STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Orangeburg County
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27768

THE STATE,

Respondent,

v.

LAMONT ANTONIO SAMUEL,

Petitioner.

Appellate Case No. 2015-002401

PETITION FOR REHEARING

On February 28, 2018, this Court filed a published opinion in which a majority of the Court reversed a decision of the Court of Appeals that had affirmed Petitioner Lamont Antonio Samuel's murder conviction and sentence. *State v. Samuel*, Op. No. 27768 (S.C. S.Ct., Feb. 28, 201) (Shear. Adv. Sheets vol. 9), reversing, *State v. Samuel*, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015). Contrary to the Court's recent unanimous decision in *City of Columbia v. Assa'ad-Faltas*, 420 S.C. 28, 45–46, 800 S.E.2d 782, 790–91 (*per curiam* 2017), *reh'g denied* (Aug. 17, 2017), the Court here concluded that the trial judge's denial of Petitioner's motion to represent himself at trial was error under *Faretta v. California*, 422 U.S. 806 (1975), because the trial judge erroneously considered upon the testimony of attorney Carl Grant, Esquire, even

though Petitioner's responses to the trial judge's questioning indicated that Mr. Grant may have undertaken representation of him, in spite of Petitioner's representations that Mr. Grant did not represent him. *See Samuel*, at 47-49.

Although aware that Petitioner had not honestly responded to the trial judge's questioning, this Court further concluded that Petitioner had "made a knowing, intelligent, and voluntary request to proceed *pro se* as required by *Faretta*" because "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation." *Samuel*, at 50 (citing *State v. Barnes*, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015). On the other hand, the dissent rejected the Court's narrow "categorical rule" because it "effectively precludes consideration of the trial court's exercise of discretion and places trial judge's at the mercy of those who seek to exploit the right to self-representation for manipulative or disruptive ends." *Id.* at 52 (Kittredge, J., dissenting). The dissent found that the trial judge had not abused her discretion because it construed the inquiry permitted under *Faretta* "more broadly to allow for a trial court's exercise of discretion where, as here, the knowingly, intelligently, and voluntarily asserted right of self-representation is accompanied by a circumstance that undermines the integrity of the proceedings and the orderly administration of justice." *Id.*

Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing[1] because the State respectfully believes this Court misapprehended and overlooked the following facts and points of law:

1. In footnote 4 of its Opinion, the Court stated that "we do not strip trial judges of their authority and discretion to maintain the integrity of the proceedings before them." *Samuel*, at 49

[1] Alternatively, the State would ask the Court to grant its Motion for Limited Remand, which is also filed today, so that a hearing may be held to determine whether Petitioner still wishes to proceed *pro se*, or whether he wishes to abandon his previously made request for self-representation and thereby potentially obviate the necessity of a retrial.

n. 4. However, by concluding that the trial judge was obligated to accept at face value Petitioner's responses even though they are now known to all as false, and by finding that the trial judge erred by vetting those responses, the Court may have overlooked that it has implicitly granted criminal defendants a right to lie to trial judges during a *Faretta* hearing, without fear of repercussion. The Court's decision thereby allows a defendant to abuse the integrity and dignity of the judicial system with impunity. Also, because these responses occurred during a *Faretta* hearing, the Court has added a constitutional dimention to this "right" to lie that has not heretofore existed and which is inconsistent with the foundation of our judicial system. *See Samuel*, at 52 (Kittredge, J., dissenting) ("More broadly, my concern is that the Court's categorical rule—that an absolute right to proceed *pro se* automatically follows formulaic responses to Faretta inquiry—will invite mischief in the trial courts of this state while tying the hands of our trial court judges. Granted, in the vast majority of cases, requests to proceed *pro se* will be regularly and properly granted, but trial court discretion must always be present to address the particular circumstances of the case, such as where this right is asserted to serve manipulative, disruptive, or dilatory ends. Trial court discretion ensures the integrity of our justice system"). *See also id.* at 60-62 Kittredge, J., dissenting). This is particularly true since these known lies call into question the veracity of each response that Petitioner gave the trial judge in the hearing.

2. First, the Court may have overlooked that in its *per curiam* Opinion in *City of Columbia v. Assa'ad-Faltas*, *supra*, which was decided after the Court heard oral arguments in this case and less than a year before it issued the Opinion in this case, the Court favorably and unanimously quoted the Court of Appeals' decision in *Samuel*, as well as the more case specific view of a proper *Faretta* inquiry advanced by the dissent and in the Brief of Respondent. Specifically, the

Court in *Assa'ad-Faltas* quoted the following that is inconsistent with the majority Opinion in this case:

> "A defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments." *State v. Samuel*, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015) (quoting *Faretta*, 422 U.S. at 807, 95 S.Ct. 2525). "However, the right of self-representation is not absolute." *Id.* (quoting *United States v. Frazier–El,* 204 F.3d 553, 559 (4th Cir. 2000)). "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525 (1975).
>
> Indeed, "[t]he right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." *Samuel*, 414 S.C. at 212, 777 S.E.2d at 401 (citation omitted). "A trial judge may refuse to permit a criminal defendant to represent himself when he is 'not able and willing to abide by rules of procedure and courtroom protocol.' " *Id.* (quoting *United States v. Lopez–Osuna,* 242 F.3d 1191, 1200 (9th Cir. 2001)). "A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel." *Id.* (citing *Frazier–El,* 204 F.3d at 560).
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> In evaluating Appellant's claim that the municipal court infringed upon her constitutional right of self-representation, we must first determine whether Appellant effectively invoked this right during proceedings before the municipal court. To be effective, "[a]n assertion of the right of self-representation therefore must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." *Frazier-El*, 204 F.3d at 558 (internal citations omitted). "The particular requirement that a request for self-representation be clear and unequivocal is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of self-representation." *Id.* (internal quotation marks and citations omitted).
>
> "At bottom, the *Faretta* right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* (internal quotation marks and citation omitted). Where the circumstances surrounding an accused's purported assertion of the right to proceed without counsel suggest "a manipulation of the system [rather] than an unequivocal desire to invoke [the] right of self-representation" and "dispense with the benefits of counsel," a court is justified in insisting that the accused proceed with the assistance of counsel. *Id.* at 560 (refusing to let a defendant proceed pro se as part of a manipulative strategy to advance frivolous arguments counsel had previously refused to make).

Assa'ad-Faltas, 420 S.C. at 45-46, 800 S.E.2d at 790-91.

The Court in *Assa'ad-Faltas* found that the defendant had not "unequivocally raised or asserted" her right to self-representation in the municipal court. *Id.* at 46-47, 800 S.E.2d at 791. However, the Court added that:

> Additionally, even had the issue been unequivocally and timely raised to the municipal court, we find the municipal court would have been justified in insisting that Appellant proceed with the assistance of counsel. Indeed, Appellant's long history of abusing the judicial process, coupled with her conduct in this case in abusing and harassing courts and court officers; disrupting, delaying, and prolonging proceedings; and persistently disregarding and circumventing the orders of this Court aimed at curbing her improper conduct all underscore the Court's interest in preventing Appellant's further manipulation of the system and "in ensuring the integrity and efficiency of the trial." *Frazier-El*, 204 F.3d at 558; *see State v. Hester*, 324 S.W.3d 1, 33 (Tenn. 2010) ("Disingenuous invocations of the right of self-representation that are designed to manipulate the judicial process constitute an improper tactic by a defendant and are not entitled to succeed.") (citing *United States v. Welty,* 674 F.2d 185, 187 (3d Cir.1982)); *id.* ("A court may deny a manipulative request for self-representation, distinguishing between a genuine desire to invoke a right of self-representation and a manipulative effort to frustrate the judicial process." (citations omitted)); *Tanksley v. State*, 113 Nev. 997, 946 P.2d 148, 150 (1997) (observing "[a] defendant's right to self-representation does not allow him to engage in uncontrollable and disruptive behavior in the courtroom," and finding "**the defendant's pretrial activity is relevant if it affords a strong indication that the defendant [ ] will disrupt the proceedings in the courtroom**" (internal quotation marks and citations omitted)).

Assa'ad-Faltas, 420 S.C. at 47-48, 800 S.E.2d at 791-92 (emphasis added).

Assa'ad-Faltas is clearly relevant, if not dispositive, of the issue before this Court. And, that decision provides trial judges with the necessary authority to preserve the "integrity and efficiency" of the judicial proceeding when faced with an accused who would manipulate the proceedings for his or her own improper purposes(s). *Assa'ad-Faltas* likewise makes it clear that the trial judge does not have to wait until the accused engages in manipulative acts during the trial. Rather, it unerringly states that the trial judge has the authority to deny the request for self-representation if " the defendant's pretrial activity ... affords a strong indication that the defendant [ ] will disrupt the proceedings in the courtroom." *Id.* at 48, 800 S.E.2d at 792. That is

precisely what occurred here: Petitioner's lies indicated he intended to manipulate the subsequent trial.

Yet, the Court in this case does not mention *Assa'ad-Faltas* in its Opinion. Separate and apart from the question of whether the doctrine of *stare decisis* compels affirmance of the Court of Appeals' decision - and, hence, the trial judge's ruling - the Court may have overlooked that its decision in *Samuel* cannot be reconciled with the unanimous decision in *Assa'ad-Faltas*. More importantly, the Court has now given trial judges two separate and distinct paths when conducting a *Faretta* hearing.

Does a trial judge follow the Court's most recent pronouncement in this case, even though it is a 3-2 decision with a vigorous dissent? Or, does she (or he) follow the unanimous, *per curiam* decision of *Assa'ad-Faltas*, which provides the trial judge with the correct and necessary authority to deal with a potentially manipulative defendant in a manner that preserves the integrity of the judicial system?[2] Thus, the Court may have overlooked that its decision needlessly makes a trial judge's already difficult task of navigating the "minefield" known as a *Faretta* hearing all the more difficult and confusing. *See Samuel*, at 64 (Kittredge, J., dissenting); *Martinez*, 528 U.S. at 164 (Breyer, J., concurring) ("I note that judges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*'s] holding"). *See also Marshall v. Rodgers*, 569 U.S. 58, 62, 63 (2013) (recognizing that "there can be some tension" between the Sixth Amendment right to counsel and a defendant's Sixth Amendment right to self-representation); *United States v. Reddeck*, 22 F.3d 1504, 1510 (10th Cir. 1994) ("We

[2] In light of the fact Justice Few was recused in this matter because he was on the panel of the Court of Appeals that affirmed Petitioner's conviction, another obvious question is will a different result be had in a future case involving similar facts. It is only fair to trial judges that this Court provide more definitive guidance on the parameters of an appropriate inquiry under *Faretta* than the Court has in this case.

have repeatedly shown concern with the use of the right to waive counsel as a 'cat and mouse' game with the courts"); *Hsu v. United States*, 392 A.2d 972, 983 (D.C. 1978) ("If a defendant asks for self-representation, the court risks reversal for denying the request or granting it"); *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc).[3] *Cf. Faretta*, 422 U.S. at 837 (Burger, C.J., dissenting) ("the Court's holding ... can only add to the problems of an already malfunctioning criminal justice system"); *id.* at 846 (Blackmun, J., dissenting) ("I fear that the right to self-representation constitutionalized today frequently will cause procedural confusion without advancing any significant strategic interest of the defendant").

3. Further, the Court may have overlooked that the result it reached in this case is contrary to *Faretta*, its progeny, and other well-settled United States Supreme Court precedent. An accused's right to self-representation at trial is not absolute. *Faretta*, 422 U.S. at 835. Rather, *Faretta* clearly held that "an accused has a Sixth Amendment right to conduct his own defense, provided ... that he knowingly and intelligently forgoes his right to counsel and that **he is able and willing to abide by rules of procedure and courtroom protocol.**" *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (emphasis added). *See also Faretta*, 422 U.S. at 834 n. 46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law"); *Indiana v. Edwards*, 554 U.S. 164, 185 (2008) (Scalia, J., dissenting). And, the Supreme Court has admonished that

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[3] In *Fields*, the Fourth Circuit Court of Appeals explained that:

> A trial court evaluating a defendant's request to represent himself must '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. A skillful defendant could manipulate this dilemma to create reversible error.

Id. (Citations omitted).

"[e]ven at the trial level ... the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000).

Also, both before and after its decision in *Faretta*, the United States Supreme Court has consistently held that he has absolutely "no right whatever-constitutional or otherwise" to testify falsely or to "use false evidence." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). The Supreme Court has likewise made clear that if an accused does testify falsely, the trial court, the prosecution and even trial counsel have recourse to deal with that perjury. *E.g.*, *Id.* at 171 (counsel's threat to inform court and to seek to withdraw if client-defendant lied on witness stand did not violate Sixth Amendment right to effective assistance of counsel: "Whether [counsel's] conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a 'threat' to withdraw from representation and disclose the illegal scheme, [counsel's] representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*"); *id.* at 173 ("*Harris* and other cases make it crystal clear that **there is no right whatever-constitutional or otherwise-for a defendant to use false evidence**") (emphasis added); *United States v. Havens*, 446 U.S. 620, (1980) (a prosecutor may use illegally seized evidence to impeach perjurious testimony by defendant on cross-examination); *id.* at 626–27 ("We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences. .... The defendant's obligation to testify truthfully is fully binding on him when he is cross-examined. His privilege against self-incrimination does not shield him from proper questioning"); *Harris v. New York*, 401 U.S. 222, 225 (1971) (in the course of holding that statements of defendant taken in violation of his *Miranda* rights were admissible to impeach

defendant's testimony on direct examination, the Court explained, "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury"); *Grayson v. United States*, 438 U.S. 41, 54 (1978) ("[If] the sentencing judge's consideration of defendant's untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury"); *id.* at 54 ("The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath-unless we are to say that the oath is mere ritual without meaning"). *See also Samuel*, at 62 (Kittredge, J., dissenting) (a criminal defendant has no right, constitutional or otherwise, to be untruthful with the court). Yet, the result of the Court's decision in the present case is to grant a Sixth Amendment right to criminal defendants to testify falsely when questioned by the trial court, which is contrary to the above-cited cases.

