outweighs any resulting difficulty in the administration of justice.**

Id. at 719 (emphasis added).

In appellant's case, the Court acknowledged, as it must, that Jackson made an unequivocal assertion of his right to represent himself. This right was denied by the trial judge during critical stages of the proceeding. The opinion failed to address appellant's analogy that the portions of the trial during which a lawyer was forced upon Jackson were critical stages. A defendant has a guaranteed right to be present at a critical stage of a criminal proceeding when his presence bears on his opportunity to defend his case. Id. at 106. This right extends to voir

dire and jury selection. United States v. Tipton, 90 F.3d 861, 872 (4th Cir. 1996). It also extends to pretrial hearings where witnesses are questioned. United States v. Hamilton, 391 F.3d 1066, 1071 (9th Cir. 2004) (holding suppression hearing where government presented the testimony of a police officer was a critical stage); People v. Williams, 726 N.E.2d 641, 643-44 (Ill. Ct. App. 2000) ("A hearing at which evidence is presented against a defendant involves substantial rights and therefore entitles a defendant to be present); McGinnis v. State, 430 S.E.2d 618, 621-22 (Ga. Ct. App. 1993) ("Therefore, we hold that it constitutes prejudicial error to conduct an evidentiary suppression hearing in the defendant's absence."). The right to be present extends to post-indictment lineups and therefore logically extends to a Biggers hearing. See United States v. Wade, 388 U.S. 218, 236-37 (1967) (holding constitutional right to be present extends to post-indictment lineups).

"[P]articipation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). "The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." Id. The trial judge told the jury that Jackson would represent himself and they could not make any adverse inference from that fact. R. 147 ll. 9 – 13. Despite his ruling that Jackson would represent himself and informing the jury of this ruling, the trial judge then had Fox participate in voir dire instead of Jackson. R. 148, l. 2 – 88, l. 20. Jackson did not speak during voir dire. R. 148, l. 2 – 155, l. 20. At no point did the trial judge ask Jackson whether he wanted to represent himself during voir dire. R. 148, l. 2 – 155, l. 20. Without obtaining Jackson's assent on the record, Judge Cottingham said, "All right, Mr. Fox, I've permitted you to sit here and assist the defendant in the selection of the jury only, but do you have any further

inquiry?" R. 154, l. 17 – 19. Fox then proposed an additional voir dire question. R. 154, ll. 20 – 23.

After voir dire, the trial judge told the jury, "And the defendant is representing himself, I've asked Mr. Fox to assist in the selection of the jury process and the defendant is agreeing to that; is that correct? R. 155, ll. 13 – 16. Fox (not Jackson) replied, "Yes, Your Honor." R. 155, l. 17. The trial judge did not obtain Jackson's consent to Fox selecting the jury on the record. Fox then exercised Jackson's strikes and selected the jury. R. 155, l. 18 – 165, l. 18. The trial then began and Jackson made his opening statement and examined the State's witnesses. R. 179, l. 11 – 180, l. 8. This sequence destroyed the appearance that Jackson was representing himself before the jury.

"To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." Faretta v. California, 422 U.S. 806, 820 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Id. at 819-20. The trial judge's refusal to allow Jackson to represent himself during critical stages of this trial is a structural error. State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 549-50 (2014) citing McKaskle. The Court should grant rehearing on this issue and reverse Jackson's conviction.

Issue 2

Respectfully, the Court failed to analyze the implied threat in the detective's statement that "There's a difference, okay?" The detective's statement necessarily implies that there will be a difference in how Jackson would be treated if he spoke to police compared to if Jackson exercised his right to remain silent. Jackson began incriminating himself immediately after this threat. While police officers may inform suspects that news of their cooperation will be relayed to the solicitor, they may not threaten consequences for the refusal to cooperate. In State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990), the court held that the sheriff's admission that Osborne would be charged

with withholding information or giving the police officer a false statement if she was not forthcoming mandated suppression of her confession. Osborne was told "you don't have to say anything, but if you withhold evidence, you can be charged with a crime." State v. Osborne, 301 S.C. at 366, 392 S.E.2d at 179. See also State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990).

In Rochester, the Supreme Court held that a 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." Rochester at 200, 391 S.E.2d at 246-47 (internal quotations omitted). The Court found that a polygraph examiner telling the defendant it would be in his best interest to tell the truth was neither a threat nor a promise. This was nonetheless a factor to consider when determining whether appellant's statement was a knowing, intelligent, and voluntary tendered confession under the totality of the circumstances. See State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001); State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987).

In Hook, this Court held that the defendant's statement to his probation officer was inadmissible because his agent expressly threatened to revoke the defendant's probationary sentence unless he told the truth. This Court noted that statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona 437 U.S. 385, 398, 399 (1978); Minnesota v. Murphy 465 U.S. 420, 427 (1984).

