STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORMAN STARNES,

APPELLANT

FINAL BRIEF OF APPELLANT

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3. Starnes did not knowingly and voluntarily waive his right to counsel during the sentencing phase of his trial.

STATEMENT OF THE CASE

On May 8, 2000, the Supreme Court reversed the two murder convictions and death sentence of Norman Starnes in this case due to a defective self-defense instruction. *State v. Starnes,* 340 S.C. 312, 531 S.E.2d 907 (2000). By his own admission, Starnes shot and killed Bill Welborn and Jared Champlin in his home the night of January 8, 1996, but maintained that he had done so in self-defense. The Court reversed because:

> The facts presented at trial entitled appellant to a self-defense charge in regard to both shootings. Appellant testified Welborn pointed a gun at him and he believed Champlin was armed. Appellant did not have to wait for Welborn or Champlin to fire or aim at him before acting in self-defense. Accordingly, appellant was entitled to a charge instructing the jury he did not have to wait before acting in self-defense. Refusal to charge this request was reversible error.

531 S.E.2d at 914. The present appeal is from the retrial of that case. The only two significant differences between the two trials were that on retrial (1) Starnes was permitted to represent himself and (2) the trial judge refused to instruct the jury on voluntary manslaughter, even though manslaughter had been charged at the prior trial based on the exact same evidence.

On November 8 through 15, 2007, following extensive pretrial hearings and jury selection, Norman Starnes again stood trial in Lexington County, before Judge Lee S. Alford and a jury, on the 1996 indictment charging him with murdering Welborn and Champlin. (Judge Alford replaced Judge Marc H. Westbrook, who presided at Starnes' first trial and a number of pretrial hearings in the present case, after Judge Westbrook's tragic death in a 2005 automobile accident. In addition, the Seventh Circuit Solicitor's Office prosecuted Starnes after the Eleventh Circuit Solicitor voluntarily recused himself and his

office from the case.) The State again sought the death penalty, relying on three statutory aggravating circumstances:

> (1) "Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct" [*S.C. Code Section 16-3-20(C)(a)(9)*];
>
> (2) "The murder was committed while in the commission of . . . robbery while armed with a deadly weapon" [*Section 16-3-20(C)(a)(1)(d)*]; and
>
> (3) "The murder was committed while in the commission of . . . larceny with the use of a deadly weapon" [*Section 16-3-20(C) (a) (1) (e)*].

Starnes advanced four statutory mitigators:

> (1) "The defendant has no significant history of prior criminal conviction involving the use of violence against another person" [*S.C. Code 16-3-20(C)(b)(1)*];
>
> (2) "The murder was committed while the defendant was under the influence of mental or emotional disturbance" [*Section 16-3-20(C)*;
>
> (3) "The victim was a participant in the defendant's conduct or consented to the act" [*Section 16-3-20(C)(b)(3);* and
>
> (4) "The defendant was provoked by the victim into committing the murder" [*Section 16-3-20(C) (b) (8)*].

The judge also instructed the jury:

> [T]he defendant has presented evidence of non-statutory mitigating circumstances concerning his adaptability to prison life. In addition to this non-statutory mitigating circumstance, you may consider any other non-statutory mitigating circumstances that you find exist.

ROA p. 3104, lines 12-17.

Starnes once again testified that he killed Welborn and Champlin in self-defense, believing that both men were armed, wired on methamphetamine, and at that moment intended to kill both him and the drug dealer, Jody Fogle, he had summoned at their request. ROA p. 2386, line 13 – p. 2390, line 19; ROA p. 2394, line 17 – p. 2396, line 8; ROA p. 2406, lines 1-6; ROA p. 2418, lines 9-11; ROA p. 2431, lines 4-7. "This case was a drug deal that went bad in my home," Starnes summarized. ROA p. 2396, lines 9 and 10. Jody Fogle largely corroborated Starnes' account of the incident. ROA p. 2150, line 6 – p. 2160, line 12.

The judge instructed the jury on murder and self-defense, but refused to charge voluntary manslaughter. The jury found Starnes guilty of murdering Welborn and Champlin and, at the penalty phase, recommended a sentence of death, having found the three statutory aggravators advanced by the State. The judge then sentenced Starnes accordingly.

ARGUMENT

1.

The trial judge committed reversible error in the guilt phase by refusing to instruct the jury on voluntary manslaughter.

The evidence at Norman Starnes' guilt phase retrial mirrored the evidence presented at his first trial in all significant respects. See *State v. Starnes,* 531 S.E.2d 909-911.

Starnes testified that, the evening of the incident, Bill Welborn had stuck "a metal object up to my head," which could have been a gun or a cigarette lighter, and threatened to "blow his fucking brains out." ROA p. 2385, line 6 – p. 2386, line 8. The cashier at the bar where Starnes, Welborn and Jared Champlin were shooting pool corroborated Starnes' account of the threat. ROA p. 2078, line 20 – p. 2079, line 7.

As to the killing of Welborn and Champlin shortly after he returned home with drug-dealer Jody Fogle, Starnes testified:

> [A]s Welborn and I were in the bedroom doorway, I heard somebody cussing and said, "I'm going to kill you, you motherfucker." I turned around. And when I turned around, I saw Jared pulling his gun and pointing it at Jody's chest. At that time, I ran into the bedroom and got my pistol off the headboard of my bed. I came back out. I looked through the bedroom doorway and I did not see anybody and I did not know where they were at, so I went to the door to exit. When I went to the door to exit, I heard somebody holler, "Whoa, [where the fuck are you going?]" I turned around. When I turned around, Bill Welborn had a gun, pointing it at me. I shot Bill Welborn and then turned and shot Jared Champlin. ... [A]pparently, when Jared pulled the gun on Jody, Bill Welborn went over and got the gun from Jared. I did not see that.

ROA p. 2386, line 13 – p. 2390, line 19; ROA p. 2393, lines 16-18. Jody Fogle largely corroborated Starnes' account of the incident. ROA p. 2151, line 9 – p. 2157, line 8.

Starnes testified that Welborn and Champlin were "out of their minds that night" on methamphetamine. ROA p. 2404, lines 11-15; ROA p. 2406, lines 1-6. Fogle testified that Champlin acted "[l]ike he was on crack." ROA p. 2152, lines 17-19. He looked "[e]vil" and had "crazy eyes," Fogle added. ROA p. 2158, lines 9-13. Key State's witness Gwendolyn Bailey, Starnes' former girlfriend and the person who turned him in to the police, testified that Welborn and Champlin appeared to be "hyper, on drugs, alcohol" earlier that night. ROA p. 1647, line 23 – p. 1648, line 6. She told the police that the two men were "out of their minds when they came in the restaurant. ... [T]hey were hyped up, and I have never seen them like that before." ROA p. 1663, line 21 – p. 1664, line 8.

In its earlier opinion in this case, the Supreme Court summarized this evidence as follows:

> Immediately prior to the shooting, appellant observed Champlin hold the gun to Fogle's head and threatened to shoot him, apparently because the intended drug deal, which appellant had arranged, had gone awry. Welborn then pointed a gun at appellant and threatened to kill him as he attempted to leave. Unaware Champlin had passed his weapon to Welborn when appellant was in the bedroom, appellant erroneously believed Champlin was armed and intended to kill him.

531 S.E.2d at 912. Thus, the guilt-phase evidence presented at both trials was virtually identical. Judge Westbrook charged voluntary manslaughter, but Judge Alford did not.

