

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2021-UP-298

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SC Court of Appeals

THE STATE,

RESPONDENT,

v.

JAHRU HAROLD SMITH,

PETITIONER

APPELLATE CASE NO. 2018-000505

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for the Petitioner, Jahru Harold Smith, respectfully requests that this Court grant rehearing. Counsel respectfully submits that this Court overlooked the fact that Petitioner, a pre-trial detainee, made the necessary showing that he was visually impaired and needed prescription eyeglasses in order to proceed to trial. Petitioner made a reasonable request for a continuance in order to obtain prescription eyeglasses. The need for eyeglasses is directly linked to Petitioner's constitutional due process rights to assist in his own defense as well as confront witnesses against him. Additionally, counsel respectfully submits that this Court overlooked the fact that once Petitioner made the showing that he was

visually impaired, the trial judge failed to make a meaningful inquiry into the nature of Petitioner's disability and make such accommodations as deemed necessary. The accommodation in the present case was to simply grant a continuance in order to allow Petitioner to obtain prescription eyeglasses. Under the narrow facts of this case, the trial judge abused his discretion in refusing to grant the continuance. The error requires reversal.

Finally, counsel for Petitioner respectfully submits that this Court overlooked the fact that Petitioner chose not to participate in the trial and represent himself only after the judge denied the continuance motion so that Petitioner could obtain the prescription eyeglasses he needed in order to represent himself. The denial of the continuance motion deprived Petitioner the constitutional right to self-representation. This error also requires reversal.

- 1. The trial judge erred in refusing to continue the case in order for the visually impaired Petitioner to obtain prescription eyeglasses so that he could see to assist his attorney with his defense.**

Petitioner's trial took place in Greenville County. The very first pre-trial motion involved Petitioner's request for prescription eyeglasses. Trial counsel told the judge, "I just spoke to my client. And Mr. Smith is being held in the Anderson County Detention Center." (R. p. 9, lines 24-25). Trial counsel additionally told the judge, "When he was arrested at that time, his glasses broke. He does not have his glasses. And he receives some disability due to the fact of his blindness. He tells me that he can barely see, and everything looks like a TV screen. And he cannot read. He tells me because of that, he cannot actively assist in his defense in picking the jury. And he requests that he be given glasses at this time so that he can – can assist in his defense, Your Honor." (R. p. 10, lines 2-10). The judge responded, "Well, I don't know that it would serve any useful purpose to give him a pair of glasses that didn't meet his prescription."

(R. p. 10, lines 11-13). Trial counsel responded, “Right. I understand, Your Honor. I do know that he does have limited vision. He did have very thick glasses the times I saw him before. I don’t know how long it would take him to get glasses.” (R. p. 10, lines 14-19). The judge then asked trial counsel, “Do you feel – do you feel that that prejudices him in some way in the jury selection process?” (R. p. 10, lines 20-22). Trial counsel answered, “Your Honor, he does. Because he wants to be able to, I guess, confer with me concerning who is selected on his jury.” (R. p. 10, lines 23-25). The judge found that Petitioner was not prejudiced by the fact that he did not have prescription glasses to see during jury selection. (R. p. 11, lines 15-16). Petitioner objected. (R. p. 11, line 19 – p. 12, lines 1-8).

Later Petitioner again objected stating:

Excuse me, Your Honor. I still . . . got to object to this. Because, one, I can’t even go over the jury questionnaire: right? I don’t know what to ask my attorney to ask these folks. You know what I’m saying? And – and, two, right – I have a right to face my jury of peers. I can’t see them, man. You’re going to force me to go through a trial a blind man. And the only thing I’m asking you to do right is to give me a deferment. It won’t take no people no more than two and a half weeks to have me some glasses made, if you’d issue an injunction; right? I’d be ready to go to trial. As a matter of fact, I’ll try the trial myself.

(R. p. 19, line 15 – p. 20, lines 1-5). The judge assured Petitioner that his objection was protected on the record and if convicted, Petitioner could appeal the judge’s decision. (R. p. 20, lines 6-11). Petitioner responded stating, “I don’t want to wait until after I’m convicted, as you say, and then assert the right. I want to assert the right here and now. Because this matter can be resolved right now; right. The only thing I’m asking is to be provided some eyes so I can see to defend myself. That’s the only thing that I’m asking.” (R. p. 20, lines 18-24). Petitioner also noted, “And, I mean, the – the Prosecution have waited three years; right? What’s – what’s a couple more weeks to try this case?” (R. p. 21, lines 1-3).

The judge advised Petitioner, “I understand, Mr. Smith. And I appreciate your position. Just understand that I’m not convinced that your – your inability to see well prejudices you legally in this instance.” (R. p. 21, lines 4-7). Petitioner then said:

Okay. Let me put it to you this way right here then. This is how it prejudices me: right? Because, one, I’m asserting my Sixth Amendment right to defend myself; right? That’s how it prejudices me. And I cannot defend myself if I cannot see to read, go over discovery, or whatever evidence that the Prosecution might have, or any exculpatory evidence that the might have that’s favorable or nonfavorable to me.

(R. p. 21, lines 8-16). The judge then told Petitioner that he had been appointed counsel but asked if he wanted to fire counsel. (R. p. 21, lines 23-24; p. 22, lines 16-17). Petitioner responded, “No. I don’t want to fire my counsel. I want – I want to assert the right to defend myself with the assistance of counsel.” (R. p. 22, lines 18-20). The judge then told Petitioner, “What you’re saying is legally inconsistent. Okay.” (R. p. 22, lines 21 -22).

After some more discussion about jury selection, the following exchange took place between Petitioner and the judge:

THE COURT: It seems to me, Mr. Smith, that if you were sincere and you were making an honest motion before this Court, you would have brought the prescription, and you would have told me your eyesight is with specificity –

DEFENDANT: How can I do that if I’m incarcerated –

THE COURT: -- as opposed to just standing up and saying I can’t see. You would have armed Mr. Kornfeld [trial counsel] –

DEFENDANT: Today is my first time seeing my attorney since last year. This is the first time I’ve seen my attorney since last year; right? He could have – he could have been here and told you this if he would have come to see me when – once he found out that a trial date had been set. He knew I was in Anderson County. He could have – he could have told you this. I tried to call him. I couldn’t get in touch with him.

(R. p. 24, lines 6-23). Trial counsel did not deny that he was seeing his client for the first time since last year on the morning of trial and simply told the judge that he wrote to his client.¹ (R. p. 24, line 25 – p. 25, lines 1). Finally, Petitioner told the judge, “Now, you’re saying that – I could have brought you my prescription up in here. I’m saying if I had my prescription and I could have brought it to you, I, certainly would have done so.” (R. p. 25, lines 14-17). The judge then ruled stating, “Okay. Mr. Smith, I appreciate it. And you’ve been heard on the record. I respectfully, respectfully and with no animus or ill will towards you, I respectfully deny your motion.” (R. p. 25, lines 18-21). The trial judge erred.

In United States v. Scheur, 547 F. Supp. 2d 580, 588 (E.D. La. 2008), Judge Eldon E. Fallon, United States District Judge for the Eastern District of Louisiana ordered special accommodations for Scheur, who was blind. The judge wrote:

“The constitutional guarantee of due process in a criminal trial ‘is, in essence, the right to a fair opportunity to defend against the State’s accusations.’ ” Ferrell v. Estelle, 568 F.2d 1128, 1131 (5th Cir.1978) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). “That guarantee encompasses both the right of a defendant to confront witnesses against him and his right to assist in his own defense.” Id. But as the United States Court of Appeals for the Fifth Circuit further explained in Ferrell, a case involving a deaf defendant, these rights are not absolute:

The Constitution does not, however, guarantee every defendant a perfect trial. The rights vouchsafed are practical, reasonable rights rather than ideal concepts of communication, and even these pragmatic rights may not be exercised without limit. The Constitution does not require that every defendant comprehend the English language with the precision of a Rhodes Scholar or appreciate the nuances of a witness’ expressions or behavior with the skill of a doctor of psychology. Nor may a defendant press the exercise of his right to the point at which he disrupts the public’s right to an orderly trial. Id. (fn #10 omitted).

In granting special accommodations by allowing the defendant to use a hand- held braille computer the district judge relied on a case decided by the Illinois Supreme Court and wrote:

¹ Trial counsel’s failure to visit Petitioner prior to trial and determine that Petitioner needed his prescription eyeglasses may be an issue that will need to be addressed in post-conviction relief.

The Supreme Court of Illinois has set forth an authoritative road map for courts to follow when faced with the trial of a disabled defendant:

The general rule in handling the trial of a criminal defendant who is handicapped by deafness, blindness or other affliction is that a trial judge should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit. He need only give such aid to intelligent appreciation of the proceeding as a sound discretion may suggest. The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial. In the proper administration of justice, however, the court should give a person accused of crime a reasonable opportunity to obtain the benefit of his constitutional rights.

People ex rel. Myers v. Briggs, 46 Ill.2d 281, 263 N.E.2d 109, 113 (1970). To exercise its discretion in this respect, however, “the court must first make some meaningful inquiry into the nature and extent of the defendant's [disability].” People v. Williams, 331 Ill.App.3d 662, 265 Ill.Dec. 136, 771 N.E.2d 1095, 1099 (2002). As noted above, the Court conducted an evidentiary hearing on April 17, 2008, regarding Scheur's disability and is now prepared to exercise its discretion.

United States v. Scheur, 547 F. Supp. 2d 580, 587–88 (E.D. La. 2008).

In the present case the trial judge abused his discretion by failing to make a meaningful inquiry into the nature and extent of Petitioner's disability. Petitioner made the necessary showing that he was visually impaired and needed prescription eyeglasses so that he could see in order to be able to assist in his defense and proceed to trial. Once Petitioner made the showing that he was visually impaired, the trial judge failed to make a meaningful inquiry into the nature of Petitioner's disability and make such accommodations as deemed necessary. Petitioner was simply asking for a continuance in order to obtain prescription eyeglasses. The request was reasonable and necessary. As correctly noted by Petitioner, he was arrested ten days after the incident on February 3, 2015, but the State did not call the case to trial until March 12, 2018, three years later. A two to three-week continuance would have provided Petitioner with a reasonable opportunity to obtain the benefit of his constitutional right to due process and to assist in his own defense. The delay in the request should not be attributed to Petitioner as trial counsel

admitted that he had not personally visited Petitioner in Anderson County prior to trial. Petitioner, a pre-trial detainee, brought the need for eyeglasses to the trial court's attention at his first opportunity. The judge's insinuation that Petitioner was not being honest or sincere about his ability to see is not supported by the record where trial counsel advised the judge that Petitioner received disability compensation because of visual impairment. (R. p. 10, lines 3-4).

Denying Petitioner the opportunity to obtain prescription reading glasses for trial is analogous to denying a non-English speaking or deaf defendant the benefit of an interpreter at trial. "The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973). While the appointment of interpreters in court proceedings for the deaf and non-English speakers is controlled by statutes in South Carolina,² a similar accommodation should be made for the blind, especially when the defendant is indigent, in pre-trial detention, and is simply requesting prescription glasses so that he can see during the trial.

In State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996), the South Carolina Supreme Court wrote:

The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion. State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989). Reversals of the refusal of a continuance are about as "rare as the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Where there is no showing that any other evidence on behalf of the Petitioner could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion. State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966).

² S.C. Code §15-27-15 for deaf people and S.C. Code §15-27-155 for non-English speaking people.

