

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Deadra L. Jefferson, Circuit Court Judge

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DEC 15 2017

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

WAYNE GARY POLITE

PETITIONER

APPELLATE CASE NO. 2017-000728

BRIEF OF PETITIONER

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ISSUE PRESENTED

Was Petitioner's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution violated when the trial judge denied his request to proceed *pro se*?

STATEMENT

During its December 2014 term, a Charleston County grand jury indicted Petitioner for obtaining property in excess of \$10,000 by false pretenses (2014-GS-10-7246). R. 265-266. The state, represented by Marian Askins and Daniel Cooper, called the case for trial before the Honorable Deadra L. Jefferson and a jury on August 12, 2015. R. 1-2. Luke Malloy and Mary Ford represented Petitioner. R. 2.

On August 14, 2015, the jury found Petitioner guilty as charged. R. 250, lines 2-7. Judge Jefferson sentenced Petitioner to seven years' imprisonment. R. 257, lines 18-21. She also found Petitioner had violated the terms and conditions of his probation as a result of his conviction. She revoked his probation in full and ordered him to serve the revoked sentence concurrently with the sentence imposed for the instant matter. R. 257, lines 6-16.

Petitioner served a notice of appeal on August 24, 2015. Briefing in the Court of Appeals followed. On January 11, 2017, the Court of Appeals, without the benefit of oral argument, filed an unpublished opinion affirming Petitioner's conviction and sentence. App. 1-3. Petitioner filed a timely petition for rehearing. App. 4-20. On February 23, 2017, the Court of Appeals denied the petition for rehearing. App. 21.

On March 27, 2017, Petitioner filed his petition for writ of certiorari raising two issues.¹ The state responded on April 25, 2017. On November 15, 2017, this Court granted the petition for writ of certiorari as to Question I. This brief of petitioner follows.

¹ The second issue, for which certiorari was not granted, was whether Petitioner was entitled to a jury instruction on a lesser-included offense based upon the value of the property.

STATEMENT OF FACTS

John Tursi owned East Coast Sports and Imports (“East Coast”) in North Charleston, where he sold “high-lined cars” “in the subprime market.” R. 72, lines 21-25; R. 73, lines 13-16. His customers were “people who have already had credit problems in the past” and he assisted them in getting credit “through banks who specialize in subprime lending.” R. 73, lines 21-25; see also R. 116, lines 18-25 (explaining that ninety percent of the customers were “credit risky”). Interests on these loans were typically twenty-five percent. R. 115, lines 16-24.

Petitioner was conditionally approved for financing a car through East Coast on March 10, 2014. R. 264. Oddly, on March 11, 2014, a day *after* the conditional approval of Petitioner’s financing, Tursi bought the car from Fanelli’s Auto for \$10,000. R. 85, lines 7-10; R. 258. Tursi then sold the car to Petitioner for \$13,862 on that same date. R. 75, lines 16-25; R. 76, lines 1-3; R. 79, lines 15-16; R. 261; R. 262; R. 263. Petitioner paid \$1500 as a down payment and the remainder would be financed with the assistance of East Coast. R. 79, lines 17-24. Tursi’s employee, Michelle Miller, completed the paperwork for financing through a third party. R. 79, line 25 – R. 80, line 2; R. 94, line 19 – R. 95, line 8; R. 95, line 16 – R. 100, line 18; R. 100, line 22 – R. 102, line 9. As part of her responsibilities, Miller contacted Petitioner’s employer, L&B Snacks. R. 104, lines 12-15. Miller spoke to “Priscilla” who verified Petitioner’s employment. R. 104, lines 12-20. Additionally, Miller obtained a copy of Petitioner’s driver’s license, pay stubs, and a reference list. R. 97, line 13 – R. 99, line 23.

After Miller obtained conditional approval from the finance company, she permitted Petitioner to take possession of the car. R. 80, line 6 – R. 81, line 13; R. 100, lines 10-11; R. 103, lines 1-22; R. 105, lines 1-21. However, when the finance company reviewed the documentation submitted by Miller, the finance company determined there were inaccuracies concerning

Petitioner's employment, and, as a result, the company refused to fund the loan. R. 81, line 24 – R. 82, line 13.

Tursi and Miller claimed that when the finance company refused to fund the loan, they called Petitioner and requested return of the car. R. 82, line 14 – R. 83, line 20; R. 84, lines 14-23; R. 106, lines 7-20; R. 107, lines 9-16. Despite Petitioner's alleged initial agreement to return the car, Petitioner never did. R. 84, lines 1-2; R. 84, lines 12-13; R. 85, lines 5-6; R. 107, lines 17-18.² While investigating Petitioner, Miller contacted Clarence Brown, who owned L&B Snacks, which was where Petitioner said he worked. Miller claimed Brown said he did not even know Petitioner. R. 109, lines 16-22.³ Based upon Petitioner not returning the car, Tursi went to the police who began a criminal investigation.

Brown owned several businesses in Charleston, including L&B Snacks, which serviced vending machines. R. 119, lines 19-24. Brown had known Petitioner "since [the] late '90s." R. 120, lines 7-11. Brown denied that Petitioner had ever worked for him, however. R. 120, lines 18-25. Brown admitted that Petitioner had performed "odd jobs" for him, such as working on his computer and getting supplies. R. 123, line 12 – R. 124, line 3. Brown also admitted that Petitioner had helped him service vending machines by running a route, but claimed this was for one day only. R. 124, lines 7-14. Brown denied issuing a paycheck to Petitioner, and indicated that if he paid Petitioner anything, it was just "a few dollars out of [his] pocket." R. 124, lines 20-23. However, Brown did not pay Petitioner "in the sense of an employee." R. 127, line 21. According to Brown,

² Ultimately, the police found the car in a tow lot in Georgia by searching Google for the VIN. The testifying officer claimed the car was abandoned at Magnolia Apartments in Marietta, Georgia. R. 183, line 19 – R. 185, line 8.

³ Brown testified that he told Miller that he and Petitioner were friends, but that Petitioner did not work for him. R. 127, lines 2-5.

Petitioner “did not work for [him] like that.” R. 128, lines 4-6. Brown supplied his employees with t-shirts, and Petitioner had one. R. 142, lines 15-18; R. 204, lines 2-3; R. 204, lines 7-8. Brown admitted that he paid his employees in cash. R. 147, lines 9-10. In fact, Brown did not issue paychecks to any of his employees. R. 148, lines 4-7.

Brown’s girlfriend and employee, Priscilla Patterson, initially claimed Petitioner wanted her to say he had worked at L&B for six months, that he “helped here and there,” and that he was paid in cash for odd jobs. R. 154, line 16 – R. 155, lines 2. When Patterson received the call from Miller, she said Petitioner had “been doing little odd jobs for Clarence, fixing computers, the copier, the scanner.” R. 157, line 16 – R. 158, line 3. Patterson had seen Petitioner doing work for Brown, including helping with the vending machines. R. 165 lines 2-15. She considered Petitioner a subcontractor – someone who performed odd jobs and was paid in cash. R. 165, lines 16-24.

According to Petitioner’s girlfriend, Ruth Love, Petitioner worked for L&B Snacks. R. 203, lines 21-23. She often dropped him off at work. R. 203, line 24 – R. 204, line 1. She recalled that Petitioner “did a lot of paperwork, did a lot of errands” for L&B Snacks and that he was good friends and coworkers with Brown. R. 204, lines 3-11. Petitioner refilled the soda machines as well. R. 204, lines 12-21.

ARGUMENT

Petitioner's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*.

Relevant facts

Prior to trial, Petitioner moved to relieve trial counsel. R. 6, lines 5-8. To support his request, Petitioner explained that he had requested trial counsel subpoena certain witnesses, and trial counsel had failed to do so. R. 6, lines 10-12; R. 7, lines 7-12. The judge responded that trial counsel would make “the decision about who gets called as a witness,” not Petitioner. R. 7, lines 13-23. When Petitioner said he did not want trial counsel as his advocate, the judge wanted to know why. R. 10, lines 1-3. Petitioner explained he did not “have confidence in him” and as a result, there were “certain things” Petitioner could not share with him. R. 10, lines 4-5; see also, R. 27, line 25 – R. 28, line 6. Thereafter, the judge asked why Petitioner had not hired someone, and Petitioner explained he had been in jail, which made hiring someone difficult, but that he had been working on it. R. 10, lines 9-16.

Petitioner explained he had written motions to aid in his defense. R. 10, lines. 22-23. The judge responded, “Only [trial counsel] decides what motions are filed. Unless you're representing yourself, you don't get to file motions. That's called hybrid representation and it's not allowed.” R. 10, line 24 – R. 11, line 2. Petitioner responded that he had a right to proceed *pro se*. R. 11, lines 3-4. When Petitioner invoked his constitutional right to self-representation, the judge agreed he had a right to self-representation. R. 11, lines 3-6. Specifically, the judge told Petitioner he had the right to self-representation if he wanted, but admonished that he could not “file a motion making [his]

lawyer file a motion. It doesn't work like that." R. 11, lines 5-8. Petitioner stated he did not want trial counsel as his lawyer. Thereafter, the following colloquy occurred:

THE COURT: Then here are your options, either [trial counsel] represents you or you represent yourself.

THE DEFENDANT: I'll represent myself.

THE COURT: I don't think that's such a good idea.

THE DEFENDANT: At the moment - - I think you're right because I don't have a law library. I don't have case laws in front of me.

THE COURT: I'm not going to delay the case for that.

THE DEFENDANT: I don't want him as my lawyer.

THE COURT: Well, your only option then is to hire someone, and this case has been pending at least for over a year, and if you desire to do that, you should have already hired someone.

R. 11, line 9 – R. 12, line 2. Petitioner continued to express his desire to relieve trial counsel noting he “would rather jump off that little small bridge in West Ashley than allow him to represent” Petitioner. R. 12, line 23 – R. 13, line 2.

When Petitioner persisted that he did not want to be represented by trial counsel, the judge informed him that his options were to permit trial counsel to represent him or to hire someone. R. 15, lines 1-6. The judge failed to tell him he had the option of representing himself pursuant to the state and federal constitutions. In light of these binary options, Petitioner said he would hire someone. R. 15, line 7. The judge responded that he “would had to have hired them before today, before it was put on the trial roster.” R. 15, lines 8-10. Thus, hiring someone was not really an option for Petitioner at this point.

Nevertheless, Petitioner persevered in his request for self-representation. R. 15, lines 11-19; R. 15, lines 23-24; R. 19, lines 17-19. When the judge ordered Petitioner to provide trial counsel with the names of potential character witnesses, Petitioner again informed the judge that he did not want trial counsel as his representative. R. 21, line 22 – R. 22, line 4. The judge responded:

I've already made the decision, sir, that your motion is denied. You've not provided the Court with any information that would amount to him being ineffective or his inability to be prepared to go forward in trial, and you have not made any efforts, at least that you have been able to provide the Court with independent corroboration, that you have made any attempts to obtain new counsel, and at this point your actions appear to the Court to be dilatory in nature.

R. 22, lines 5-15.

After additional discussion among the participants regarding witnesses and theories, the judge explained that she had “not heard any bases to relieve” trial counsel and had “not heard anything that amounts to ineffective assistance of counsel.” R. 31, lines 18-23. She further stated that in light of the case pending for a year, Petitioner had ample time to retain a lawyer. R. 31, line 24 – R. 32, line 2. As a result, she denied Petitioner’s motion to relieve trial counsel. R. 32, lines 2-3.

Petitioner responded that he wanted to do his best to fight for his rights. R. 34, line 24- R. 35, line 1. All he wanted was “a fair chance and a fair opportunity.” R. 35, lines 1-2. While trial counsel “might be a great lawyer for someone else,” he was not the right lawyer for Petitioner. R. 35, lines 3-6. To Petitioner’s continued request, the judge responded that Petitioner had not provided “any independent information ... that would justify ... relieving an attorney who is prepared and ready to go forward.” R. 35, lines 7-11. When Petitioner tried to argue his point further, the judge instructed him, “There is no further argument once the Court has ruled.” R. 36, lines 2-9. Despite Petitioner’s continued refusal to accept the judge’s ruling, the judge instructed Petitioner that trial counsel was “going to be representing him.” R. 37, lines 5-6.

Discussion

A 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)(citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010)(explaining “[a]n accused may waive the right to counsel and proceed *pro se*” and “[t]he request to proceed *pro se* must be clearly asserted by the defendant prior to trial”). “The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.” Faretta v. California, 422 U.S. 806, 819 (1975); see also McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)(explaining “Faretta’s holding was based on the long-standing recognition of a right of self-representation in federal and state courts, and on the language, structure and spirit of the Sixth Amendment”); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997)(stating “the Sixth Amendment implicitly provides an affirmative right to self-representation”).⁴ According to the Fourth Circuit, the right to self-representation is “mutually exclusive” of the right to counsel. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005).

The right to self-representation “must be preserved even if the court believes that the defendant will benefit from the advice of counsel.” State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant’s detriment, the decision “must be honored out of that respect for the individual which is the lifeblood of the law.” Faretta, 422 U.S. at 834; see also

⁴ The South Carolina Constitution explicitly provides for the right of self-representation: “Any person charged with an offense shall enjoy the right ... to be fully heard in his defense by himself or by his counsel or by both.” S.C. Const. Art. I, § 14.

State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). “So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta.” Barnes, 407 S.C. at 35, 753 S.E.2d at 550.

“When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.” Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. “The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge’s advice, but the defendant’s understanding.” Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). “A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel.” Id. “A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one.” Id. at 120, 492 S.E.2d at 99.

“Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.” Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977)(explaining “it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver”). “Faretta requires that a defendant ‘be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.’” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990)(quoting Faretta, 422 U.S. at 835). “To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to

counsel; and (2) adequately warned of the dangers of self-representation.” Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to this Court, “a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred.” Id. The trial judge must “make a meaningful inquiry into [a defendant’s] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel.” Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

The United States Supreme Court held that when a defendant requests to proceed *pro se*, “a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.” Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). “To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.” Id. at 724. Thus, a judge must make “a penetrating and comprehensive examination of all the circumstances.” Id.; see also United States v. Stanley, 739 F.3d 633, 345 (11th Cir. 2014)(noting the “ideal method” for determining an exercise of the right to self-representation is to conduct a pre-trial hearing, informing the defendant of the charges, basic trial procedures, and the hazards of self-representation).

“The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature.” United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant “of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry.” Id. Also, “a defendant should be made aware

of the ‘difficulties he would encounter in acting as his own counsel.’” Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)); see also United States v. McBride, 362 F.3d 360, 366 (6th Cir. 2004)(explaining the Sixth Circuit’s “model inquiry” for courts to use when confronted with a request for self-representation).

However, “[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant’s understanding.” State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

According to the Fourth Circuit Court of Appeals, an assertion of the right to self-representation must be (1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. See United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015); United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Recently, this Court adopted this three-part test as well. City of Columbia v. Assa’ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017).

Clear & unequivocal invocation

“The right to appear *pro se* must be clearly asserted by the defendant before trial.” State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995)(invocation of right to self-representation must be clear and unequivocal); United States v. Treff, 924 F.2d 975, 979 (10th Cir. 1991)(explaining the request must be unequivocal to avoid a “cat and mouse” game).

Prior to the trial, Petitioner invoked his constitutional right to self-representation, and the judge agreed he had a right to self-representation. Petitioner clearly and unequivocally requested to exercise his constitutional right to self-representation when the judge told him his only options were to either be represented by trial counsel or to represent himself. Rather than engaging in the proper inquiry as required by law, the judge voiced her opinion that such a choice was not “such a good

idea.” While Petitioner agreed it was not a good idea due to his limited ability to conduct legal research in the jail, he did *not* waver from his desire to represent himself. See Pasha v. State, 90 So.3d 1259, 1262 (Fla. 2010)(concluding a defendant’s statement that he preferred to have an attorney, but not the one appointed, did not negate his request to proceed *pro se* where the defendant made the request after the judge refused to discharge appointed counsel); People v. Longuemire, 257 N.W.2d 273, 275 (Mich. Ct. App. 1977)(holding a defendant’s invocation unequivocal even when the “the defendant may have been unhappy with all of the alternatives available to him on the day his trial began, his choice to represent himself . . . was unequivocal and unconditional”); Barnes v. State, 528 S.W.2d 370, 372-373 (Ark. 1975)(finding a defendant’s invocation clear where on the day of trial, the defendant moved to represent himself because he had been deceived by everyone, including his lawyer, but his explanation on this point “was vague, to say the least”).

