STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

VINCENT MISSOURI,

APPELLANT

APPELLATE CASE NO. 2014-001176

Appeal from Pickens County

Honorable James R. Barber, Circuit Court Judge

Opinion No. 2017-UP-383

PETITION FOR REHEARING

Appellant Vincent Missouri petitions this Court for rehearing. The Court correctly found that appellant was denied the right to represent himself, but erred in determining that appellant "abandoned or waived" this right on the day of trial. Appellant made a timely motion to represent himself five months before the trial. The trial court's erroneous ruling prevented appellant from litigating his own case and preparing for trial. Requiring appellant to ask to proceed *pro se* on the day of trial when he was unprepared, instead of far in advance, does not remedy the earlier denial of his Sixth Amendment right.

When the trial judge learned that Judge Verdin had earlier denied appellant's motion to represent himself, he stated, "Well, that motion's been taken care of." R. 24, ll. 14 – 20. Judge Barber told appellant that he lacked the ability undo Judge Verdin's ruling. R. 25, ll. 2 – 8. Judge Barber stated, "And if there's an error in that regard, then you will have to deal with it in the future." R. 25, ll. 2 – 12.

After taking up other matters and after a break, the trial judge then reconsidered its earlier decision and told appellant he could move to represent himself. R. 45, ll. 4 – 23. However, the trial judge was clear that the trial was going forward that day, regardless of whether appellant represented himself or not. R. 45, l. 4 – 50, l. 6. Appellant protested about "the twenty-three months that I was trying to do this. . . " when the court interrupted him and demanded that he decide immediately whether to move to represent himself. R. 45, l. 20 – 46, l. 15. The trial judge told appellant "If you make the motion. If you don't want to make the motion, that's fine. We're ready to go. What is it you want to do?" R. 46, ll. 12 – 15. When appellant protested that he was being put "in an awkward position" the trial judge again interrupted him. R. 46, ll. 16 – 22.

Faretta v. California, 422 U.S. 806 (1975) does not explicitly say when the court must decide whether a defendant will represent himself. "Well before the date of trial" Faretta asked to represent himself. Faretta, 422 U.S. at 807. The trial judge held two hearings on whether Faretta could represent himself before conducting any substantive proceedings. Id. at 807-11. At the second hearing, the court held that Faretta had no constitutional right to represent himself and forced the public defender upon him. Id. at 809-10. The United States Supreme Court reversed. In reviewing lower court decisions, the Court stated, "We confront here a nearly universal conviction,

on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." Id. at 817.

The majority opinion in Faretta hints at when a decision must be made about representation. The majority recognized that decisions on matters of trial strategy are allocated to counsel. Id. at 820. The Court stated this allocation was justified only "by the defendant's consent, **at the outset**, to accept counsel as his representative." Id. at 820-21 (emphasis added). Justice Blackmun's dissent noted "the procedural problems that . . . today's decision will visit upon trial courts in the future." Id. at 852. Among the dissent's list of procedural problems were whether a defendant must be given notice of his right to proceed *pro se* and "when must that notice be given?" Id. Justice Blackmun also asked, "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*?" Id. The justices in Faretta expressed a clear preference that the question of the defendant's representation be decided early in the case. Appellant here followed the intent of Faretta and should not be punished for bringing his desire to represent himself to the court's attention at his earliest opportunity.

Justice Thurgood Marshall's dissent from the denial of certiorari in Raulerson v. Wainwright, 469 U.S. 966 (1984) also indicates that the question of self-representation should be decided early. The defendant in Raulerson sent the trial judge a letter unequivocally demanding to represent himself. Id. at 967. The trial judge "provided a copy of the letter to counsel and did nothing more." Id. Justice Marshall wrote that "once a defendant affirmatively states his desire to proceed *pro se*, a court should cease other business and make the required inquiry." Id. at 970. Justice Marshall continued:

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

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

Id. at 970 (emphasis in original).

The Court's decision in appellant's case creates an unnecessary and onerous procedural bar for a criminal defendant. A defendant who, as is the clear preference of the courts, decides early that he wants to represent himself should not then be forced, on the eve of trial, to proceed *pro se* when that right is denied. Unlike many defendants who use the request to proceed *pro se* as a delay tactic, appellant here made a bona fide attempt to represent himself early so that he could prepare his defense as he sought fit. The Court recognized that Judge Verdin's ruling improperly denied appellant that right.

Here, Judge Barber made it clear that appellant's case would proceed to trial, despite the fact that appellant assumed he would be represented by counsel. The Court's ruling punishes appellant for litigating his representation issue early. Giving a defendant the "choice" to proceed himself without being prepared or with counsel after his Sixth Amendment right was denied was no choice at all. This Court should grant rehearing and reverse appellant's conviction.

Respectfully Submitted,

DAVID ALEXANDER
Appellate Defender

This 31st day of October, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Vincent Missouri, #197996, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of October, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 31st day of October, 2017.

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