STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

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MAY - 9 2013

S.C. Supreme Court

THE STATE,

PETITIONER,

V.

ROBERT WATKINS,

RESPONDENT.

Appellate Case No: 2011-195272

BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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II.

Should the Court elect to address petitioner's second issue, respondent's conviction should be reversed because the trial judge abused his discretion by allowing respondent to represent himself at trial, after having vacillated on the issue in the months leading up to the trial, after having selected a jury and introducing respondent's then-attorney to the jurors, and in placing the issue of respondent's representation before the jury.

STATEMENT OF THE CASE

Respondent agrees with appellant's procedural history with the exception that Respondent takes no position with respect to the reasons for the recall of the remittitur.

ARGUMENT

I.

The Court of Appeals correctly ruled that the trial judge should have recused himself because he previously served as respondent's PCR judge and was reversed. As an additional ground for affirmance, the record demonstrates that the trial judge should have recused himself based on the unusual procedural and factual circumstances regarding this case.

Factual Background

The Robbery

Marcus Scarabino ("Scarabino") was employed at the Chuck E. Cheese in 2001. R. 202, ll. 3 – 11. Scarabino was the general manager. R. To to ll. 12 – 13. Scarabino testified that on the night of December 19, 2001, the workers at the restaurant stayed late to do extra cleaning. R. 202, l. 22 – 203, l. 18. 5 people were in the restaurant. R. 203, ll. 19 – 24. Scarabino claimed that a man wearing a ski mask and carrying a handgun came in from the back of the restaurant. R. 209, l. 14 – 211, l. 21. The man asked them where the restaurant kept its money. R. 210, l. 23 – 211, l. 1. Scarabino gave the man money from the restaurant's safe. R. To 14, l. 4 – 215, l. 4. Scarabino claimed that the robber was not wearing gloves and his skin was black. R. To 15, ll. 5 – 10. Scarabino could not identify respondent Robert Watkins ("Watkins") as the robber. R. 227, l. 24 – 228, l. 3.

Krystyna Reilly ("Reilly") also worked at the restaurant. R. 231, ll. 16 – 217, l. 8. She saw the robber. R. 235, ll. 2 – 8. When law enforcement arrived, Reilly hid in the dressing room of the restaurant. R. 237, ll. 13 – 16. She never gave a statement to law enforcement. R. 240, l. 18 – 241, l. 1. She did not identify Watkins as the robber.

Jeannie Pireda ("Pireda"), another employee, was taken to the parking lot of an apartment complex where police shined a light on Watkins and asked her to identify him as the robber. R. 254, l. 25 – 255, l. 12. She did not identify Watkins. R. 255, ll. 5 – 21. Pireda also refused to identify Watkins as the robber at trial. R. 270, ll. 22 – 24.

Watkins testified in his own defense and vehemently denied committing the robbery. R. 357, ll. 3 – 6. Watkins explained that the money police found in his apartment came from his job as an automobile detailer and from cutting hair. R. 358, ll. 7 – 22. Watkins testified that his girlfriend should have provided an alibi. R. 358, l. 23 – 484, l. 6. This testimony was corroborated during the cross-examination of police officer Daniel Fuller, who admitted that in her initial statement to police, Watkins' girlfriend told them Watkins was in his room at their apartment at 1:00 am, which was the approximate time of the robbery. R. 303, l. 18 – 304, l. 12.

Watkins' PCR

The Honorable Larry R. Patterson presided over Watkins' PCR hearing. Supp. App. 1 – 6. Watkins claimed that his trial counsel was ineffective for failing to provide the State with a proper alibi notice pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure. Supp. App. 4; see also SCRCrimP 5(e). Watkins' trial judge deemed the notice insufficient and refused to give an alibi charge to the jury. Supp. App. 4. Despite this seemingly clear instance of ineffective assistance, Judge Patterson denied Watkins' PCR application. Supp. App. 6. In doing so, Judge Patterson made a specific finding that Watkins' testimony was not credible. Supp. App. 4. Judge Patterson also ruled that Watkins could not show prejudice. Supp. App. 5.

