STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JEFFERY JAMES WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2019-001481

Appeal from Saluda County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2021-UP-429

PETITION FOR REHEARING

On December 8, 2021, this Court affirmed appellant's conviction where he argued the lower court erred by allowing appellant to represent himself where the record shows the *Faretta*[1] colloquy did not contain a sufficient warning regarding the danger of self-representation and appellant therefore could not have knowingly, intelligently, and voluntarily waived his right to counsel. Pursuant to rule 221(a), SCACR, appellant respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by the Court discussed below.

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

This Court held the record reflects appellant had sufficient background to understand the disadvantages of self-representation and was advised of his right to counsel. The court found appellant knowingly, intelligently, and voluntarily waived his right to counsel. In its opinion the Court cited *State v. Cash*, which states, "Although a specific inquiry by the [trial court] expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test in not the trial [court's] advice but the accused's understanding." 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992). The Court also cited *State v. Bryant*, which states "[W]hen the trial court fails to expressly make this inquiry, the [appellate] court will examine the record to determine whether the accused had sufficient background or was apprised of his rights by some other source." 383 S.C. 410, 415, 680 S.E.2d 11, 13 (Ct. App. 2009).

The record does not contain a valid waiver of appellant's right to counsel where the trial court did not adequately warn appellant of the disadvantages of self-representation. *See Wroten v. State*, 301 S.C. 293, 391 S.E.2d 575 (1990) (A specific inquiry by the judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but the accused's understanding). However, "[i]n the absence of an inquiry by the judge, courts look to the record to determine if the accused had sufficient background to understand the disadvantages of self-representation." *State v. Cash*, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992).

Cash provides ten factors courts have considered in determining whether the accused had sufficient background to understand the disadvantages 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 he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he 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 he knew of legal challenges he could raise in defense to the charges 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. *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065–1067 (11th Cir.1986); *see also Strozier v. Newsome*, 926 F.2d 1100 (11th Cir.1991) (restating the factors noted in *Fitzpatrick*), cert. denied, 502 U.S. 930, 112 S.Ct. 350, 116 L.Ed.2d 289 (1991).

Cash at 43, 419 S.E.2d at 813.

There is little evidence in the record that appellant had sufficient background to understand the risks of proceeding *pro se*. Appellant was forty-nine at the time and had a high school education. Appellant told the court he had post traumatic stress disorder (PTSD) and took medication for anxiety and depression. Likewise, prior defense counsel, Mr. Lake, expressed serious concern regarding appellant's mental health and about his ability to assist in his own defense, much less represent himself at trial. While it is true that appellant was previously convicted of a crime, in 1999, there is nothing in the record that demonstrated that he had enough experience with the criminal justice system to qualify him to represent himself at trial.

The exchange between appellant and the trial court was brief and perfunctory. Appellant never indicated verbally that he did not understand the nature of the charges against him or the possibly penalty. Nevertheless, the record reflected he and defense counsel Lake had difficulty communicating, and therefore it was unlikely Lake was able to convey to appellant the dangers of self-representation in his case.

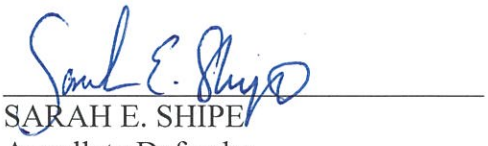
Furthermore, after representing appellant for over a year, Lake told the judge he thought appellant needed to be represented by counsel. The court appointed Mr. Casto as stand-by counsel for appellant but failed to inquire whether appellant was aware of trial procedures other than telling him that he would be held to the same standard as a lawyer. This statement, without

any further explanation, was meaningless. Appellant could not know what standard a lawyer is held to or that he would be required to comply with certain procedural and evidentiary rules without being told explicitly. Accordingly, appellant could not have understood the gravity of this decision or the extreme disadvantages of self-representation.

Additionally, the record does not demonstrate that appellant unequivocally asserted his right to represent himself. During the May 2019, hearing before Judge McLeod, appellant said he did not wish to represent himself, and in the August 2019, hearing, although he first responded "yes" when Judge Addy asked him if he wanted to represent himself, he later said his sister was trying to find him another attorney. Appellant never insisted on representing himself. The record does show that appellant was dissatisfied with the attorney he had retained, Mr. Lake, and because he could not afford to retain another attorney and his other option was a court appointed attorney, appellant felt he had no other good choice.

Appellant's waiver of his right to counsel was not knowing or voluntary because he was not sufficiently warned about the dangers inherent in self-representation by the trial court, or otherwise, and he did not have sufficient background to understand the dangers of self-representation. During the *Faretta* colloquy, the court advised appellant that he believed it would be a good idea for him to have an attorney and told him he would be held to the same standard as a lawyer at trial. The court's suggestion was not adequate to warn appellant of the danger of self-representation under *Faretta*.

Respectfully Submitted,



SARAH E. SHIPE
Appellate Defender

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Dec 22 2021
SC Court of Appeals

This 22nd day of December, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true 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 Jeffery James Williams, at 205 Cardington Avenue, Piedmont, SC 29673, this 22nd day of December, 2021.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT