No._____

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA, *Petitioner*,
vs.

LAMONT ANTONIO SAMUEL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
South Carolina Attorney General

*WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
esalter@scag.gov
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

**Counsel of Record*

QUESTION PRESENTED

In *Faretta v. California*, 422 U.S. 806, 834-35 (1975), the Court held that *Faretta v. California*, 422 U.S. 806, 834 (1975), cautioned that the Sixth Amendment right to self-representation is "not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." In a 3-2 decision, a majority of the Supreme Court of South Carolina held that the trial judge erroneously vetted Samuel's sworn representations that an attorney not present at trial was involved in his case by having the attorney testify before her, even though the attorney's denial of any involvement in the case supported the trial judge's factual findings because it concluded that "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation." App. 16-17. This conflicts with seven circuit courts of appeals that hold self-representation may be denied based on pretrial conduct evincing manipulative intent.

Given these facts, the Question Presented is

> Did the South Carolina Supreme Court err when it held — in conflict with many federal courts of appeals — that a trial court may not deny a criminal defendant's motion to represent himself based on the "defendant's improper motive or unethical conduct."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

Other Authority

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The published opinion of the Supreme Court of South Carolina is reported at 813 S.E.2d 487, and is reproduced in the Appendix at App. 2-55. The opinion of the South Carolina Court of Appeals is reported at 777 S.E.2d 398, and is reproduced at App. 108-18.

JURISDICTIONAL STATEMENT

The opinion of the Supreme Court of South Carolina was filed on February 28, 2018. App. 2-55. The State's timely petition for rehearing (App. 56-97) was denied on May 25, 2018. App. 106-07. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

The Attorney General of the State of South Carolina respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of South Carolina because it conflicts with many circuit courts of appeals and it is contrary to this Court's opinion in *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975), in that it fails to recognize that Samuel's request for self-representation was properly denied, since he personally asserted under oath that an attorney, not present at trial, had received funds to "coach" or assist him and would continue to assist him in the trial, but the attorney's contrary testimony supported the trial judge's factual findings that Samuel had not been candid in his responses to her questioning of him and that he was attempting to manipulate the trial. And, by ruling that the trial judge was bound by Samuel's answers to questions

that suggested a knowing and intelligent waiver because "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation," App. 16-17, the lower court has created a unique constitutional "right" to lie that is contrary to this Court's well settled precedent and creates a conflict with seven circuit courts of appeals that have held the right of self-representation may be denied based on manipulative, obstructionist, or obstreperous behavior occurring prior to trial.

STATEMENT OF THE CASE

A. Trial proceedings relevant to Questions Presented.

When Respondent Samuel's case was called for trial, appointed counsel indicated that Samuel wished to represent himself. The trial judge addressed his motion in camera and without the State present. Samuel stated that he wanted to represent himself because he was an innocent man who had been in jail for fourteen months, and he did not think that counsel were working for his best interests because they refused to let him provide the prosecutor with "exculpatory" letters his co-defendant sent him. Also, counsel was planning to seek a conviction on a lesser offense despite his innocence. R. 4-15.

Many of his sworn[1] responses to the trial judge's questions appeared to reflect a knowing and intelligent waiver of his right to counsel. He stated that he was twenty-one years old, had graduated from high school with a 4.0 in honors classes, had enlisted in the military, and was waiting to enter the Navy. He claimed that while waiting on his enlistment to begin, he worked with the recruiting office at Fort Jackson, without pay. He also said that he understood the trial judge's explanation of the dangers of self-representation and the advantages of counsel, but his decision was firm. R. 29-33. Further, he claimed that he had never been treated in alcohol, drug or other substance abuse mental health or emotional problems, and there were no physical or emotional issues that might keep him from understanding what he was doing. R. 33-34.

Yet, when asked whether he had "ever studied law," he said he had been reading the trial procedures in *Criminal Law Handbook*, which was a book his mother provided at the suggestion of attorney Carl Grant. He also claimed that Grant had "coach[ed] him" on the rules of evidence. R. 34-38. Later, he said, "[M]y mama, basically paid Mr. Grant a good bit amount of money" but Grant could not represent him since Samuel was related to Grant's paralegal. So, Grant would daily "go over

---

[1] *See* R. 29. Of course, the veracity of all of his responses is undermined by the trial judge's finding that he had not been candid as to the involvement of a private attorney, discussed shortly.

the steps" with him and he could ask Grant questions if needed. R. 44-45.

After completing the *Faretta* colloquy, the trial judge found that although she hoped to dissuade him, Samuel was bright, educated, and did not have substance abuse or mental health problems that would interfere with his ability to represent himself. He said he understood that the judge was "putting [her] neck on the line," but claimed he would not disappoint her and, again, mentioned Grant's assistance. R. 50-54. The judge then had Grant come to court and explain his involvement in the case. R. 54-55.

Grant testified he had discussed the amount of a retainer with Samuel's mother, but she left his office and never paid him. He denied giving Samuel a copy of the rules of evidence or criminal procedure, he had not offered any assistance and he was unavailable as standby counsel because he was not retained. R. 65-68. After his testimony, Samuel thanked Grant "for your information you provided me. I thank you for your advice and everything and I appreciate you addressing that to [the judge]." When the judge asked, "[W]hat advice and information you are speaking of specifically," Samuel replied, "Everything he said." When she asked whether he meant "today," he evasively said, "I'm just saying in general. Everything he said makes a whole lot of sense." R. 68.

Samuel allegedly understood that he could not depend on Grant to be present at trial. Still, he

insisted that he and his mother had spoken to Grant, and that Grant only testified differently because Samuel was related to Grant's paralegal. "[H]e already had told me and stated if it came down to him coming in front of a judge ... he was going to state that." R. 69-70.

The trial judge denied Samuel's motion after a brief recess. R. 72-75. She found that his "educational background … is very strong," and that he was "very bright … [and] extremely articulate." She explained that she had Grant attend the hearing and testify "out of concern that ... [Grant] had undertaken representation of you and whether or not he would be acting as stand-by counsel in some form or fashion if you were to be self-representing yourself." She further found that Grant had testified that he did not provide Samuel with a book, that he had not coached Samuel or had any conversations with Samuel about "the processes and that he ha[d] not led [Samuel] to believe that he would ... be doing so throughout the trial." R. 72-73.

She did not believe what Samuel had said about his relationship with Grant in light of Grant's testimony. She explained, "One of the elements that the Court has to consider is whether or not the defendant is attempting to delay or manipulate the proceedings. .... I am concerned that the proceedings are being manipulated." And, she found that "I cannot try a case without candor towards the tribunal." She had not anticipated this as an issue but she was "very concerned now with regards to your candor. I cannot try a case if the people trying

the case are not candid with me." R. 73-75.

Samuel persisted in asserting that Grant had been untruthful about assisting him even after this ruling, but the trial judge found that his claim was not credible. R. 75-76. He was thereafter tried with appointed counsel and convicted of murder. R. 237-38.

B.Procedural History.