The Court of Appeals reversed Judge Patterson. Supp. App. 9 – 11. The Court of Appeals discredited Judge Patterson's basis for finding trial counsel effective. Supp. App. 10. Judge Patterson found that trial counsel was not ineffective because "his belief that he complied with the rule was 'well-founded.'" Supp. App. 10. The Court of Appeals rejected this notion, stating that since Watkins was entitled to an alibi charge, "trial counsel was deficient for failing to raise this argument to the trial court and obtaining an alibi instruction." Supp. App. 10 The Court of Appeals also held that there was a reasonable probability that the result of Watkins' trial would have been different because "the State based its case against [Watkins] entirely on circumstantial evidence." Supp. App. 10. Watkins' case was remanded for a new trial.

Events at the Pre-Trial Proceedings

On March 14, 2008, after remand from the Court of Appeals, Watkins appeared before Judge Patterson for a bond hearing. R. 1 – 9. Watkins' original bond on the armed robbery charge was $15,000 with an additional $5,000 for the gun charge. R. 6, ll. 7 – 12. At the bond hearing, Judge Patterson said, "We've all – everyone in this room reads the advance sheets every week, and we know he got a new trial from the Supreme Court." R. 7, ll. 6 – 9. Judge Patterson more than doubled Watkins' bond and set it at $70,000. R. 8, ll. 16 – 9, l. 1. As part of his basis for setting the bond, Judge Patterson said, "And the facts are pretty much in place. We've got the witnesses, everybody knows what – who the witnesses are and the evidence is." R. 8, ll. 16 – 22.

Watkins appeared before Judge Patterson again on March 27, 2008. At this hearing, Judge Patterson indicated he had read the Supreme Court opinion reversing him. R. 29, ll. 3 – 9. Judge Patterson said, "I – it's going to be very difficult to change the facts the way

they came out." R. 30, ll. 13 – 14. Judge Patterson then said, "I haven't read the – totally the case that was tried before Judge Pyle." R. 30, ll. 15 – 16. This contradicted what Judge Patterson said in his PCR order when he stated he had the opportunity to review the record in its entirety. Supp. App. 3. Judge Patterson also stated that he did not know who the judge would be for Watkins trial. R. 28, ll. 13 – 15. Judge Patterson relieved the Greenville County Public Defender's office. R. 31, ll. 20 – 22.

Watkins' Motion to Recuse Judge Patterson

Judge Patterson held another hearing on April 18, 2008. R. 33. Watkins previously told the State that he wanted a bench trial. R. 37, ll. 8 – 9. With this knowledge in mind, the State indicated that it wanted to set the case in front of Judge Patterson. R. 36, ll. 13 – 18. They wanted judge Patterson to try this case because of his familiarity with Watkins at the previous bond hearing and the history of his motion to relieve his attorneys. R. 36, ll. 13 – 18.

Watkins asked Judge Patterson to reduce his bond. In response, Judge Patterson indicated an opinion about the strength of the evidence against Watkins. R. 38, ll. 15 – 22. Judge Patterson said, "[Y]ou've been convicted and you have served six and a half years. And I'm not going to say you're going to be convicted again. But you know, a person knowing what the evidence is you – there's a real good chance you'd be a flight risk, and for that reason the bond is set at $70,000 and it just can't be reduced." R. 38, ll. 15 – 22.

Watkins, who was representing himself at this hearing, then immediately asked Judge Patterson "to step down from hearing my case." R. 38, l. 25 – 39, l. 2. Without any discussion, Judge Patterson denied Watkins' motion, stating:

> I'm not going to recuse yourself (sic). I'd see that you got the fairest trial of anybody on the bench. You're going to get your witnesses. You're going to

> get it all done. And I deny the motion to recuse myself. I've got nothing against you whatsoever.

R. 39, ll. 3 – 7. Watkins tried to respond, stating, "[Y]ou've been on my case since—I mean the original case—" when Judge Patterson interrupted him. R. 39, ll. 8 – 9. The judge then said, "I haven't done anything except review what Judge Pyle did on the PCR. And [your trial counsel] told me the reason he didn't call your alibi witness is because she – I think she pled guilty to the same crime and she wouldn't have been an alibi witness."[1] R. 39, ll. 10 – 14. Despite having adjudicated Watkins' PCR, Judge Patterson then said, "I have not read all the transcript." R. 41, l. 21.

Judge Patterson became frustrated with Watkins as he attempted to continue to argue for a bond reduction. Judge Patterson told him two times that he did not want to argue about the bond. R. 42, ll. 12 – 25. Judge Patterson again told them that he would be a flight risk that tried to correct his assessment of the evidence by saying that, "I don't know what your chances are of you're getting convicted or not." R. 42, ll. 14 – 16. He then told Watkins, "We're going to be here and I'm going to see that you get a fair trial, the fairest trial that any man on the face of the earth can get." R. 42, l. 24 – 43, l. 2. Judge Patterson's frustration increased as he told Watkins he was taking up the court's time. R. 51, ll. 9 – 11.

During a hearing held May 30, 2008, Judge Patterson initially claimed ignorance of the previous trial. R. 63, l. 23 – 64, l. 2. Then Judge Patterson stated "but I would think that it's going to be the same case that was previously tried." R. 63, l. 23 – 64, l. 2. As Watkins made arguments concerning discovery and the conflicts of interest of the attorneys

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[1] The State contends that the issue of Judge Patterson's recusal is not preserved for appeal. This contention is without merit. Watkins was stating the grounds with specificity—that Judge Patterson "had been on his case since—" when the judge interrupted him. The judge mentioned the PCR in his ruling. This issue is preserved.

representing him, Judge Patterson said, "Listen, you cannot play around the courts and I made that perfectly clear." R. 68, ll. 3 – 4. Despite Watkins telling Judge Patterson that he had obtained discovery that he had not seen before, Judge Patterson responded, "And apparently it's going to be the same case that you sat in when it was tried before, whatever that was before Judge Pyle." R. 69, ll. 2 – 5. When discussing a continuance and Watkins' request for a lawyer, Judge Patterson said, "But Mr. Mauldin, Mr. Bannister for that matter, except you got a new trial based on something that he didn't do, and – but we got – and I explained you before, **we got to put this thing behind us.**" R. 78, ll. 5 – 8 (emphasis added).

Judge Patterson then appointed Stephen Henry ("Henry") as Watkins' attorney. R. 79, ll. 16 – 19. In his explanation of why he was appointing Henry as his lawyer, Judge Patterson told Watkins:

> He's going to be your lawyer. And you ain't going to get rid of him. And we're going to call your trial real quickly. And he's not going to – he's got something in this writing, and I want the Appellate Courts to know. All these documents you've filed, and all these writings you give us, some of them is relevant in some of them is not. Nobody wants to protect your rights anymore than the Court, Mr. Mauldin, Mr. Henry, or Mr. Bannister, any other lawyer you've had. I know all these lawyers.

R. 79, l. 19 – 80, l. 2. At this hearing, Judge Patterson further told Watkins:

- "You're just pulling strings with this Court." R. 80, l. 11.
- "We tried to be fair with you." R. 80, ll. 22 – 23.
- "I don't know anything about your case. But my job is to not let people play games with the Court." R. 81, ll. 5 – 7.
- "And I'm going to try your case, so just get ready." R. 81, ll. 12 – 13.

- "[A]nd this is just not going to be a circus. It's just going to be a trial. And you got the full transcript from the last case. I haven't read it." R. 85, l. 23 – 86, l. 1.

Watkins later filed a motion to relieve Henry as his attorney based on a conflict of interest with the Defender Corporation in Greenville County which was denied by Judge Patterson. R. 97, ll. 1 – 6.

Pre-Trial Hearings

On the morning of trial, Watkins filed a motion to relieve his attorney. R. 93, ll. 13-18. After a lengthy discussion and colloquy pursuant to Faretta v. California, 422 U.S. 806 (1975), Watkins decided not to represent himself. R. 117, ll. 14-22. However, after the conclusion of pre-trial motions, Watkins then made another motion to proceed *pro se*. R. 192, ll. 6-13. Judge Patterson stated:

> I'm not spending any more time on this issue. He's going to represent himself *pro se*. And I don't want to be faced with this issue again. And I mean I—this is really trying—**kind of trying the patience of the Court**. But you have a Constitutional right to do that. Mr. Henry can be standby counsel and sit behind you, and you can represent yourself. Okay.

R. 193, l. 25—194, l. 6 (emphasis added). Watkins represented himself for the remainder of the trial with Henry as stand-by counsel.

Discussion

The Court of Appeals' opinion reversing Judge Patterson is simple and direct because the principle is straightforward. In 1991, this Court determined that a criminal defendant should have a new set of hands weigh the scales of justice in a PCR. Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991). This same principle applies with even greater force when a PCR judge who has been reversed is asked to sit impartially over a new trial. This Court should adopt a *per se* rule requiring PCR judges who have been reversed to

recuse themselves from the retrial upon the motion of an applicant who is successful on appeal. Even if the Court declines to adopt such a rule, the unique circumstances of this case require reversal.

A Per Se Rule Extending Floyd v. State

The Court of Appeals correctly extended Floyd to this case and this Court should do the same. Floyd holds that in a PCR action, "a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought." Floyd at 299, 400 S.E.2d at 146. The Floyd court held that this rule would "eliminate even the suggestion of partiality." Id. The commentary to Canon 1 of the Judicial Code of Conduct states that "Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to [the] responsibility [of upholding the integrity and independence of the judiciary]. SCACR 501, Canon 1. Canon 2 states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." SCACR 501, Canon 2. Canon 3(C)(1) requires a judge to diligently discharge his administrative responsibilities without bias or prejudice. SCACR 501, Canon 3.

The rationale of Floyd and these canons applies with more force in this situation. A PCR judge who denied an applicant's claim would be more subject to the appearance of partiality than a trial judge. In a trial, the jury, not the judge, renders the verdict. In a PCR, the judge is the sole decider of the facts. The lack of a jury therefore makes a PCR judge more vulnerable to a charge of partiality.

Unlike a trial judge, a PCR judge is required to form an opinion as to the strength of the State's case against a defendant. In every PCR, the court must conduct a prejudice

inquiry. Strickland v. Washington, 466 U.S. 668, 687 (1984). The PCR judge must determine whether but for the alleged error there is a reasonable probability the outcome of the trial would be different. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 329 (2011). In many PCR cases, the judge conducts this prejudice inquiry by deciding whether the evidence of guilt was overwhelming. Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 11 (2009). These PCR standards for determining prejudice require a judge to form an opinion concerning the guilt or innocence of an accused far more than a trial judge who is merely concerned with the admissibility of evidence and its existence at the directed verdict and jury charge stages. See State v. Bostick, 392 S.C. 134, 138-39, 708 S.E.2d 774, 776-77 (2011) ("The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict."). These considerations weigh heavily in favor of the adoption of the Floyd rule in cases such as the one at bar.

The State's analysis does not weigh these considerations. The State likens a PCR judge who is reversed to a trial judge who is reversed and who is called upon to re-try the case. This analysis fails to take into account the different role of a trial judge from a PCR judge. Trial judges are not called upon to form opinions about the weight of the evidence in a case. Judges recognize that their rulings on the admissibility of evidence are subject to attack. When a case is remanded for a new trial, a judge is given instructions from the appellate court concerning an evidentiary issue to follow. A PCR judge who is reversed is told that his opinion regarding the weight of the evidence is incorrect. This reversal, which is different in kind from a trial reversal, is more subject to attacks on a judge's partiality.

The State also argues that Floyd should be overturned. That issue is not before the Court. The only issue that is before the Court is whether Floyd should be extended to this

factual scenario. Regardless, Floyd has been the law in this state for almost twenty-five years. It has proved itself to be a good and workable rule and protects both criminal defendants, judges, and the reputation of our justice system. The rule of *stare decisis* provides sound guidance for rejecting this contention. The State's urging to adopt the federal convention used in motions pursuant to 28 U.S.C. § 2255 should also be disregarded. The federal procedure was in place when Floyd was adopted. Rule 4(a) governing § 2255 motions was adopted in 1976. 28 U.S.C. § 2255, R.4, Advisory Committee Notes. The Floyd court certainly knew of the federal procedure and chose differently. Nothing has changed in the interim to require the abandoning of the rule in Floyd.

The State argues that adoption of a *per se* rule of recusal will tax scarce judicial resources. This argument is wholly without merit. Very few cases will be subject to this rule for the simple reason that very few PCR judgments are reversed. The standard of review in a PCR action is whether "any evidence" supports the PCR judge's ruling. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The burden of proof is on the applicant. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (internal quotations omitted). These procedural rules ensure that reversal of convictions in PCR actions will remain rare. Furthermore, as this Court recently addressed in its April 12, 2013, Order, any judge in a circuit or an adjoining circuit may sign a PCR order. Order of the S.C. Supreme Court dated April 12, 2013.

States are free to give their citizens greater freedom and more rights than the minimum required by federal law. State v. Forrester, 343 S.C. 637, 644-45, 541 S.E.2d 837, 840-41 (2001) (recognizing that South Carolinians have greater protections from unreasonable searches and seizures under state law than federal law). This Court should hold with that principle of safeguarding the rights of South Carolina's citizens and expand the rule of Floyd to the small number of successful PCR reversals.

The Unusual Circumstances of this Case Require Reversal

Several factors specific to this case required Judge Patterson to recuse himself. In his PCR order, Judge Patterson made an adverse credibility finding against Watkins, that he suffered no prejudice as the result of any alleged error, and made a clear error of law that resulted in Watkins' not receiving a new trial for over two years longer than if he had granted the application. Judge Patterson also stated that he "had the opportunity to review the record in its entirety." Supp. App. 3. The adverse findings, as discussed above, required Judge Patterson to form opinions about Watkins and the strength of the State's case not required of any trial judge. Second, Judge Patterson contradicted himself frequently during Watkins' retrial by stating multiple times that he had not read Watkins' transcript. To decide Watkins' PCR, he necessarily had to have read Watkins' transcript.

More disturbing are the unusual comments made by Judge Patterson during the proceedings leading up to the trial. As shown by the above-quoted comments, Judge Patterson was obviously frustrated with Watkins. Furthermore, the State's enthusiasm about trying the case before Judge Patterson—especially when it thought Watkins was waiving a jury trial—creates the appearance that Judge Patterson was inclined to be favorable to the State. "Under Canon 3(C), a judge should disqualify himself if his

impartiality might reasonably be questioned." Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) (involving *ex parte* communications). The findings on the record made against Watkins in the PCR matter combined with the numerous statements recited above are evidence that the judge's impartiality could reasonably be questioned. Judge Patterson should have recognized these issues and recused himself.

II.

Should the Court elect to address petitioner's second issue, respondent's conviction should be reversed because the trial judge abused his discretion by allowing respondent to represent himself at trial, after having vacillated on the issue in the months leading up to the trial, after having selected a jury and introducing respondent's then-attorney to the jurors, and in placing the issue of respondent's representation before the jury.

