

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

Opinion No. 27768

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MAR 15 2018

S.C. SUPREME COURT

**THE STATE,**

**Respondent,**

v.

**LAMONT ANTONIO SAMUEL,**

**Petitioner.**

Appellate Case No. 2015-002401

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MOTION FOR LIMITED REMAND

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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). The Court held that the trial judge's refusal to allow Petitioner 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. *See Samuel*, at 47-49.

Respondent, the State, has filed a Petition for Rehearing, pursuant to Rule 221(a), SCACR. Should the Court be disinclined to grant rehearing, the State would ask the Court, in the alternative, to Order a limited remand so that a re-hearing may be held on Petitioner's desire to proceed *pro se*, upon reversal of his conviction and sentence. If he wishes to withdraw his request for self-representation at the remand hearing, after an inquiry consistent with the Court's decision in *Samuel*, then the additional time and expense of a new trial will not be necessary even if the Court's current Opinion stands. The State would show the following in support of this motion:

The Honorable Diane Schafer Goodstein denied Petitioner's request for self-representation at a May 13, 2013 hearing. *R. p. 73, line 20 – p. 75, line 19*. Thereafter, Petitioner received a jury trial before Judge Goodstein on June 11-14, 2013. Assistant First Circuit Public Defenders Margaret "Peggy" Hinds and Douglas Mellard represented him at his trial. If the Court denies rehearing and the Opinion vacating the judgment of conviction stands, the State anticipates that the case will be called for retrial. On direct appeal, a majority of this Court has found that the trial judge "impermissibly exceeded the scope of the *Faretta* inquiry by considering Grant's testimony to conclude that Samuel was attempting to manipulate the proceedings." *Samuel*, at 47. The Court later stated that:

We agree with Samuel that the circuit judge erred in refusing to allow him to represent himself at trial. In this case, the circuit judge repeatedly noted how intelligent and articulate she found Samuel to be. Samuel also clearly expressed his understanding of the nature of the charge against him and the potential penalties he faced were he to be found guilty. He indicated he was making the request of his own volition and continuously asked to represent himself despite the circuit judge's persistent attempts to dissuade him. See *Reed*, 332 S.C. at 41, 503 S.E.2d at 750 (holding although it is the circuit judge's responsibility to inform the defendant of the dangers and disadvantages of self-representation, whether the judge believes the decision is prudent or wise is entirely irrelevant).

We acknowledge it was within the circuit judge's authority to summon Grant; however, her questioning of Grant should have been limited to discerning whether Samuel's request was knowingly and voluntarily made.

*Samuel*, at 48.

The Court observed that “even if Samuel's testimony was misleading, this Court indicated in *Barnes* that a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation. See [*State v. Barnes*, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1(2015)].” *Samuel*, at 51. The Court concluded by finding that “Samuel made a knowing, intelligent, and voluntary request to proceed *pro se* as required by *Faretta*, and he should have been given the opportunity to represent himself.” *Samuel*, at 51.

If the majority Opinion stands, the State anticipates that there will be a retrial. Obviously, a new trial will take time for the trial court, Petitioner (his counsel, if any are desired), and the prosecution. Also, the taxpayers of Orangeburg County will also have to bear the cost of a new trial. Should Petitioner determine at a hearing on remand that he no longer wishes to exercise his right to self-representation and waives that right after a proper inquiry in accordance with this Court's decision in this case, there would be no constitutional need or legal basis necessitating re-trial. In that circumstance, his presently vacated conviction must be reinstated because no further relief is warranted. If he affirms his waiver, and the Court finds that the waiver is valid under the correct standard, the remedy is a new trial.

Thus, in accordance with other jurisdictions, the State would ask this Court, if it is disinclined to grant rehearing, to Order a limited remand so as to whether Petitioner wishes to affirm his waiver of counsel or abandon his previously made waiver.