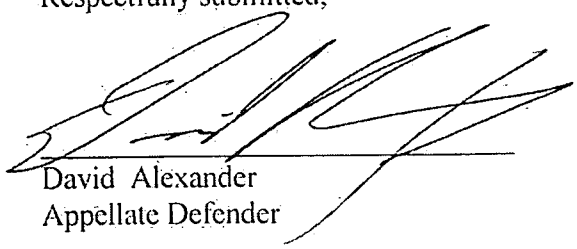
The officer's assertion that there would be a "difference" if Jackson failed to cooperate meant that he would be treated more harshly. Jackson clearly felt threatened by this statement. This "difference" in treatment is similar to the threats of consequences in Osborne and Hook. The fact that it was a threat can be seen from its consequences. Immediately after Detective Clothier made this threat, Jackson began making incriminating statements. Detective Clothier's threat was not

"slight" and its existence compels the suppression of Jackson's statement. This Court should grant rehearing and reverse.

CONCLUSION

For the foregoing reasons, and the reasons stated in the briefing before this Court and at oral argument, this Court should grant rehearing, reverse appellant's conviction, and order his statement suppressed.

Respectfully submitted,



David Alexander
Appellate Defender

This 14th day of October, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

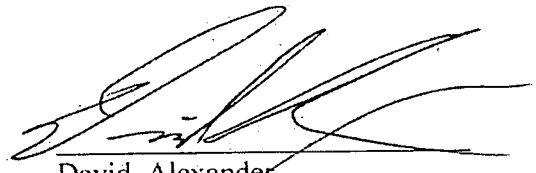
V.

ANTHONY JACKSON,

APPELLANT

CERTIFICATE OF SERVICE

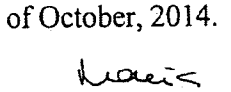
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Anthony Jackson, #138454, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th of October 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day
of October, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The South Carolina Court of Appeals

The State, Respondent,

v.

Anthony Jackson, Appellant.

Appellate Case No. 2012-213445

ORDER

After careful consideration of the Appellant's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

RECEIVED
DEC 12 2014
SUPREME COURT
APPELLATE DIV.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

FILED

December 12, 2014

cc:
Alan McCrory Wilson, Esquire
David Alexander, Esquire
Jennifer Ellis Roberts, Esquire
The Honorable Edward B. Cottingham

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 2014-UP-348 (S.C. Ct. App. filed 10/1/2014)

12-GS-26-00730

THE STATE,

RESPONDENT,

V.

ANTHONY JACKSON,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 12/12/2014.

QUESTIONS PRESENTED

1.

When a defendant alerts the court he wishes to represent himself, may the court postpone the exercise of his constitutional right until after critical stages of the trial?

2.

Whether the Court of Appeals erred in affirming the trial court's ruling that 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?

STATEMENT OF THE CASE

On February 23, 2012, an Horry County grand jury indicted Anthony Jerome Jackson ("Jackson") for first degree burglary. R. 387. On April 5, 2012, a hearing was held before the Honorable Larry B. Hyman. April 5, 2012 R. 1. At this hearing, Jackson was represented by Ronald W. Hazzard. April 5, 2012 R. 1. Martin D. Spratlin and Bradley C. Richardson represented the State. April 5, 2012 R. 1. On September 12, 2012, another hearing was held in the case before the Honorable J. Derham Cole. September 12, 2012 R. 17. At this hearing, Eric J. Fox represented Jackson. September 12, 2012 R. 17.

On October 11, 2012, another pretrial hearing was held before the Honorable Edward B. Cottingham. October 11, 2012 R. 31. Fox represented Jackson. At this hearing, Judge Cottingham ruled, *inter alia*, that a statement given by Jackson to law enforcement was admissible. October 11, 2012 R. 64, ll. 9 – 25.

On November 13-15, 2012, Jackson was tried before Judge Cottingham and a jury. R. 68. Martin D. Spratlin and Joshua D. Holford represented the State. R. 68. Eric Fox initially appeared on behalf of Jackson, but Jackson represented himself during the trial. R. 68. R. 146, l. 20 – 148, l. 1. The jury convicted Jackson of first degree burglary. R. 377, l. 24 – 378, l. 6. The State previously served a notice of intent to seek life without parole on Jackson and this was the sentence he received. R. 382, l. 18 – 384, l. 9. Jackson appealed.

On September 10, 2014, a panel of the Court of Appeals consisting of Chief Judge Few, Judge Thomas, and Judge Lockemy heard oral argument. App. 1. On October 1, 2014, the court issued an unpublished *per curiam* opinion affirming appellant's conviction. App. 1. Jackson's petition for rehearing was denied on December 12, 2014. App. 13. This petition follows.

ARGUMENT

1.

When a defendant alerts the court he wishes to represent himself, the court may not postpone the exercise of his constitutional right until after critical stages of the trial.