Knowing, intelligent, and voluntary invocation

While the trial court failed to engage in an adequate colloquy with Petitioner in regard to his desire to proceed *pro se*, as discussed *infra*, evidence in the record revealed Petitioner’s request for self-representation was made knowingly, intelligently, and voluntarily.

“In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source.” Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, “[i]f the record demonstrates the defendant’s decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.” Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

A variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

(1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew the legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Petitioner had significant contacts with the criminal justice system as indicated by his criminal record. R. 42, line 13 – R. 48, line 2; R. 211, line 3 – R. 213, line 15. In fact, Petitioner entered a guilty plea just two years prior to this trial. R. 44, line 24 – R. 45, line 1. Petitioner was forty-three years old at the time of the trial. R. 267. The record revealed Petitioner had prior work experience, including fixing computers and printers, loading trucks, and running trucking routes. R. 154, lines 4-7; R. 165, lines 2-24. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Petitioner's invocation as knowing, intelligent, and voluntary.

Timely invocation

Petitioner's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). Pierce v. State, 209 S.W.3d 364, 371 (Ark. 2005)(holding a defendant timely asserted his right to

self-representation when he invoked his right prior to trial in chambers); Blankenship v. State, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984)(finding invocation of self-representation time when made prior the empaneling of the jury); Barnes, 528 S.W.2d at 372-373 (Ark. 1975)(finding a defendant's invocation timely where on the day of trial, the defendant moved to represent himself). Just as in Fuller, Petitioner's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Petitioner "complained to the trial court that his counsel had been ineffective in preparing for trial." See Fuller, 337 S.C. at 242, 523 S.E.2d at 171. Petitioner's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id.

Adequate hearing


The inquiry that followed Petitioner's request had little do to with the *only* inquiry that mattered – whether Petitioner was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether trial counsel had provided ineffective assistance during the investigative phase of the case. Although the judge agreed with Petitioner that he had a constitutional right to self-representation and advised Petitioner that waiving counsel was not "such a good idea," the judge did little else to ensure Petitioner could make an intelligent and voluntary waiver. Rather, the judge turned her attention to Petitioner's complaints against trial counsel and his efforts and ability to retain private counsel. The trial judge's error is clear in her ruling that she had "not heard any bases to relieve" trial counsel and had "not heard anything that amounts to ineffective assistance of counsel." Petitioner was under no obligation to present a basis to relieve counsel or to present evidence of ineffective assistance in order to exercise his constitutional right to self-representation. The trial judge erred and violated Petitioner's constitutional rights pursuant to the federal and state constitutions to represent himself in criminal proceedings.

Conclusion

The trial judge failed to honor Petitioner's clear and unequivocal invocation of his right to self-representation as required by the state and federal constitution. Instead of advising Petitioner of the dangers and disadvantages of self-representation, the judge placed the burden on Petitioner to provide reasons to relieve counsel, and even went so far as to require those reasons amount to ineffective assistance of counsel. The right to self-representation does not hinge upon one's ability to show counsel's representation is inadequate. Rather, the right to self-representation must be honored with no regard to the ability of counsel to represent the individual. The judge failed to engage in the proper colloquy regarding Petitioner's invocation. This Court should reverse his convictions and remand for a new trial in light of the trial judge's erroneous denial of Petitioner's right of self-representation.

CONCLUSION

Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of December, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 15 2017

S.C. SUPREME COURT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

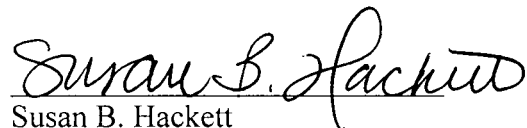
V.

WAYNE GARY POLITE

PETITIONER

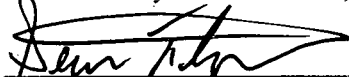
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Wayne Gary Polite, #354236, at 4420 Oakwood Avenue, Lot 9, North Charleston, SC 29405, this 15th day of December, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of December, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.