Judge Posner, of the Seventh Circuit Court of Appeals, aptly summarized the position as follows:

We add that as he has made no representation that if we order a new trial he will persist in his desire to represent himself, his claim that his right of self-representation was infringed may be moot, as well as having no merit for the reasons just indicated [*i.e.* waiver of the right to self-representation by acquiescence, inaction on his motion]. For if as we expect he would be represented by lawyers at any new trial, he would not have vindicated the right of self-representation upon which he premises his appeal from the denial of that right. The point is not that at a subsequent trial he would be estopped to invoke his right to counsel, an argument rejected in the only cases to have considered the issue. *United States v. McKinley*, 58 F.3d 1475, 1483 (10th Cir.1995); *Johnstone v. Kelly*, 812 F.2d 821 (2d Cir.1987) (*per curiam*). The point is rather that if he wants on remand exactly what he had in his first trial, namely representation by competent lawyers, it is difficult to understand what he lost by the denial of his motion: he had at the first trial what he wants at the second.

*United States v. Johnson*, 223 F.3d 665, 669 (7<sup>th</sup> Cir. 2000).

Similarly, the Court of Appeals of Virginia has held that:

In this case, the actual harm is not simply that the trial court denied Edwards's *Faretta* request—but that it denied the request using an incorrect legal standard without making any of the predicate factual findings, one way or the other, required by the correct standard. In such circumstances, the proper appellate response is to vacate the convictions and remand the case to the trial court with instructions to conduct a hearing on the matter.<sup>FN2</sup>

FN2. This remedy tracks the prevailing approach used in analogous situations. *See, e.g., Murray v. United States*, 487 U.S. 533, 543-44, 108 S.Ct. 2529, 2536, 101 L.Ed.2d 472 (1988) (vacating and remanding with instructions for trial court to apply correct legal principles to facts presented by a suppression motion); *United States v. Wade*, 388 U.S. 218, 242, 87 S.Ct. 1926, 1940, 18 L.Ed.2d 1149 (1967) (vacating and remanding for trial court to apply correct legal standard in determining whether in-court identifications had independent origin); *Orndorff v. Commonwealth*, 271 Va. 486, 505, 628 S.E.2d 344, 355 (2006) (ruling the "proper remedy" was to remand the case to the trial court for "proper application" of the legal test); *Thomas v. Commonwealth*, 263 Va. 216, 233, 559 S.E.2d 652, 661 (2002) (vacating and remanding for trial court to "apply the proper test" when ruling on the motion).

If the trial court finds Edward's request satisfies the *Faretta* requirements, the court should order a retrial so that Edwards may exercise his constitutional right of self-representation. *See, e.g., People v. Carson*, 35 Cal.4th 1, 23 Cal.Rptr.3d 482, 104 P.3d 837, 844 (2005) (holding that retrial was required if trial court on remand finds defendant's *Faretta* right was violated).<sup>FN3</sup> If the court concludes, based upon facts previously presented and those offered upon remand, that

Edwards's request fails the *Faretta* standard, the court should reinstate the convictions. *See, e.g., Carson*, 23 Cal.Rptr.3d 482, 104 P.3d at 844. In either event, Edwards retains his right of appeal from the final judgment on remand. *Id.*

FN3. We do not mean to imply that Edwards cannot withdraw his *Faretta* motion on remand. He has that right. But that election, however, would moot the need for a retrial. If he were "represented by lawyers at any new trial, he would not have vindicated the right of self-representation upon which he premises his appeal from the denial of that right." *United States v. Johnson*, 223 F.3d 665, 669 (7th Cir.2000). To be sure, if a defendant "wants on remand exactly what he had in his first trial, namely representation by competent lawyers, it is difficult to understand what he lost by the denial of his motion: he had at the first trial what he wants at the second." *Id.*

*Edwards v. Com.*, 644 S.E.2d 396, 403 (Va.Ct.App. 2007). *See also People v. Carson*, 104 P.3d 837, 844 (Cal. 2005) (affirming the Court of Appeal's reversal of the conviction and remanding for a hearing on whether "defendant's *Faretta* rights were properly terminated" and if found properly terminated, directing the lower court to "reinstate the judgment"). *Cf. Doby v. South Carolina Dept. of Corrections*, 802 F.2d 718, 721 (4<sup>th</sup> Cir. 1986).

In *Barnes*, a majority of this Court affirmed the trial judge's denial of the State's motion to have the defendant's convictions reinstated where he sought counsel and counsel were appointed to represent him on retrial, although this Court had previously reversed his convictions and sentence of death because he had been erroneously denied his right to self-representation in the original trial. The Court found that the State's motion was properly denied because the State was complaining of the defendant's conduct after the Remittitur had been sent to the circuit court:

In order to effect a review of respondent's first appeal, this Court would need to recall the remittitur from the circuit court. "In order to justify this court in exercising the unusual power of recalling the remittitur after it has been sent down, a very strong showing would be required that the remittitur was sent down through some mistake or inadvertence on the part of this court or its officer...." *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893). The State cites no authority, and we are aware of none, that permits the remittitur to be recalled, not because of an

error or inadvertence on the part of the Supreme Court, but rather because of post-remittitur conduct by a party. Accordingly, we do not believe that even if we were to find merit to the State's position, that we would be empowered to grant the relief it seeks. *See also Earle v. City of Greenville*, 84 S.C. 193, 65 S.E. 1050 (1909).<sup>FN2</sup> As explained below, we find no authority supporting the State's position in this matter.<sup>FN3</sup>

FN2 “[W]hen points arising in a case before this Court have been decided, they become res judicata, and, when the remittitur has been sent down, this Court loses jurisdiction, and cannot, therefore, in the further progress of the case, render a different decision upon the points decided, so as to affect the particular case in which the decision was rendered.” *Id.* at 196, 65 S.E. at 1051.

FN3 Even if we were to find merit to the State's position, the issue would not be ripe. Respondent's right to self-representation is a trial right, and one that he may seek to exercise under state law at any time up until that trial commences. *See State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010). *See McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (The “core” of the right to self-representation is the defendant's right “to preserve actual control over the case he chooses to present to the jury.”). That respondent seeks attorneys at this juncture, attorneys who have access to witnesses, investigators, discovery, law libraries, and other resources, does not mean that he will not choose to exercise his constitutional right to proceed *pro se* at the next trial.

*Barnes*, 413 S.C. at 4 & nn. 2-3, 774 S.E.2d at 456. & nn. 2-3. The Court further found that the above authorities from outside this jurisdiction were inapposite because the remands in those cases occurred during the same proceedings. *Id.* at 4-6, 774 S.E.2d at 456-57. The Court further stated that the State should have made its motion, if at all, while *Barnes*' case was pending on appeal, *i.e.*, a motion for a remand. *Id.* at 6, 774 S.E.2d at 457.

Unlike the State's motion in *Barnes*, the State is not complaining of post-Remittitur conduct. Also, the State is not seeking to bar him from requesting representation by counsel at a subsequent retrial, should one occur. Rather, in accordance with the majority's statement in *Barnes*, the State is asking for a limited remand in the present case to determine whether Samuel

stands by his original decision to waive counsel or whether he wishes to abandon his previously made request for self-representation and thereby potentially obviate the necessity of a retrial.

WHEREFORE, as an alternative to granting the Petition for Rehearing, the State respectfully requests that this Court Order a limited remand 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.

Respectfully submitted,

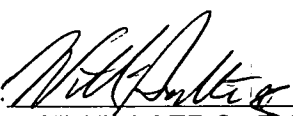
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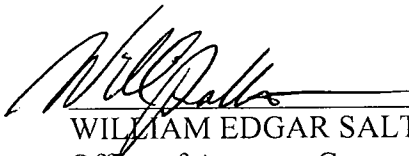
PROOF OF SERVICE

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I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Motion for Limited Remand 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 15<sup>th</sup> day of March, 2018.



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