The Court need not address this issue if it affirms the Court of Appeals. However, in the event the Court does reach this issue, Watkins' convictions should be reversed because the trial judge abused his discretion in how he handled whether Watkins would represent himself.

At the March 27, 2008, hearing, Watkins first suggested that he would want to represent himself. R. 26, l. 23 - 27, l. 11. The State's position was that they believed Watkins should be represented. R. 28, l. 8 - 9. The judge concluded that he "would probably let [Watkins] do it if that's what [Watkins wants]. R. 28, ll. 17 - 18. He reiterated that he would probably let him represent himself. R. 30, ll. 6 - 13.

At the April 18, 2008, hearing, the court again discussed the issue of Watkins' representation. It appears that Watkins did not have any representation at this hearing, and that he was, in fact, representing himself *pro se*:

> MR. WATKINS: . . . All I want to do is ask for a fair chance to represent myself.
>
> THE COURT: You got a fair change (sic) to represent yourself. We're going to do the trial— . . .
>
> MR. WATKINS: Can I get a continuance?
>
> THE COURT: No, sir. Everything is in place. You got a transcript. And there is no reason to keep putting this case off. It's something that happened in 2002. We're not going to do it. They're going to bring the witnesses in from out of state. And we're going to conduct this trial. And you're going to represent yourself.
>
> I'm going to appoint a real good lawyer to sit behind you and help you a little bit, but he cannot be responsible for your trial. You cannot file an ineffective assistance of counsel or anything against him. You're going to be representing yourself.

R. 54, ll. 3 - 22.

At the May 30, 2008, Watkins asked for an attorney to represent him because of new discovery material he received. R. 63, ll. 17-20. Specifically, Watkins obtained a copy of the 911 tape. Watkins could not listen to the tape at the detention center R. 64, l. 3 - 68, l. 25. The importance of this tape became apparent at trial because it uncovered the existence of Reilly, the restaurant employee who hid from the police. Watkins reiterated that he needed a lawyer because of the new evidence the State produced. R. 68, ll. 1 - 2. The court responded:

> Listen, you cannot play around with the Courts and I made that perfectly clear. The people in South Carolina want you to have a fair trial, Mr. Watkins. And I want you to understand that. You told me before you didn't want Mr. Mauldin. He is one of the best defense lawyers in Greenville County. He's a State employee now, or he was up until the

Governor vetoed the budget yesterday, but—I mean, these people nothing would please them more—I mean, nobody believes in the Constitution any more than Mr. Henry back there and Mr. Mauldin, and a lot of the lawyers you've had.

And I tried to emphasize to you the last hearing we had that you should have a lawyer to represent you. And you told me that you just might need a lawyer to do preliminary investigation for you and you were talking to Mr. Warder and—or something to that effect. I don't remember everything that was said. But we can't be—the Supreme Court sent this thing back for a trial. And this thing has been pending since 2001. And the Court just will not tolerate letting us sit here and not do anything about your case and you just sit down in the Greenville County jail. Your case has got to go to trial.

R. 68, ll. 14 - 25.

Watkins again asked for counsel. R. 78, ll. 15 - 16. The judge granted his request and gave him a lawyer, but told him he would not be allowed to relieve him:

THE COURT: We're going to see that everything is taken care of. Now, he's your lawyer. And he's going to speak for you from now on. Do you understand that? He will not be relieved. And I'm going to try your case, so just get ready.

MR. WATKINS: Let me ask you this.

THE COURT: That's it for the day. You talk to him and everything goes through him.

MR. WATKINS: I have a motion.

THE COURT: You're not representing yourself any more.

MR. WATKINS: I know, but I got—

THE COURT: You wanted a lawyer. You've got one. You're not representing yourself. So you cannot address the Court. We can't have two people representing you. You can't do it alone with Mr. Henry. You've got to follow his advice.