The Orangeburg County Grand Jury indicted Samuel in November 2012, for the March 20, 2012 murder of Taneris Hamilton. R. 239-40. His case was originally called for a jury trial on May 13, 2013. At that time, the trial judge denied Samuel's request to appear *pro se* after an in camera hearing. R. 1-76. On May 14, 2013, the jury was selected but dismissed before it was sworn. After a June 10, 2013 motion hearing, Samuel received a jury trial on June 11-14, 2013. The jury convicted him of murder (R. 237), and he received a fifty year sentence. R. 238.

Samuel timely perfected an appeal. The South Carolina Court of Appeals affirmed his conviction and sentence. It rejected his claim that the trial judge violated *Faretta* by not allowing him to represent himself, since his answers to the trial judge's questioning allegedly reflected a knowing and voluntary waiver of his right to counsel. The Court of Appeals found that the trial judge did not err in denying the motion because the record supported her "determination [Samuel] displayed

an unwillingness to act as an officer of the court through his lack of candor." App. 109-18. Samuel thereafter petitioned the Supreme Court of South Carolina for a writ of certiorari and his petition was granted.

On February 28, 2018, a 3-2 majority of the Supreme Court of South Carolina reversed Samuel's conviction. App. 2-17. Based entirely upon the majority's interpretation of *Faretta* and its progeny, the majority found that the trial judge erroneously denied his motion. The Court held that the trial judge erroneously vetted his representations that Grant either represented him or was otherwise willing to assist him at trial. App. 14-16. It reached this conclusion even though the trial judge's factual findings of a lack of candor in responding to her questions and his attempt to manipulate the trial were supported by the attorney's denial of any involvement in the case. The majority concluded that he had "made a knowing, intelligent, and voluntary request to proceed *pro se* as required by *Faretta*" (App. 13-15) and that "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation." App. 17.

The dissent (App. 17-55) found that the trial judge had not abused her discretion by denying his motion. It rejected the majority's narrow "categorical rule," which "effectively precludes consideration of the trial court's exercise of discretion and places trial judges at the mercy of those who seek to exploit the right to

self-representation for manipulative or disruptive ends." App. 18 (Kittredge, J., dissenting). It construed the inquiry permitted under *Faretta* "more broadly to allow for a trial court's exercise of discretion where, as here, the knowingly, intelligently, and voluntarily asserted right of self-representation is accompanied by a circumstance that undermines the integrity of the proceedings and the orderly administration of justice." *Id*. The Court denied Petitioner's timely petition for rehearing on May 25, 2018. App. 106-07.

REASONS FOR GRANTING THE PETITION

The Supreme Court of South Carolina's constitutionally indefensible conclusion that "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation" under *Faretta* has created a conflict with seven circuit courts of appeals on whether the right of self-representation may be denied based on manipulative, obstructive, or obstreperous behavior occurring prior to trial.

The Court should grant certiorari because the Supreme Court of South Carolina misapplied *Faretta* and created a conflict with the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits on whether the right to self-representation may be denied based on manipulative, obstructive,

or obstreperous behavior occurring prior to trial.

This Court's holding in *Faretta v. California*, 422 U.S. 806, 834-35 (1975), that the Sixth Amendment protects a right of self-representation that generally must be honored even if the trial judge believes that the defendant would benefit from the advice of counsel, did not create an absolute right to self-representation. *Indiana v. Edwards*, 554 U.S. 164, 171 (2008). This is because the accused also has a Sixth Amendment right to counsel and, while "the right to defend oneself at trial is 'fundamental' in nature, … it is clear that ... representation by counsel ... is the standard, not the exception." *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000).

A very significant limitation on the right of self-representation is that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834 n. 46. *Pro se* defendants must be "able and willing abide by the *rules of procedure and courtroom protocol*," *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (emphasis added), because "[e]ven at the trial level … 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." *Martinez*, 528 U.S. at 162.

Petitioner submits that the Supreme Court of

South Carolina misapplied this limitation. Despite Respondent's sworn (R. 29)[2] but false assurances to the trial judge that attorney Grant was actively assisting him and would continue to do so at trial, the Court reversed the trial judge's denial of his motion for self-representation. It found that counsel's testimony was irrelevant to the inquiry because Respondent had given responses indicating a knowing and intelligent waiver of his right to counsel and the trial judge had made findings supporting his waiver. App. 13-16. It concluded that "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation" under this Court's decision in *Faretta*. App. 17 (citing *State v. Barnes*, 774 S.E.2d 454, 455 n. l (S.C. 2015) (*Barnes II*).

I. The Supreme Court of South Carolina's decision conflicts with seven circuit courts of appeals cases.

Petitioner submits that the finding "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation" conflicts with the following authority from the Fourth, Fifth, Sixth, Seventh,

[2] See Rule 603, SCRE ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so").

Eighth, Tenth, and Eleventh Circuits.

In *United States v. Bush*, 404 F.3d 263 (4th Cir. 2005), *cert. denied*, 546 U.S. 916 (2005), the Fourth Circuit affirmed the district court's denial of the defendant's motions to appear *pro se* at a pretrial hearing, based on its findings that Bush did not clearly and unequivocally assert the right but was being manipulative in his assertion of the right. "We believe, on the record before us, the district court was permitted to find that Bush was engaged in an effort to manipulate and distort the trial process." *Id.* at 272. The Court observed that "Bush had appeared in court with counsel on several occasions, including the hearing on the motion to suppress." *Id.* Also, the motion was not untimely, but it was not made until "a week before trial was scheduled to begin and was based on counsel's refusal to file certain [frivolous] motions." *Id.* Observing that Bush had "continued to file motions during the trial while represented by counsel, the Court concluded, "Admittedly, Bush did not threaten to 'stand mute;' to the contrary, Bush threatened to disrupt the trial if his motion was denied." *Id.*

The Tenth Circuit reached a similar result in *United States v. Mackovich*, 209 F.3d 1227 (10th Cir. 2000), *cert. denied*, 531 U.S. 905 (2000). In *Mackovich*, the defendant was held over for two competency hearings, because he believed he was receiving prophecies from God. *Id.* at 1231. He was "especially noisy" in the hearings on his competency, and he made "loud and inappropriate comments."

He also stated that "he believed he would be acquitted at trial and his acquittal would trigger Armageddon." *Id*. The district court, however, found that he was competent to stand trial. *Id*. Before jury selection, the defendant moved to represent himself because "neither he nor his attorney was ready to try the case," and he asserted that "it would be unjust and a 'farce' if he did not receive 'at least a few weeks' time to allow [him] to prepare and gather witnesses.'" *Id*. at 1235-36. After the district court denied the request for a continuance and the motion to appear *pro se*, he stated, "I refuse to participate. I stand mute, and I wish to have an order for my attorney to stand mute. This would just be a mockery of justice. I don't want him to participate in it." *Id*. at 1236.

The Tenth Circuit affirmed, finding that "the evidence contained in the record on appeal is more than adequate to support the district court's finding that Mackovich's requests for self-representation were merely a tactic for delay." *Id*. at 1237. Specifically, the Court found that before Mackovich moved for self-representation,

> he (1) utilized appointed counsel for more than seven months, (2) appeared in court with his attorney on multiple occasions, and (3) sought and received three other continuances. The record also reveals that Mackovich (4) requested leave to represent himself only six to ten days before trial, (5) based his request for

> self-representation in part on his counsel's refusal to file a variety of frivolous motions (e.g., "Motion for An Identity Hearing, Exculpatory Motions, and Motion for Bail."), (6) coupled his request for self-representation made on the first day of trial with yet another "motion for continuance to prepare," and (7) threatened to "stand mute" and withhold his participation when the district court denied his request. These facts adequately support the district court's finding that Mackovich asserted his right to self-representation in an attempt to delay the trial and abuse the judicial process.

Id. at 1237.

The Sixth Circuit held in *United States v. Pryor*, 842 F.3d 441 (6th Cir. 2016), *cert. denied*, 137 S.Ct. 2254 (2017), that the defendant's "refusal to provide a straight answer to the thrice-repeated question of whether he wished to be represented by counsel or by himself was a rejection of further inquiry into his waiver of counsel and justified the magistrate judge's conclusion of the [pretrial] colloquy." *Id*. at 449.

In *United States v. Powell*, 847 F.3d 760, 775 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 143 (2017), the Court affirmed the district court's denial of the

appellant's motion for self-representation made on the day of his trial. Following a hearing at which the district court "candidly express[ed] its skepticism about Powell's intentions ... and insinuated] that Powell was "engaged in a ploy to avoid trial at the last minute," the district court found that the motion "'was not made in good faith but was intended as a tactic to delay trial.'" *Id*. at 776. On appeal, the Court concluded that "[t]he timing and circumstances of [appellant's] request support the district court's finding." It found that the district court had properly considered that the appellant had not made his motion in the two years between indictment and the trial date, that he only made his motion after a firm trial date was set, and that "his request was based at least in part on the refusal of counsel to file frivolous documents." *Id*. at 777.

In *United States v. Brock*, 159 F.3d 1077, 1081 (7th Cir. 1998), the Court upheld the district court's revocation of the defendant's right to proceed *pro se* based on his disruptive pretrial conduct. The defendant repeatedly denied that any court-appointed attorney was authorized to represent him, and he filed multiple *pro se* motions requesting a "Bill of Particulars" and seeking to represent himself. *Id*. at 1078. When the court tried to conduct a hearing to determine whether Brock wished to waive his right to counsel, he "refused to answer the [c]ourt's questions or to cooperate in any way with the proceedings." Instead, he repeatedly demanded a Bill of Particulars and challenged the court's authority.

Id. A magistrate judge again attempted to hold a *Faretta* hearing at the direction of the trial court. At that hearing, the defendant displayed the same obstructionist conduct, and he refused to answer any questions regarding his desire to waive his right to counsel and proceed *pro se*. *Id*. at 1079. The district court held another hearing to reconsider the defendant's *pro se* status following month, prior to trial, but the defendant "continued to challenge the [c]ourt's jurisdiction and made repeated demands for a Bill of Particulars." The district court concluded that the defendant had "forfeited" his right to self-representation, and it appointed standby counsel to serve as his attorney. *Id*.

The Seventh Circuit affirmed. The Court noted that the defendant's repeated disruptive behavior in the courtroom "was sufficient to allow the district judge to conclude that there was a strong indication that [he] would continue to be disruptive at trial." *Id*. at 1080. It found that "Brock's steadfast refusal to answer the court's questions made it extremely difficult for the court to resolve threshold issues, such as whether the defendant would be represented by counsel. Brock did not simply refuse to prepare for trial, he refused to cooperate, even minimally, with the court." *Id*. at 1081. Thus, the district court did not abuse its discretion by terminating Brock's *pro se* status. *Id*.

The Fourth and Fifth Circuit Courts of Appeals have each reached similar results based on similar facts. *See United States v. Glover*, 715 F.App'x. 253, 255-56 (4th Cir. 2017), *cert. denied*,

138 S.Ct. 1454 (2018); *United States v. Weast*, 811 F.3d 743, 748 (5th Cir. 2013), *cert. denied*, 137 S.Ct. 126 (2016); *United States v. Long*, 597 F.3d 720, 727 (5th Cir. 2010), *cert. denied*, 561 U.S. 1034 (2010) (defendant "may well have" waived his right to self-representation by similar pretrial conduct).

In *United States v. Mosley,* 607 F.3d 555 (8th Cir. 2010), both the magistrate judge and the district court denied the defendant's motion for self-representation based upon his refusal to answer the magistrate judge's questions in the hearings held on his request. *Id.* at 557-58. Observing that "self-representation can be disallowed or terminated when the defendant 'engages in serious obstructionist misconduct,'" *id.* at 558, the Eighth Circuit found that "Mosley's obstreperous conduct provided sufficient grounds for the district court to terminate and disallow Mosley's self-representation" because his conduct "interfered with pretrial proceedings and delayed the trial" and "[t]here was good cause to believe that Mosley would continue to disrupt the proceedings if the court permitted him to resume self-representation." *Id.* at 559.

The Eleventh Circuit in *United States v. Raulerson*, 732 F.2d 803, 809 (11th Cir. 1984), *reh'g denied*, 736 F.2d 1528, *cert. denied*, 469 U.S. 966 (1984), concluded that the defendant waived his request for self-representation when he voluntarily walked out of the courtroom during his pretrial

Faretta hearing.[3]

II. The finding that Respondent was not required to be candid in his sworn answers to the trial judge's questioning is constitutionally indefensible.

---

[3] The Supreme Court of South Carolina's decision also conflicts with decisions by the California Supreme Court. In *People v. Carson*, 104 P.3d 837, 840 (Cal. 2005), the Court remanded for a hearing on whether the defendant's *Faretta* rights were properly revoked. But, the Court specifically rejected the argument that a trial court may terminate or revoke a criminal defendant's right of self-representation only for in-court misconduct because it was not supported by "either the language or the logic of *Faretta*." *Id*. at 840. The Court found that because "opportunities to abuse the right of self-representation and engage in obstructionist conduct are not restricted to the courtroom," ... 'relevant rules of procedural and substantive law ... are not limited to those relating solely to the trial itself." *Id*. at 841. "Ultimately, the effect, not the location, of the misconduct and its impact on the core integrity of the trial will determine whether termination is warranted." *Id*. In *People v. Williams*, 315 P.3d 1, 41-42 (Cal. 2013), *cert. denied*, *Williams v. California*, 134 S.Ct. 2673 (2014), the Court concluded that the defendant's right to self-representation was not violated since "[t]he trial court did not abuse its discretion in finding that defendant had engaged in 'delay tactics' in the course of his self-representation [prior to trial]." *Cf. State v. Worthy*, 583 N.W.2d 270, 279-80 n. 7 (Minn. 1998) (finding the trial court did not abuse its discretion in not reappointing the defendants' previously-discharged attorneys after defendants refused to remain present for their trial, but observing that "trial courts may have the authority in some cases to require manipulative defendants to accept legal representation").

There can be no more fundamental rule of "courtroom protocol," *see McKaskle*, 465 U.S. at 173, than the obligation of the parties and their attorneys to be truthful and candid with the trial court, particularly when sworn to tell the truth. "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States v. Havens*, 446 U.S. 620, 626 (1980) (citing *Oregon v. Hass*, 420 U.S. 714, 722 (1975)). "Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993). *See also* Stephen J. Safranek, *The Legal Obligation of Clients, Lawyers, and Judges to Tell the Truth*, 34 Idaho L. Rev. 345, 366 (1998) ("Although justice is the end of the legal system, a failure to act in accordance with the truth not only constitutes a breach of the rules that guide the conduct of the participants in the legal process, but also threatens the trust that each of the participants in the system must have in the other participants"); *id.* at 357-58 ("The legal system is entirely dependent upon the client's and witness's willingness to be a truth teller. If such expectations do not exist, then the system breaks down at a critical stage"). *Cf. Illinois v. Allen*, 397 U.S. 337, 346 (1970) ("[O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity"). Indeed, this Court recently emphasized that "ethical rules are necessary to the maintenance of a culture of civility

and mutual trust within the legal profession." *Azar v. Garcia*, 138 S.Ct. 1790, 1793 (2018) (per curiam).

The trial judge properly denied Respondent's motion for self-representation because the sworn Respondent either deliberately refused or was unable to be truthful in his responses to the trial judge's questions. *See Faretta*, 422 U.S. at 834 n. 46; *McKaskle*, 465 U.S. at 173; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (in presenting witnesses in his defense, "the accused ... 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence'"). "It would be a nonsensical and needless waste of scarce judicial resources to [grant a motion for self-representation and] proceed to trial when, as here, defendant has shown by his conduct during pretrial proceedings that he is unable to conform to procedural rules and protocol." *People v. Watts*, 173 Cal.App.4th 621, 630, 92 Cal.Rptr.3d 806 (Cal. Ct.App. 2009), *reh. denied* (May 19, 2009), *review denied* (Aug 19, 2009).[4]

---

[4] Respondent was repeatedly contentious with his attorneys and both contentious and argumentative with the Assistant Solicitor in the subsequent *Jackson v. Denno*, 378 U.S. 368 (1964), hearing. R. 90-146. This misbehavior continued at trial, with the trial judge admonishing him several times to be either responsive to a question asked of him or not to be argumentative. R. 150-236. So, the trial judge's finding that he was trying to manipulate the proceedings was proven correct.

Ignoring that Respondent was under oath when he responded to the trial judge's questioning, the Supreme Court of South Carolina found that the trial judge erroneously relied on Rule 3.3, RPC (Candor toward the Tribunal), Rule 407, SCACR, in denying Respondent's motion based upon a lack of candor. App. 15-16; 53-54.[5] "Not only has this Court never held that a criminal defendant acting *pro se* must comply with the rules of professional conduct, but we are unaware of any jurisdiction which has explicitly required criminal defendants to comply with ethical rules governing lawyers. Indeed, this Court has suggested, albeit in *dicta*, that the opposite may be true." App. 15 (citing *Barnes II*, 774 S.E.2d at 455 n. l).

In footnote 4, the majority below also denied that it was "strip[ping] trial judges of their authority and discretion to maintain the integrity of the proceedings before them." App. 52. Yet, by concluding that the trial judge was obligated to accept at face value Respondent's responses (now known to be false) and by finding that the trial judge erroneously vetted those responses, the Court implicitly granted criminal defendants a "right" to lie under oath to trial judges during a hearing on a

[5] Rule 3.3 (a)(1) provides that "[a] lawyer shall not knowingly … make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Comment 2 to Rule 3.3 states, in part, "This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process."

motion for self-representation. So, a defendant may now abuse the integrity and dignity of the judicial system with impunity and South Carolina trial courts are placed at the mercy of unreasonable, dilatory, obstreperous and dishonest defendants, who may choose to play games at the expense of the judicial system. Worse, because Respondent's false responses occurred during a *Faretta* hearing, the Court has added a constitutional dimention to this "right" to lie that has not heretofore existed and which tends to undermine the foundation of our judicial system.

Both before and after *Faretta*, this Court has consistently held that an accused has absolutely "no right whatever-constitutional or otherwise ... to use false evidence." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). The Court has likewise made clear that if an accused does testify falsely, the trial court, the prosecutor and even trial counsel have recourse to deal with his perjury. *E.g.*, *id.* at 171 (counsel's threat to inform court and to seek to withdraw if client-defendant lied on witness stand was "well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under [*Strickland v. Washington*, 466 U.S. 668 (1984)]"); *United States v. Havens*, 446 U.S. 620, 626 (1980) (a prosecutor may use illegally seized evidence to impeach perjurious testimony by the defendant on cross-examination); *Harris v. New York*, 401 U.S. 222, 225 (1971) (in the course of holding that statements of defendant taken in violation of his *Miranda v. Arizona*, 384 U.S. 436 (1966) rights were admissible to impeach

defendant's testimony on direct examination, the Court explained, "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury"); *Grayson v. United States*, 438 U.S. 41, 54 (1978) ("The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath-unless we are to say that the oath is mere ritual without meaning. .... [If] the sentencing judge's consideration of defendant's untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury").

Unless Petitioner is granted relief, the result of the majority's decision creates an unprecedented and constitutionally indefensible Sixth Amendment "right" for criminal defendants to testify falsely when questioned by the trial court, in flagrant disregard of this Court's precedent. *Id*. *See also Bryson v. United States*, 396 U.S. 64, 72 (1969); *Walder v. United States*, 347 U.S. 62, 65 (1954). Petitioner is unaware of any other jurisdiction in America that has created such a "right." It cannot seriously be maintained that a defendant's perjury during a hearing on his motion for self-representation is any less of a failure to "abide by the rules of procedure and courtroom protocol," *McKaskle*, 465 U.S. at 173, or any less manipulative than refusing to give any answer to the trial judge's questions, see *Pryor*, 842 F.3d at 449; *Brock*, 159 F.3d at 1080-81; *Mosley,* 607 F.3d at 559, or walking

out of the courtroom questions during the hearing on his motion. *Raulerson*, 732 F.2d at 809. Indeed, such conduct is even more of an affront to the integrity and efficiency of that criminal justice system, given the importance of honesty to the proper functioning of that system.

Petitioner would also note that over the State's objection in a capital case, the Supreme Court of South Carolina declined "to insist upon representation by counsel for those competent enough to stand trial under [*Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." See *Edwards*, 554 U.S. at 171. The Court in *State v. Barnes*, 753 S.E.2d 545, 550 (S.C. 2014) (*Barnes I*), held that "[a] defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty." So, the Supreme Court of South Carolina now permits a mentally ill defendant with an "improper motive," or one who lies or engages in other "unethical conduct," to make a knowing and intelligent waiver of his right to counsel and represent himself at trial, provided his responses satisfy a formulaic inquiry. Certainly, the Court's recognition of the right to self-representation in *Faretta* was never intended to permit this heretofore unthinkable result.

Therefore, the Supreme Court of South Carolina has needlessly made a trial judge's already difficult task of navigating the "minefield" known as a *Faretta* hearing all the more difficult, if not

impossible. [6] *See* App. 67-68 (Kittredge, J., dissenting). Its opinion also demonstrates why many trial judges dislike *Faretta*. *See Martinez*, 528 U.S. at 164 (Breyer, J., concurring) ("I note that judges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*'s] holding"); *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (recognizing that "there can be some tension" between the Sixth Amendment right to counsel and a defendant's Sixth Amendment right to self-representation). *See also Faretta*, 422 U.S. at 837 (Burger, C.J., dissenting) ("the Court's holding … can only add to the problems of an already malfunctioning criminal justice system"); *id*. at 846 (Blackmun, J., dissenting) ("I fear that the right to self-representation constitutionalized today frequently will cause procedural confusion without advancing any significant strategic interest of the defendant"). [7] Also, the criminal judicial system

---

[6] If a trial judge follows the lower court's decision, then she or he is helpless to reject requests for self-representation by an accused who is clever enough to satisfactorily answer the court's questions but who actually intends to manipulate the subsequent trial.

[7] The problems discussed in this Petition epitomize why some wish to overrule *Faretta*. *See Edwards*, 554 U.S. at 188 (Scalia, J., dissenting) ("some Members of this Court have expressed skepticism about *Faretta*'s holding"). *Cf. Martinez*, 528 U.S. at 156-57 ("The historical evidence relied upon by *Faretta* as identifying a right of self-representation is not always useful because it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime. For one who could not obtain a lawyer, self-representation was the only feasible alternative

strives to achieve a balance of the rights of all parties. It is not solely a source of defense rights which a defendant may opt to waive or impose at his discretion. *See Stein v. New York,* 346 U.S. 156, 197 (1953) ("The people of the State are also entitled to due process of law"), *overruled on other grds.*, *Jackson v. Denno,* 378 U.S. 368 (1964); *Payne v. Tennessee,* 501 U.S. 808, 827 (1991) ("'[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true'") (quoting *Snyder v. Mass.,* 291 U.S. 97, 122 (1934)).

Nor should this Court decline review of the Supreme Court of South Carolina's fundamentally flawed understanding of the Sixth Amendment right to self-representation simply because these errors benefited Respondent, since the decision is a gross misapplication of *Faretta* and its progeny, and it grants a defendant a legally unsupportable "right to lie under oath," which he clearly does not and cannot have. *See Havens*, 446 U. S. at 626 ("We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences. This is true even though a defendant is compelled to testify against his will"); *Kansas v. Carr*, 136 S.Ct. 633, 641-42 (2016) ("a state court

---

to asserting no defense at all") (footnote omitted). Petitioner urges the Court to overrule *Faretta*, but submits that the Court can remedy the lower court's constitutional errors without doing so.

cannot ... experiment with our Federal Constitution and expect to elude this Court's review so long as victory goes to the criminal defendant. 'Turning a blind eye' in such cases 'would change the uniform 'law of the land' into a crazy quilt'") (citation omitted). *Accord Johnson v. United States,* 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring) ("To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution"). Accordingly, Petitioner asks the Court to grant certiorari because it is imperative that the integrity and efficiency of criminal trials in this State not be undermined in a fashion that is contrary to both this Court's jurisprudence and many of the circuit courts of appeals. Also, South Carolina trial judges must be provided more definitive authority to deal with an accused who attempts to mislead the court during the *Faretta* colloquy, rather than no authority under the lower court's holding. Otherwise, public confidence in the judicial system will be greatly undermined.

Conclusion

The petition for a writ of certiorari should be granted.

ALAN WILSON
South Carolina Attorney General

*WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
esalter@scag.gov

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

August 21, 2018

*****_Counsel of Record_

APPENDIX

STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lamont Antonio Samuel, Petitioner.

Appellate Case No. 2015-002401

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27768
Heard March 1, 2017 - Filed February 28, 2018

REVERSED AND REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General J. Robert Bolchoz, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

JUSTICE HEARN: In this case we clarify the proper scope of a circuit judge's inquiry under *Faretta* [FN 1] when a criminal defendant knowingly, intelligently, and voluntarily waives his right to counsel and requests to proceed *pro se*. Prior to his trial for murder, Lamont Antonio Samuel moved to represent himself under *Faretta*. The circuit judge denied his motion, finding Samuel was lying about whether he had or would have access to legal coaching in preparation for trial. The court of appeals affirmed. *State v. Samuel,* 414 S.C. 206, 777 S.E.2d 398 (Ct. App. 2015). We now

reverse.

FACTUAL/PROCEDURAL BACKGROUND

Samuel was indicted for the murder of his cousin, Taneris Hamilton. On the day his case was called to trial, Samuel indicated he was dissatisfied with defense counsel and made a *Faretta* motion to waive his right to counsel and proceed *pro se*. The circuit judge then properly initiated an *ex parte* hearing to discuss Samuel's *Faretta* motion with him.

Samuel informed the court that he was twenty-one years old and had graduated from high school with a 4.0 GPA in all honors classes with hopes of enlisting in the Navy as a diesel mechanic. Additionally, Samuel affirmed he understood he was charged with murder and was aware of the elements of the crime. He realized he could be sentenced to at least thirty years in prison, with a maximum possible sentence of life imprisonment without the possibility of parole. Samuel also indicated he had never been treated for drug or alcohol abuse, mental, or emotional health issues, nor had he taken any medication, drugs, or alcohol in the previous seventy-two hours. The judge noted

she found Samuel to be "incredibly articulate" and "exceptionally bright;" nevertheless, she repeatedly told Samuel she had misgivings about his self-representation. Samuel thanked the judge for her advice, but reiterated his request to proceed *pro se*.

The circuit judge then inquired as to whether Samuel had any legal training. He responded that he had been studying trial procedures in the Criminal Law Handbook, which he had received in the mail while in prison. Samuel testified that his mother had sent him the book upon the advice of attorney Carl Grant. The circuit judge further questioned whether Samuel was familiar with the rules of evidence, motions *in limine,* and motions for directed verdict. Samuel affirmed that he was, based upon his study of the Criminal Law Handbook and coaching he had received from Grant. He also acknowledged he would be required to follow the rules of evidence if he were to represent himself, and that he had the right not to testify under the Fifth Amendment. Finally, the circuit judge asked Samuel if he was aware of any possible defenses he might have to the charge against him and, following some prompting questions by the judge, he acknowledged his intent

to maintain his innocence based upon his co-defendant's alleged confession.

Rather than concluding the *Faretta* colloquy, the circuit judge continued to caution Samuel against representing himself, stating in her opinion Samuel would be far better defended by a trained lawyer, it would be unwise of him to waive his right to counsel, and she did not believe he was sufficiently familiar with the law, procedure, or rules of evidence to adequately represent himself. Despite the judge's warnings and in light of the potential penalties he faced, Samuel voluntarily reaffirmed his desire to dispense with the assistance of counsel and proceed *pro se*.

Nevertheless, the circuit judge continued her attempts to dissuade Samuel, asking "Do you know anything or anyone that I can have you speak with that might urge you to have a lawyer represent you?" Samuel responded,

> No, ma'am. . . . I mean, my mama, basically paid Mr. Grant a good bit amount [sic] of money. The reason why he couldn't represent me is because . . . his paralegal is related, you know, in some manner. So he

> had decided to just go over the steps with me day by day. I go through the trial, I got back to him. I talk to him, he'll tell me things or he won't -- he's not going to be in the courtroom, present. . . . I know he's not representing me, but he is coaching me on --.

The circuit judge then stated, "You're bright enough, educated enough. . . . You don't have a problem that I'm aware of that I can use, in all candor, to keep you from representing yourself." However, instead of ruling on Samuel's motion at that point, the circuit judge summoned Grant to question him on his relationship with Samuel. Nonetheless, prior to Grant's arrival, the judge stated on the record that her inclination was to allow Samuel to represent himself.

> Upon his arrival, Grant testified as follows: I have no recollection of ever sharing with Ms. Betty Hickson, [Samuel's] mother, anything pertaining to any rules of evidence or rules in criminal procedure or anything like that. . . . The only discussion has been about

> the legal fees to represent this young man. . . . Also, I've not been retained. . . . I've not offered any assistance to anyone, Judge. I've not even given this young man any kind of copy of the rules of evidence or rules of criminal procedure or offered my assistance in any way. . . . [A]s far as my offering any assistance to him, Judge, number one, if he's representing himself I would not be available to provide any assistance to him in any capacity.

After hearing Grant's testimony, the circuit judge denied Samuel's request to proceed *pro se* citing Rule 3.3 of the Rules of Professional Conduct [FN 2] and *Gardner v. State,* 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002) (including whether a defendant is attempting to delay or manipulate the proceedings as *one of ten* factors courts can consider when determining if a defendant "has a sufficient background to understand the dangers of self-representation"). Specifically, the circuit judge interpreted Samuel's and Grant's conflicting testimony to mean Samuel was lying to her and attempting to

manipulate the proceedings.

Thereafter, Samuel proceeded to trial with his counsel and was found guilty and sentenced to fifty years imprisonment. He appealed his conviction, asserting the circuit judge erred in denying his right to self-representation, and the court of appeals affirmed. *Samuel,* 414 S.C. at 213, 777 S.E.2d at 402. This Court granted Samuel a writ of certiorari to review the court of appeals' opinion.

STANDARD OF REVIEW

Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo. *United States v. Lopez-Osuna,* 242 F.3d 1191, 1198 (9th Cir. 2000). Specifically, we review a circuit judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de nova. *United States v. Bush,* 404 F.3d 263, 270 (4th Cir. 2005). In doing so, this Court must consider the defendant's testimony, history, and the circumstances of his decision, as presented to

the circuit judge at the time the defendant made his request. *United States v. Singleton,* 107 F.3d 1091, 1097 (4th . Cir. 1997).

LAW/ANALYSIS

Through counsel, Samuel now argues the court of appeals erred in affirming the circuit judge's denial of his *Faretta* motion to proceed *pro se.* In particular, Samuel contends the circuit judge impermissibly exceeded the scope of the *Faretta* inquiry by considering Grant's testimony to conclude that Samuel was attempting to manipulate the proceedings, thereby precluding him from proceeding *pro se.* We agree.

In *Faretta,* the United States Supreme Court held that criminal defendants have a fundamental right to self-representation under the Sixth Amendment. 422 U.S. at 819-21. In order to effectively invoke this right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently and voluntarily. *United States v. Frazier-El,* 204 F.3d 553, 558 (4th Cir. 2000). Where a defendant invokes

his right of self-representation before trial, the only inquiry the circuit judge may undertake is that required by *Faretta. State v. Barnes,* 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, 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. Reed,* 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). A circuit judge's denial of a defendant's knowing and voluntary request to proceed *pro se* is a structural error requiring automatic reversal and a new trial. *State v. Rivera,* 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013).

Whether a defendant has intelligently waived his right to counsel depends upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. *Singleton,* 107 F.3d at 1097. Moreover, as the United States Supreme Court has emphasized, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right,* not the competence to represent himself." *Godinez,* 509 U.S. at 399 (emphasis in original). In other words, whether a defendant is capable of effectively representing

himself has no bearing upon his ability to elect self-representation. *Id.* at 400; *see also Faretta,* 422 U.S. at 836 (holding a defendant's "technical legal knowledge . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself '). Thus, this Court has held that

> [t]he 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. 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.

State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (internal citations omitted) (emphasis added).

Although a defendant's decision to proceed *pro se*

may ultimately be to his detriment, such requests "must be honored out of that respect for the individual which is the lifeblood of the law." *Barnes,* 407 S.C. at 35-36, 753 S.E.2d at 550 (internal quotation omitted); *see also Frazier-El,* 204 F.3d at 558 (noting a defendant's right of self-representation generally must be honored, regardless of whether he would benefit from advice of counsel). Indeed, "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." *Reed,* 332 S.C. at 41, 503 S.E.2d at 750.

We agree with Samuel that the circuit judge erred in refusing to allow him to represent himself at trial. In this case, the circuit judge repeatedly noted how intelligent and articulate she found Samuel to be. Samuel also clearly expressed his understanding of the nature of the charge against him and the potential penalties he faced were he to be found guilty. He indicated he was making the request of his own volition and continuously asked to represent himself despite the circuit judge's persistent attempts to dissuade him. *See Reed,* 332 S.C. at 41, 503 S.E.2d at 750 (holding although it is the circuit judge's responsibility to inform the defendant of the dangers and disadvantages of self-representation, whether the judge believes the

decision is prudent or wise is entirely irrelevant).

We acknowledge it was within the circuit judge's authority to summon Grant; however, her questioning of Grant should have been limited to discerning whether Samuel's request was knowingly and voluntarily made. Moreover, our standard of review requires us to consider de novo the circuit judge's application of Grant's testimony to Samuel's *Faretta* request. *Bush,* 404 F.3d at 270. We are unaware of any cases in which a circuit judge has relied on testimony from a third party witness, such as Grant, to determine whether a defendant has effectively invoked the right to proceed *pro se.* Moreover, whether Grant would be available to advise or coach Samuel throughout the trial [FN 3] relates to his competence to represent himself which, as discussed *supra,* is entirely irrelevant to the issue of whether he effectively invoked his right of self-representation. *Godinez,* 509 U.S. at 399. Rather, it is clear the circuit judge, with the best of intentions, was so concerned with Samuel proceeding *pro se* that she went beyond the scope of the question at hand using Grant's testimony as the basis to prevent Samuel from invoking his constitutional right. We fully recognize the delicate balance a circuit judge must try to achieve in

safeguarding a defendant's constitutional right to represent himself and the almost sure disaster that will result from his self-representation. Nevertheless, because we find Grant's testimony irrelevant to the issue, the circuit judge erred in relying on it to deny Samuel's request to represent himself. [FN 4]

Moreover, we find the circuit judge's reliance on Rule 3.3 RPC and *Gardner* is misplaced. Not only has this Court never held that a criminal defendant acting *pro se* must comply with the rules of professional conduct, but we are unaware of any jurisdiction which has explicitly required criminal defendants to comply with ethical rules governing lawyers. Indeed, this Court has suggested, albeit in *dicta,* that the opposite may be true. *See State v. Barnes,* 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015) ("Even if we believe that a criminal defendant's exercise of his constitutional rights stem from impure motives, that motivation alone is not a basis to deny him these rights. Further, while it is unethical for an *attorney* to engage in conduct which tends to pollute the administration of justice (Rule 7(a)(5), Rule 413 SCACR), we are unaware that this principle applies to a criminal defendant."

(emphasis added)). [FN5]

Finally, although *Gardner* permits a circuit judge to consider a defendant's attempted manipulation of the proceedings, we discern no attempt by Samuel to disrupt or manipulate the process here. In 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 defenses at trial- in effect, to "beat the system"-rather than to waive the benefits of counsel. *See, e.g., Frazier-El,* 204 F.3d at 560 (court found defendant's conduct manipulative where defendant repeatedly requested to replace his appointed counsel with another public defender, because his attorney would not present certain impermissible arguments, and it was clear his request to appear *pro se* was merely "a manipulative effort . . . to assert the defenses himself '). 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.l, 774 S.E.2d at 455 n.l. Therefore, we find Samuel made a knowing, intelligent, and voluntary request to proceed *pro se* as required by *Faretta,* and he should have been given the opportunity to represent himself.

CONCLUSION

For the foregoing reasons, we hold the circuit judge erred in denying Samuel's invocation of his right to self-representation under *Faretta.* Accordingly, we reverse the court of appeals' opinion and remand to the circuit judge for a new trial.

BEATTY, C.J. and Acting Justice J. Cordell Maddox, Jr., concur. KITTREDGE, J., dissenting in a separate opinion in which JAMES, J., concurs.

JUSTICE KITTREDGE: I respectfully dissent. The majority holds that "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." I certainly do not disagree in the

abstract that an assertion of this right must be knowing, intelligent, and voluntary, and in the vast majority of cases, the majority's categorical approach will result in the proper outcome. But I construe the *Faretta* [FN 6] framework more broadly to allow for a trial court's exercise of discretion where, as here, the knowingly, intelligently, and voluntarily asserted right of self-representation is accompanied by a circumstance that undermines the integrity of the proceedings and the orderly administration of justice. As a result, I would reject the majority's categorical rule that effectively precludes consideration of the trial court's exercise of discretion and places trial judges at the mercy of those who seek to exploit the right to self-representation for manipulative or disruptive ends.

In my judgment, this case illustrates the perplexing difficulties trial courts encounter when a defendant desires to proceed *pro se* and provides satisfactory, formulaic responses to the *Faretta* inquiry, yet the trial court perceives there is more at play. One of those difficulties occurs when a defendant's request to proceed *pro se* is motivated by a desire to manipulate the

proceedings. According to the experienced trial judge, that is precisely what Petitioner was attempting to do. Review of such a fact-based determination necessarily involves consideration of the trial court's exercise of discretion and recognition that the trial judge was in a position to hear the accused and observe his demeanor. Because I am convinced there is evidence to support the trial court's finding, I would affirm.

More broadly, my concern is that the Court's categorical rule-that an absolute right to proceed *pro se* automatically follows formulaic responses to *Faretta* inquiry-will invite mischief in the trial -courts of this state while tying the hands of our trial court judges. Granted, in the vast majority of cases, requests to proceed *pro se* will be regularly and properly granted, but trial court discretion must always be present to address the particular circumstances of the case, such as where this right is asserted to serve manipulative, disruptive, or dilatory ends. Trial court discretion ensures the integrity of our justice system.

I.

The record in this case reveals that in addition to being charged with murder, Petitioner was also charged with obstruction of justice for repeatedly giving false statements to police in which he identified an uninvolved person as the shooter; for snatching one of his written statements from an investigator's hand and ripping it up; and for lying to police when he claimed to have thrown a gun involved in the murder [FN 7]into a nearby pond-a lie that caused three separate law enforcement agencies, including a dive team from Lexington County, to expend time and resources over several days searching the pond for a nonexistent gun. [FN 8]

In asserting his right of self-representation, Petitioner expressed frustration with his appointed counsel because counsel refused to let Petitioner speak directly with the solicitor to provide what Petitioner believed to be exculpatory evidence-namely, letters from a codefendant which Petitioner believed constituted a written confession exonerating him. Petitioner explained that counsel's request to review the letters for incriminating statements before deciding whether they should be shared with the State was asinine

because "Why would I give you something that incriminates me[?]" Petitioner further explained his belief that counsel's efforts to negotiate a guilty plea to a lesser included offense demonstrated counsel did not believe Petitioner was innocent and this caused Petitioner to question counsel's loyalty in defending him.

During a detailed *Faretta* inquiry, the trial court asked Petitioner whether he had ever studied the law. Petitioner responded that he had studied a criminal law handbook which he claimed was provided to his mother by a local attorney, Carl Grant. Shortly thereafter, Petitioner mentioned Mr. Grant again, explaining:

> [Petitioner]: I mean, my mama, basically paid Mr. Grant a good bit of money. The reason why [Mr. Grant] couldn't represent me is because my family-I guess his paralegal is related, you know, in some manner. So he had decided to just go over the steps with me day by day. I go

through the trial, I got back to him. I talk to him, he'll tell me things or he won't-he's not going to be in the courtroom, present.

The Court: Okay. And you know he's not representing you?

[Petitioner]: I know he's not Representing me, but he is Coaching me on-

The Court: I got you, but he's not representing you?

[Petitioner]: Oh, no, ma'am.

Following several further questions, the trial court appeared poised to grant Petitioner's motion. Then, Petitioner interrupted the trial court to make yet another reference to Mr. Grant:

The Court: Okay. Well, here's what I am going to do. You're bright enough, educated enough.

You're not-you don't have a drug problem, you don't have an alcohol problem. You don't have a mental health problem. You don't have a problem that I'm aware of that I can use, in all candor, to keep you from representing yourself.

[Petitioner]: Ms. Goodstein-

The Court: You're bright enough.

[Petitioner]: I'd like to say something.

The Court: You understand your charges?

[Petitioner]: Yes, ma'am. I can say something to you?

The Court: Yeah.

[Petitioner]: I know, basically, you-what you're saying is that you're putting your neck on the line by you wouldn't want me to

disappoint you. That's what's bringing me into this. My mama paying Carl Grant to come in and educate me, at the same time, just because he a lawyer, I mean, I went to school, I'm smart. I can catch onto the common sense-I won't put you down when we're going to trial . . . .

The Court: Here's what I'm going to do. I'm going to ask Mr. Grant to come over here.

[Petitioner]: Yes, ma'am.

The Court: Just because I want to-I just want to have a little bit of dialogue with him with you, also. . . . I want to understand a little bit about that relationship, okay.

[Petitioner]: Yes, ma'am.

The Court: So I'm going to go see

> if I can find him and have him come on over here and let's have a little bit of a dialogue, okay.
> . . . I'm inclined to allow you to represent yourself although there have been some communications between you and Carl Grant, and I have to understand what they are a little more fully, okay?
>
> [Petitioner]: Yes, ma'am.

Neither defense counsel nor Petitioner contemporaneously objected to this procedure. After Mr. Grant arrived, the trial court explained, "I need for our record to reflect [ ] the relationship, the extent of it, and going forward for trial, what, if any, contact at all [Petitioner] can anticipate *because I think he needs to know that-if* you'll share with us." (emphasis added). In other words, the trial court's express purpose for asking Mr. Grant to appear and answer questions on the record was to establish that Petitioner's choice about whether to represent himself was "made with eyes open," *Faretta,* 422

U.S. at 835, specifically with regard to what coaching or assistance, if any, Petitioner could expect Mr. Grant to provide him throughout the trial.

Mr. Grant informed the trial court that he had not been retained by Petitioner or Petitioner's mother and that he had not provided Petitioner any assistance whatsoever. Mr. Grant had quoted a retainer to fee to Petitioner's mother but never heard from Petitioner's mother again. Mr. Grant also stated that he would not provide any form of assistance to Petitioner during the trial. In short, Mr. Grant's testimony refuted Petitioner's statements to the trial court.

Thereafter, the trial court confirmed that Petitioner understood that Mr. Grant would not be providing him any form of assistance during trial:

> The Court: [Petitioner], do you have any questions of Mr. Grant that you want to ask him?
>
> [Petitioner]: No, ma'am. But I will tell Mr. Grant . . . thank you for your

information you provided me. I thank you for your advice and everything and I appreciate you addressing that to Ms. Goodstein.

The Court: And do you know what-tell me what advice and information you are speaking of specifically?

[Petitioner]: Everything he said.

The Court: You're talking about today?

[Petitioner]: I'm just saying in general. Everything he said makes a whole lot of sense.

The Court: Okay . . . . Do you understand though that his-do you understand what the extent of his relationship has been?

[Petitioner]: Yes, ma'am.

The Court: Okay. And that going forward that you cannot count on him being

there?

[Petitioner]: Yes, ma'am.

The Court: Very well.

Mr. Grant: May I be dismissed, Your honor[?]

The Court: Indeed, sir.

Mr. Grant: Thank you, Judge.

The Court: Thank you, kindly.

Mr. Grant: All right. See y'all.

The Court: All right.

[Petitioner]: Ms. Goodstein?

The Court: Yes? Yes, sir?

[Petitioner]: All right. What I was trying to say before Mr. Grant came . . . before

> Mr. Grant came, when he was talking to me and talking to my mother, the reason why he indicated he said what he said was because one of his paralegals is kin to me or something. That's why he could never take the case. But I'm sorry for having to go through that, but he already told my mother ahead of time that he had been through that in the previous past. So his reasons for not coming out and indicating the same is because his reputation was on the line . . . . [H]e already had told me and stated if it came down to him coming in front of a judge in front of the attorneys he was going to state that. I know if it was somebody I was trying to do-handling some business for and be nice to them I would understand then because if my family member was kin to somebody else, I would do the same.

Following a short recess, the trial court made its ruling:

> The Court: I am ready to rule and I want to put on the record why I

am making the determination that I am making in this case. Now, first of all, here's what occurred this morning. . . . You went through [a] colloquy. You told me your educational background, which I think is very strong. I think you're very bright, I think you're very articulate, extremely articulate. Then we began to talk about the rules and your knowledge of the rules, and I think it was at that point you informed me that your mother had provided you with the rule book and that the title had been given to her by Carl Grant. And that you had been studying-

[Petitioner]: Yes, ma'am.

The Court: the rules then you went on to tell me that Carl Grant had been coaching you, had been coaching you with regards to the process and that-that you believe that he

would, likewise, be coaching you with regards to the process of a trial, throughout the trial.

[Petitioner]: Yes, ma'am.

The Court: I then, out of concern that whether Carl Grant had undertaken representation of you and whether or not he would be acting as stand-by counsel in some form or fashion if you were to be [ ]representing yourself. That is why I had him come in here.

[Petitioner]: Yes, ma'am.

The Court: He has testified. What he has said is he did not provide the title and that he has not coached you, that he has not had any conversations with you with regards to the processes and that he has not led you to believe that he would, likewise be doing so throughout the trial. Now,-

[Petitioner]: Ms. Goodstein, can I say something?

The Court: No, sir. I'm ruling. It's my turn to speak.

[Petitioner]: Okay.

The Court: Now, I have listened to you, I have listened to Carl Grant. I want you to understand I do not believe what you tell me about your relationship with Mr. Grant in terms of his having coached you and his willingness to coach you during the course of the trial. I simply do not believe that. I have to make a determination[,] and I do not believe what you are telling me is accurate. That brings me to one of our rules . . . . One of the elements that the Court has to consider is whether or not the defendant is attempting to delay or manipulate the proceedings. I do not believe

> that you are trying to delay the proceedings. *I am concerned that the proceedings are being manipulated.*
>
> . . . [Y]ou're not allowed to attempt to manipulate the court in your attempts in representation and . . . I believe that there is authority for me to disallow your self-representation . . . . Unfortunately, it has been demonstrated to [m]e between this morning and this afternoon that you lack candor with the court. On that basis and the basis of the case law that I have already mentioned[,] I cannot allow you to self-represent. I must have counsel to represent you.

[Petitioner]: Ms. Goodstein?

The Court: Yes.

[Petitioner]: I ain't never said I want [counsel] to leave. I mean, they can

be aside and stay by my side. I respect that, but when Carl Grant came in here and told you before this situation occurred that about his name being mentioned by his paralegals, he don't want his reputation ruined. That's why Mr. Grant came and did-

The Court: I understand that. I don't believe you, because that's not what lawyers do. He simply would have a conflict and not be able to represent you. I don't believe you that he would be representing you and saying if it gets out[,] it will ruin my reputation. I find that very difficult to believe.

[Petitioner]: Due to the fact that Denise Hamilton is one of his paralegals-

The Court: I hear what you are saying.

> [Petitioner]: -she's kin to me.
>
> The Court: I hear what you are saying and I have ruled. There's another rule that says you don't argue with the court once it has ruled.
>
> (emphasis added).

During both direct and cross-examination at trial, Petitioner was argumentative and nonresponsive, and he was admonished by the trial court numerous times. Ultimately, the jury returned a guilty verdict, and Petitioner was sentenced to prison.

II.

A.

I begin my discussion by acknowledging the obvious-an accused has the right to proceed *pro se*. But no right is absolute. [FN 9] Trial courts must have the authority to control the proceedings and

to ensure orderly administration of justice. Courts are citadels of justice, and it is the trial judge who is charged with ensuring the integrity of the proceeding and protecting against the proceeding becoming-infected with abusive and manipulative conduct. As the United States Supreme Court has explained:

> [O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. . . . It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion.
> