STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2017-UP-021 (S.C. Ct. App. filed Jan. 11, 2017)

2014-GS-10-07246

THE STATE,

RESPONDENT,

V.

WAYNE GARY POLITE

PETITIONER

APPELLATE CASE NO. 2015-001843

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

I.

Petitioner's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*. 7

II.

Where the state charged Petitioner with obtaining property valued at ten thousand dollars or more by false pretenses, Petitioner was entitled to jury instructions on the lesser-included offenses of lesser values in light of the conflicting evidence on the value of the property. 17

CONCLUSION 25

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 23, 2017. App. 21.

QUESTIONS PRESENTED

I. Was Petitioner's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution violated when the trial judge denied his request to proceed *pro se*?

II. Where the state charged Petitioner with obtaining property valued at ten thousand dollars or more by false pretenses, was Petitioner entitled to jury instructions on the lesser-included offenses of lesser values in light of the conflicting evidence on the value of the property?

STATEMENT OF THE CASE

John Tursi owned East Coast Sports and Imports ("East Coast") in North Charleston, where he sold "high-lined cars" "in the subprime market." R. 72, lines 21-25; R. 73, lines 13-16. His customers were "people who have already had credit problems in the past" and he assisted them in getting credit "through banks who specialize in subprime lending." R. 73, lines 21-25; see also R. 116, lines 18-25 (explaining that ninety percent of the customers were "credit risky"). Interests on these loans were typically twenty-five percent. R. 115, lines 16-24.

Petitioner was conditionally approved for financing a car through East Coast on March 10, 2014. R. 264. Oddly, on March 11, 2014, a day *after* the conditional approval of Petitioner's financing, Tursi bought the car from Fanelli's Auto for $10,000. R. 85, lines 7-10; R. 258. Tursi then sold the car to Petitioner for $13,862 on that same date. R. 75, lines 16-25; R. 76, lines 1-3; R. 79, lines 15-16; R. 261; R. 262; R. 263. Petitioner paid $1500 as a down payment and the remainder would be financed with the assistance of East Coast. R. 79, lines 17-24. Tursi's employee, Michelle Miller, completed the paperwork for financing through a third party. R. 79, line 25 – R. 80, line 2; R. 94, line 19 – R. 95, line 8; R. 95, line 16 – R. 100, line 18; R. 100, line 22 – R. 102, line 9. As part of her responsibilities, Miller contacted Petitioner's employer, L&B Snacks. R. 104, lines 12-15. Miller spoke to Priscilla who verified Petitioner's employment. R. 104, lines 12-20. Additionally, Miller obtained a copy of Petitioner's driver's license, pay stubs, and a reference list. R. 97, line 13 – R. 99, line 23.

After Miller obtained conditional approval from the finance company, she permitted Petitioner to take possession of the car. R. 80, line 6 – R. 81, line 13; R. 100, lines 10-11; R. 103, lines 1-22; R. 105, lines 1-21. However, when the finance company reviewed the documentation submitted by Miller, the finance company determined there were inaccuracies concerning

Petitioner's employment, and, as a result, the company refused to fund the loan. R. 81, line 24 – R. 82, line 13.

Tursi and Miller claimed that when the finance company refused to fund the loan, they called Petitioner and requested return of the car. R. 82, line 14 – R. 83, line 20; R. 84, lines 14-23; R. 106, lines 7-20; R. 107, lines 9-16. Despite Petitioner's alleged initial agreement to return the car, Petitioner never did. R. 84, lines 1-2; R. 84, lines 12-13; R. 85, lines 5-6; R. 107, lines 17-18.[1] While investigating Petitioner, Miller contacted Clarence Brown, who owned L&B Snacks, which was where Petitioner said he worked. Miller claimed Brown said he did not even know Petitioner. R. 109, lines 16-22.[2] Based upon Petitioner not returning the car, Tursi went to the police who began a criminal investigation.