Reasons for Granting Certiorari

Since this case presents a novel issue of constitutional law, compelling reasons exist for granting certiorari. Rule 242(b)(1) and (4), SCACR. The Court of Appeals recognized this case presents a novel constitutional issue. In its unpublished opinion, the court stated, "**While South Carolina courts have not ruled on this specific issue**, we discovered no cases explicitly prohibiting a trial court from delaying its ruling on a *Faretta*[1] motion." App. 2 (emphasis added). This Court should take up this important issue and provide guidance for the lower courts when they are confronted with a defendant asserting his Sixth Amendment right to represent himself.

Relevant Facts

From the very beginning of this case, Anthony Jerome Jackson ("Jackson") told the court he was unhappy with his attorney. R. 15, ll. 12 – 22. At an April 5, 2012, hearing, Jackson attempted to plead guilty. R. 11, ll. 6 – 9. Jackson – not his attorney – begged the trial judge to accept a plea deal offered by the State that would result in a sentence of between seven and ten years, but asked to delay sentencing for two weeks so that he could finish his GED classes at the county jail. R. 8, ll. 7 – 9, l. 12. Judge Hyman agreed. R. 9, ll. 11 – 12. But during the plea colloquy when Jackson told Judge Hyman that he was dissatisfied with the services of his attorney, the plea hearing stopped. R. 15, ll. 12 – 23. Jackson ultimately went to trial. He was accused of stealing a credit card from a hotel room in Myrtle Beach. R. 175, l. 2 – 176, l. 15. He received a sentence of life imprisonment

without the possibility of parole for taking a credit card and using it to buy $28.89 worth of food from a pancake house for himself and other homeless people. R. 315, l. 11 – 316, l. 13. R. 311, ll. 6 – 21.

The September 12, 2012, Hearing Before Judge Cole

After the hearing before Judge Hyman, Jackson next appeared before Judge Cole with a different lawyer, Eric Fox ("Fox"). R. 20, ll. 8 – 9. Jackson told Judge Cole that he did not understand the reason he was before the court that day. R. 20, ll. 10 – 13. Judge Cole told Jackson about a plea offer extended by the State. R. 20 l. 14 – 21 l. 13. When asked if he had enough time to confer with Fox about whether to accept the State's offer, Jackson replied, "No, I ain't had that much time; it just came and just proposed it to me and that was it." R. 21, ll. 15 – 20.

Fox was a public defender appointed when Jackson's previous attorney took a position in another county. R. 22, ll. 2 – 11. By the time of this hearing, the State's offer had changed to a plea that would result in a sentence of zero to fifteen years' imprisonment. R. 23, l. 19 – 24, l. 17. Jackson was confused about the offers and his charges. R. 26, l. 10 – 27, l. 17. After answering the court that he understood English "[a] little bit," Judge Cole told him, "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." R., 19 23 – 12, l. 2. Before removing Jackson, the State served him with a notice of intent to seek life without parole. R. 28, ll. 5 – 22. Fox never said a word during the entire hearing.[2]

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

[2] The transcript records Fox speaking on page 9, but this is a typographical error. It is clear from the text that the solicitor is speaking because he refers to "Mr. Fox" several times. R.25, l. 10 – 26, l. 9.

The Denno Hearing Before Judge Cottingham

Fox represented Jackson at a pretrial hearing held before Judge Cottingham on October 11, 2012. R. 31. The original purpose of the hearing was to determine whether a statement given by Jackson was admissible pursuant to Jackson v. Denno, 378 U.S. 368 (1964). Before the Denno hearing began, Fox told Judge Cottingham that Jackson wanted to address the court. R. 39, ll. 3 – 9. Jackson first told the court he wanted a different lawyer. R. 39, ll. 19 – 20. Jackson had two pending burglary charges. R. 39, l. 19 – 40, l. 1. Jackson stated, "I was talking to [Fox] out there in the conference room and he don't even know which burglary that I'm going to trial on...." R.39, l. 23 – 40, l. 1. Jackson said, "I'm not satisfied with my counsel." R. 40, ll. 14 – 15.

Judge Cottingham then attempted to convince Jackson that Fox was a very capable attorney and that he needed representation. R. 40, ll. 16 – 12, l. 41. Jackson replied, "I don't want him on my case." R. 42, l. 12. Judge Cottingham replied, "Well, I don't care what you want, **the decision is mine.**" R. 42, ll. 13 – 14 (emphasis added). Jackson replied, "Let the record be known that I don't want him on my case." R. 42, ll. 15 – 16. Judge Cottingham responded, "Well, let the record be known too, that I offered you to represent yourself or hire your own lawyer. Absent that, Mr. Fox is going to be your lawyer." R. 42, ll. 17 – 19.

The trial judge then conducted a colloquy with the attorneys and discussed a plea offer. R. 43,l. 21 – 44, l. 45. Judge Cottingham asked Jackson to confirm whether he had declined a previous plea offer. R. 44, ll. 10 – 15. Jackson replied, "I don't even understand what he's still on my case. I don't understand –" R. 44, l. 16 – 17. The trial judge told Jackson, "I'm not asking you now." R. 44, l. 18. Without inquiring further as to whether Jackson wanted to represent himself or conducting a colloquy pursuant to Faretta v. California, 422 U.S. 806 (1975), Judge Cottingham conducted the Denno hearing with Fox representing Jackson. R.45, l. 21 – 46, l. 7.