4. Indeed, the Court may have overlooked that there is no more fundamental rule of "courtroom protocol," *see McKaskle*, 465 U.S. at 173, than the obligation of the parties and their attorneys to be truthful and candid with the trial court because

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. **Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent**.

United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993) (emphasis added). *See also Id.* at 458 ("The general duty of candor and truth thus takes its shape from the larger object of

preserving the integrity of the judicial system"); *Grayson*, 438 U.S. at 54; *Samuel*, at 62-63, Kittredge, J., dissenting) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944); Stephen J. Safranek, *The Legal Obligation of Clients, Lawyers, and Judges to Tell the Truth*, 34 Idaho L. Rev. 345, 366 (1998) ("The importance of truth in our legal system is recognized in the rules that regulate the actions of clients, lawyers, and judges. Although justice is the end of the legal system, a failure to act in accordance with the truth not only constitutes a breach of the rules that guide the conduct of the participants in the legal process, but also threatens the trust that each of the participants in the system must have in the other participants"); *id.* at 357-58 ("The legal system is entirely dependent upon the client's and witness's willingness to be a truth teller. If such expectations do not exist, then the system breaks down at a critical stage"). *Cf.* Rule 11(a), SCRCP.

This Court found that "the circuit judge's reliance on Rule 3.3 RPC and [*Gardner v. State*, 351 S.C. 407, 411, 570 S.E.2d 184, 186-87 (2002)] is misplaced." *Samuel*, at 50. However, the State submits the dissent correctly states that:

> I am persuaded by the Fourth Circuit's holding that a defendant asserting the right of self-representation assumes the responsibility of acting in a manner befitting an officer of the court. *See United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989). Even assuming the Court is nevertheless correct in refusing to apply the rules of professional conduct to Petitioner, the duty of candor to the tribunal set forth in Rule 3.3 "takes its shape from the larger object of preserving the integrity of the judicial system," and does not "displace[ ] the broader general duty of candor and good faith required to protect the integrity of the entire judicial process." *Shaffer Equip. Co.*, 11 F.3d at 458.

See Samuel, at 62 (Kittredge, J., dissenting).

Therefore, regardless of whether or not Petitioner was bound by the ethical requirements of Rule 3.3, Rule 407, SCACR, he was unquestionably obligated to comply with the requirement of being honest and candid with the trial judge in order to appear *pro se*. *Accord McKaskle*, 465

U.S. at 173; *see also United States v. Fennell*, 553 F. Supp. 2d 1303, 1306 (N.D. Okla. 2008) ("It is the absolute duty of the defendant to be honest and truthful with the Court during the plea hearing"). However, he repeatedly and deliberately violated this requirement, even after the trial judge had denied his request for self-representation. See ***R. p. 75, line 22 – p. 76, line 2.***

Because he was unwilling or unable to act as an officer of the court, the trial judge properly denied his request for self-representation. *Id. See also Faretta*, 422 U.S. at 834 n. 46; *United States v. West, et al.*, 877 F.2d 281, 287 (4th Cir. 1989) ("By asserting his right of self-representation, Mills assumed the responsibility of acting in a manner befitting an officer of the court. By flouting the responsibility, he forfeited the right"); *Martinez*, 528 U.S. at 162; *McKaskle*, 465 U.S. at 173; *Smith v State*, 267 Ind. 167, 368 NE2d 1154(1977) (a defendant acting as his own counsel, of necessity, must be held to the established rules of procedure, the same as trained legal counsel); *State v Sheets*, 564 SW2d 623 (Mo App. 1978) (since it was conceivable that the retrial of the case would result in further appellate review, it seemed proper to caution the defendant that although he has the constitutional right to represent himself, he is held to the same standard of compliance with trial and appellate court rules and procedures as are those who are admitted to the practice of law); *People v. Tatum*, 329 Ill. Dec. 497, 906 N.E.2d 695 (App. Ct. 1st Dist. 2009) (A *pro se* defendant is held to the same standards as an attorney); .

5. After hearing Mr. Grant's testimony, the trial judge denied Petitioner's request for self-representation because she found that Mr. Grant's sworn testimony revealed that Petitioner had not been candid in response to her questioning of him, she could not trust his responses to her, and she was afraid that he was attempting to manipulate the proceedings. ***R. p. 73, line 20 – p. 75, line 19***. *Cf. Assa'ad-Faltas*, 420 S.C. at 45-46, 800 S.E.2d at 790-91. Before the trial judge ruled, Petitioner "thanked" Mr. Grant in a manner that insinuated Mr. Grant had been untruthful

with the trial judge about assisting Petitioner and he dodged the trial judge's questions as to what he had meant. Also, after Grant left the courtroom, Petitioner stated that Grant had told Petitioner he would lie if questioned under oath. ***R. p. 68, lines 12-24; p. 69, line 20 – p. 70, line 19***. Even after the trial judge had denied his motion, Petitioner again contended that Mr. Grant had been untruthful about assisting Petitioner because "he don't want his reputation ruined." (Sic). ***R. p. 75, line 22 – p. 76, line 2***.