MR. WATKINS: But State versus—I mean Foretta (sic)—

THE COURT: He can explain all that and he's going to speak.

MR. WATKINS: -- versus—Foretta (sic) versus California—

THE COURT: Take him away.

R. 81, l. 9 - 82, l. 6. The judge did not have him taken immediately away, but did inform him that he had had his "chance" to represent himself. R. 82, ll. 21 - 23.

At the September 11, 2008, hearing, Watkins again requested to be allowed to proceed *pro se*. Watkins told the judge that he believed a conflict of interest existed because Henry was on the Board of Directors for the Defender Corporation which oversees the Greenville County Public Defender's office. He believed this conflict accounted for the fact that Henry was not filing the motions that he wanted filed in his case. R. 90, l. 1 - 97, l. 10. Watkins earlier stated that he intended to sue the Defender Corporation. R. 23, ll. 19 – 21. The motion was denied.

On the morning of trial, Watkins filed a motion to relieve his attorney. R. 93, ll. 13-18. Before he conducted a *Faretta* colloquy, the judge stated, "But you can represent yourself. I'm going to have to conduct a hearing and ask you a lot of questions, but I've got to know—the reasons you've given me right now as far as you getting more in and can do more than Mr. Henry can, it's just not an accurate statement." R. 97, ll. 6 - 10.

The judge asked Watkins general questions about his background. R. 108, ll. 4 - 25. He asked him whether he had taken any medications, drugs or alcohol in the past 24 hours. He asked him if there were any competency issues; any physical, emotional, or nervous problems, or anything else that would affect his ability to understand what he was doing. R. 109, ll. 4 - 25. He asked if he had any formal training in law. He did not. R. 110, ll. 1 - 3. He asked if he had any other experiences with criminal trials. He did not. R. 110, ll. 4 - 9.

Watkins testified he understood the charges contained in the indictment. R. 110, ll. 10 - 18. He understood the range of possible punishments. R. 110, ll. 19 - 25.

Then, when the judge asked if he knew the elements of the crime, Watkins responded that he did not. R. 111, ll. 1 - 6. The judge did not inquire further. He asked if Watkins was familiar with the rules of criminal procedure. Again, Watkins replied he was not. Watkins was not familiar with what he may or may not be able to say in opening statements. R. 112, l. 13 - 113, l. 2. The judge did not inquire further.

The judge asked if he understood that he would need to make proper objections to preserve issues for appeal; and he reviewed his right to testify. R. 113, ll. 11 - 114, l. 23. They discussed prior convictions. R. 115, ll. 7 - 10. The judge told Watkins he believed it was unwise for him to represent himself. R. 116, ll. 8 - 22.

At the end of this colloquy, Watkins decided not to represent himself. R. 117, ll. 14 - 22. The court then heard pre-trial motions argued by Henry, including making a motion for a continuance based on the newly discovered witness referenced on the 911 tape.[2] R. 118, l. 1 - 129, l. 17; R. 130, l. 23 - 136, l. 15. The jury was selected. The parties discussed prior convictions which may be used for impeachment purposes. Henry then made a motion to suppress the fruits of the search warrant executed in this case, which was denied. R. 137, l. 4 - 191, l. 25.

At the conclusion of the pretrial motions, Watkins then made another motion to proceed *pro se*. R. 192, ll. 6 - 13. After again telling Watkins that he was likely to make mistakes, and informing him again that he would not be allowed to file an ineffective

[2] Henry presented essentially the same ground which, when presented earlier by Watkins, frustrated the trial judge.

assistance of counsel claim against himself, the judge ruled that Watkins would represent himself and Henry would act as standby counsel. R. 193, l. 25 - 194, l. 6.

After the jury was sworn, the judge addressed the jury:

> Now, I informed you yesterday, and I introduced Mr. Henry as Mr. Watkins' lawyer. Mr. Watkins has chosen to exercise his Constitutional right and represent himself, and not be represented by Mr. Henry, who's in the courtroom here.

