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August 16, 2016

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

Re.: Trey Williams v. State
Case No. 2013-CP-46-1797
Appellate Case No. 2016-001553

Dear Clerk Shearouse:

Please find enclosed the Notice of Appeal, Proof of Service and Order being appealed submitted for filing on the above referenced case. I have also included copies of each to be mailed back to me after filing in the also enclosed self-addressed stamped envelope. I have sent a copy of each to Appellate Defense and expect them to be taking over this matter from here on forward. Thank you and please feel free to contact me with any additional questions or concerns.

Sincerely Yours,

Nathan Sheldon
The Law Office of Nathan J. Sheldon

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 22 2016
SC SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2013-CP-46-1797

State of South Carolina, Appellant-Respondent,

v.

Trey A. Wiliams, Respondent-Appellant.

NOTICE OF APPEAL

Trey A. Williams appeals the order of the Honorable Alison Renee Lee dated July 14, 2016 denying his request for post-conviction relief (relief was granted on other grounds). Appellant received written notice of entry of this order on July 20, 2016.

August 16, 2016

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v.

Trey A. Williams, Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Justin J. Hunter with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2016 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

August 16, 2016

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4601797

Trey A Williams 341036	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

ORDER

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Alison Renee Lee — **Circuit Court Judge**

2118 — **Judge Code**

7/14/2016 — **Date**

For Clerk of Court Office Use Only

This judgment was entered on **July 18, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **July 18, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Nathan James Sheldon PO Box 36682 Rock Hill, SC 29732

Justin James Hunter PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Trey A. Williams, ~~#344266,~~ 341036	)	Docket No. 2013-CP-46-01797
Applicant,	)	
v.	)	**ORDER**
State of South Carolina	)	
Respondent.	)	

This matter comes before the Court by way of an application for Post-Conviction Relief ("PCR"). Applicant Trey Williams ("Applicant") filed the application on June 12, 2013. The State of South Carolina ("Respondent") made its Return on September 13, 2013. A hearing was convened on November 18, 2014, at the York County Courthouse. Applicant was present at the hearing and was represented by counsel, Charles T. Brooks, III, Esquire ("Brooks"). Respondent was represented by Assistant Attorney General J. Rutledge Johnson, Esquire ("Johnson"). After reviewing all of the testimony and evidence presented at the hearing, along with a review of all records provided to the Court, the Court finds that there are constitutional deprivations on which to grant relief, and therefore, grants this application for PCR.

PROCEDURAL HISTORY

Applicant presently is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the May 2010 term of the York County Grand Jury for Criminal Sexual Conduct with a Minor, First Degree. Erik Delaney, Esquire, ("Delaney") represented Applicant on his charge. On May 26, 2010, Applicant proceeded to a bench trial before the Honorable John C. Hayes, III ("Trial Judge"). Applicant was found guilty and sentenced to confinement for thirty years. A notice of appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. *See State v. Williams*, 2013 WL 8482396, at *1 (Ct. App. Mar. 13, 2013). The Remittitur was issued on April 3, 2013.

In his PCR application, Applicant alleges that he is being held unlawfully in custody for the following reason: "Applicant was denied the rights to effective assistance of trial and appellate counsel by the 6th & 14th of the U.S. Const. as guaranteed and accordingly to the S.C.

Const. Art. I, §§ 3 and 14, during all phases of the criminal and appeal case, etc." Applicant's Application for Post-Conviction Relief at PCR Addendum 1, question 10-a. During the PCR hearing, it was determined that Applicant alleged that his waiver of counsel was invalid and that both his trial standby counsel and appellate counsel provided ineffective assistance of counsel. During the hearing, Respondent made a motion for summary judgment arguing that since Applicant represented himself, there could be no ineffective assistance of standby counsel.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, the Court had before it Applicant's trial transcript, the records from the York County Clerk of Court regarding the convictions, Applicant's appellate brief, and Applicant's records from the South Carolina Department of Corrections.