In finding that "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation," *Samuel*, at 50 (citing *State v. Barnes*, 413 S.C. at 3 n.1, 774 S.E.2d at 455 n.1, *see also Samuel*, at 49 n. 4, the Court may have overlooked that its decision is inconsistent with *Martinez*, *McKaskle*, and *Faretta*, as well as its own decision in *Assa'ad-Faltas*. Furthermore, the Court may have overlooked that "[i]t would be a nonsensical and needless waste of scarce judicial resources to [grant a request for self-representation and] proceed to trial when, as here, [the] defendant has shown by his conduct during pretrial proceedings that he is unable to conform to procedural rules and protocol." *People v. Watts*, 173 Cal.App.4th 621, 630, 92 Cal.Rptr.3d 806 (2009); *see also United States v. Keiser*, 319 Fed. Appx.457, 2008 WL 4280003 at *1 (9th Cir. Sept.17, 2008) ("the right to self-representation does not overcome the court's right to preserve courtroom order"). And, the Court may have overlooked that " '[a] trial court *must* be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel.' " *United States v. Bush*, 404 F.3d 263, 271 (4th Cir. 2005) (emphasis added) (quoting *United States v. Frazier–El*, 204 F.3d 553, 560 (4th Cir. 2000). *See also Assa'ad-Faltas*, 420 S.C. at 45, 800 S.E.2d at 791; *Blankenship v. State*, 673 S.W.2d 578, 589 (Tex. Crim. App.

1984) ("...constitutional rights must be asserted and exercised in a manner not inconsistent with the trial judge's control over the orderly administration of justice in his court").[4]

6. The majority Opinion concluded that "the only inquiry the circuit judge may make is that required by *Faretta*," *Samuel*, at 47, and that the trial judge erroneously relied upon the testimony of attorney Carl Grant, Esquire, in denying Petitioner's request to appear *pro se*, *Samuel*, at 49. The Court found that the trial judge had the authority to have Grant come to court and testify, but stated that "her questioning of Grant should have been limited to discerning whether Samuel's request was knowingly and voluntarily made." *Id.* at 49.

In making these conclusions, the Court may have overlooked that the United States Supreme Court has stated, "We have not ... prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election ... will depend on a **range of case-specific factors**, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (emphasis added). The Court may have also overlooked that "the trial judge is not simply an automaton who insures that technical rules are adhered to. [Trial judges] are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." *Faretta*, 422 U.S. at 839 (Burger, C.J., dissenting). *See also Samuel*, at 66 (Kittredge, J., dissenting) ("the *Faretta* framework is more than formulaic responses to questioning").

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[4] The record of the subsequent *Jackson v. Denno* hearing demonstrates that Petitioner was repeatedly contentious with his attorneys and both contentious and argumentative with the Assistant Solicitor. *See* ***R. pp. 90-146***. This continued at trial and the trial judge had to admonish him several times to be either responsive to a question asked of him or not to be argumentative. *See* ***R. pp. 150-236***. *See also Samuel*, at 60 (Kittredge, J., dissenting). Thus, the trial judge's concerns that he was trying to manipulate the proceedings proved to be correct.

The Court states, "We are unaware of any cases in which a circuit judge has relied on testimony from a third party witness, such as Grant, to determine whether a defendant has effectively invoked the right to proceed *pro se*." *Samuel*, at 49.[5] Yet, "[j]ust as defendants have certain rights in court, so do courts have the power to preserve their dignity and their basic ability to function." *People v. Howze*, 85 Cal.App.4th 1380, 1398-99 (2001). Here, the record unequivocally reflects that Mr. Grant was not merely "a third party witness."

To the contrary, in the course of responding to the trial judge's inquiry of whether he had ever studied the law, Petitioner stated that "I studied a little bit of law during the -- a law book I used during the course of -- to look at the procedure to stand trial, self-representation. And I look at all the rules and regulations [that are] supposed to be appropriate while I'm standing trial." He explained that the book he was using was entitled *Criminal Law Handbook*; that it had been mailed to him; and that Mr. Grant had told his mother about it. ***R. p. 34, line 20 – p. 36, line 3.***

Moments later, Petitioner again mentioned Mr. Grant. When asked if he understood the South Carolina Rules of Evidence, he indicated that he did from reading the book he mentioned earlier that his mother had sent him. He further claimed that "basically ... Mr. Grant, he tried to coach me on it a little bit" on the rules of evidence. ***R. p. 37, lines 85-16.*** He thereafter made two more references to his mother having paid Mr. Grant "a good bit amount of money" to "coach" or "educate" him and he state that Grant would assist him, but that Mr. Grant did not

[5] The State respectfully submits that the appropriate inquiry is not whether there are any cases holding that a trial judge "has relied on testimony from a third party witness ... to determine whether a defendant has effectively invoked the right to proceed *pro se*." Rather, the proper question is are there any cases from this Court or the United States Supreme Court that have held it is improper for a trial judge to follow this procedure? Because the answer to this query is "No," the trial judge in this case did not abuse her discretion by following this procedure. Or, as stated by the dissent, "... trial court discretion must always be present to address the particular circumstances of the case, such as where this right is asserted to serve manipulative, disruptive, or dilatory ends. Trial court discretion ensures the integrity of our justice system." *Samuel*, at 52 (Kittredge, J., dissenting).

represent him because Petitioner was related to a paralegal in Mr. Grant's office. ***R. p. 44, line 21 – p. 45, line 12; p. 53, line 24 – p. 54, line 3***.

At that point, the trial judge said she was going to tell the State that she was inclined to grant Petitioner's motion, but she wanted to speak with Mr. Grant, so that she could more fully understand Mr. Grant's relationship to the case and what discussions he had with Petitioner about the case. ***R. p. 54, line 14 – p. 55, line 22***. She subsequently explained that she had Mr. Grant attend the hearing and testify "out of concern that whether Carl Grant had undertaken representation of you and whether or not he would be acting as stand-by counsel in some form or fashion if you were to be self-representing yourself." ***R. p. 73, lines 6-10***.

Her concerns were justified because Petitioner's references to Mr. Grant's involvement in the case, if accepted as true as the trial judge apparently did, suggested that Mr. Grant may have been representing Petitioner or, at least, may have had some role in assisting him during the trial. "A person attains the status of 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice." *Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct.App.1984). "[T]he existence of a retainer is not in and of itself dispositive of whether an attorney is representing a client. *See In re Broome,* 356 S.C. 302, 315, 589 S.E.2d 188, 195-96 (2003) ("[A] signed retainer agreement is not essential to create [an attorney-client] relationship."). Instead, a person can be deemed a client when he seeks legal advice and discusses those matters with a lawyer in confidence for the purpose of obtaining such advice. *Id.*" *In re Carter*, 400 S.C. 170, 176, 733 S.E.2d 897, 900 (2012).[6]

[6] In response to questioning by the Court at oral argument, the State began to cite this authority at approximately one minute and forty-two seconds into its oral argument. This is found at 10:40 into the video of the oral argument. However, the State was asked further questions by the Court before the citation was given.

Thus, the Court may have overlooked that rather than erroneous, the trial judge's decision to question Mr. Grant was proper, if not mandatory. *See Martinez*, 528 U.S. at 161 ("Although we found in *Faretta* that the right to defend oneself at trial is 'fundamental' in nature, ... it is clear that it is representation by counsel that is the standard, not the exception") (citation added); *Patterson v. Illinois*, 487 U.S. 285, 307 (1988) (Stevens, J., dissenting) (noting the "strong presumption against" waiver of right to counsel). *See also United States v. Purnett*, 910 F.2d 51, 54 (2nd Cir. 1990) ("The right to self-representation and the assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin"); *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997) (explaining that "courts have assumed that the right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and thus that assertion of one constitutes a de facto waiver of the other. ... Of the two rights, however, the right to counsel is preeminent and hence, the default position").

If, in fact, Mr. Grant was representing Petitioner under *In re Carter*, then an effective waiver of the right to counsel required Mr. Grant's presence.[7] *See also Samuel*, at 65-66 (Kittredge J., dissenting). Even though it subsequently became clear that Mr. Grant had not undertaken representation, the trial judge's actions were more than reasonable and, as the dissent

[7] "Deprivation of the right to [one's] preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification." *Hagood v. Sommerville*, 362 S.C. 191, 197-98, 607 S.E.2d 707, 710 (2005). Additionally, the Sixth Amendment provides some protection to a criminal defendant's the right to an attorney of his or her choice. "Where this Sixth Amendment right is invoked, the court must balance the defendant's right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility." *State v. Sanders*, 341 S.C. 386, 390, 534 S.E.2d 696, 697-98 (2000).

correctly observed, this was "a quintessential example of an appropriate exercise of discretion, as she took a reasonable and measured step to protect a defendant's right of self-representation while also ensuring the integrity of the proceeding." *Samuel*, at 66 (Kittredge, J., dissenting).

Likewise, the trial judge's stated reason for having Mr. Grant answer questions concerning his involvement in this case was to establish that Petitioner's decision on whether or not to represent himself "was 'made with eyes open,' *Faretta*, 422 U.S. at 835[...], specifically with regard to what coaching or assistance, if any, Petitioner could expect Mr. Grant to provide him throughout the trial." *Samuel*, at 55 (Kittredge, J., dissenting)..

7. Also, this Court found that "whether Grant would be available to advise or coach Samuel throughout the trial relates to his competence to represent himself which, as discussed *supra*, is entirely irrelevant to the issue of whether he effectively invoked his right of self-representation." *Samuel*, at 49 (footnote omitted). However, this conclusion overlooks the trial judge's duty to determine whether Petitioner had retained Mr. Grant, whether Mr. Grant otherwise represented him or whether Grant had agreed to provide assistance to Petitioner. Her duty to inquire was necessitated by Petitioner's equivocation on what role, if any, Mr. Grant had in the case (*e.g.*, "' I know he's not representing me, but he is coaching me"), since the alleged assistance from Mr. Grant was inextricably tied to Petitioner's alleged desire to waive counsel. *See In re Carter*, 400 S.C. at 176, 733 S.E.2d at 900. Therefore, her decision was reasonable because Mr. Grant's testimony was clearly relevant on these issues.

The Court may have likewise overlooked that to the extent that Petitioner truly believed that he had received assistance and advice in the case from Mr. Grant even though this did not occur, then his waiver of the right to counsel was not knowing and intelligent under *Faretta*. As discussed, he persisted in asserting that Mr. Grant had assisted him even after the trial judge had

ruled, and he stated that Mr. Grant had told him that Grant would lie under oath if questioned about involvement. The Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Therefore, the Court may have overlooked that this case should be affirmed on the ground that Petitioner did not make a knowing and intelligent waiver of his right to counsel because he held a false belief that counsel had assisted him and would continue to do so, when there was no basis in reality for his belief.

8. The Court may have overlooked that it erroneously applied de novo review to the trial judge's finding that Petitioner's request for self-representation was "manipulative," since a finding that an accused's assertion of the right of self-representation is manipulative in nature and, thus, an abuse of the judicial process is a factual finding. *United States v. Mackovich*, 209 F.3d 1227, 1237-38 (10th Cir. 2000); *United States v. Egwaoje*, 335 F.3d 579, 586 (7th Cir. 2003) (same)); *Hamilton v. Groose*, 28 F.3d 859, 862 (8th Cir. 1994) (the question of whether a defendant invoked his right to self-representation in an unequivocal manner is a question of fact); *Howze*, 85 Cal.App.4th at 1397 (applying abuse its discretion standard to findings that defendant's *Faretta* motion "was manipulative and that defendant was obstreperous and created a risk of disrupting the proceedings"); *State v. Rasul*, 216 Ariz. 491, 495, 167 P.3d 1286, 1290 (Ct. App. 2007) ("We defer to the trial court's findings [that defendant was disruptive and manipulative] because the record supports them").

As correctly noted by the dissent, despite this Court's statement that "we review a circuit judge's findings of historical fact for clear error," *Samuel*, at 47, the Court thereafter ignored this deferential standard of review and engaged in its own fact-finding. Specifically, the Court found that "the only discrepancy between [Petitioner's and Grant's] recitations of the situation was Grant's willingness and availability to provide advice and guidance to Samuel prior to and

throughout the trial." *Id.* at 49. Also, the Court "discern[ed] no attempt by Samuel to disrupt or manipulate the process here." *Id.* at 51. Again, the trial judge's findings are supported by the record and are not clearly erroneous. Moreover, even if de novo review was the appropriate standard, the Court may have overlooked that its contrary findings are not supported by the record.

There was not a simple "discrepancy" or simply "disparate testimony" between Petitioner's claims of Mr. Grant's involvement in the case and Mr. Grant's testimony. Petitioner testified that Mr. Grant had told his mother of the *Criminal Law Handbook* that she sent him; that she had paid a significant amount of money to Mr. Grant; that Mr. Grant had "educated" and "coached him;" and that Mr. Grant would be available to assist him in the future. On the other hand, Mr. Grant's sworn testimony was that (1) he had not provided Petitioner with "any kind of copy of the rules of evidence or rules of criminal procedure or offered my assistance in any way;" (2) that he would have only gotten involved in the case if Petitioner had retained him; (3) that he had not been retained in this case; and (4) that he would be available to provide assistance to Petitioner, as stand-by counsel, if Petitioner did appear *pro se*. ***R. p. 65, line 20 – p. 68, line 9.***

Obviously, Petitioner's representations and Mr. Grant's sworn testimony squarely conflicted with one another, their representations could not both be true, and someone had testified falsely. Because the trial judge resolved the question of credibility against Petitioner, the veracity of his other responses during the hearing was undermined. This Court and the United States Supreme Court have made clear that it is the province of the trial judge, and not an appellate court, to resolve issues of witness credibility. *E.g.*, *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S.Ct. 831, 850 (2015) ("We have recognized, however, that trial courts have a special competence in judging witness credibility and weighing the evidence"); *Miller v. Fenton*, 474

