

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
G. Thomas Cooper, Circuit Court Judge

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AUG 23 2017

Appellate Case No.: 2014-002483

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SC Court of Appeals

The State .....Respondent

v.

John Henry Dial Jr.....Appellant

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PETITION FOR REHEARING

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## ARGUMENT

Pursuant to Rule 221(a) and Rule 240(i), SCACR, the Appellant respectfully petitions this Court for a rehearing of Opinion No, 2017-UP-339. Rehearing is warranted when the Court has overlooked or misapprehended an argument. This Court ruled that “the circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate.” Indigo Assocs. V. Ryan Inv. Co., 314 S.C. 519, 523, 431 S.E.2d 271, 272 (Ct. App. 1993)

Appellant respectfully requests that this Court reconsider this finding in this case since the basis of the argument is that Appellant was not warned of the dangers of self representation at the magistrate court. Since Appellant was not an attorney and was not warned of the dangers of self representation it would be highly improbable that he would have objected to the failure of the magistrate court to warn of the dangers of self representation. One of the dangers of self representation of which Appellant was not warned is the danger of not objecting to objectionable evidence or proceedings. Preservation of the record cannot be accomplished on the issue of the failure to be warned of the dangers of self representation by someone not warned of the dangers of self representation. “Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self representation.” Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) as quoted in In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004). See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

“It is the trial court’s responsibility to determine whether there was a knowing and intelligent waiver by the accused.” State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009).

Therefore, a knowing and intelligent waiver of Appellant's Sixth Amendment right to counsel is a proactive duty of the trial court and not a responsibility of the Appellant to raise. Furthermore, as Respondent argued in their brief citing State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991), "except in extraordinary cases where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing." See State v. Dixon, 269 S.C. 107, 236 S.E. 2d 419 (1977).

CONCLUSION

For all the foregoing reasons, as well as those addressed in the Appellant's Initial Brief and Reply Brief to this Court, the Appellant now seeks an Order granting Rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Mills", written over a horizontal line.

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This 23rd day of August, 2017

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PROOF OF SERVICE

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I certify that I have served the PETITION FOR REHEARING on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on August 23, 2017 addressed to:

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