In the present case there is a showing that Petitioner needed a continuance in order to obtain prescription eyeglasses. The need for the eyeglasses is directly linked to Petitioner's constitutional due process rights to assist in his own defense as well as confront witnesses against him. Based on counsel's representation to the judge that Petitioner was visually impaired, the judge should have made a meaningful inquiry into the nature and extent of Petitioner's disability and made such accommodations as deemed necessary. What little inquiry was made by the judge in the present case was not meaningful. The present case is analogous to State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017), where the Court found the trial judge erred in refusing to grant a continuance and proceeding with a trial in absentia without making proper findings in regard to notice. The trial judge in the present case abused his discretion in refusing to grant a continuance so that Petitioner could obtain prescription eyeglasses.

In affirming the convictions this Court wrote:

We find no error in the trial court's denial of Petitioner's motion for a continuance to acquire glasses in order to assist in his defense. Petitioner made no showing to the trial court that he required prescription eyeglasses in order to assist in his own defense or to confront witnesses against him. See Rule 7(a), SCRCrimP (providing "[c]ontinuances may be granted by a presiding judge . . . only upon a showing of good and sufficient legal cause"). Though Petitioner maintained to the trial court that he could not see without his prescription eyeglasses and trial counsel stated his understanding that Petitioner received some disability due to his visual impairment, these were mere assertions. During his motion, Petitioner presented nothing to the court regarding the extent of his visual impairment or whether it hampered his ability to assist in his defense. He also presented nothing to show he made any effort prior to trial to obtain a new pair of glasses. Further, we find no evidence that the trial court's suggested accommodation of the use of trial counsel to assist Petitioner visually, as well as the court's assurance that they could take their time, was insufficient or that Petitioner would be prejudiced by use of the suggested accommodation. Additionally, we find Petitioner's reliance on United States v. Scheur, 547 F. Supp. 2d 580 (E.D. La. 2008), is misplaced. There, the government filed a motion in limine regarding the need for special accommodations for Scheur—who was blind—following allegedly fruitless

discussions with defense counsel concerning the defendant's disability. *Id.* at 582, 583. The United States District Court thereafter scheduled an evidentiary hearing on the matter, which was held eleven days prior to Scheur's trial date. *Id.* at 584 n.6. In the wake of the hearing, the court observed "an authoritative road map for courts to follow when faced with the trial of a disabled defendant" and ordered certain accommodations for Scheur. *Id.* at 588, 589. Here, the issue is not the extent to which a court should accommodate a defendant's known disability as it was in Scheur. Rather, the issue is whether the trial court abused its discretion in denying Petitioner's motion for a continuance—made on the day of trial—when no showing was made of (1) the extent of his alleged disability or whether his disability required further accommodations in order for Petitioner to assist in his defense beyond those noted available by the court and (2) whether Petitioner acted with diligence in attempting to obtain prescription eyeglasses prior to trial or in bringing the matter to the court's attention.

State v. Jahru Harold Smith, No. 2018-000505, 2021 WL 3523206, at *1 (S.C. Ct. App. Aug. 11, 2021).

Counsel respectfully submits that Petitioner made the necessary showing that he was visually impaired and needed prescription eyeglasses so that he could see in order to be able to assist in his defense and proceed to trial. (R. p. 10, lines 2-25). Once Petitioner made the showing that he was visually impaired, the trial judge failed to make a meaningful inquiry into the nature of Petitioner's disability and failed to make such accommodations as deemed necessary. Petitioner, a pre-trial detainee, brought the need for eyeglasses to the trial court's attention at his first opportunity.

This Court also wrote, "To the extent Petitioner maintains he was unable to present the proper showing to the trial court based upon trial counsel's failures, the proper remedy for such—as observed by Petitioner in his brief—is a post-conviction relief (PCR) action." State v. Jahru Harold Smith, No. 2018-000505, 2021 WL 3523206, at *1 (S.C. Ct. App. Aug. 11, 2021). While trial counsel's failure to meet with Petitioner prior to trial can be raised in post-conviction relief, the trial judge's failure to grant a continuance motion after Petitioner made the necessary showing is raised on direct appeal and should be properly addressed by this Court.