Fox cross-examined the State's witness at the Denno hearing. R. 60, l. 12 – 62, l. 16. Fox made a limited argument supporting his motion to suppress the statement. R. 63, ll. 13 – 23. The trial court refused to suppress the statement. R.64, ll. 8 – 25. The trial judge concluded the hearing by urging Jackson to cooperate with Fox, but telling him that he was "not entitled to have the benefit of his advice every day between now and date of trial." R. 65, ll. 11 – 24.

The Issue of Jackson's Self-Representation at Trial

After the solicitor called the case, Fox told Judge Cottingham that Jackson wanted to address the court. R. 75, ll. 14 – 15. Jackson told the trial judge that he did not want Fox representing him. R. 75, ll. 19 – 22. Jackson said, "I'll represent myself." R. 75, ll. 19 – 22.

The trial judge attempted to convince Jackson to keep Fox as his attorney. R. 76, l. 1 – 10, l. 12. Jackson replied:

> **I'll represent myself, I rather represent myself. If I'm going to get life I rather get take, get life for myself, I don't need no help.**

R. 77, ll. 13 – 15 (emphasis added). The trial judge then asked Jackson several questions about his ability to represent himself and whether he was prepared for trial. R. 77, l. 19 – 81, l. 9. Judge Cottingham warned Jackson that it would be "extremely dangerous in this most serious offense for you to represent yourself." R. 78, ll. 18 – 20. He told Jackson he was facing life imprisonment. R. 78, l. 17 – 24.

The discussion regarding Jackson's self-representation ceased when the trial judge was unable to get a copy of the Faretta decision from the solicitor. R. 81, ll. 9 – 13. Judge Cottingham said, "Okay, well let's go ahead, be finding it and let's go ahead with the other issue while your staff is finding the case for me. All right let's go forward with the identification matter." R. 81, l. 25 –

82, l. 3. The trial judge said, "Mr. Fox, I'm going to leave you in the case for this important matter." R. 83, ll. 12 – 13.

The court then ruled:

> And after this after I hear any motions if he still wants to represent himself I'm going to let him do it in his peril. I would urge him not to do it but the law is clear if he insists he's got that right, but I do want you [Fox] to stay with him **in this important part of the proceedings** to protect his interest.

R. 83, ll. 15 – 20 (emphasis added). The State's first witness was sworn for a Neil v. Biggers, 409 U.S. 188 (1972) hearing. Before the State questioned the witness, the following occurred:

> THE COURT: Mr. Jackson, I'll deal with whether or not you want to represent yourself after this but –
>
> DEFENDANT JACKSON: I still do.
>
> THE COURT: This is [an] important legal matter that you need your lawyer to look into.
>
> DEFENDANT JACKSON: **I'll represent myself, I don't need him, I don't trust him.**
>
> THE COURT: **Well I'll deal with that in a minute.**

R. 83, l. 24 – 84, l. 7 (emphasis added). The court then conducted the Biggers hearing with Fox representing Jackson and questioning the witnesses. R. 84, l. 12 – 126, l. 6.

During the Biggers hearing, the State presented the testimony of a Myrtle Beach police officer and a waitress at the pancake house. R. 84, ll. 14 – 16. R. 99 ll. 15 – 20. The police officer, Jeffery Thomas ("Thomas") responded to a call of a suspicious person at a hotel. R. 85, l. 17 – 21. The officer spoke with the occupants of the room and obtained a description of the man who entered the room claiming to be a hotel security guard. R. 85, l. 22 – 21, l. 12. He also viewed the hotel security video. R. 88, ll. 13 – 89, l. 4. One of the room's occupants told the officer that his credit card had been used twice at the pancake house. R. 89, ll. 5 – 15. The officer went to the pancake

house and spoke with the waitress, Tara Maenner ("Maenner"). R. 90, ll. 1 – 13. Maenner provided copies of credit card receipts showing charges to the victim's account and gave the officer a description of the man who used the credit card. R. 90, ll. 1 – 23.

Officer Thomas went outside and "spotted someone fitting the description a half block away." R. 91, ll. 2 – 8. He detained Jackson. R. 91, ll. 2 – 8. Officer Thomas had another policeman bring Maenner to the scene and said she "did positively identify him." R. 92, ll. 15 – 22. At this point, Fox objected. R. 92, l. 23. Jackson interjected, "Can he ask did the victims identify me?" R. 92, ll. 24 – 25. Judge Cottingham told Jackson, "No, sir, you let your lawyer do this at this time, proceed." R. 93, ll. 1 – 2. Fox then cross-examined Officer Thomas. R. 94, l. 8 – 98, l. 2.

Maenner testified she recognized the defendant because he had been in the pancake house "a time or two." R. 100, ll. 3 – 16. She gave an in-court identification of Jackson. R. 104, ll. 2 – 23. Fox then cross-examined Maenner. R. 104, l. 24 – 106, l. 12. The State also called the hotel room's two occupants who could not positively identify Jackson as the man who entered their room. R. 107, l. 7 – 125, l. 1. Fox conducted the cross-examinations. R. 107, l. 7 – 125, l. 1. After hearing argument from Fox (not Jackson), the trial court refused to suppress Maenner's in-court identification. R. 125, l. 22 – 126, l. 6.

By the end of the Biggers hearing, the court had obtained copies of several cases to use in questioning Jackson and in advising him regarding the dangers of self-representation. R. 126, l. 9 – 127, l. 21. The trial judge conducted an extended discussion with Jackson. R. 127, l. 20 – 140, l. 19. After the discussion, the court said that it had "exhaustively warned [Jackson] of the dangers" and asked if he still wanted to represent himself. R. 140, ll. 20 – 25. Jackson said, "Yes, sir, I represent, I don't understand what's going on but I, I'll talk for myself." R. 141, ll. 1 – 3. After further discussion, during which Jackson offered to plead guilty even if it meant life without parole,

the trial judge ruled, "No, sir, we are going to trial. I'm going to let you represent yourself." R. 141 l. 4 – 142, l. 21.

The jury entered the courtroom. R. 146, ll. 16 – 19. The trial judge told the jury that Jackson would represent himself and they could not make any adverse inference from that fact. R. 147 ll. 9 – 13. Despite his ruling that Jackson would represent himself and informing the jury of this ruling, the trial judge then had Fox participate in voir dire instead of Jackson. R. 148, l. 2 – 88, l. 20. Jackson did not speak during voir dire. R. 148, l. 2 – 155, l. 20. At no point did the trial judge ask Jackson whether he wanted to represent himself during voir dire. R. 148, l. 2 – 155, l. 20. Without obtaining Jackson's assent on the record, Judge Cottingham said, "All right, Mr. Fox, I've permitted you to sit here and assist the defendant in the selection of the jury only, but do you have any further inquiry?" R. 154, l. 17 – 19. Fox then proposed an additional voir dire question. R. 154, ll. 20 – 23.

After voir dire, the trial judge told the jury, "And the defendant is representing himself, I've asked Mr. Fox to assist in the selection of the jury process and the defendant is agreeing to that; is that correct? R. 155, ll. 13 – 16. Fox (not Jackson) replied, "Yes, Your Honor." R. 155, l. 17. The trial judge did not obtain Jackson's consent to Fox selecting the jury on the record. Fox then exercised Jackson's strikes and selected the jury. R. 155, l. 18 – 165, l. 18. The trial then began and Jackson made his opening statement and examined the State's witnesses. R. 179, l. 11 – 180, l. 8.

The Evidence at Trial

Two golfers from Pennsylvania and Connecticut were awakened in their Myrtle Beach hotel room by a man entering through the room's sliding glass door. R. 181, ll. 1 – 3. R. 181, ll. 17 – 24. R. 182, ll. 7 – 15. R. 187, l. 20 – 189, l. 8. The man told them he was with hotel security. R. 188 1, ll. 5 – 10. He shined a light and showed them a badge. R. 188, ll. 11 – 13. The man called the front

desk and said everything was "all clear." R. 188, l. 17 – 19. He had the golfer lock the sliding glass door and then exited the room. R. 188, ll. 19 – 22. The golfer noticed that the man picked up a pair of pants and left the room with them. R. 188, ll. 22 – 24.

The golfer gave chase. R. 188, ll. 24 – 25. The man told the golfer he had heard that marijuana was being consumed in the room and was checking the pants for drugs. R. 188, l. 24 – 189, l. 5. The golfer took the man back to the room. R. 189, ll. 1 – 8. The man looked around and then left. R. 189, ll. 5 – 6. Once the man left, one of the golfers noticed his wallet was missing. R. 189, ll. 6 – 8. Neither golfer could identify Jackson as the man they encountered in their room. R. 200, l. 22 – 201, l. 8. R. 216, ll. 7 – 8.

By the time the police arrived, the golfer was already on the telephone canceling his credit cards. R. 197, l. 18 – 198, l. 1. As he was canceling a card, the company informed him the card had just been used at a nearby pancake house. R. 199, ll. 7 – 20. The golfer informed the police. R. 199, l. 21 – 200, l. 3. As recounted in the Biggers hearing, Officer Thomas went to the pancake house, met with the waitress, and subsequently arrested Jackson. R. 221, l. 14 – 223, l. 14.

The morning following his arrest, Jackson was questioned by Detective Paul Clothier ("Clothier"). R. 289, ll. 2 – 11. Detective Clothier made an audio recording of Jackson's interrogation. R. 290, ll. 1 – 6. During the interrogation, Jackson admitted taking the credit card from the hotel room. R. 313, ll. 12 – 16. The detective confronted Jackson with two charges made at the pancake house which totaled $28.89. R. 315, ll. 11 – 24. Jackson admitted making the charges on credit cards when he bought food for himself and other homeless people. R. 316, ll. 1 – 16.

Jackson made his own closing argument. R. 350, l. 24 – 352, l. 17. He argued that no one had seen him commit the burglary. R. 351, ll. 9 – 10. Jackson also argued that his statement to law

enforcement was coerced and the police lied to him about the evidence to get him to confess. R. 352, ll. 6 – 10. During deliberations, the jury requested to hear a portion of the audio recording of Jackson's interrogation. R. 373, ll. 12 – 20. While the trial record does not conclusively show at what point the jury had the recording stopped, the trial judge immediately re-charged them on the law concerning whether a statement is freely and voluntarily made. R. 375, l. 24 – 376, l. 9. After continuing deliberations, the jury returned a guilty verdict. R. 377, l. 24 – 378 11, l. 6.

Discussion

The Court of Appeals erred in deciding that a trial judge may postpone the Sixth Amendment right of self-representation. The trial court refused to let Jackson represent himself during the Denno hearing, the Biggers hearing, voir dire, and jury selection. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Id. at 819-20. "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." Id. at 820.

In Faretta, the defendant "weeks before trial" told the judge he wanted to represent himself. Id. at 835. The trial judge originally ruled that the defendant could represent himself, but later reversed his decision after the defendant was unable to satisfactorily answer technical questions concerning the law. Id. at 808-10. The United States Supreme Court reversed. The Court held, "We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule in the California code provisions that govern the challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." Id. at 836.

Just as in Faretta, Jackson told the trial court weeks before trial that he did not want Fox to represent him. R. 44, l. 16 – 17. When the trial court indicated that Fox would conduct the Denno hearing, Jackson said, "I don't even understand what he's still on my case. I don't understand –."R. 44, l. 16 – 17. This was after the trial judge made an incorrect statement of law and told Jackson the decision of whether he would represent himself was the court's to make. R. 42, ll. 13 – 14. The trial judge therefore erred when it did not make any further inquiry into Jackson's desire to represent himself at the Denno hearing and forced Fox's unwanted representation among him.

Before any substantive portion of the trial began, Jackson made an unequivocal demand that he be allowed to represent himself. Jackson said, "I'll represent myself, I don't need [Fox], I don't trust him." R. 83, l. 24 – 84, l. 7. "To force a lawyer on a defendant can only lead him to believe that the law contrived against him." Id. at 834. The trial judge ultimately determined that Jackson would represent himself, but inexplicably refused to allow him to do so until after the Biggers hearing, voir dire, and jury selection. This also was error that requires reversal. State v. Barnes, 704 S.C. 27, 753 S.E.2d 545 (2014).

In Barnes, a capital defendant unequivocally told the trial court that he wanted to represent himself. Id. at 31-34, 753 S.E.2d at 547-49. The trial court refused to allow the defendant to represent himself after his own psychiatrist testified that while he was competent to stand trial, he was not competent to waive his Sixth Amendment right to counsel. Id.. This Court ruled that no such higher standard of competency exists and reversed. Id. at 4-5. The Court held, "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Id. citing State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010).

No prejudice inquiry or harmless error analysis may be conducted because the erroneous denial of a Faretta request is a structural error. Barnes at 37, 753 S.E.2d at 550-51. See also

McKaskle v. Wiggins, 465 U.S. 168 (1984). The Barnes Court did not perform any harmless error analysis. Barnes at 37, 753 S.E.2d at 550-51. Once it determined that a Faretta error occurred, it summarily reversed. Id.

Any argument that the Faretta error is not structural in this case must fail because it cannot be disputed that a Denno hearing, Biggers hearing, voir dire, and jury selection are critical portions of the trial. This analysis is similar to that used to determine whether a defendant has a right to be present at any particular stage of a criminal proceeding. Snyder v. Massachusetts, 291 U.S. 97 (1934). A defendant has a guaranteed right to be present at a critical stage of a criminal proceeding when his presence bears on his opportunity to defend his case. Id. at 106. This right extends to voir dire and jury selection. United States v. Tipton, 90 F.3d 861, 872 (4th Cir. 1996). It also extends to pretrial hearings where witnesses are questioned. United States v. Hamilton, 391 F.3d 1066, 1071 (9th Cir. 2004) (holding suppression hearing where government presented the testimony of a police officer was a critical stage); People v. Williams, 726 N.E.2d 641, 643-44 (Ill. Ct. App. 2000) ("A hearing at which evidence is presented against a defendant involves substantial rights and therefore entitles a defendant to be present); McGinnis v. State, 430 S.E.2d 618, 621-22 (Ga. Ct. App. 1993) ("Therefore, we hold that it constitutes prejudicial error to conduct an evidentiary suppression hearing in the defendant's absence."). The right to be present extends to post-indictment lineups and therefore logically extends to a Biggers hearing. See United States v. Wade, 388 U.S. 218, 236-37 (1967) (holding constitutional right to be present extends to post-indictment lineups).

The trial court allowed Jackson to exercise his constitutional right to defend himself, but did so too late. Judge Cottingham warned Jackson of the dangers of self-representation and concluded that he understood them. R. 141, l. 4 – 142, l. 21. However, the record shows no reason

excusing the trial court's refusal to allow Jackson to represent himself when he first informed the Court of his wish to do so. The trial court's decision to force representation upon an unwilling Jackson at critical stages of the trial constitutes a structural error that requires reversal.

The Court of Appeals correctly understood that the right to self-representation is a fundamental right, but erred in concluding that the lack of controlling authority for this exact situation equated to discretion for the trial judge to postpone Jackson's exercise of his fundamental right. This does not constitute an adequate reason to deny appellant relief.

The cases cited by the Court of Appeals do not support the proposition that when the right to self-representation has been asserted, it can be postponed. In Nelson v. Alabama, 292 F.3d 1291 (11th Cir. 2002), the defendant sent the trial judge a letter informing the court that he wished to represent himself at a capital sentencing proceeding. Id. at 1294. The trial judge allowed the defendant to represent himself without conducting a Faretta hearing. Id. The issue on appeal was whether a Faretta hearing was required, not the postponement of the defendant's right to self-representation. Id. at 1295. At no point did the court force a lawyer upon the defendant. Id.

United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000) does not concern postponement of the right to self-representation, but a complete denial. In Frazier-El, the trial judge denied the defendant's request to proceed *pro se* because of the defendant's vacillation and dilatory tactics. Id. at 560. The court found the defendant was more interested in "a manipulation of the system than an unequivocal desire to invoke his right of self-representation." Id. The defendant told the court he wanted a new attorney who would argue the court lacked jurisdiction over him because he was a member of the "Moorish Science Temple." Id. Jackson never made any such frivolous statements, his request to represent himself was unequivocal and ultimately granted, albeit too late.

Much of the language in Swan v. Commonwealth, 384 S.W.3d 77 (Ky. 2012) supports appellant's position. The court stated, "Perhaps more importantly, once a defendant invokes his right to proceed *pro se*, in whole or part, the trial court is required to hold the Faretta hearing and allow the defendant to exercise the right, if at all possible." Swan at 93. The defendant in Swan did not make an unequivocal assertion of his right to represent himself and he abandoned the claim. Id. at 94. At no point of the proceedings did the court force an attorney on the defendant after an unequivocal assertion of the right to self-representation. Id.

Even more supportive of Jackson's case is State v. Madsen, 229 P.3d 714 (Wash. 2010). In Madsen, the trial court deferred the defendant's first request to represent himself to give him the opportunity to consult with another attorney. Madsen at 716. The opinion does not reflect that any proceedings were held after this deferral and the next hearing, which was held for the express reason of determining the defendant's right to proceed pro se. Id. In fact, the Madsen court's holding was that the trial court **erred in deferring ruling** at this hearing after the defendant's second request because the defendant's request was unequivocal. Id. at 718-19. The court's holding, which runs expressly counter to the language quoted in the opinion, was:

> Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. **The value of respecting this right outweighs any resulting difficulty in the administration of justice.**

Id. at 719 (emphasis added). "[P]articipation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). "The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear

pro se exists to affirm the accused's individual dignity and autonomy." Id. This Court should grant certiorari.

2.

The Court of Appeals erred in affirming the trial court's ruling that 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.

Relevant Facts

Jackson was arrested at 2:00 AM. R. 51, ll. 1 – 5. At 9:10 AM, Officer Clothier began interrogating Jackson.[3] R. 51, ll. 1 – 5. When asked if he was under the influence of alcohol or drugs, Jackson told Officer Clothier that he "done slept it off." R. 302, ll. 10 – 12. Officer Clothier did not ask what type of intoxicants Jackson consumed or any other questions related to his intoxication and proceeded to explain to Jackson his rights. R. 302, l. 13 – 303, l. 19. Jackson told Detective Clothier that he did not understand his charges. R. 303, l. 12 – 304, l. 10.

When Jackson told the detective he did not have any credit cards, the officer said the following:

> Okay. Well, what were you doing with his credit card then? See, I don't like liars. I'm, I'm trying to help you and—and when somebody is honest with me in an interview I make a note of it when this case gets transferred to the Solicitor's Office. Okay? There's a point where I tell the Solicitor, yeah, he cooperated. **I wouldn't mind you 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? So let's stop with the B.S.** that you asked me for a cigarette and tell me what happened. It's that easy. He's a man, fess up and just tell me what happened. Okay? **It goes a lot easier; it goes quicker if, if you're honest and you tell me what happened.** So let's start all over again. Start from the beginning and tell me what happened. If you want to take your time to gather your thoughts, that's fine. It's—just be a man. Fess

[3] The interrogation was transcribed by the court reporter during the trial.

> up. It's okay. It's all right. It just shows that you're a man and you're willing to help.

R. 306, l. 17 – 307, l. 11 (emphasis added). Jackson then began talking about entering the hotel room. R. 307, l. 12 – 308, l. 15.