Applicant testified at the PCR hearing. He explained that on April 15, 2010, he made a motion to remove Delaney as his trial counsel. Thereafter, Delaney was appointed to act as Applicant's standby counsel during trial. Applicant testified that he did not have much communication with Delaney about the case. The first indictment, according to Applicant, contained allegations that were inconsistent with allegations the victim made or that the victim's mother made. Applicant testified that he made a motion to relieve Delaney as trial counsel because he did not believe Delaney was doing anything for him. Applicant explained that Delaney did not seem to want to work with Applicant as standby counsel during trial. According to Applicant, Delaney failed to properly advise Applicant when to make objections during trial. Applicant, furthermore, testified that he did not cross-examine the State's witnesses during trial because he thought the State's witnesses were supposed to testify as witnesses for Applicant after the State closed its case-in-chief. In the end, Applicant explained that he represented himself at trial because Delaney failed do anything for him.

Applicant then testified concerning how his appellate counsel, Lanelle Durant, Esquire, ("Appellate Counsel") was ineffective. Appellate Counsel, according to Applicant, did not argue all the issues that he wanted her to argue. Specifically, Applicant testified that Appellate Counsel should have argued that Applicant's waivers of trial counsel and a jury trial were invalid. Although Applicant did not specifically testify at the PCR hearing *why* his waivers of trial counsel and of a jury trial were invalid, Applicant's PCR Application makes clear that, concerning his waiver of counsel, Applicant did not believe he was made aware of the dangers of self-representation before waiving counsel as required under *Faretta v. California*, 422 U.S. 806,

807 (1975). *See, e.g.*, Applicant's PCR Application at Exhibit #8 ("If the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of *Ferretta v. Calif.*, [sic] this is error of law, the court must look at the record to determine whether appellant had sufficient background or was appraised of his rights by some other sources[.]" Concerning Applicant's testimony that his waiver of a jury trial was invalid, it appears he was relying on the brief filed on his behalf by Appellate Counsel. *See, e.g.*, Applicant's Appellate Brief at 5 ("The trial court erred in not granting appellant's motion for a jury trial although Appellant had requested a bench trial initially but changed his mind two days later and asked for a jury trial after his attorney had been relieved and appellant was representing himself.").

Applicant also testified that the State committed prosecutorial misconduct because the assistant solicitor during his trial, Jennifer Colton, Esquire, ("Solicitor") misrepresented the facts of the medical testimony presented at trial. During the PCR hearing, Applicant did not testify *specifically* how the Solicitor misrepresented the facts at trial. A review of the record, moreover, does not help elucidate Applicant's argument on this ground. In Applicant's PCR Application, Applicant argues the Solicitor committed prosecutorial misconduct because she failed to provide certain information to Applicant. *See, e.g.*, Applicant's PCR Application at PCR Addendum 1, question 11-a (The Solicitor committed prosecutorial misconduct by "fail[ing] to disclose to the Applicant information that could have exonerated Applicant based upon the facts that the victim was not examine[d] by the doctors in the required time frames as was required by SC laws"). Moreover, in a document entitled "Judicial Notice of Adjudicated Facts," filed October 17, 2014, Applicant also argues that the Solicitor committed prosecutorial conduct in her presentation of certain facts to the court during trial.[1] *See, e.g.*, Applicant's Judicial Notice of Adjudicated Facts at 8 (The Solicitor committed prosecutorial misconduct "by way of misrepresenting the forensic evidence [ ] to the Courts, fraud upon the court by official court officers of the State, presenting perjured testimony and false documentation to deliberately deceive the Courts"). Accordingly, it appears that Applicant argues that the Solicitor committed prosecutorial misconduct in her representation (or lack thereof) of information to both Applicant and the trial court.

Upon cross examination at the PCR hearing, Applicant reiterated that Delaney failed to explain trial procedure. Again, Applicant testified that he thought he possessed the opportunity

[1] It is unclear whether this alleged improper presentation of facts occurred during the Solicitor's opening statements or closing arguments, or through some other mechanism.

to recall the same witnesses that the State called. Specifically, Applicant testified that he did not have an opportunity to cross-examine certain doctors who testified at trial because he failed to cross-examine them when they were on the stand as witnesses called by the State. Applicant, moreover, was not aware that he had to conduct his own research while acting as his own attorney. Applicant also testified that the Trial Judge informed Applicant that were dangers associated with self-representation but did not explain what those dangers were.

Next, Delaney testified at the PCR hearing. Delaney testified that he was appointed to represent Applicant around March 2009. Delaney explained that he was relieved as counsel in April 2010. Prior to being relieved as counsel, Delaney personally conducted some investigative work concerning Applicant's case. Delaney testified that he went to the home where the incident allegedly occurred and spoke with the victim's grandmother. Delaney then explained that during trial, he sat behind Applicant. Delaney also testified that he explained to Applicant the dangers of self-representation. Delaney also urged Applicant to think long and hard about proceeding in a bench trial. Delaney further testified that Applicant had informed Delaney that he had been offered a plea deal of Assault and Battery of a High and Aggravated Nature with registration on the Sex Offender Registry. Applicant, however, did not want to register as a sex offender, and thus, he did not accept the plea deal. Delaney explained that, during trial, Applicant was very meticulous about writing notes and potential questions to ask witnesses. Applicant did not ask Delaney any specific questions regarding the trial. According to Delaney, early on in the trial, Applicant gave up and explained that Applicant was no longer interested in the case.

On cross-examination, Delaney testified that he did not believe there were any issues regarding Applicant's competency. Delaney, moreover, testified that he would have advised Applicant of the dangers of self-representation, including: (a) the potential penalties associated with Applicant's underlying charge; (b) specific issues that would have to be addressed; (c) issues related to the cross-examination of the doctors who would testify during trial; and (d) the fact that Applicant could not call himself as a witness during trial.[2] Delaney testified that he specifically advised Applicant against having him relieved Delaney as counsel. Lastly, Delaney testified that he did not recall how extensive Applicant's prior record was but believed most of it consisted of juvenile matters.

[2] Rutledge asked Delaney "Can you extrapolate on the different dangers of self-representation that you would have explained to [Applicant]?"

This Court then asked Delaney some questions. Delaney explained that the main issue with Applicant was that Applicant wanted the case to be tried in the near future. When asked whether he recalled any specific discussions with Applicant regarding self-representation, Delaney explained that he could only remember what was in the motion hearing transcript. Delaney reiterated that, on several occasions, he informed Applicant that it was not best to represent himself. Delaney again explained that the Trial Judge also instructed Applicant regarding the dangers of self-representation. Delaney, moreover, explained that he had been the only attorney to represent Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony provided at the PCR hearing. This Court, further, has had the opportunity to observe the witnesses presented at the hearing, pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1976).

I. Waiver of Counsel

Applicant argues that his "waiver" of counsel was unconstitutional because he did not make a knowing and voluntary waiver of counsel. The Court notes, at the outset, that although Applicant phrases it as a "waiver" of counsel, it actually was a "relief" of counsel. Delaney was appointed to represent Delaney. Applicant decided, however, to represent himself, and thus, moved to have Delaney relieved as counsel. Nonetheless, the Court will review this issue as a waiver of counsel.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to assistance of counsel before he can be validly convicted and punished by law." *Faretta v. California*, 422 U.S. 806, 807 (1975). A person, however, is not required to have counsel and may, instead, choose to represent himself. *See id.* "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." *Id.* at 835. Therefore, for a defendant to represent himself, he must "'knowingly and intelligently' forgo those relinquished benefits." *Id.* "To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990). "While

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a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding." *Wroten v. State of South Carolina*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). "In the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, [the reviewing court] will look to the record to determine whether [a PCR applicant] had sufficient background or was apprised of his rights by some other source." *Bridwell v. State*, 306 S.C. 518, 519, 413 S.E.2d 30, 31 (1992). "If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." *Wroten*, 301 S.C. at 294, 391 S.E.2d at 576. If, however, "the record fails to demonstrate the [PCR applicant] made an informed choice to proceed *pro se*, with 'eyes open,' then the [PCR applicant] did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial." *Gardner v. State*, 351 S.C. 407, 412, 570 S.E.2d 184, 186 (2002).