The need for eyeglasses is directly linked to Petitioner's constitutional due process rights to assist in his own defense as well as confront witnesses against him. Respectfully, this Court should grant the motion for rehearing and find that the trial judge abused his discretion in refusing to grant a continuance in order to allow Petitioner to obtain prescription eyeglasses. This Court should grant a new trial.

2. The trial judge erred in refusing to continue the case in order for the visually impaired Petitioner to obtain prescription eyeglasses so that he could see in order to exercise his Sixth Amendment right to self-representation.

Later, after the trial judge denied the motion for a continuance, Petitioner moved to represent himself. Trial counsel told the judge, "I spoke with Jahru Smith, my client, at lunch. And he now says that you misunderstood him, I guess, I concluded. But he wants to represent himself and assert his Sixth Amendment right, and have me act as standby counsel. Those aren't the exact words that he said." (R. p. 36, line 21 – p. 71, line 1). When questioned, Petitioner told the judge, "Yes, sir. As I previously informed the Court that I'd like to assert my Sixth Amendment right to self-representation with the assistance of counsel." (R. p. 37, lines 12-15). After questioning Petitioner about self-representation, Petitioner told the judge, "As I informed you before, it is impossible for me to do that without my mandate prescription eyeglasses. And the fact of the matter is the new evidence that the Prosecution has turned over to my attorney, I have not had the opportunity to review, as well as other material in the case." (R. p. 39, lines 4-9). The judge ruled, "All right. Mr. Smith, I'll allow you to represent yourself. I'm not going to continue the case. Okay. You can – you can use Mr. Kornfeld to assist you in the review of documents. And we'll take our time. Any document that's turned over –" (R. p. 39, lines 14-18). Petitioner objected. (R. p. 39, lines 19-21).

When Petitioner stated that he wished to leave the courtroom, the judge encouraged him to stay but Petitioner responded, “For what? How am I going to stay? Man, I’m blind. How in the hell you going to allow me to represent myself and I’m blind? But I’m telling you I can see if you allow me time to get my prescription eyeglasses. That’s not fair. That is not fair at all.” (R. p. 40, line 22 – p. 41, line 1). The following took place between Petitioner and the judge:

DEFENDANT: Yes. I’m saying my counsel and me, we’re leaving. Y’all go ahead and try the case. That’s what you’re doing anyway. I ain’t got no counsel.

THE COURT: I’m directing Mr. Kornfeld to stay and to represent you.

DEFENDANT: Well, I’m directing him to not represent me. I’m representing myself.

(R. p. 41, lines 3-9). Petitioner then left the courtroom. (R. p. 41, lines 10-11). The judge then stated:

All right. Just to be very clear about matters, I’m ordering, Mr. Kornfeld, for you to continue to represent Mr. Smith in this proceeding. I recognize that he has made a motion to have you removed as counsel or to represent himself. However, he’s elected to leave the courtroom. I don’t want him to be prejudiced by that decision any more than is absolutely necessary. I know that you have prepared this case. You’ve had the opportunity to discuss the same with him. And, inasmuch, he deserves representation, and I’m going to leave you on the case. I think that’s appropriate under the circumstances.

And I’ll state clearly for the record in case I haven’t articulated clearly enough, because Mr. Smith, essentially, didn’t want to have a discussion or to articulate his position clearly. He says he couldn’t see. Well, that may or may not be true. I don’t know that. I don’t have any type of prescription which would suggest to me that he is blind, that he’s legally blind, or that his ability to see is so compromised that he can’t function. Now, that very well may be the case. But I don’t have anything that demonstrates that, other than his representation. So I -- I don’t -- I don’t have anything in the record substantively which demonstrates by a preponderance of the

evidence, clear and convincing evidence, or beyond a reasonable doubt, or even rises to probable cause that he is legally prejudiced by not having glasses today.

