STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

APPELLANT

APPELLATE CASE NO. 2017-001676

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2020-UP-017

PETITION FOR REHEARING

On January 29, 2020, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed Jan. 29, 2020). Appellant challenged the trial judge's denial of his request for self-representation. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter due to significant points that were overlooked or misapprehended by this Court in arriving at its decision.

This Court's opinion suggested the trial judge's decision to deny Appellant his constitutional right to self-representation was correct because "'the government's interest in

ensuring the integrity and efficiency of the trial ... outweigh[ed] the [Appellant]'s interest in acting as his own lawyer.'" State v. Roberts, Op. No. 2020-UP-017 (S.C. Ct. App. filed Jan. 29, 2020) (quoting United States v. Frazier-El, 204 F.3d 553, 599 (4th Cir. 2000)). Further, this Court's opinion suggested Appellant's request was denied because he was not able and not willing to abide by the rules of procedure and courtroom protocol. Id. Finally, this Court's quotation that the right to self-representation "is not a license to abuse the dignity of the courtroom" nor a license to "not comply with relevant rules of procedural and substantive law" suggested this Court affirmed the trial judge's decision based upon a belief that Appellant was abusive to the court or refused to comply with the rules.

Appellant respectfully requests this Court rehear the matter because the record does not support these conclusions. Further, although this Court correctly stated the standard of review, this Court failed to apply the correct standard. In fact, this Court substituted its own view of the record for the trial judge's findings of fact.

The trial judge's ruling

The trial judge, who "deliberately" made "a conscious and concerted effort to observe" Appellant's "behavior" never indicated she was denying Appellant's right to self-representation because Appellant was not able or willing to abide by the rules of procedure or courtroom protocol. See R. 146, ll. 1-3. The trial judge never expressed any fear that Appellant was abusive to the dignity of the courtroom or would fail to comply with the rules of court. Instead, the judge repeatedly indicated she was denying Appellant's request because she did not find that he had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, ll. 17-21; R. 145, ll. 17-18. Later, she reiterated that her ruling was based upon her finding that Appellant did not understand "the significant jeopardy" that he was placing himself in by

invoking his right to self-representation. R. 145, ll. 14-16. In fact, the judge found that relieving trial counsel and permitting Appellant to represent himself "would be a substantial constitutional deprivation of [his] rights." R. 145, ll. 18-20. Contrary to any concerns about Appellant abusing the court, the judge denied the request because she determined Appellant did not "understand the consequences of [his] decision to proceed without a lawyer." R. 145, ll. 20-23. This Court must afford due deference to the trial judge's findings of fact, which included no findings that Appellant was abusive to the court or that he would engage in abusive conduct.

The right to self-representation

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").[1] According to the Fourth Circuit, the right to self-

[1] 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.

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 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 the South Carolina Supreme 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).

Invocation of the right to self-representation

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, the South Carolina Supreme 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 trial, on July 19, 2017, Appellant moved to relieve trial counsel and for the appointment of new counsel or the opportunity to retain new counsel. R. 2, ll. 9-18. The judge indicated she would not appoint new counsel, but she would allow Appellant to retain new counsel as long as counsel was ready for trial on the following Monday. R. 2, ll. 16-24.

Later when the subject was addressed again, the judge explained that she would not permit Appellant to represent himself *and* have counsel represent him simultaneously, however, she told Appellant that if he wanted to represent himself, he could talk all he wanted. R. 11, ll. 14-15. She also told Appellant that he would have to waive counsel with his "eyes wide open knowing that everything [he said] can be used against [his] best interest." R. 11, ll. 15-17. The judge encouraged Appellant to take advantage of trial counsel's representation. R. 24, ll. 8-15. However, if Appellant chose not to avail himself of representation that was "fine" by the judge. R. 24, ll. 16-17.

At the start of trial, the judge asked trial counsel if Appellant desired a formal arraignment. R. 116, ll. 7-10. When trial counsel indicated Appellant wanted to represent himself, the judge remarked that was "fine," but she required trial counsel to remain as "shadow counsel." R. 116, ll. 9-12. Thereafter, the judge inquired of Appellant personally regarding an arraignment, his request for a bond, his desire for minutes from the statewide grand jury proceedings, and access to audio/visual elements of the discovery materials. R. 116, l. 23 – R. 131, l. 7. During the discussions of those matters, Appellant requested "a moment" and the

judge agreed. R. 126, ll. 12-14. Then Appellant asked, apparently in reference to trial counsel, "He's supposed to shadow me, right?" R. 126, l. 15. The judge responded:

> Well, I would suggest to you that you keep him as your attorney because he knows the rules and you don't. And you tell him what questions you want asked of witnesses so that he can phrase them the way that they should be phrased so that you don't inadvertently incriminate yourself in anything. And I would strongly suggest you take advantage of a very seasoned criminal record.

R. 126, ll. 16-23. When Appellant protested that trial counsel was not working in his interest, the judge responded that he was working in Appellant's interest and that he would not risk losing his law license to collaborate with the state. R. 126, l. 24 – R. 127, l. 9.

After these preliminary matters were discussed, the judge asked trial counsel if he were ready to proceed with jury selection. R. 133, ll. 6-7. Trial counsel indicated Appellant was prepared to go forward as his own lawyer. R. 133, ll. 8-9. The judge responded that she was not going to relieve trial counsel "at this late stage or juncture." R. 133, ll. 10-11. She did not think it was "prudent to relieve [trial counsel] as counsel." R. 133, l. 12.

Even at the start of jury selection, Appellant continued to express his desire for self-representation, but he was rebuffed. R. 134, ll. 12-14; R. 143, l. 23 – R. 144, l. 8; R. 145, ll. 11-12. The judge threatened to remove Appellant and his lawyer from the courtroom if he made "any other outbursts." R. 144, ll. 9-12.

Throughout the course of the trial, Appellant continued to press his desire for self-representation, explaining his need to protect the record for appeal. R. 392, ll. 22-25; R. 393, ll. 7-8; R. 393, ll. 11-12; R. 393, ll. 24-25. Judge Jefferson re-iterated that South Carolina did not permit "hybrid representation" and that if "something" needed "to be protected," trial counsel would "do that." R. 393, ll. 1-6.

At the conclusion of the trial, Appellant still expressed his desire for self-representation. R. 890, l. 9; R. 890, l. 15. After the jury found Appellant guilty, Appellant asked if he could represent himself on appeal. The judge responded that if he wanted an appeal, trial counsel would file "a motion to appeal." R. 890, ll. 11-12. Thereafter, "Indigent Defense" would "step in and take over." R. 890, ll. 12-13. When Appellant reiterated his desire for self-representation, the judge told him he did not "want to do that" because "[t]hey have a whole group of lawyers who all they do is appeals. They are very good at it. Take advantage of their services, at no charge to you." R. 890, ll. 16-19.

Appellant moved for self-representation prior to trial. Appellant moved for self-representation again when his case was called for trial. Appellant moved for self-representation throughout the trial and into the sentencing proceeding. Nevertheless, he was denied this basic constitutional right because the judge determined it would not be in Appellant's best interest for him to act as his own lawyer. When Appellant clearly and unequivocally invoked his right to self-representation, the judge failed to conduct the proper inquiry as required by law. Although Appellant's requests for self-representation were coupled with expressions of dissatisfaction with trial counsel, Appellant did *not* waver from his desire to represent himself. See 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 Appellant in regard to his desire to proceed pro se, as discussed *infra*, evidence in the record revealed Appellant'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).

Regarding Applicant's competency, the judge stated she did "not perceive that he is incompetent." R. 22, ll. 1-2. In her estimation, Appellant had "a more than adequate understanding of the system." R. 22, ll. 2-3. In the judge's estimation, Appellant "probably

ha[d] a better grasp of it than others." R. 22, ll. 3-4. She perceived his refusal to cooperate with counsel and the doctor as "dilatory." R. 22, ll. 4-6. The judge did "not perceive" that Appellant had "some cognitive deficits that prevent him from doing what he needs to do." R. 23, ll. 8-9. Regarding, his intelligence, the judge opined he was "probably average standard if not slightly above average I.Q." R. 23, ll. 10-12.

The trial judge indicated that she "deliberately" made "a conscious and concerted effort to observe" Appellant's "behavior." R. 146, ll. 1-3. She determined Appellant was "more than qualified and adaptable and aware of what [was] going on." R. 146, ll. 3-4. She was confident that Appellant had "more than adequate ability to assist [his] counsel." R. 146, ll. 4-5. Per her observations, Appellant had "been involved in all the proceedings" and had "more than the ability to communicate" with trial counsel. R. 146, ll. 5-8.

Appellant had significant contacts with the criminal justice system as indicated by his criminal record. R. 891, l. 17 – R. 893, l. 13. In fact, Appellant had been convicted of an offense just three years prior to the instant trial. R. 893, ll. 9-10. The judge aptly explained that "due to the breadth of his criminal history," Appellant understood "the legal process" and his constitutional rights. R. 897, ll. 8-14. The judge had "no concern that he understands the legal process, that he understands the nature of his right to a jury trial, his right to a defense, and the other rights attendant constitutionally to him, as he has more than on many events during the court of this trial articulated for the Court." R. 897, ll. 8-14.

Appellant was thirty-eight years old at the time of the trial. R. 894, ll. 15-16. Appellant had a family, including two children. R. 895, ll. 19-20. According to the trial judge, Appellant exhibited average or above average intelligence. R. 23, ll. 10-12. During the sentencing, the judge remarked that Appellant had "articulated" his rights to the court over the course of his trial. R. 897,

ll. 8-14. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Appellant's invocation as knowing, intelligent, and voluntary.

At one point in the trial, Appellant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witnesses claimed Appellant was engaged in criminal activity in South Carolina. R. 632, ll. 10-14. Appellant indicated his counsel was "fighting against" him regarding presenting that evidence. R. 632, l. 14. When the judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of his incarceration in New York would "open[] the door." R. 635, ll. 21-22. The judge indicated the evidence was "a double-edge" sword. R. 635, l. 23. Appellant explained that the charges against him were "by far the worst" of any prior accusations or convictions. R. 635, ll. 24-25. Trial counsel indicated he had been discussing with Appellant that the jury had "no idea who he" was at that point, but that if Appellant "open[ed] the door" to allow the state to introduce "his entire record," then the jury would have a "preconceived mind." R. 636, ll. 2-6.

In response, the judge told Appellant the evidence of his incarceration in another state when alleged drug purchases were being made from him in South Carolina would be "prejudicial" to him. R. 636, l. 7. The judge told Appellant that as long as he were silent, there was nothing the state could say. R. 636, ll. 12-13. She informed Appellant that he could not "just get on the stand and say, I was in Nassau County." R. 636, ll. 15-16. If Appellant took the stand, the state would "get to ask [him] about everything else." R. 636, ll. 16-17. She opined that was "a dangerous road to go down. It's a rabbit hole." R. 636, ll. 17-18. She agreed with trial counsel that it was "not in [his] interest." R. 636, ll. 18-19. Despite trial counsel's and the judge's indication that presentation of

the evidence was not in Appellant's best interest, Appellant's desire to present the evidence of an alibi showed he had an understanding of the charges against him and the defenses available to him.

The judge's factual findings regarding Appellant's prior criminal history, intelligence, and understanding of the proceedings supported Appellant's request to make a knowing, voluntary, and intelligent waiver of counsel. Yet, the trial judge refused to permit Appellant to waive counsel because she did not believe it was "prudent to relieve" trial counsel and she did not perceive that Appellant had "sufficient grasps of the rules such that he would be able to protect his own interests." R. 133, l. 12; R. 133, ll. 17-21. Just as the trial judge in Samuel noted "how intelligent and articulate she found Samuel to be," Judge Jefferson repeatedly noted Appellant's intelligence and clear understanding of the legal proceedings. See Samuel, 422 S.C. at 604, 813 S.E.2d at 491. Also, like Samuel, Appellant repeatedly expressed his desire for self-representation despite the judge's "persistent attempts to dissuade him." See id.

All of the judge's factual findings regarding Appellant's intelligence, ability to understand, and comprehension of the legal proceedings are supported by the record. However, those factual findings militate in favor of concluding Appellant's invocation was knowing and voluntary. Thus, the judge's factual findings, which must be accorded deference, support a legal conclusion that Appellant's request to waive counsel was made with his "eyes wide open." The judge's legal conclusion, which must be reviewed de novo, was error.

Timely invocation

Appellant'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, Appellant's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Appellant "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. Appellant'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. Not only did Appellant move to represent himself on the day of trial, but he made his request the week prior to trial when the parties were gathered for the pre-trial hearings. According to the judge, this was the first hearing in Appellant's case; thus, it was the first time that Appellant could invoke his right to self-representation. See R. 7, ll. 4-5.

The judge's comment that she would not relieve counsel at that late "stage or juncture" was belied by the record because the judge previously appeared to grant the motion and permit Appellant to discuss several legal matters. See R. 116, ll. 9-12. In fact, on the day of the pre-trial hearing, the judge told Appellant that it was "fine" by her if he wanted to represent himself at trial. R. 24, ll. 16-17. The judge stated she was "comfortable" with "whatever" Appellant felt was "acting in [his] best interest." R. 24, ll. 17-19. Again, the judge reiterated that she was "fine" if Appellant "plan[ned] to represent [himself]" and that "[w]hatever decision [he] ma[d]e [was] on [him]." R. 25, ll. 3-4.

The trial judge sent what can only be described as "mixed messages" to Appellant. At times, the judge appeared to permit Appellant to represent himself, but at other times, she refused. After the judge informed Appellant that hybrid representation was not allowed, she then – in direct contradiction of her disavowal of hybrid representation – inquired of Appellant and trial counsel regarding various matters. During the pre-trial hearing, the judge seemed to permit Appellant to represent himself. However, when the trial started the judge refused to allow Appellant to continue representing himself. Even the cold record revealed the surprise by all parties at the sudden turn of events.

Adequate hearing

The inquiry that followed Appellant's request had little do to with the *only* inquiry that mattered – whether Appellant was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether Appellant's decision to waive counsel was "prudent" and whether Appellant sufficiently grasped the rules "such that he would be able to protect his own interests." R. 133, ll. 12-21. Although the judge agreed with Appellant that he had a constitutional right to self-representation and advised Appellant that by waiving counsel he risked "inadvertently incriminate[ing]" himself, the judge did not engage in a colloquy with Appellant to determine if decision to waive was knowingly and voluntarily made. See R. 126, ll. 16-23.

While the judge's benevolent and paternalistic instincts are laudable, they have no place in determining whether an individual may waive his right to counsel. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (explaining "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one"); Fuller, 337 S.C. at 241 (explaining the right to self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel"); Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (the decision to

proceed pro se must be honored out of respect for the individual and a determination that the accused lacks legal knowledge does not justify a denial of the right to self-representation); Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (explaining that the "only proper inquiry is that mandated by Faretta" when a defendant invokes his right to self-representation); see also, Frazier-El, 204 F.3d at 558 (re-iterating a long-standing principle that a request to waive counsel must be honored without regard to whether the defendant would benefit from the advice of counsel).

Not manipulation

While the trial judge never found that Appellant's motion to waive counsel was an attempt to manipulate the proceedings, any argument to that effect would be meritless. If this Court's opinion rested upon a determination that Appellant was attempting to manipulate the judicial proceedings, it is not supported by the record and violates the standard of review.

The South Carolina Supreme Court explained that when a defendant invokes his right to self-representation before trial, "the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel." State v. Samuel, 422 S.C. 596, 603, 813 S.E.2d 487, 491 (2018). According to the Court, "once a defendant has been permitted to represent himself, the trial court has broad discretion to revoke that right" for manipulative behavior. Id. at 605 n.4, 813 S.E.2d at 492 n.4. Trial courts are not required "to suffer 'mischief' or disruptive behavior in the courtroom with no recourse." Id. In fact, "a defendant's constitutional right to self-representation may be lost when, in the trial court's discretion, he is disrupting or manipulating the trial of a case." Id. "[H]owever, that inquiry is separate from ... the trial court's initial decision to permit a defendant to waive his right to counsel and proceed *pro se*." Id.

The trial judge never found Appellant's desire for self-representation was anything but sincere. More precisely, the judge never found Appellant's request for self-representation was a manipulative effort in order to present frivolous and baseless arguments rather than a genuine desire to proceed *pro se*. Had the judge made such a finding, the record would not support the conclusion.

Appellant expressed his understanding of the statutory scheme governing the state grand jury and requested the state be required to abide by that scheme. For example, Appellant requested the "minutes" from the state grand jury proceedings. R. 119, ll. 5-6. When the judge indicated Appellant would not be able to learn of anything during the grand jury proceedings, the state acknowledged that although the transcript from the state grand jury was not a public record, Appellant was permitted to read it according to the statute and controlling case law. R. 119, ll. 14-18. When Appellant informed the judge he had been trying to order the transcript from Court Administration, the judge informed him he had been requesting the transcript from the wrong entity. R. 119, l. 19 – R. 122, ll. 9.

When the judge questioned what Appellant believed he would learn from the documents related to the grand jury, Appellant indicated he hoped to prove that "no State Grand Jury even occurred." R. 123, ll. 11-12. To this, the judge explained the grand jury met as evidenced by the indictments. R. 123, ll. 13-14. Without question, Appellant's desire to view the documents related to the grand jury proceedings was well-founded in the law. See Evans v. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005) (explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury's proceedings).

Next, Appellant explained he had questions about his indictments not being "certified." R. 123, ll. 21-23. Appellant explained that during a pre-trial hearing, the judge indicated the indictments were not certified and did not have to be certified, but on the day of the trial, the judge indicated the indictments were certified. R. 21, ll. 10-20; R. 123, ll. 17-23. The judge told Appellant that "once something is in a court order, sir, it's already certified." R. 123, ll. 24-25. Seemingly inconsistent, however, she subsequently told Appellant that only documents going out of state would need to be certified. R. 124, ll. 1-2. According to the judge, "never, under any circumstances," would an individual receive "certified indictments." R. 124, ll. 2-4. Certainly, Appellant's request for certified indictments was not unreasonable or an attempt at manipulation in light of the statutory requirement that his indictment be certified. See S.C. Code Ann. § 14-7-1640 (stating that if an indictment is returned by the state grand jury, "it must be certified").

Later when Appellant expressed his concerns that his right to a speedy trial had been violated, the judge told him that the issue was "moot" because a trial date had been set. R. 160, ll. 6-11. According to the judge, "[t]he only remedy for a speedy trial motion is to set a trial date." R. 160, ll. 9-11. After explaining that other people were in jail awaiting trial for much longer than Appellant, the judge remarked that she denied demands for speedy trial "all the time" because the case law was not in the defendants' favor. R. 160, ll. 12-23. She further told Appellant that "the remedy for a speedy trial is to set a trial date," and there was "no other remedy." R. 160, ll. 23-25. Specifically, she told Appellant that the "[r]emedy for speedy trial is *not* to *dismiss* [the] charges. Doesn't make them go away. Purpose of speedy trial is to get [the defendant] in front of a court and get [the defendant] to trial. Cases don't get away or get *dismissed* on a speedy trial motion." R. 161, l. 25 – R. 161, l. 4 (emphasis added). Later, when the judge was discussing the state's plea offers with Appellant and Appellant's concerning about

a guilty plea waiving his right to pursue matters on appeal, the judge again told Appellant that a violation of his right to speedy trial would not result in a dismissal. R. 296, ll. 15-23.

Certainly, Appellant's interest in asserting his right to a speedy trial could not be deemed an attempt at manipulation. Rather, it showed Appellant's understanding of the legal process and his understanding of possible legal remedies he could pursue. Contrary to the judge's assertion that the remedy for a speedy trial violation was not dismissal of the charges, the South Carolina Supreme Court and the United States Supreme Court held the *only* remedy for a speedy trial violation is dismissal of the charges. See Barker v. Wingo, 407 U.S. 514, 522 (1972) (holding that if a court concludes a defendant's right to a speedy trial has been violated, dismissal of the charges "is the *only* possible remedy") (emphasis added); State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016) (same).

In addition to all the evidence in the record indicating Appellant was not attempting to manipulate the criminal justice system when he moved to waive counsel, "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation." Samuel, 422 S.C. at 606, 813 S.E.2d at 492 (citing State v. Barnes, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015)). As the Supreme Court explained, "[i]n most cases where a court has found a defendant to be manipulative, the defendant was clearly attempting to dispense with counsel in order to make impermissible arguments or raise invalid defense at trial – in effect, to 'beat the system' – rather than to waive the benefits of counsel." Id. at 606, 813 S.E.2d at 493.

Application of the proper standard of review coupled with the guidance provided by the Supreme Court in Samuel regarding how to analyze the question on appeal requires reversal of

Appellant's convictions and sentences due to the trial judge's failure to honor his sincere request for self-representation.

Conclusion

Appellant respectfully requests rehearing of this matter in order to analyze the question presented using the proper standard of review and the guidance from the Supreme Court provided in Samuel.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 13th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Emory Warren Roberts, #373393, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of February, 2020.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 13th day of February, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: December, 31, 2029