

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to the Court of Appeals

S.C. SUPREME COURT

Honorable James R. Barber, Circuit Court Judge

—————
Opinion No. 2017-UP-383 (Filed October 18, 2017)

THE STATE,

RESPONDENT,

V.

VINCENT MISSOURI,

PETITIONER

APPELLATE CASE NO. 2018-000057

—————
APPENDIX FROM THE COURT OF APPEALS

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ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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THE STATE,

RESPONDENT,

V.

VINCENT MISSOURI,

Petitioner

APPELLATE CASE NO. *2018-000057*

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The South Carolina Court of Appeals

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October 18, 2017

Mr. Vann Henry Gunter, Jr., Esquire
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Re: The State v. Vincent Missouri
Appellate Case No. 2014-001176

RECEIVED

OCT 18 2017

APPELLATE DEFENSE

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Handwritten signature of Jenny A. Kitchings in cursive.

CLERK

cc: Vincent Missouri, #197996
Alan McCrory Wilson, Esquire
The Honorable James R. Barber, III

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

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Vincent Missouri, Appellant.

Appellate Case No. 2014-001176

Appeal From Pickens County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2017-UP-383
Submitted October 5, 2017 – Filed October 18, 2017

AFFIRMED

Appellate Defender David Alexander, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Vann Henry Gunter, Jr., both of
Columbia, for Respondent.

PER CURIAM: Vincent Missouri appeals his convictions of entering a bank with intent to steal, strong armed robbery, and failure to stop for a blue light. Missouri argues he was denied his Sixth Amendment right to proceed pro se. We affirm.

We find Missouri was initially denied the right to represent himself at a hearing five months prior to trial; however, Missouri abandoned or waived the right via his subsequent conduct on the day his trial began.

"A South Carolina 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); see U.S. Const. amend. VI; S.C. Const. art. I, § 14. If a defendant makes the request prior to trial, the court must conduct an inquiry as mandated by *Faretta v. California*, 422 U.S. 806 (1975). *Barnes*, 407 S.C. at 35, 753 S.E.2d at 550. Only a clearly and unequivocally expressed request for self-representation will require the court to engage in the *Faretta* inquiry. *United States v. Lorick*, 753 F.2d 1295, 1298 (4th Cir. 1985); *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). The requirement that the request "be clear and unequivocal . . . prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000). The court is placed in a difficult position when a defendant vacillates on the issue—being required to "'traverse . . . a thin line' between improperly allowing the defendant to proceed pro se, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation." *Id.* (quoting *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc)). "In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." *Id.*; see *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985) ("Of the [rights to counsel and self-representation], the right to be represented by counsel is preeminent.").

"Even if [a] defendant requests to represent himself, however, the right may be waived through [the] defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982); see *Gillis*, 773 F.2d at 559 (noting the right to self-representation can be waived "by subsequent conduct giving the appearance of uncertainty"). The "constitutional primacy" given the right to counsel over the right to self-representation is equally applicable to the waiver of the right after assertion. See *Brown*, 665 F.2d at 611 ("Since the right of self-representation is waived more easily than the right to counsel at the outset, before assertion, it is reasonable to conclude it is more easily waived at a later point, after assertion."); *Gillis*, 773 F.2d

at 559 (indicating the right to self-representation is more easily waived than the right to counsel); *cf. Brewer v. Williams*, 430 U.S. 387, 404 (1977) (stating courts must indulge every reasonable presumption against waiver of *counsel*).

Here, five months prior to trial, the circuit court heard Missouri's motion to relieve counsel. Missouri clearly requested new counsel or, in the alternative, to proceed pro se. Rather than engaging in the *Faretta* inquiry, the court merely stated, "Pro se is not in the realm of possibility right now." We find this was a denial of Missouri's right to self-representation.

However, we find Missouri's subsequent conduct indicated he was abandoning his request or amounted to a waiver of his right to self-representation. During pretrial motions, the court gave Missouri the option to move for self-representation if Missouri was still interested in doing so—the court acknowledged it would have to ask Missouri "certain questions" if Missouri wanted to represent himself. Rather than making the motion—to indicate he was still interested—Missouri questioned the court's decision. Additionally, Missouri requested to go back over the pretrial motions of his attorney and make additional motions *if* he were allowed to represent himself. The court indicated that it would not change its decision regarding the previous motions, and Missouri never moved for self-representation. The court repeatedly ensured Missouri he only need to move for self-representation in order to invoke the right and Missouri chose to equivocate rather than commit to his own representation. Therefore, we find Missouri abandoned his previous request for self-representation. At the very least, Missouri's conduct before the court created an ambiguous situation giving the appearance of uncertainty, and considering the "constitutional primacy" given to the right to counsel, the circuit court did not err in retaining Missouri's counsel.

AFFIRMED.¹

SHORT, KONDUROS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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

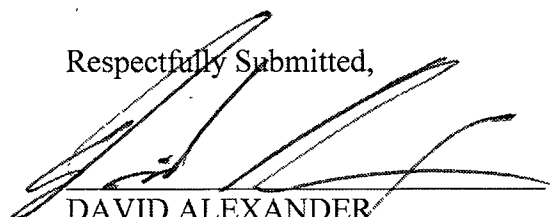
unequivocally asserted undermines that right by forcing the accused to proceed with counsel in whom he has no confidence and whom he may distrust.

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.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

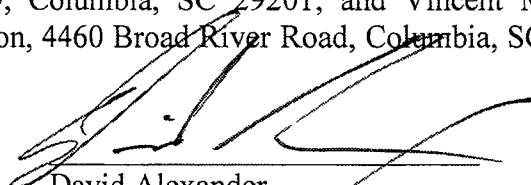
V.

VINCENT MISSOURI,

APPELLANT

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

The South Carolina Court of Appeals

The State, Respondent,

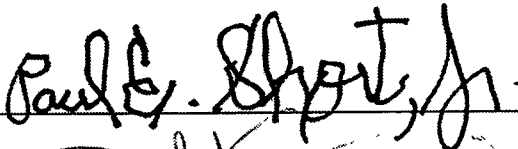
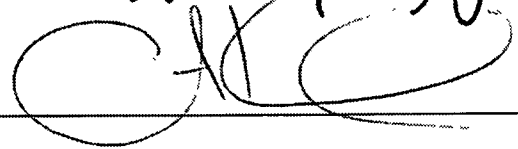

v.

Vincent Missouri, Appellant.

Appellate Case No. 2014-001176

ORDER

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

	J.
	J.
	J.

Columbia, South Carolina

cc:
Vincent Missouri, #197996
Alan McCrory Wilson, Esquire
Vann Henry Gunter, Jr., Esquire
David Alexander, Esquire

FILED

December 14, 2017

RECEIVED

DEC 14 2017

APPELLATE DEFENSE