R. 197, ll. 8 - 12. After opening arguments, and before the jury, the judge said this:

> I need to put in the record that I did have a hearing, and I found affirmatively that it was implied that Mr. Watkins knowingly, intelligently and voluntarily waived his right to council (sic) and decided to proceed with himself. And I find that he did it knowingly, voluntarily and intelligently. I want to put that in the record. Okay.

R. 200, ll. 7-13.

The judge abused his discretion by allowing Watkins to proceed *pro se* because he did not exercise his discretion in making the decision. State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). Rather, the judge granted Watkins' request simply because he was frustrated with Watkins. The judge allowed Watkins to proceed *pro se* prior to conducting a Faretta colloquy. As referenced above, at the March 27th hearing, the judge had already decided that he would "probably" let Watkins represent himself. By the time of the April 18th hearing, Watkins was appearing in court on his own motions. The court was quite clear that Watkins was representing himself at that point, but no Faretta colloquy had been conducted at that time.

The court had no difficulty allowing him to represent himself at trial at that point, although it did later, and after an attorney was appointed to represent Watkins. The judge then denied Watkins' request to proceed *pro se* at the September 11th hearing further shows the lack of discretion exercised by the judge. Once Watkins was assigned an attorney, the

judge would not allow him to relieve that attorney until after the jury had been sworn. If the judge believed that Watkins had the unfettered constitutional right to represent himself he should have allowed Watkins the right to relieve his attorney on September 11th. Instead, he summarily denied the motion

Finally, the judge did not provide his reasons for changing his mind on the record. There were no additional facts brought to the judge's attention between the September 11th hearing and the trial that would have justified the judge's granting the request at that late point, but not at an earlier time. This point strongly suggests that the judge did not predicate his decision on anything other than his frustration. It is also notable that the judge granted the request after the jury had been selected and Watkins' attorney was introduced to them. It would have been well within the judge's discretion to have denied Watkins' request at that point based on the timing of the request. See State v. Fuller, 337 S.C. 236, 523 S.E. 2d 168 (1999); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). Instead, he granted it at that late point.

Further compounding the problem, Judge Patterson brought the matter to the jury's attention. The judge told the jury that he conducted a hearing on the matter to which they were not privy. The judge's actions brought the issue of representation to the forefront of the jurors' minds. Certainly they would have wanted to know why Watkins started off with an attorney and then no longer had one. This was improper.

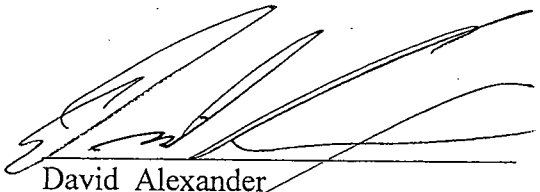
It is also worth noting that the Faretta colloquy that was conducted was unrelated to the judge's decision-making in this case. He never engaged in the colloquy prior to initially allowing Watkins to represent himself, nor did he engage in it prior to his decision to not allow Watkins to represent himself. For some reason, he only seemed to believe that he

needed to give the warnings on the day of trial. This strongly suggests that the judge was merely attempting to sanitize his actions by going through the motions, but without an appreciation of the values to be protected by the colloquy. Further evidence of the *pro forma* quality of the colloquy is the fact that Watkins gave negative responses to the judge's inquiries, but the judge never followed up. Therefore, should the Court reach this issue, it should affirm the Court of Appeals' reversal of Watkins' convictions on these grounds.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals reversing Watkins' convictions should be affirmed and this case remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 8th day of May, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Judge

THE STATE,

PETITIONER,

V.

ROBERT WATKINS,

RESPONDENT,

Appellate Case No. 2011-195272

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon, Robert Watkins #243803 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899, this 8th day of May, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2013.

Shawn A. Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2022.