On April 15, 2015, during a hearing concerning a speedy trial motion made by Delaney, Applicant informed the Trial Judge that he would like to relieve Delaney as counsel. Applicant and the Trial Judge engaged in the following colloquy:

> Applicant: Uh, Your Honor, yes, sir. I think I want – Could I represent myself today? Could I be able to represent myself throughout my case today?
>
> Trial Judge: Well I would have to relieve Mr. Delaney and it [sic] you want to proceed by yourself and represent yourself, you can't do half and half. You either have an attorney or you don't.
>
> Applicant: Yes, sir.
>
> Trial Judge: And if I relieve your attorney then you don't have one. And that's dangerous because you're not an attorney and an attorney could be of a benefit to you. And of course you've got an attorney appointed to you at no expense to you. But you have a right to hire an attorney and you also have a right to waive your right to counsel and proceed on your own if you wish. What do you wish to do?
>
> Applicant: Well honestly what I ask was could I speak with him before I came in here but I wasn't able to. Right now I don't wish to bother him right now. I had some things I wanted to ask him. And he just said right now some things that I have wanted to ask.

Trial Judge: Well I'll give you all a chance to do that. Would you want me to wait then and not hear anything further on this until you've had a chance to talk to your attorney?

Applicant: Yes, sir.

Trial Judge: All right. When can we do that? Can we do that first thing in the morning?

Solicitor: Yes, sir.

Motion Hearing Transcript of Record at 5:21-25 to 6:1-24. Accordingly, Applicant and the Trial Judge agreed to take up this matter the next morning on April 16, 2010.

On the morning of April 16, 2010, the Trial Judge began the hearing by asking Delaney to provide the procedural background behind Applicant moving to have Delaney relieved as counsel. Delaney explained that he had informed Applicant that since Applicant was "facing a charge that carries a maximum of life imprisonment, mandatory minimum twenty-five years . . . [Delaney was] really concerned for [Applicant] as far as representing himself at trial." Motion Hearing Transcript of Record at 8:4-7. Delaney also explained to the Trial Judge that: "[Applicant] has made it clear that he does not trust me, he does not believe me, he does think that I am not being truthful with him about his case." Transcript of Record at 8:7-10. Essentially, Applicant was discouraged that he could not go to trial in the immediate future. *See id.* at 8:10-12. Delaney had explained to Applicant that he did not have control over the docket. *Id.* at 8:14-15. Delaney explained to the Trial Judge that Applicant felt as if Delaney was misleading him. *Id.* at 8:20-21.

The Trial Judge then discussed with the Solicitor whether she would be able to try Applicant's case in the near future. *See id.* at 8:24-25 to 10:1-2. The Solicitor explained that trying the matter depended upon the availability of two physicians who were expected to testify at trial. *Id.* at 9:7-8. The Solicitor also explained that the South Carolina Law Enforcement Division ("SLED") had recently completed a DNA analysis of some evidence that the State intended to use at trial. *Id.* at 9:17-19. The Solicitor also expressed that she "was hesitant to call [Applicant's] case to trial [with] the defense not having all the discovery." Motion Hearing Transcript of Record at 10:1-2. Thereafter, the Trial Judge engaged in the following colloquy with Applicant:

Trial Judge: Mr. Williams, I talked to you yesterday and told you about the dangers of self-representation and the benefits of having an attorney and your right to have an attorney. And of course your right not to have an attorney. I told you that it would be in your benefit to have an attorney and it's dangerous not to have an attorney. And if my memory serves me correctly you said you thought your family was arraigning to have – Mr. Wellborn?

Delaney: No. That was a different client.

Trial Judge: That was a different one. Okay. All right, so if you release or if you convince me that I should let Mr. Delaney cease to represent you, you will be without an attorney and you will have to go to trial on your own. All right, anything you want to say, keeping in mind what I told you also yesterday that everything's being taken down on the record.

Applicant: Yes, sir. Do you know – can I get a date set today in the courtroom when I can go to trial?

Trial Judge: Unfortunately not, because in this State not only to Mr. Delaney as a public defender to not set your trial date [sic], a Judge cannot either. It is very clear in South Carolina that the Solicitor controls the docket. I have certain ways I can assist them in picking a time but I can't pick a time. So right now it looks like it would be in the June term which is June 7th. So I'm going to encourage the State to try you the week of June 7th. Do you have a bond?

Applicant: That's what I was going to ask. Could I be eligible for some kind of a bond?