And any prejudice that he may suffer individually from having his vision compromised is compensated by having an attorney, an able-bodied attorney, who is able to review documents and conduct the trial of this case. Again, he's elected to excuse himself from the courtroom, which is unfortunate. I wish he wouldn't. I'd rather put up with his antics than have him leave the courtroom. But he made that decision. And I'm not going to continue the case simply because he makes a representation that he can't see. If that were the case, then people with handicaps would never – they could never go the trial. And I'm not convinced, again, that he suffers from a definable handicap, because he hasn't given me any evidence to convince me of the same. It's simply a bald-faced assertion. It may be true or not be true. But it isn't sufficient in the court of law. Are we ready for the jury?

(R. p. 41, line 17 – p. 42, 43, lines 1-11). The trial judge erred. In failing to grant a continuance and make the reasonable accommodation of providing the opportunity for the visually impaired Petitioner to obtain prescription eyeglasses, the trial judge denied Petitioner the right to self-representation. The trial judge's statement that Petitioner's visual impairment was "simply a bald-faced assertion" is not supported by the record where trial counsel advised the judge that Petitioner received disability for being blind.³ (R. p. 10, lines 3-4). Before concluding the trial proceedings for that day the trial judge stated, "If some how, we can get him glasses, get him glasses." (R. p. 119, lines 17-18). It is unclear from the record what, if any, action was taken in regard to obtaining prescription eyeglasses for Petitioner.

Prior to the proffer of Petitioner's prior attorney as to whether or not Petitioner waived the attorney client privilege by instructing the attorney to inform law enforcement about the location of a weapon, Petitioner's trial counsel told the judge, "Your Honor, is there a – I tried to

³ Any issue in regard to trial counsel's failure to obtain evidence of Petitioner's visual impairment or failure to obtain prescription eyeglasses will need to be addressed in post-conviction relief.

get Jahru to come in earlier today. . . .I guess it was his lunch and he didn't. Is there a possibility – I don't know where he is – that maybe I could get him to come in for this and maybe he could testify concerning this? Maybe he wants to, maybe he doesn't." (R. p. 280, line 24 – p. 281, lines 2-6). The following exchange then took place:

THE COURT: You can, certainly, ask him. Let's go ahead and put Ms. Gorton on the stand. Okay.

MR. KORNFELD: Okay

THE COURT: Is he there in the cell, or is he – he's downstairs?

THE COURTROOM DEPUTY: He's downstairs. And he used some profanity about him talking to him at lunchtime.

THE COURT: Is that right?

MR. KORNFELD: Not to me.

THE COURTROOM DEPUTY: Through the officer.

THE COURT: I understand. I understand. So what you're suggesting is that they may be a little bit on the outs, at least, from Mr. Smith's perspective. Swear Ms. Gorton in.

(R. p. 281, lines 7-20). It is unclear from the record whether Petitioner was given the opportunity to return to the courtroom for the proffer.

The judge ruled that Petitioner waived the attorney client privilege and allowed former counsel to testify against Petitioner at trial. After ruling the judge stated, "I will tell you that I – I certainly, wish that he were here to respond and, perhaps, assist in – in the cross-examination of Ms. Gorton. But he has voluntarily elected to excuse himself from the courtroom. And there's nothing I can do about that." (R. p. 293, lines 23 – p. 294, lines 1-2). It is unclear from the record whether Petitioner was given the opportunity to return to the courtroom for the testimony of his former attorney.