U.S. 104, 114 (1985) ("when an "issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court"); *Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) (" 'The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire' ") (citation omitted); *State v. Alston*, No. Op. No. 27774, 2018 WL 1177699, *10 (S.C. Mar. 7, 2018) ("Because Alston's statements conflicted with Deputy Gilbert's testimony, it was within the province of the trial judge, as the trier of fact, to determine this issue of credibility"); *State v. Blackwell*, 420 S.C. 127, 143 n. 12, 801 S.E.2d 713, 722 n. 12 (2017) ("The dissent agrees there is evidence to support the trial court's conclusion; however, it finds the decision is against the preponderance of the evidence. In reaching this conclusion, the dissent disregards our deferential standard of review and effectively acts as a trial court rather than an appellate court"), *cert. denied,* No. 17-6882, 2018 WL 942570 (U.S.S.C. Feb. 20, 2018).

9. The Court also criticized the trial judge because she repeatedly stressed the dangers and disadvantages of self-representation despite Petitioner's assurances that he understood her explanation. *Samuel*, at 45, 48. However, the State respectfully submits that the Court may have overlooked that although *Faretta* held "that the right to defend oneself at trial is 'fundamental' in nature, ... it is clear that it is representation by counsel that is the standard, not the exception." *Martinez*, 528 U.S. at 161 (citation omitted). *See also Purnett*, 910 F.2d at 55 ("Because the assistance of counsel in a criminal proceeding is constitutionally guaranteed, a district court must inquire into defendant's full understanding of the disadvantages of proceeding *pro se,* before it finds a waiver of counsel"); *Singleton*, 107 F.3d at 1096 (explaining that "courts have assumed

that the right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and thus that assertion of one constitutes a de facto waiver of the other. ... "Of the two rights, however, the right to counsel is preeminent and hence, the default position"); *Assa'ad Faltas*, 420 S.C. at 46-47, 800 S.E.2d at 791.

More importantly, the Supreme Court stated in *Patterson* that "recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." See 487 U.S. at 298. *See also id.* at 299-300 ("we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during postindictment questioning—not because postindictment questioning is 'less important' than a trial (the analysis that petitioner's 'hierarchical' approach would suggest)—but because the full 'dangers and disadvantages of self-representation,' *Faretta*, *supra*, 422 U.S. at 835, ... during questioning are less substantial and more obvious to an accused than they are at trial"); . Additionally, it is clear that "the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary...." *People v. Brooks*, 293 Mich.App 525, 538; 809 NW2d 644 (2011), *vacated in part on other grounds*, 490 Mich. 993 (2012) (citation and quotation marks omitted). Therefore, the Court may have overlooked that the trial judge's inquiry was proper in the context of a *Faretta* hearing.

10. Finally, the majority of this Court also focused upon the trial judge's repeated comments that she found Petitioner "intelligent," "bright," and articulate." *See Samuel*, at 45, 48. The State respectfully submits that - rather than providing a basis on which the trial judge's ruling should be reversed – her finding that he was intelligent bolsters her finding of manipulation, *see id.* at 64

(Kittredge, J., dissenting), since it supports the conclusion that his responses concerning Mr. Grant's involvement were deliberate lies (told with the intent to deceive the trial judge, so that he could gain control of the proceedings), as opposed to the misunderstandings of a man with a limited intellect.

Moreover, the trial judge's finding that he was not candid with respect to Mr. Grant's involvement undermines any confidence in the truthfulness of Petitioner's other responses to the trial judge that might otherwise exist. "In any event, Petitioner's intelligence in no manner demonstrates an abuse of discretion in the finding of manipulation." *Id.* *See also Blankenship*, 673 S.W.2d at 591 n.13 ("It is not the accused's ignorance of the law which is critical, but rather his apparent willingness to be untruthful with the trial court to effect his own designs, which [ ] evince[s] an intent to abuse the judicial process").

WHEREFORE, based on the foregoing argument and the arguments raised in the Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Petitioner's conviction and sentence.

Respectfully submitted,

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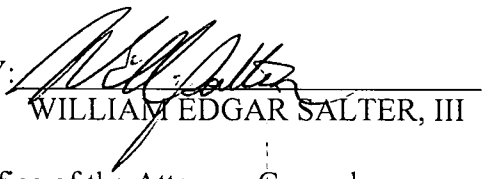
BY: 
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March 15, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Orangeburg County
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27768

THE STATE,

Respondent,

v.

LAMONT ANTONIO SAMUEL,

Petitioner.

Appellate Case No. 2015-002401

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Petition for Rehearing on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Pachak, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 15th day of March, 2018.

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