Trial Judge: Well, here's what I'm gonna do. I'm going to tell the State to try you in June. If they do not try you in June, you can come before the Court, either me or another Judge, and see about getting a bond set because you've been in jail for over a year. We'll either see about getting you tried or maybe let you out on bond. Now I'm not promising that. And I'm not promising if we set bond, obviously it would be something you could make. We wouldn't intentionally at least I wouldn't try to put it in a situation where I give you a bond but it would be hollow because I know you couldn't make it. But I will certainly give you the right if you are not tried in June to come back before the Court and seek a bond being set.

Motion Hearing Transcript of Record at 10:11-25 to 12:1-3. Applicant then explained to the Trial Judge that he was frustrated in not being able to get his case tried in the near future. *See id.* at 12:4-17. The Trial Judge thereafter continued his colloquy with Applicant:

Trial Judge: Well the bottom line is, it looks like it will be June and do you want the Court to relieve Mr. Delaney? And of course I remind you that

> means you – I'm not going to appoint another attorney, you don't get to pick – if you get an attorney appointed to you at the State's expense you don't get to choose that attorney. The State chooses, or the Judge does. And if I relieve Mr. Delaney then you are without an attorney and you will have to go to trial what they call pro se. That is without an attorney.
>
> Applicant: All right. Yes, sir.
>
> Trial Judge: Is that you want to do?
>
> Applicant: Yes, sir.
>
> Trial Judge: All right. Mr. Delaney, I am going to ahead now and appoint you as standby counsel for Mr. Williams[.]

Motion Hearing Transcript of Record at 12:18-25 to 13:1-8. Accordingly, Delaney was relieved as counsel for Applicant, and trial was scheduled in approximately two months.

In this matter, the Trial Judge did not specifically address the disadvantages of Applicant proceeding *pro se*. Instead, the Trial Judge merely explained to Applicant that representing himself would be "dangerous" and that an attorney "could be of some benefit" to Applicant. These comments to Applicant do not constitute a "trial judge addressing the disadvantages of proceeding *pro se*." *See Bridwell*, 306 S.C. at 519, 413 S.E.2d at 31; *see also Wroten*, 301 S.C. at 294, 391 S.E.2d at 576 (where the South Carolina Supreme Court found that "the trial judge made no specific inquiry to determine whether petitioner made his choice to proceed *pro se* 'with eyes open.'"). As explained above, "[i]n the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, [this court] will look to the record to determine whether [a PCR applicant] had sufficient background or was apprised of his rights by some other source." *Bridwell*, 306 S.C. at 519, 413 S.E.2d at 31.

A review of the record makes clear that Applicant did not have a sufficient background to understand the dangers of self-representation. In determining whether "an accused has a sufficient background to understand the dangers of self-representation, the courts consider many factors," including:

> (1) the accused's age, educational background, and physical and mental health;
> (2) whether the accused was previously involved in criminal trials;
> (3) whether the accused knew the nature of the charge(s) and of the possible penalties;

(4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
(5) whether the accused was attempting to delay or manipulate the proceedings;
(6) whether the court appointed stand-by counsel;
(7) whether the accused knew he would be required to comply with rules of procedure at trial;
(8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him;
(9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and
(10) whether the accused's waiver resulted from either coercion or mistreatment.

Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

During the PCR hearing, Applicant exhibited little understanding of criminal proceedings. Shortly after Brooks began his direct examination of Applicant, Applicant asked Brooks "so I have to present my case the way you ask me the questions or can I present it the way I had it prepared to present?" Applicant continued on by stating "I had wanted to point to my Judicial Notice of Adjudicated Facts." The record indicates that Applicant was twenty-one years old at the time of the motion to relieve counsel hearing, and Applicant testified at the PCR hearing that he dropped out of high school in the ninth grade. Applicant also testified that he was "mentally challenged."[3] Applicant, moreover, did not have any experience with criminal trial matters outside of an unspecified number of matters within the juvenile system.[4] The facts of the instant matter are somewhat analogous to the facts in *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990).

In *Prince*, the petitioner filed a PCR application alleging that he did not validly waive his right to counsel, and thus, that his guilty plea was invalid under *Faretta*. *Prince*, 301 S.C. at 423, 392 S.E.2d at 463. The petitioner had "pleaded guilty to escape and breach of trust and was

[3] The Court acknowledges that the only evidence to support Applicant's allegation that he was mentally challenged at the time of the Motion to Relieve Counsel hearing was his self-serving testimony presented at the PCR hearing. At the PCR hearing, he testified that he was mentally challenged and that he had informed Delaney of his cognitive impairment when Delaney was still his attorney. However, even if the Court disregards Applicant's contention that he was/is mentally challenged, Applicant still did not have a sufficient background to understand the dangers of self-representation before relieving Delaney as counsel.