The next day, before the trial resumed, trial counsel told the judge, “Your Honor, I haven’t talked to him [Petitioner] this morning. I talked to one of the officers. And he indicated that he didn’t want to come up again.” (R. p. 351, lines 9-11). The mother of Petitioner’s child, Tiffany Petty, was called as a witness by the State and testified that Petitioner was legally blind and received a disability check as a result. (R. p. 371, lines 12-25). Following a discussion with Petitioner during the lunch break trial counsel told the judge, “I spoke with Jahru at lunch. And he has instructed me, again, to do a few things. But, one, he’s instructed me to leave the courtroom. He’s instructed me that I am no longer his lawyer. And he’s instructed me to inform the Court, again, that he asserts his Sixth Amendment right to self-representation. And that he needs the assistance of glasses to legally help him with his case. He cannot have – he cannot get glasses because he is in the Anderson County Detention Center and has not been provided any.” (R. p. 431, lines 19 – p. 432, lines 1-4). The judge ordered trial counsel to continue to represent Petitioner and ruled, “With respect to the glasses issue, again, I’ve heard that and I’ve ruled on it. And I’ll not – I’ll not articulate the Court’s position again. The ruling stands.” (R. p. 432, lines 14-16).

After denying trial counsel’s motion for a directed verdict, the judge stated:

I’ll, also, take the opportunity again to address the fact that he’s -- that he, Mr. Jahru Smith, has elected not to participate in the trial. He’s here again today. He has clothes to dress out. He’s elected not to come into the courtroom. And, again, I’ve tried to encourage him to come into the courtroom.

I, also, recognize the motions with respect to his --I recognize that he’s made a motion to defend himself, which I granted. But once he found out that that was not going to operate to cause a continuance, he left the courtroom again.

Oftentimes, when you look at a transcript of a record, it’s difficult to ascertain what, actually, happened. And I just want to state on the record that, from the Court’s perspective, that motion of self-representation, that was entirely pretextual and an attempt from the

Defendant to delay the trial. When that was unsuccessful, then he, for the second time, excused himself from the courtroom and elected not to participate in the trial.

So I think it's clear that was a pretextual motion made by him. And I'll state as well, after colloquy, I granted his motion. And then he elected, again, not to participate. So I believe that addresses all of the issues that you had raised, Mr. Kornfeld.

(R. p. 491, line 20 – p. 492, lines 1-20).

Prior to Petitioner's brother and co-defendant testifying the following took place:

THE COURT: Mr. Kornfeld, did you have the opportunity to discuss with Mr. Jahru Smith whether he would like to come into the courtroom, sir?

MR. KORNFELD: An officer came out and told me he said his peace. He's got nothing to say, and he wants to fire me.

THE COURT: Who spoke to him?

THE COURTROOM DEPUTY: Ashley Wilson.

THE COURT: All right. So he indicated clearly to law enforcement that he doesn't intend to come out?

THE COURTROOM DEPUTY: That's correct.

THE COURT: Good enough.

(R. p. 498, lines 10-21).

After the jury reached verdicts, Petitioner indicated that he did not wish to attend sentencing. (R. p. 627, line 21 – p. 628, lines 1-20). Trial counsel renewed motions stating, "I reassert, on behalf of my client, his motion concerning the fact that he wanted to represent himself and fire me, but for the fact that he could not see and he needed glasses and was unable to get them." (R. p. 643, lines 9-12). The next day the judge ordered Petitioner to appear for sentencing. (R. p. 647, line 13 –25). Petitioner refused to appear. (R. p. 648, line 2). The

judge again ordered Petitioner to appear for sentencing. (R. p. 652, line 15 – p. 653, lines 1-11). Petitioner then entered the courtroom and the judge sentenced him to life without parole for murder and armed robbery and five years for possession of a weapon during the commission of a violent crime. (R. p. 653, line 14 – p. 654, lines 1-16). The trial judge erred in refusing to continue the case in order for the visually impaired Petitioner to obtain prescription eyeglasses so that he could see in order to exercise his Sixth Amendment right to self-representation. The failure to make a reasonable accommodation deprived Petitioner the right to self-representation.

“A South Carolina 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). “The request to proceed *pro se* must be clearly asserted by the defendant prior to trial.” State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). Petitioner clearly asserted his right to self-representation prior to trial. “At bottom, the Faretta⁴ right to self-representation is not absolute, and ‘the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.’ ” United States v. Bush, 404 F.3d 263, 271 (4th Cir. 2005) (quoting Frazier-El, 204 F.3d 553, 560 (4th Cir. 2000)). “ ‘A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel.’ ” Id. (quoting Frazier-El, 204 F.3d at 560).

In the present case there is no evidence that Petitioner was attempting to manipulate the system by asserting the right to self-representation in order to make impermissible arguments or raise invalid defenses. While the trial judge found that Petitioner’s motion to represent himself

⁴ Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

was pretextual, as the South Carolina Supreme Court noted in State v. Samuel, 422 S.C. 596, 606, 813 S.E.2d 487, 493 (2018), “The only instance of manipulation the circuit judge cited was the disparate testimony from Samuel and Grant regarding their relationship. However, even if Samuel's testimony was misleading, this Court indicated in Barnes that a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation. See Barnes, 413 S.C. at 3 n.1, 774 S.E.2d at 455 n.1.” While Petitioner’s motive in seeking self-representation may have been to obtain the glasses he needed in order to see, this is not an improper motive and should not serve to deny Petitioner the constitutional right to represent himself.

In affirming the convictions this Court wrote:

We likewise find the trial court's denial of Petitioner's motion for a continuance did not deprive him of his right to self-representation. First, the trial court did not deny Petitioner this right. Rather, the court specifically granted Petitioner's motion to represent himself. As with his assistance of counsel claim, Petitioner failed to make any showing to the trial court that his visual impairment deprived him of the ability to represent himself or that trial counsel could not provide the needed visual assistance as stand-by counsel. See State v. Bennett, 259 S.C. 50, 53-54, 190 S.E.2d 497, 498 (1972) (finding no error in the trial court's denial of the defendant's motion for continuance—made on the day of trial—to allow him to pursue an opportunity to obtain counsel of his choice, as the “[d]efendant's constitutional right to counsel [was] fully met at every stage of the proceeding against him by the representation afforded him by diligent and talented appointed counsel”). It was Petitioner's own action in refusing to remain in court and participate in the trial that denied him the opportunity to represent himself. See State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (“[A] party 'cannot complain of an error which his own conduct has induced.’” (quoting State v. Worthy, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962))). Likewise, based upon his own conduct, Petitioner is unable to show how he was prejudiced by the trial court's ruling. See Mansfield, 343 S.C. at 72, 538 S.E.2d at 260 (“The trial court's refusal of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion *resulting in prejudice to the Petitioner.*” (emphasis added)).

State v. Jahru Harold Smith, No. 2018-000505, 2021 WL 3523206, at *2 (S.C. Ct. App. Aug. 11, 2021). Counsel respectfully submits that the trial judge’s denial of the continuance motion

deprived Petitioner the constitutional right to self-representation. As discussed above in issue one, Petitioner made the necessary showing that he was a pre-trial detainee who was visually impaired and needed prescription eyeglasses in order to proceed to trial. Petitioner chose not to participate in the trial and represent himself only **after** the judge denied the continuance motion so that Petitioner could obtain the prescription eyeglasses he needed in order to represent himself. It was not Petitioner's action of choosing not to participate blindly in the trial that deprived him of the right to represent himself. Instead, it was the judge's refusal to grant a reasonable request for a continuance that deprived Petitioner of the constitutional right to represent himself.

Based on the above arguments, Petitioner respectfully seeks rehearing.



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ATTORNEY FOR PETITIONER

This 25th day of August, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED

Aug 25 2021

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JAHRU HAROLD SMITH,

PETITIONER

APPELLATE CASE NO. 2018-000505

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Michael D. Ross, Esquire at the primary e-mail address listed in the Attorney Information System (AIS); and on Jahru Harold Smith, #375721, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 25th day of August, 2021.



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