At an in-chambers charge conference, Starnes unequivocally requested a jury charge on voluntary manslaughter. ROA p. 2478, lines 16-19. He also submitted accurate written requests to charge manslaughter. ROA pp. 4221. The Solicitor agreed that "there is provocation is somebody pulls a gun on you in your house." ROA p. 2490, lines 15 and 16. He nevertheless objected to a charge on manslaughter, fearing a situation such as occurred

in *State v. Wharton,* 381 S.C. 209, 672 S.E.2d 786 (2009), where the defendant's conviction for voluntary manslaughter in a murder prosecution was found to be without evidentiary support on appeal and resulted in a complete acquittal. ROA p. 2494, lines 8-21. (In *Wharton*, though, manslaughter was requested by the State and charged over the defendant's objection.)

The judge ultimately decided not to charge manslaughter for that reason, but added:

> The defendant, Mr. Starnes, who is representing himself, does not request specifically the court to charge voluntary manslaughter, neither does he request that it not be charged [.] ... His position is basically no position, that he requests the court to charge the appropriate law based on the facts of the case. That's his position. And I have asked him two or three times what his position is. That's what he stated to the court.

ROA p. 2639, line 25 – p. 2641, line 16. But he clearly understood Starnes' "theory of the case:"

> He was trying to get away and he had no choice but to defend himself, because Welborn was pointing a pistol at him, and he thought he was going to kill him and he defended himself. He then turned and shot Champlin because he had seen Champlin with a pistol shortly before that, threatening ... and he thought that Champlin had a pistol and would shoot him, so he shot Champlin.

ROA p. 2542, lines 10-18. He *did* misapprehend the relationship between self-defense and voluntary manslaughter:

> Now, obviously, if he was angry and upset and out to get these two men, then that would negate self-defense, although it might bring into play voluntary manslaughter. It would negate the defense of self-defense, because you can't go there with the intent of hurting somebody, mad at them, and then all of a sudden claim self-defense.

ROA p. 2543, lines 3-8. The judge reiterated, "[Starnes] has not requested that I even charge voluntary manslaughter, just to charge the law on the facts." ROA p. 2543, lines 10-15.

When given the chance, Starnes advised the judge, "I disagree with that, Your Honor." ROA p. 2550, lines 9-15. At this point, the judge became exasperated with Starnes' insistence upon a charge on voluntary manslaughter. ROA p. 2558, line 12 – p. 2559, line 6. He accused Starnes of "changing your position." ROA p. 2560, line 22 – p. 2561, line 25.

The judge instructed the jury on murder and self-defense, but not manslaughter. ROA p. 2594, line 11 – p. 2618, line 5. Starnes took exception to the omission of voluntary manslaughter, citing (in addition to the South Carolina cases he had already cited) *Beck v. Alabama,* 447 U.S. 625, 638 (1980), which holds, "[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case" by the Due Process Clause of the Fourteenth Amendment. ROA p. 2618, lines 15-18. Against all evidence to the contrary, the judge continued to insist that Starnes had never even requested voluntary manslaughter. ROA p. 2624, line 7 – p. 2626, line 1.

Voluntary manslaughter is defined as the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Damon,* 285 S.C. 125, 328 S.E.2d 628 (1985). A refusal to charge voluntary manslaughter is justified only when there is absolutely no evidence which would tend to reduce murder to that lesser-included offense. *State v. Gilliam,* 296 S.C. 395, 373 S.E.2d 596 (1988). Moreover, as Starnes correctly indicated, *Beck v. Alabama* holds that "a jury in a capital case must be permitted to

consider all lesser included non-capital offenses to the crime of capital murder when supported by the evidence" under the Due Process Clause of the Fourteenth Amendment. *State v. Patterson,* 285 S.C. 5, 327 S.E.2d 650, 652 (1984).

In deciding whether a charge on voluntary manslaughter is required, the evidence is viewed in the light most favorable to the defendant. *State v. Byrd,* 323 S.C. 319, 474 S.E.2d 430 (1996).

> In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing.

State v. Gardner, 219 S.C. 97, 64 S.E.2d 130, 134 (1951).

> The provocation by the deceased must be the direct and controlling cause of the passion, and it must be such as naturally and instantly to produce in the minds of persons ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection.

State v. Davis, 50 S.C. 405, 27 S.E.2d 905, 911 (1897) (quotation marks and citation omitted).

The threat of an imminent deadly assault is sufficient to require an instruction voluntary manslaughter. *State v. Jackson,* 301 S.C. 41, 389 S.E.2d 650 (1990). The Court has previously observed that "[t]here can be little argument" that an unprovoked attack with a deadly weapon constitutes legal provocation sufficient to warrant a charge on manslaughter. *State v. Knoten,* 347 S.C. 296, 555 S.E.2d 391, 397 (2001). This includes pointing a gun at the defendant with apparent deadly intent. *State v. Penland,* 275 S.C. 537, 273 S.E.2d 765 (1981).

Starnes testified, "I didn't kill [Welborn and Champlin] with malice aforethought[.] ... I was scared and I was frightened." ROA p. 2395, line 24 – p. 2396, line 8. Fear can constitute a basis for heat of passion to support voluntary manslaughter. *State v. Wiggins,* 330 S.C. 538, 500 S.E.2d 489 (1998).

In short, the evidence presented during the guilt-phase of Starnes' trial was more than sufficient to warrant a charge on voluntary manslaughter, as Judge Westbrook (and the Eleventh Circuit Solicitor) recognized at Starnes' first trial. Its omission, as Starnes argued below, violated both South Carolina law and the Due Process Clause of the Fourteenth Amendment.

The error apparently stemmed from Judge Alford's belief that the heat of passion necessary for manslaughter "would negate the defense of self-defense." ROA p. 2543, lines 3-8. But in fact:

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury and supported by the evidence. The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596, 597 (1988); see, also, *State v. Lowry,* 315 S.C. 396, 434 S.E.2d 272 (1993). More to the point:

> The defendant may have intended to kill the deceased "because he wanted to kill him," and yet it would not be murder if he took his life under sudden heat and passion and upon a sufficient legal provocation.

State v. Rochester, 72 S.C. 194, 51 S.E. 685, 688 (1905). Self-defense is "a justification or excuse for a homicide." *State v. Bryant,* 336 S.C. 340, 520 S.E.2d 319, 322 (1999). In other

words, the *mens rea* for voluntary manslaughter (heat of passion) does not negate – and may even coexist with – self-defense.

In conclusion, the trial judge's refusal to instruct the jury on voluntary manslaughter as to both Welborn and Champlin was reversible error, so the Court should reverse Starnes' convictions for murder, vacate his death sentence, and remand for further proceedings.

2.

This Court should overrule *State v. Reed*[1] and *State v. Brewer*[2] and hold that capital defendants do not have the right to represent themselves at trial.

At this second trial, Starnes represented himself. During a pre-trial hearing conducted on August 18, 2003, Starnes complained that (1) it was taking too long to try him again, and (2) his attorneys were not compelling the State to produce evidence to which he believed he was entitled. Starnes also informed the judge that he wanted "hybrid representation" for his trial. He wanted to conduct the *voir dire* and his own opening argument. The judge asked one of Starnes's attorneys (the other attorney was out of the country) for his position. The attorney responded that neither hybrid nor *pro se* representation was in Starnes's best interest. ROA, page 3718, line 11 to p. 3179, line 16. The judge explained that Starnes would not be allowed hybrid representation. Having denied that request, the judge then asked Starnes whether he wanted to go forward with attorneys, or represent himself. Because one of Starnes's attorneys was unavailable, Starnes did not wish to make the decision at that time. The judge, however, engaged in the *Faretta*[3] colloquy at that hearing. The court ruled that Starnes would be allowed to proceed *pro se*. ROA, p. 3206, lines 1-3.

The Faretta colloquy

At this hearing on August 18, 2003, the judge asked him if he knew what he was charged with, and the sentences he faced. ROA p. 3162, line 2 – p. 3163, line 1. He

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1 332 S.C. 35, 503 S.E.2d 747 (1998).

2 328 S.C. 117, 492 S.E.2d 97 (1997).

asked if he knew the rules of evidence in South Carolina (ROA p. 3163, line 20 – p. 21); if he knew what hearsay is (ROA p. 3164, line 22 – p. 20, line 4); the rule of relevance, and did he know the South Carolina Rules of Criminal Procedure? ROA p. 3165, lines 5 – p. 3166, line 18. The judge asked if he realized "in a capital case, there are some particular rules of law that apply in a capital case that may not apply otherwise?" ROA p. 3168, lines 7-11. The judge asked him if he was familiar with *voir dire* in capital cases ROA p. 3182, line 10 – p. 3183, line 14; if he understood his 5th amendment rights (ROA p. 3196, line 10 – p. 3197, line 13); if he knew the elements of murder (ROA p. 3197, line 14 – p. 3198, line 12); if he knew what defenses he may have (ROA p. 3198, line 12 – p. 3199, line 6); if he understood what lesser-included offenses were (ROA p. 3199, lines 7-22). The judge asked how old Starnes was (ROA p. 3158, lines 16-18); how far he went in school (ROA p. 3158, lines 19-22); what kind of work he had done (ROA p. 3158, line 22 – p. 3159, line 1); had he ever been treated for mental illness (ROA p. 3159, lines 2-5); had he taken any medication in the previous 24 hours (ROA p. 3159, lines 6-8); was he under the influence of medications, drugs, or alcohol; (ROA p. 3159, lines 6-12); did he have any physical, emotional, nervous or mental condition that would prevent him from understanding the days events (ROA p. 3159, line 13 – p. 3160, line 1); had he been examined for competency (ROA p. 3160, lines 2-14); had he ever studied the law (ROA p. 3160, line 15 – p. 3161, line 2); and, had he been in criminal court before? ROA p. 3161, lines 3-25. At the March 11, 2004 hearing, the court remarked that it had gone through "all of the *Faretta* factors with him pretty thoroughly . . ." ROA p. 3553,

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[3] *Faretta v. California*, 422 U.S. 806 (1975).

lines 14-19. The *Faretta* colloquy failed to query Starnes regarding any capital sentencing issues.

On August 27, 2003, Starnes withdrew his motion to proceed *pro se*. ROA, p. 3230, line 25 – p.3231, lines 3.

At the later March 11, 2004 hearing Starnes again requested hybrid representation because his "main focus" was to *voir dire* the jury and make the opening statement, but was again denied. (ROA, p. 3554, line 15 – p. 3556, line 15). He also complained again that it was taking too long to try him, and that he wanted the discovery to which he believed he was entitled. ROA, p. 3555, lines 10-15. Starnes informed the judge that he felt that he needed to proceed *pro se* so he could compel the State the try him and to release the evidence. ROA, p. 3556, lines 10-15. Attorneys John Delgado and William Nettles (Nettles represented Starnes during his first trial) were appointed stand-by counsel. ROA, p. 3572, lines 14 – p. 3573, line 2. Starnes asked for, among other things, a law clerk to help him with his case. The judge denied the request. ROA hearing, p. 3570, lines 5-18.

At a later hearing, on April 29, 2005, the judge strongly suggested that Starnes reconsider his decision to proceed *pro se*. The judge, however, did not believe that he had any ability to stop him:

> "I don't know that I am in a position to do anything or change anything, but my own feeling is that I think you are in some real serious trouble in terms of preparing for this case.
>
> There are just some things here that—and just from my experience from going from hearing to hearing to hearing, things keep popping up that you don't seem to anticipate; and you are not supposed to anticipate them . . .

> This *pro se* thing, you may need to take another look at. You may need to think about it again. I'm not telling you I can even change it. It may be too late to change it. I don't know. . .
>
> You are going to find yourself at some point overwhelmed. The problem is you are going to find yourself overwhelmed at a time when your head should be very clear to get ready for trial. . .
>
> I'm not telling you what to do. It's up to you to decide how you are going to do with it. The Constitution says you have the right to do that, but I think I have a duty as the judge in this thing, just from my experience and seeing what is going to come, of just basically telling you I see some real problems coming down the line on this. . . It's up to you to make those decisions."

ROA, p. 3517, line 16 – p. 3519, line 24.

Even a local legislator, state Senator Jake Knotts, was concerned about *pro se* representation in this capital case, and was prepared to address it in legislation related to peremptory strikes. Senator Knotts, of Lexington County—where this case was tried—was concerned about capital defendants having access to juror questionnaires. Apparently another *pro se* litigant, in a non-capital case, wrote letters to jurors after his conviction, asking about their deliberations in his case. Having access to the questionnaires, he also had access to their personal information, including their addresses. To allay that concern, Starnes's stand-by counsel agreed to keep the juror questionnaires in their possession, and not with Starnes. ROA, p. 3427, line 9 – p. 3430, line 14.

Starnes represented himself during the guilt and sentencing phases of his capital trial. The testimony Starnes presented in mitigation during the penalty phase is 67 pages of transcript. ROA pp. 3000-3067. At his first trial, and represented by lawyers, the

penalty phase transcript is 245 pages long, including the testimony of an expert, Diane Follingstad, who testified about Starnes' adaptability to prison. First trial, ROA pp. 3438-3683. Starnes did not call any experts during his second trial. He was convicted, and again sentenced to death.

Both *Reed* and *Brewer* provide that capital defendants have the right to represent themselves at trial provided they properly waive their rights to counsel as required by *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). To waive the right to counsel, a defendant must do so "knowingly and voluntarily." Knowingly and voluntarily waiving right to counsel means that a defendant 'know[] what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269,279, 63 S.Ct. 236, 87 L.Ed. 268 (1942). To the extent that these two state cases permit *pro se* representation by a defendant on trial for his life, they should be overruled.

Faretta must now be considered in light of the significant developments in capital litigation that have occurred since *Faretta* was first decided in 1975. The capital sentencing structure of the modern day capital trial is much more complex than the *Faretta* court contemplated, and provides a reason to circumscribe the exercise of *Faretta* rights in this narrow context. See *Indiana v. Edwards*, 128 S.Ct. 2379, 2384, 171 L.Ed.2d 345 (2008) (citing other cases limiting the right to self-representation). Indeed, at the time *Faretta* was decided, the country was recognizing a moratorium on death penalty litigation. *See Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

As the United States Supreme Court in *Faretta* concedes, the question of the right to self-representation "[i]s not an easy question." Id. at 807. The Court however, held

that the right is necessarily implied from the structure of the Amendment ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails"). Id. at 819.

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353.).

Id. at 834. See *McKaskle v. Wiggins*, 465 U.S 168, 178, 104 S.Ct. 944 (1984) ("The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy.")

Notably, neither *Faretta* nor *McKaskle* are capital cases.

The Court's analysis could not have predicted the complex evolution of capital litigation in this country. While it may have been true in 1975 to hold that a defendant essentially carries the full weight of his ill-considered trial strategy, such arguments today fail to consider the resonant effects of capital litigation. In other words, a capital conviction and death sentence is not simply the concern of the condemned inmate, but implicates weighty interests of the state, and other inmates convicted of capital offenses. For these reasons, *pro se* representation in a capital case falls beyond the compass of *Faretta* and, respectfully, this Court should undertake to circumscribe the practice.

A. Weighty interests of the State

The State has significant and weighty interests in a capital conviction that are not otherwise present with the conviction of a non-capital defendant. The Due Process Clause of the Fourteenth Amendment imposes on States duties consistent with their sovereign obligation to ensure "that justice shall be done'" in all criminal prosecutions." *Cone v. Bell*, 129 S.Ct. 1769 (2009) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). See also *United States v. Agurs*, 427 U.S.97, 111, 96 S.Ct. 2392, (1976). However, there are unique considerations for the State in the capital litigation context that states must honor to ensure the fair administration of justice in such cases. Justice Stevens, in his concurrence in *Baze v. Rees*, 128 S.Ct. 1520 (2008) particularly notes, for example, a concern about the existence of rules that deprive defendants of a trial by jurors representing a fair section of the community, a higher risk of error because of the egregious nature of capital crimes, the risk of discriminatory application of the death penalty, and the irrevocable nature of the punishment. Id. at 1550-1551. Also, the State has an interest in heightened procedural safeguards for insuring a fair sentencing hearing. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978). The State has an interest in the competency of the condemned inmate. *Atkins v. Virginia*, 536 U.S. 304 (2002). Significantly, the State has an interest in the method of execution and challenges to those methods. *Baze, supra.* And, additionally, the State has an interest in the amount of time that inmates are on death row awaiting execution, and in the reversible error rate of capital trials. See *Thompson v. McNeil*, 129 S.Ct. 1299, 1300 (2009) (Stevens, J. mem.) ("[C]ondemned inmates await execution for an average of

nearly 13 years." And, "[m]ore than 30 percent of death verdicts imposed between 1973 and 2000 have been overturned, and 129 inmates sentenced to death during that time have been exonerated, often more than a decade after they were convicted").

The State has a weighty interest in insuring that a proper mitigation case is presented to the jury. *State v. Mercer*, 381 S.C. 149, 161, 672 S.E.2d 556, 562 n.7 (2009) ("This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence . . . The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence."). See *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). These significant and weighty concerns give the State a heightened interest in the representation that a capital defendant receives. See *S.C. Code Ann.* §16-3-26(B) (1) (requiring the appointment of two qualified counsel in death penalty cases). Simply, a *pro se* defendant's interest in his "individual dignity" and "autonomy" must be measured against the State's interest in protecting against the imposition of a death sentence based on concerns other than the individual characteristics of the defendant and the crime he committed:

> "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Lockett at 604, *supra* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1976)).

The *pro se* defendant's interests must also be measured against the State's interests in housing an inmate on death row who, but for his ill-conceived desire to represent himself, might not otherwise be there, and the potentially high costs of repeatedly litigating his case. And, axiomatically, the State has a supreme interest in not allowing its machinery to be used to execute an innocent person. A capital defendant's right to represent himself is substantially less than the State's interest in insuring that its death penalty apparatus functions conscientiously, and provides a justification for this Court to overturn *Reed* and *Brewer*.

B. Other Condemned Inmates

Another significant reason for imposing a *Faretta* limitation in the context of capital litigation involves this state's death sentence proportionality review. Pursuant to *S.C. Code Ann.* §16-3-25, the South Carolina Supreme Court is directed to consider the condemned defendant's sentence in relation to other "similar cases." 16-3-25 (C) (3) and further must reference those cases that it took into consideration. 16-3-25(E). A capital conviction, then, has an effect on parties aside from the defendant invoking his rights under *Faretta*. So, not only does the State have more of an interest when a capital defendant waives his right to counsel, but so do other defendants having their cases reviewed under this statute after they have been condemned. For example, James Reed's death sentence was considered in the proportionality review of the following cases: *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004) and *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003). These two inmates had a direct stake in the quality of Reed's representation since, had he not received a death sentence, then perhaps their cases would

not have passed the proportionality review, and their death sentences would be abrogated. Because *pro se* representation affects other condemned inmates' death sentences, the State has a significant interest in a capital defendant's representation at trial that trumps a defendant's rights under *Faretta*. Respectfully, the Court should condemn the practice of *pro se* representation for capital litigants, and overturn *Reed* and *Brewer*.

As an additional consideration that militates in favor of eliminating the practice of *pro se* representation in capital cases is the complexity and importance of the sentencing phase. There is no question but that issues relating to capital sentencing have come to the forefront in capital litigation, acknowledging the critical importance of the issue. See *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), and *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). While many, if not most, cases within this context address the duties and obligations of trial counsel to ensure that an appropriate mitigation case is put forward, the State should consider whether a capital defendant is even capable of putting forth his own mitigation case. In addition to the philosophical question of whether a defendant is sufficiently self-reflective to be able to cull through his life's events and provide some sort of context for them for the sake of asking the jurors to spare his life, there is a more pragmatic concern as well—his ability to simply make the case. The Lexington County Detention Center, for example, was not allowing Starnes' paralegal to come and visit him. ROA, page 3531, lines 6-9. There were funding issues as well, regarding a courier service since Starnes was incarcerated and could not run any errands himself. ROA, p. 3538, line 12 – p. 3540, line 6. Starnes also had difficulty consulting with experts because they were reluctant to do business

with him because he was an inmate. ROA, p. 3541, lines 12-23. Again, given the importance of the sentencing phase for a capital litigant and the logistical difficulties a *pro se* litigant has in mounting an adequate mitigation case, this Court should forbid the exercise of *pro se* representation for capital trials.

For this reason, the Court should reverse Starnes' murder convictions, vacate the death sentence and remand for further proceedings.

3.

Starnes did not knowingly and voluntarily waive his right to counsel during the sentencing phase of his trial.

Starnes never knowingly and voluntarily waived his right to counsel at the sentencing phase of his trial. During the *Faretta* colloquy, he was neither questioned nor advised of the problems associated with presenting his own mitigation case. The record does not otherwise reveal that he understood the dangers of proceeding *pro se* during this part of his capital trial. For a waiver to be effective, it must be knowingly and intelligently made. *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). And see *Adams*, *supra*. (Knowingly and voluntarily waiving right to counsel means that a defendant "know[] what he is doing and his choice is made with eyes open.") Additionally, waiver of fundamental rights cannot be presumed from a silent record. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938). See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973):

> "A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trail reached an unfair result precisely because all the protections specified in the Constitution were not provided. . . The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial."

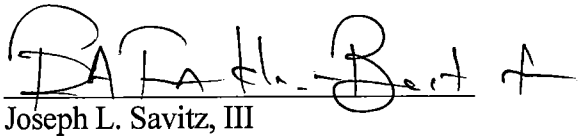
Id. At 241-242, 93 S.Ct. 2041.

Because the *Faretta* colloquy did not address the sentencing phase of his capital trial, and because it was not otherwise ascertained whether Starnes understood the dangers of proceeding with self-representation for this part of his trial, the record fails to establish that Starnes knowingly and voluntarily waived his right to counsel. Respectfully, Starnes asks this Court to direct a new sentencing hearing.

CONCLUSION

Based on the foregoing arguments, the Court should grant the relief requested therein and remand for further proceedings.

Respectfully submitted,



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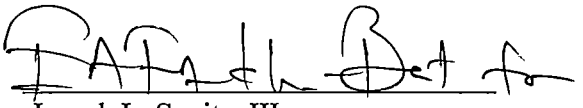
ATTORNEYS FOR APPELLANT

This 29th day of December, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 29, 2009



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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

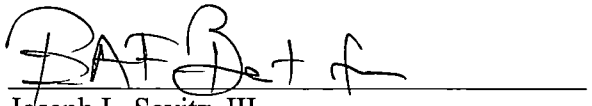
V.

NORMAN STARNES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of December, 2009.



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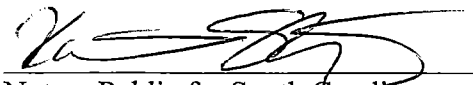
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of December, 2009.



(L.S.)
Notary Public for South Carolina

My Commission Expires: July 1, 2019 .