Detective Clothier then lied to Jackson and told him he had a fingerprint match from the hotel balcony. R. 308, l. 16 – 309, l. 3. R. 320, ll. 15 – 19. He also lied and told Jackson he had seen a video of him using the credit card at the pancake house. R. 310, ll. 3 – 10. Jackson told him, "I'm getting nervous." R. 310, l. 1. R. 320, l. 20 – 321, l. 1. Detective Clothier replied, "But if you lie it makes it worse." R. 310, ll. 17 – 18. The officer also told Jackson he would "put in there" that he had a drug problem and "want[ed] some sort of help." R. 314, ll. 4 – 12.

Following Detective Clothier's testimony and the playing of the audio recording, Fox moved to have the statement suppressed. R. 63, ll. 13 – 23. Fox told the court, "I'll go ahead and make the motions, Your Honor, to—the motion, I guess, is to suppress the statement. Your Honor, could make the finding, you heard the testimony as to its voluntariness." R. 63, ll. 13 – 23. Judge Cottingham ruled the statement was admissible and made "without duress, hope or promise." R. 64, ll. 14 – 17.

Discussion

The detective's statement that "There's a difference, okay?" to Jackson was a threat. While police officers may inform suspects that news of their cooperation will be relayed to the solicitor, they may not threaten consequences for the refusal to cooperate. In State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990), the court held that the sheriff's admission that Osborne would be charged with withholding information or giving the police officer a false statement if she was not forthcoming mandated suppression of her confession. Osborne was told "you don't have to say

anything, but if you withhold evidence, you can be charged with a crime." State v. Osborne, 301 S.C. at 366, 392 S.E.2d at 179. See also State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990).

In Rochester, the Supreme Court held that a 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." Rochester at 200, 391 S.E.2d at 246-47 (internal quotations omitted). The Court found that a polygraph examiner telling the defendant it would be in his best interest to tell the truth was neither a threat nor a promise. This was nonetheless a factor to consider when determining whether appellant's statement was a knowing, intelligent, and voluntary tendered confession under the totality of the circumstances. See State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001); State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987).

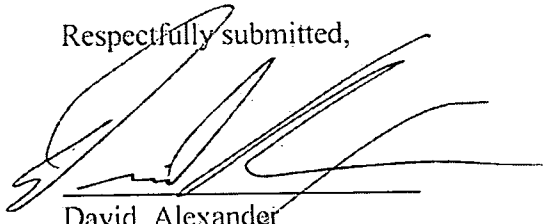
In Hook, this Court held that the defendant's statement to his probation officer was inadmissible because his agent expressly threatened to revoke the defendant's probationary sentence unless he told the truth. This Court noted that statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona 437 U.S. 385, 398, 399 (1978); Minnesota v. Murphy 465 U.S. 420, 427 (1984).

The officer's assertion that there would be a "difference" if Jackson failed to cooperate meant that he would be treated more harshly. Jackson clearly felt threatened by this statement. This "difference" in treatment is similar to the threats of consequences in Osborne and Hook. The fact that it was a threat can be seen from its consequences. Immediately after Detective Clothier made this threat, Jackson began making incriminating statements. Detective Clothier's threat was not "slight" and the Court of Appeals erred in affirming.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's conviction and granting him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 12th day of January, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 2014-UP-348 (S.C. Ct. App. filed 10/1/2014)
12-GS-26-00730

THE STATE,

RESPONDENT,

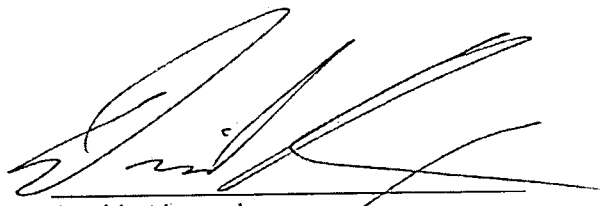
V.

ANTHONY JACKSON,

PETITIONER

CERTIFICATE OF SERVICE

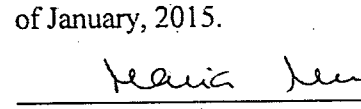
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Jennifer Ellis Roberts, Esquire, AR Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, The S.C. Court of Appeals, and Mr. Anthony Jackson #138454, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of January, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of January, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The Supreme Court of South Carolina

The State, Respondent,

v.

Anthony Jackson, Petitioner.

Appellate Case No. 2015-000038
Lower Court Case No. 2012-GS-26-00730

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Jackson*, Op. No. 2014-UP-348 (S.C. Ct. App. filed Oct. 1, 2014). We deny the petition.

C.J.
FOR THE COURT

Columbia, South Carolina

April 8, 2015

cc:
The Honorable Jenny A. Kitchings
David Alexander, Esquire
Alan McCrory Wilson, Esquire
Jennifer Ellis Roberts, Esquire
Jimmy A. Richardson, II, Esquire
Melanie Huggins-Ward

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