During its December 2014 term, a Charleston County grand jury indicted Petitioner for obtaining property in excess of $10,000 by false pretenses (2014-GS-10-7246). R. 265 - 266. The state, represented by Marian Askins and Daniel Cooper, called the case for trial before the Honorable Deadra L. Jefferson and a jury on August 12, 2015. R. 1-2. Luke Malloy and Mary Ford represented Petitioner. R. 2.

In addition to Miller and Tursi testifying, Brown also testified at Petitioner's trial. Brown owned several businesses in Charleston, including L&B Snacks, which serviced vending machines. R. 119, lines 19-24. Brown had known Petitioner "since [the] late '90s." R. 120, lines 7-11. Brown denied that Petitioner had ever worked for him, however. R. 120, lines 18-25. Brown

[1] Ultimately, the police found the car in a tow lot in Georgia by searching Google for the VIN. The testifying officer claimed the car was abandoned at Magnolia Apartments in Marietta, Georgia. R. 183, line 19 – R. 185, line 8.

[2] Brown testified that he told Miller that he and Petitioner were friends, but that Petitioner did not work for him. R. 127, lines 2-5.

admitted that Petitioner had performed "odd jobs" for him, such as working on his computer and getting supplies. R. 123, line 12 – R. 124, line 3. Brown also admitted that Petitioner had helped him service vending machines by running a route, but claimed this was for one day only. R. 124, lines 7-14. Brown denied issuing a paycheck to Petitioner, and indicated that if he paid Petitioner anything, it was just "a few dollars out of [his] pocket." R. 124, lines 20-23. However, Brown did not pay Petitioner "in the sense of an employee." R. 127, line 21. According to Brown, Petitioner "did not work for [him] like that." R. 128, lines 4-6. Brown supplied his employees with t-shirts, and Petitioner had one. R. 142, lines 15-18; R. 204, lines 2-3; R. 204, lines 7-8. Brown admitted that he paid his employees in cash. R. 147, lines 9-10. In fact, Brown did not issue paychecks to any of his employees. R. 148, lines 4-7.

Brown's girlfriend and employee, Priscilla Patterson, initially claimed Petitioner wanted her to say he had worked at L&B for six months, that he "helped here and there," and that he was paid in cash for odd jobs. R. 154, line 16 – R. 155, lines 2. When Patterson received the call from Miller, she said Petitioner had "been doing little odd jobs for Clarence, fixing computers, the copier, the scanner." R. 157, line 16 – R. 158, line 3. Patterson had seen Petitioner doing work for Brown, including helping with the vending machines. R. 165 lines 2-15. She considered Petitioner a subcontractor – someone who performed odd jobs and was paid in cash. R. 165, lines 16-24.

According to Petitioner's girlfriend, Ruth Love, Petitioner worked for L&B Snacks. Tr. 261, lines 21-23. She often dropped him off at work. R. 203, line 24 – R. 204, line 1. She recalled that Petitioner "did a lot of paperwork, did a lot of errands" for L&B Snacks and that he was good friends and coworkers with Brown. R. 204, lines 3-11. Petitioner refilled the soda machines as well. R. 204, lines 12-21.

On August 14, 2015, the jury found Petitioner guilty as charged. R. 250, lines 2-7. Judge Jefferson sentenced Petitioner to seven years' imprisonment. R. 257, lines 18-21. She also found Petitioner had violated the terms and conditions of his probation as a result of his conviction. She revoked his probation in full and ordered him to serve the revoked sentence concurrently with the sentence imposed for the instant matter. R. 257, lines 6-16.

Petitioner served a notice of appeal on August 24, 2015. Briefing in the Court of Appeals followed. On January 11, 2017, the Court of Appeals, without the benefit of oral argument, filed an unpublished opinion affirming Petitioner's conviction and sentence. App. 1-3. Petitioner filed a timely petition for rehearing. App. 4-20. On February 23, 2017, the Court of Appeals denied the petition for rehearing. App. 21.

This petition for writ of certiorari follows.

ARGUMENT

I. Petitioner's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*.

In affirming the trial judge's refusal to permit Petitioner to exercise his state and federal constitutional right to self-representation, the Court of Appeals cited several authorities with parentheticals of the applicable principles of law derived from those cases. App. 1-3. Nevertheless, the Court's specific reasoning remained unclear in light of the brevity of the opinion; however, it appeared, based on the parentheticals, that the Court of Appeals determined Petitioner's assertion was not (1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. App. 1-3. The opinion of the Court of Appeals conflicts with prior decisions of this Court, directly involves a substantial constitutional issue, and involves resolution of a federal question in a way that conflicts with decisions of the United States Supreme Court. See Rule 242(b)(3)-(5), SCACR.

Relevant facts

Prior to trial, Petitioner moved to relieve trial counsel. R. 6, lines 5-8. To support his request, Petitioner explained that he had requested trial counsel subpoena certain witnesses, and trial counsel had failed to do so. R. 6, lines 10-12; R. 7, lines 7-12. The judge responded that trial counsel would make "the decision about who gets called as a witness," not Petitioner. R. 7, lines 13-23. When Petitioner said he did not want trial counsel as his advocate, the judge wanted to know why. R. 10, lines 1-3. Petitioner explained he did not "have confidence in him" and as a result, there were "certain things" Petitioner could not share with him. R. 10, lines 4-5; see also, R. 27, line 25 – R. 28, line 6. Thereafter, the judge asked why Petitioner had not hired someone, and Petitioner

explained he had been in jail, which made hiring someone difficult, but that he had been working on it. R. 10, lines 9-16.

Petitioner explained he had written motions to aid in his defense. R. 10, lines. 22-23. The judge responded, "Only [trial counsel] decides what motions are filed. Unless you're representing yourself, you don't get to file motions. That's called hybrid representation and it's not allowed." R. 10, line 24 – R. 11, line 2. Petitioner responded that he had a right to proceed *pro se*. R. 11, lines 3-4. When Petitioner invoked his constitutional right to self-representation, the judge agreed he had a right to self-representation. R. 11, lines 3-6. Specifically, the judge told Petitioner he had the right to self-representation if he wanted, but admonished that he could not "file a motion making [his] lawyer file a motion. It doesn't work like that." R. 11, lines 5-8. Petitioner stated he did not want trial counsel as his lawyer. Thereafter, the following colloquy occurred:

THE COURT: Then here are your options, either [trial counsel] represents you or you represent yourself.

THE DEFENDANT: I'll represent myself.

THE COURT: I don't think that's such a good idea.

THE DEFENDANT: At the moment - - I think you're right because I don't have a law library. I don't have case laws in front of me.

THE COURT: I'm not going to delay the case for that.

THE DEFENDANT: I don't want him as my lawyer.

THE COURT: Well, your only option then is to hire someone, and this case has been pending at least for over a year, and if you desire to do that, you should have already hired someone.

R. 11, line 9 – R. 12, line 2. Petitioner continued to express his desire to relieve trial counsel noting he "would rather jump off that little small bridge in West Ashley than allow him to represent" Petitioner. R. 12, line 23 – R. 13, line 2.

When Petitioner persisted that he did not want to be represented by trial counsel, the judge informed him that his options were to permit trial counsel to represent him or to hire someone. R. 15, lines 1-6. The judge failed to tell him he had the option of representing himself pursuant to the state and federal constitutions. In light of these binary options, Petitioner said he would hire someone. R. 15, line 7. The judge responded that he "would had to have hired them before today, before it was put on the trial roster." R. 15, lines 8-10. Thus, hiring someone was not really an option for Petitioner at this point.

Nevertheless, Petitioner persevered in his request to relieve trial counsel. R. 15, lines 11-19; R. 15, lines 23-24; R. 19, lines 17-19. When the judge ordered Petitioner to provide trial counsel with the names of potential character witnesses, Petitioner again informed the judge that he did not want trial counsel as his representative. R. 21, line 22 – R. 22, line 4. The judge responded:

> I've already made the decision, sir, that your motion is denied. You've not provided the Court with any information that would amount to him being ineffective or his inability to be prepared to go forward in trial, and you have not made any efforts, at least that you have been able to provide the Court with independent corroboration, that you have made any attempts to obtain new counsel, and at this point your actions appear to the Court to be dilatory in nature.

R. 22, lines 5-15.

After additional discussion among the participants regarding witnesses and theories, the judge explained that she had "not heard any bases to relieve" trial counsel and had "not heard anything that amounts to ineffective assistance of counsel." R. 31, lines 18-23. She further stated that in light of the case pending for a year, Petitioner had ample time to retain a lawyer. R. 31, line

24 – R. 32, line 2. As a result, she denied Petitioner's motion to relieve trial counsel. R. 32, lines 2-3.

Petitioner responded that he wanted to do his best to fight for his rights. R. 34, line 24- R. 35, line 1. All he wanted was "a fair chance and a fair opportunity." R. 35, lines 1-2. While trial counsel "might be a great lawyer for someone else," he was not the right lawyer for Petitioner. R. 35, lines 3-6. To Petitioner's continued request, the judge responded that Petitioner had not provided "any independent information ... that would justify ... relieving an attorney who is prepared and ready to go forward." R. 35, lines 7-11. When Petitioner tried to argue his point further, the judge instructed him, "There is no further argument once the Court has ruled." R. 36, lines 2-9. Despite Petitioner's continued refusal to accept the judge's ruling, the judge instructed Petitioner that trial counsel was "going to be representing him." R. 37, lines 5-6.

Discussion

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010)(explaining "[a]n accused may waive the right to counsel and proceed *pro se*" and "[t]he request to proceed *pro se* must be clearly asserted by the defendant prior to trial").[3] "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). "That right must be preserved even if the court believes that the defendant will benefit

[3] The South Carolina Constitution explicitly provides for the right of self-representation: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14.

from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550.

"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." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the

record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (quoting Faretta, 422 U.S. at 835). "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, 423-424, 392 S.E.2d 462, 463 (1990).

According to this Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id. The trial judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001). However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).[4]

Clear & unequivocal invocation

Prior to the trial, Petitioner invoked his constitutional right to self-representation, and the judge agreed he had a right to self-representation. Petitioner clearly and unequivocally requested to

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[4] The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id. "The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)).

exercise his constitutional right to self-representation when the judge told him his only options were to either be represented by trial counsel or to represent himself. Rather than engaging in the proper inquiry as required by law, the judge voiced her opinion that such a choice was not "such a good idea." While Petitioner agreed it was not a good idea due to his limited ability to conduct legal research in the jail, he did *not* waver from his desire to represent himself. See Pasha v. State, 90 So.3d 1259, 1262 (Fla. 2010)(concluding a defendant's statement that he preferred to have an attorney, but not the one appointed, did not negate his request to proceed *pro se* where the defendant made the request after the judge refused to discharge appointed counsel); People v. Longuemire, 257 N.W.2d 273, 275 (Mich. Ct. App. 1977)(holding a defendant's invocation unequivocal even when the "the defendant may have been unhappy with all of the alternatives available to him on the day his trial began, his choice to represent himself ... was unequivocal and unconditional"); Barnes v. State, 528 S.W.2d 370, 372-373 (Ark. 1975)(finding a defendant's invocation clear where on the day of trial, the defendant moved to represent himself because he had been deceived by everyone, including his lawyer, but his explanation on this point "was vague, to say the least").

Knowing, intelligent, and voluntary invocation

While the trial court failed to engage in an adequate colloquy with Petitioner in regard to his desire to proceed pro se, as discussed *infra*, evidence in the record revealed Petitioner's request for self-representation was made knowingly, intelligently, and voluntarily.

"In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, "[i]f 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.

A variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew the legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Petitioner had significant contacts with the criminal justice system as indicated by his criminal record. R. 211, line 3 – R. 213, line 15; R. 42, line 13 – R. 48, line 2. In fact, Petitioner entered a guilty plea just two years prior to this trial. R. 44, line 24 – R. 45, line 1. Petitioner was forty-three years old at the time of the trial. R. 267. The record revealed Petitioner had prior work experience, including fixing computers and printers, loading trucks, and running trucking routes. R. 154, lines 4-7; R. 165, lines 2-24. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Petitioner's invocation as knowing, intelligent, and voluntary.

Timely invocation

Petitioner's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing

the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). Just as in Fuller, Petitioner's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Petitioner "complained to the trial court that his counsel had been ineffective in preparing for trial." See id. at 242, 523 S.E.2d at 171. Petitioner's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id.

Adequate hearing

The inquiry that followed Petitioner's request had little do to with the *only* inquiry that mattered – whether Petitioner was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether trial counsel had provided ineffective assistance during the investigative phase of the case. Although the judge agreed with Petitioner that he had a constitutional right to self-representation and advised Petitioner that waiving counsel was not "such a good idea," the judge did little else to ensure Petitioner could make an intelligent and voluntary waiver. Rather, the judge turned her attention to Petitioner's complaints against trial counsel and his efforts and ability to retain private counsel. The trial judge's error is clear in her ruling that she had "not heard any bases to relieve" trial counsel and had "not heard anything that amounts to ineffective assistance of counsel." Petitioner was under no obligation to present a basis to relieve counsel or to present evidence of ineffective assistance in order to exercise his constitutional right to self-representation. The trial judge erred and violated Petitioner's constitutional rights pursuant to the federal and state constitutions to represent himself in criminal proceedings.

Conclusion

The trial judge failed to honor Petitioner's clear and unequivocal invocation of his right to self-representation as required by the state and federal constitution. Instead of advising Petitioner of

the dangers and disadvantages of self-representation, the judge placed the burden on Petitioner to provide reasons to relieve counsel, and even went so far as to require those reasons amount to ineffective assistance of counsel. The right to self-representation does not hinge upon one's ability to show counsel's representation is inadequate. Rather, the right to self-representation must be honored with no regard to the ability of counsel to represent the individual. The judge failed to engage in the proper colloquy regarding Petitioner's invocation. This Court should grant certiorari to address the substantial constitutional issue directly involved and to resolve the conflict between the decision of the Court of Appeals and the decisions of this Court and the United States Supreme Court concerning the right to self-representation. See Rule 242(b)(3)-(5), SCACR.

II. Where the state charged Petitioner with obtaining property valued at ten thousand dollars or more by false pretenses, Petitioner was entitled to jury instructions on the lesser-included offenses of lesser values in light of the conflicting evidence on the value of the property.

The opinion issued by the Court of Appeals provided no explanation of why the Court chose to affirm on this issue. The Court cited two cases concerning when a trial court must instruct a jury on lesser-included offenses and the statutory provision under which Petitioner was convicted. The Court offered no analysis of the substantial constitutional issue presented or why the Court's decision to rule in Petitioner's case in a way that directly contravened the clearly established precedent of this Court and of the United States Supreme Court. Thus, this Court should grant certiorari to review the opinion of the Court of Appeals and align this state's jurisprudence on the subject of lesser-included offenses internally and with federal precedent. See Rule 242(b)(3)-(5), SCACR.

Relevant facts

With the assistance of East Coast, Petitioner received conditional approval for financing of the car on March 10, 2014. R. 264. On March 11, 2014, Tursi, the owner of East Coast Sports and Imports, bought a car from Fanelli's Auto for $10,000. R. 85, lines 7-10; R. 258. On that same day, Tursi sold the car to Petitioner for $13,862. R. 75, lines 16-25; R. 76, lines 1-3; R. 79, lines 15-16. R. 261; R. 262; R. 263. According to the documentation, the car was a clean trade-in valued at $8,875.00. R. 264. Petitioner paid $1500 as a down payment and the remainder would be financed. R. 79, lines 17-24. Tursi's employee, Michelle Miller, completed the paperwork for financing through a third party, Pelican. R. 79, line 25 – R. 80, line 2; R. 94, line 19 – R. 95, line 8; R. 95, line 16 – R. 100, line 18; R. 100, line 22 – R. 102, line 9. Upon the financing approval, Petitioner took possession of the car. R. 80, line 6 – R. 81, line 13; R. 100, lines 10-11; R. 103, lines 1-22; R. 105,

lines 1-21. When Pelican reviewed the documentation submitted by Miller, however, Pelican refused to fund the loan. R. 81, line 24 – R. 83, line 13.

According to Tursi and Miller, when Pelican refused to fund the loan, the two called Petitioner and requested he return the car. R. 82, line 14 – R. 83, line 20; R. 84, lines 14-23; R. 106, lines 7-20; R. 107, lines 9-16. Petitioner never returned the car to the dealership. R. 84, lines 1-2; R. 84, lines 12-13; R. 85, lines 5-6; R. 107, lines 17-18. As a result, the state alleged Petitioner "by false pretense or representation, did obtain a 2004 BMW X3 with a value in excess of Ten Thousand Dollars from East Coast Sports and Imports, with the intent to cheat and defraud East Coast Sports & Imports of said property" "in violation of Section 16-13-240 of the South Carolina Code of Laws (1976) as amended." R. 265-266.

Love testified regarding her recorded telephone conversations with Petitioner after he was arrested. During those recorded conversations, the two discussed a BMW. R. 198, lines 4-9; State's Exhibit #14. The two discussed a car sitting in Atlanta. Love wanted to sell it, but Petitioner asked her to wait. Love and Petitioner agreed they would only get $800 for the car if they "junked" it. State's Exhibit #14. Love testified that she was referring to a green two-door BMW that Petitioner had given her, not the car at issue in the case. R. 203, lines 7-11.

When Petitioner moved for a directed verdict based on the failure of the state to present evidence that value of the property was greater than $10,000 as indicated in the indictment and the statutory section cited. R. 206, lines 1-7. The state argued Tursi's testimony that he purchased the car for $10,000 and then sold it to Petitioner for $14,000 was sufficient to establish the value to meet the elements of the statute. R. 206, lines 9-14. Further, the state argued "[t]he value of the vehicle is what someone would pay for an item in the open market, the fair market value." R. 206, lines 14-16. The judge ruled that the state had "more than established that the fair market value of

the vehicle was at least $10,000, but on the open market was being sold for more than $10,000." R. 207, lines 2-5. The judge further explained that "[f]air market value is established by what a seller … offers property for and what a willing buyer will pay for the property, and the bill of sale establishes that Mr. Tursi paid $10,000 for the car." R. 207, lines 6-10. Thus, she concluded the statutory elements were met. R. 207, lines 10-11.

During the charge conference, Petitioner requested "something regarding the dollar amount controversy." R. 218, lines 20-21. The judge responded, "That's a penalty provision. It's not for the jury to decide." R. 218, lines 23-24. The judge continued that "[t]he only instructions that are regarding money in the statute deals with penalty and you would never instruct penalty to the jury. That's not within their province." R. 219, lines 4-7. Petitioner clarified that he was requesting the jury be instructed as to the lesser-included offense, which would be based upon the lesser value. R. 219, lines 8-9. The judge responded,

> The only way they can find him guilty is that the state establishes - - the only way they will be able to meet the elements of the offense, if he's found guilty by virtue of that, they would have proven that it was $10,000, or more. And that's the only evidence in the record as to the value of the car. There is no other testimony in the record regarding the value of the chattel.

R. 219, lines 14-22. Petitioner noted the testimony that the car was an "older model." R. 220, lines 23-24. The judge responded there had been "no testimony as to Blue Book value." R. 220, lines 9-10. The judge ruled that "[t]he only evidence in the record that's uncontroverted is that the value of the car was $10,000." Thus, she refused to charge the jury as to the lesser-included offense. R. 220, lines 12-19.

During closing argument, the prosecutor told the jury that the state had to prove the value of the car was $10,000 or more. R. 229, lines 13-15. According to the prosecutor, the state had done so through the "only two pieces of evidence about the value of the car": (1) State's Exhibit #1, the

purchase document showing Tursi bought the car for $10,000, and (2) the evidence that Petitioner was willing to buy the car for "$13,800, so odd dollars." R. 229, lines 13-22. The prosecutor claimed the value of the car was based on its "fair market value," which was "what a willing buyer is willing to pay for something." R. 229, line 24 – R. 230, line 2. Further, the prosecutor told the jury that Petitioner could not argue "now that it's not $10,000 because that's what he was going to pay for it, fair market value." R. 230, lines 2-4. Additionally, the prosecutor argued that Love had lied to the jurors when she said the car discussed during the recorded conversations was not the car at issue in the case. R. 227, lines 12-14; R. 227, lines 15-21. The prosecutor acknowledged the two discussed "trying to sell the car for $800, for junk, for scrap value." R. 227, lines 24-25. The prosecutor hypothesized that the two were considering selling the car for scrap "there is no title to the car. There are no tags on the car." R. 228, lines 1-5. She acknowledged that Petitioner and Love valued the car at $800. R. 228, lines 10-11.

During closing argument, trial counsel noted the car was ten years old when it was sold to Petitioner. R. 234, lines 3-4. Further, trial counsel explained that simply because Tursi testified that he paid $10,000 for the car did not mean the car was "worth that much." R. 234, lines 4-5. In other words, trial counsel encouraged the jurors to use their common sense in valuing the car.

The judge charged the jury *only* as to the provision of the statute concerning obtaining property with a value of ten thousand dollars or more. Specifically, the judge instructed the jury that the state must prove "beyond a reasonable doubt that the value of the property was $10,000, or more." R. 246, lines 16-18. There were no other instructions concerning the value of the car.

Discussion

The statute under which Petitioner was charged provided for three levels concerning valuation of the property obtained by false pretenses and corresponding punishments related to

those valuations. The first level, and the one in the indictment, concerned property valued at ten thousand dollars or more and provided that a person convicted of this subsection could be sentenced up to ten years. S.C. Code Ann. § 16-13-240(1). The second level provided for property valued at "more than two thousand dollars but less than ten thousand dollars" and listed the punishment as imprisonment for not more than five years S.C. Code Ann. § 16-13-240(2). Finally, the third level dealt with property valued at two thousand dollars or less. S.C. Code Ann. § 16-13-240(3). A person convicted of this subsection was subject to a fine or up to thirty days' imprisonment. S.C. Code Ann. § 16-13-240(3).

This case presents the following questions: (1) whether the lesser valuations in the statute constitute lesser-included offenses and (2) whether there was any evidence to warrant charging the jury on the lesser-included offenses. Both questions must be answered in the affirmative.

Lesser-included offenses

Petitioner has been unable to find a case in South Carolina stating that the differing valuations in the obtaining property by false pretenses statute render the lesser-values to be lesser-included offenses of the greater value. However, application of the "same elements" test and analogizing the statute to similar statutes renders the finding that the lesser-values are lesser-included offense inevitable.

Typically, "[t]he test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005)(citing State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000)). "If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense." Id. at 580, 564 S.E.2d at 105

(citing Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997)); see also Rutledge v. United States, 517 U.S. 292, 297 (noting the Court has "often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other"). Perhaps the best analogous criminal provisions are the offenses relating to larceny. "Grand larceny is a felony which includes all the elements of the lesser offense of petit larceny except that grand larceny involves the theft of goods valued at fifty dollars or more." State v. Smith, 274 S.C. 622, 623, 266 S.E.2d 422, 423 (1980).

Applying the "same elements" test to the instant offenses reveals the greater offense of obtaining property valued at $10,000 or more includes all of the elements of the lesser offenses.[5] The only difference among the statutory provisions is the value of the property. Thus, the greater offense encompasses all of the elements of the lesser offenses contained within the same statutory provision. The analogous criminal provisions for grand larceny and petit larceny support this conclusion.

Jury charge to a lesser-included – Any evidence

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence

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[5] Consideration of the legislative intent leads to the same result. The structure of the obtaining property by false pretenses statute reveals the legislative intent for the offenses to be construed as lesser and greater offenses because the legislature placed all of the provisions within one statute and made clear the elements were the same except for the monetary value of the property. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)(reiterating that "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will"); In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998)(stating that under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)(providing that the cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature).

from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

As an initial matter, the judge's ruling that the valuation portions of the statute were not matters for the jury's consideration was an error of law. It is clearly established that any question of fact that increases the penalty for a crime must be determined by a jury. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Thus, the judge's reliance upon her misapprehension that the property values contained within the statutory provisions were "not within [the jury's] province" in making her decision not to charge the jury concerning the lesser-included offenses was an error of law.

At least two pieces of physical evidence supported an instruction on the lesser-included offense based on the car's value. First, the recorded telephone conversations between Petitioner and Love supported valuation of $800 for the car. Although Love testified the car that was the topic of the conversation was not the car at issue in the case, the state argued to the jury that Love lied in her testimony and that the car that was discussed by Love and Petitioner was the car sold to him by East Coast Sports and Imports. Thus, a reasonable inference from the evidence was that the car discussed by Love and Petitioner during the recorded conversation was the 2004

BMW X3 purchased from East Coast Sports and Imports. Second, the financing agreement, which was an exhibit admitted by the state, indicated the finance company valued the car at $8,875.00 as a "clean trade-in." R. 264. The term "clean trade-in" is a common term used in the sale of used cars meaning the value of the car if in good condition. Thus, the value of the car according to the financing company was below the $10,000 threshold of the greater offense. The state should not be permitted to present evidence of a lesser value – in the form of the exhibit from the finance company and the recorded telephone conversations – and then run from such evidence when it does not support the state's theory.

Furthermore, Tursi testified that he had purchased the car for $10,000, which was the very lowest valuation of the greater offense. Thus, it would not be unreasonable for a jury to believe that Tursi had paid too much for the car – even just one dollar too much. This reasoning coupled with trial counsel's argument to the jury that the value of the car was probably less than $10,000 based upon one of the most important factors for valuation of cars known to all jurors – the age. The BMW at issue was ten years old at the time of the sale and its value was likely much less than the $10,000 claimed by the state.

Relying upon her misapprehension of the law concerning the jury's "province," the trial judge ignored evidence in the record supporting charging the jury on the lesser-included values of the property. Not only could the jury use its common sense to determine the car was valued at less than $10,000, which was the price paid by the car dealer on the date after he sold it to Petitioner, the jury could have relied upon the evidence that the financing company valued the car at less than $10,000 and the conversation between Petitioner and Love that the car was worth only $800. This evidence required charging the jury on the lesser-included offenses.

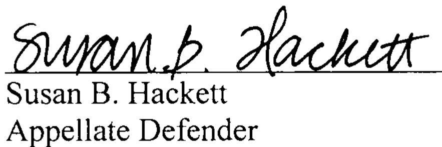
Conclusion

The judge erred as a matter of law by construing the statutory provisions regarding valuation as outside the jury's province. This erroneous decision resulted in another erroneous decision – denying Petitioner's request for a lesser-included offense where the evidence supported the instruction. The trial judge's errors were compounded by the Court of Appeals' opinion, which contravened this Court's and federal courts' jurisprudence in this arena regarding a substantial constitutional issue; this Court should grant certiorari. See Rule 242(b)(3)-(5), SCACR.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order fully briefing on the issues presented. If this Court grants the petition, but dispenses with further briefing, Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2017-UP-021 (S.C. Ct. App. filed Jan. 11, 2017)
2014-GS-10-07246

THE STATE,

RESPONDENT,

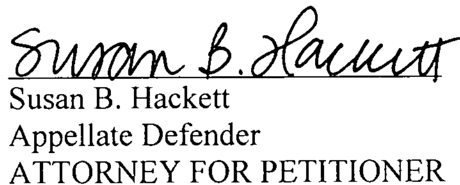
V.

WAYNE GARY POLITE

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari to the Court of Appeals and a copy of the Appendix in this case has been served on William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Wayne Gary Polite at 4420 Oakwood Avenue, Lot 9, North Charleston, SC 29405, this 27th day of March, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME this 27th day of March, 2017.

____________________________ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023