[4] During the PCR hearing, Delaney testified that he did not recall how extensive Applicant's prior record was but believed most of it related to juvenile matters.

#10

sentenced to consecutive terms of one year and three years." *Id.* Following a hearing, the PCR judge denied the petitioner's PCR application. Thereafter, the petitioner filed a writ of certiorari with the South Carolina Supreme Court. Finding an "absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required under the second *Faretta* prong, [the Court] look[ed] to the record to determine whether [the] petitioner had sufficient background or was apprised of his rights by some other source." *Id.* at 424, 392 S.E.2d at 463. The Court determined that the petitioner did not possess a background sufficient to allow him to understand the dangers of self-representation.

The petitioner in *Prince* was twenty-two years old at the time of his plea; Applicant was twenty-one years old at the time of his motion to relieve counsel. The petitioner in *Prince* "was a high-school graduate and had some college education," *see id.*; Applicant dropped out of school in the ninth grade. The *Prince* record "indicate[d] [the] petitioner was mentally disturbed at the time of his plea," *see id.*; Applicant testified he had an intellectual disability at the time of his motion to relieve counsel hearing. "In response to questioning at the PCR hearing, [the] petitioner [in *Prince*] exhibited little understanding of criminal proceedings," *see id.*; Applicant exhibited a similar misunderstanding of criminal proceedings at his PCR hearing evidenced, in part, by his belief that he did not need to cross-examine the State's witnesses as they were called by the State, but instead, thought he could recall those same witnesses during the presentation of his case. After reviewing the record as described above, the *Prince* Court found that "the record [did] not demonstrate [the] petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed *pro se*." *Id.* The Court, thus, held that "the PCR judge erred in finding a valid waiver of counsel." *Id.* Accordingly, the PCR judge was reversed and the case was remanded for a new trial. *See id.* Just as in *Prince*, Applicant similarly did not have a sufficient background to understand the dangers of self-representation. This Court, thus, must review the record in this case, including the PCR hearing testimony, to determine whether Applicant was advised of the dangers of self-representation by some other source. *See Stevenson v. State*, 337 S.C. 23, 26, 522 S.E.2d 343, 344 (1999).

The record makes clear that Applicant was not apprised of the dangers of self-representation by any other source. As mentioned above, during the PCR hearing, Delaney testified that he *would have* advised Applicant of the dangers of self-representation, including:

(a) the potential penalties with Applicant's underlying charge; (b) certain issues[5] that would have to be addressed in preparing for trial; (c) issues concerning the cross-examination of doctors; and (d) the fact that Applicant could not call himself as a witness at trial. *See, e.g., Watts v. State*, 347 S.C. 399, 404, 556 S.E.2d 368, 371 (2001) (where the Supreme Court found that the solicitor's testimony that the trial judge "*would have warned*" the PCR applicant about the dangers of self-representation was insufficient to satisfy the requirements of *Faretta*). Moreover, Delaney testified that he informed Applicant that he could not call himself as witness in response to a leading question by Johnson.[6]

Outside of Delaney's testimony at the PCR hearing, there is no evidence in the record to show that Delaney explained these dangers to Applicant. Moreover, when asked by this Court whether Delaney recalled any specific discussions with Applicant regarding the dangers of self-representation, Delaney responded that he could only recall what was on the motion hearing transcript. Delaney also testified that the Trial Judge similarly instructed Applicant regarding the dangers of self-representation. However, in the Motion Hearing Transcript of Record, neither Delaney nor the Trial Judge specifically addressed the dangers of self-representation to Applicant. The record, also, does not reflect that Applicant was made aware of the dangers of self-representation by a source outside of Delaney or the Trial Judge. Accordingly, Applicant was not apprised of the dangers of self-representation "by some other source." *See Bridwell*, 306 S.C. at 519, 413 S.E.2d at 31.

Since Applicant did not possess the background sufficient to allow him to understand the dangers of self-representation, and because he was not apprised of those dangers by any other source, Applicant did not knowingly and intelligently waive his right to counsel. *See, e.g., Wroten*, 391 S.C. at 295, 301 S.C. 293 at 577 ("We find the record before us does not demonstrate petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed without counsel[.]"). Accordingly, Applicant has been denied his Sixth Amendment right to counsel, and his application for post-conviction relief is granted for this reason.

[5] During the PCR hearing, Delaney did not elaborate on, or explain, these "issues."

[6] Delaney testified that he explained (a) through (c) as noted above to Applicant. Following Delaney's response, however, Johnson posited to Delaney "and that he can't call himself as a witness?" to which Delaney hesitantly responded, "umm, yes."

II. Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving the allegations in his application. *Hyman v. State*, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Claims of ineffective assistance of counsel are evaluated under a two-prong test. *See Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). First, the applicant must prove that counsel's performance was deficient. *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). To receive relief, a PCR applicant must overcome this presumption. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Suber*, 371 S.C. at 558, 640 S.E.2d at 886.

A. Standby Counsel

Applicant argues Delaney provided ineffective assistance of counsel for not adequately assisting Applicant throughout trial. Specifically, Applicant argues that Delaney "abandoned" him during the bench trial in front of the Trial Judge by failing to inform him of trial procedure, including how and when to cross-examine witnesses.

"The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S. Ct. 944, 950 (1984). Although, however, a defendant may represent himself, he is not entitled to simultaneously represent himself *pro se* and have counsel. *See State v. Stuckey*, 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). In other words, in South Carolina, a defendant does not possess a constitutional right to "hybrid representation" whereby the defendant "choreograph[s] special appearances by counsel." *Id.* Furthermore, although a defendant possesses the constitutional right to represent himself, "a

State may - even over objection by the accused - appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta*, 422 U.S. 806 at 834, n.46, 95 S. Ct. at 2541, n.46 (1975). (Emphasis added). The Sixth Amendment, however, "does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding *pro se*." *United States v. Lawrence*, 161 F.3d 250, 253 (4th Cir. 1998). If appointed, standby counsel must allow the pro se defendant to "preserve actual control" over his case, and standby counsel's participation in the trial "must not destroy the jury's perception that the defendant is representing himself." *State v. Barnes*, 407 S.C. 27, 42 753 S.E.2d 545, 553 (2014). "[W]here standby counsel act[s] only within that limited role, the defendant cannot raise an ineffective assistance claim based on standby's performance or lack thereof." 3 Crim. Proc. § 11.5(f) The Constitutional Right to Self-Representation (2015); *see also United States v. Makolajczyk*, 137 F.3d 237, 246 (5th Cir. 1998) ("If [the defendant] had no right to standby counsel, it seems unlikely that standby counsel's failure to assist could be a violation of his Sixth Amendment rights.").

In this matter, Applicant decided to represent himself. Applicant, moreover, did not have a constitutional right to standby counsel. Since Applicant did not have a constitutional right to standby counsel, he cannot tenably claim that his standby counsel was ineffective. In other words, the law does not recognize ineffective assistance of *standby* counsel. Accordingly, Applicant's request to grant PCR on this ground is denied.

B. Appellate Counsel

Applicant also argues that his appellate counsel was ineffective for not raising the specific issues Applicant wanted her to raise. Applicant argues that Appellate Counsel should have raised both Applicant's invalid waiver of his right to a jury trial *and* his waiver of counsel. Appellate Counsel only raised and briefed Applicant's waiver of his right to a jury trial.

"A defendant is entitled to effective assistance of appellate counsel." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). Appellate counsel, however, "is not required to raise every nonfrivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." *Jones v. Barnes*, 463 U.S. 745, 754,

103 S. Ct. 3308, 3314 (1983). Thus, where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *See, e.g., Griffin v. Aiken*, 775 F.2d 1226, 1235 (4th Cir. 1985) (Appellate counsel "must be allowed to exercise [her] reasonable professional judgment in selecting those issues most promising for review[.]"). For a PCR applicant to show ineffective assistance of Appellate Counsel, the applicant must satisfy the two-prong *Strickland* standard: (1) the PCR applicant must show that appellate counsel's performance was deficient; and that (2) but for appellate counsel's deficiency, the result of the appellate proceeding would have been different. *See Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). In this matter, Appellate Counsel provided ineffective assistance of counsel.

On appeal, Appellate Counsel focused exclusively on Applicant's waiver of his right to a jury trial. Specifically, Appellate Counsel argued that:

> The trial court erred in not granting [A]ppellant's motion for a jury trial although Appellant had requested a bench trial initially but changed his mind two days later and asked for a jury trial after his attorney had been relieved and appellant was representing himself.

Applicant's Appellate Brief at 5. Appellate Counsel, however, failed to brief and argue Applicant's waiver of counsel. In Appellate Counsel's brief, she writes that during the motion hearing to relieve counsel, "Judge Hayes then explained to Williams the dangers of representing himself. The judge explained that Williams would be without an attorney and would represent himself at trial." Applicant's Appellate Brief at 6-7. It appears that Appellate Counsel interpreted the Trial Judge's statement to Applicant that it was "dangerous" to represent himself as specifically addressing the dangers of self-representation as is required under *Faretta*. As has been detailed, however, this general statement *patently* did not satisfy *Faretta*. *See, e.g., Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (where the South Carolina Supreme Court ruled that "it [was] patent that if [appellate] counsel had raised the [subject] issue on direct appeal, [the defendant] would have been entitled to a reversal . . . [and] [a]ccordingly, [the defendant] has met his burden of demonstrating both that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different."). It, therefore, was deficient for Appellate Counsel not to brief and argue this issue before the Court of Appeals. This Court, moreover, is of the opinion that if Appellate Counsel would have raised this issue, the Court of Appeals would have determined that

Applicant did not validly waive his right to counsel and would have remanded the matter to the trial court. Accordingly, since Appellate Counsel provided ineffective assistance of appellate counsel, Applicant's application for PCR on this ground is granted.

III. Prosecutorial Misconduct

In criminal prosecutions, the State possesses the duty to "refrain from improper methods calculated to produce a wrongful conviction . . . [and] use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 632 (1935). Prosecutorial misconduct occurs "when the government crosses the line between proper and improper methods." Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. L. Rev. Q. 714, 720 (1999). The label of "prosecutorial misconduct" "can be attached to as broad an array of acts as the prosecutor has authority to perform because the admonition to ensure 'justice' shadows every endeavor of the prosecutor." *Id.* In some instances, prosecutorial misconduct may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1867, 1872 (1974). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 3109 (1987).

Applicant alleges that the State committed prosecutorial misconduct because the Solicitor misrepresented the testimony of the doctors who testified at trial and because Applicant's indictment was insufficient and erroneous. Applicant also alleges the Solicitor committed prosecutorial misconduct because she "failed to disclose to the Applicant information that could have exonerated Applicant based upon the facts that the victim was not examine[d] by the doctors in the required time frames as was required by SC laws". Applicant's PCR Application at PCR Addendum 1, question 11-a. During the PCR hearing, however, Applicant did not testify *how* the Solicitor misrepresented the testimony of the doctors at trial or *why* his indictment was insufficient and erroneous. Applicant, moreover, did not testify concerning what information the Solicitor could have provided Applicant that could have exonerated him. A review of the other materials in the record, moreover, does not help elucidate Applicant's arguments on these grounds. Accordingly, Applicant has not met his burden of proving the State committed prosecutorial misconduct. Therefore, Applicant's request to grant PCR on this ground is denied.

ORDER

Based on all of the foregoing, this Court finds that Applicant has established a violation of his constitutional right to counsel and ineffective assistance of appellate counsel, requiring this Court to grant his application.

IT IS THEREFORE ORDERED that the Application for PCR is **GRANTED.** This matter is remanded to general sessions court for a new trial.

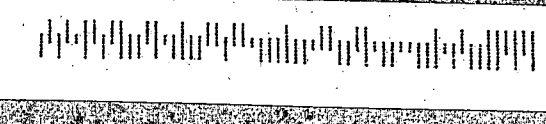
AND IT IS SO ORDERED.

Al Renee Lee

ALISON RENEE LEE
Presiding Judge

July 14, 2016
Columbia, South Carolina

ard #17



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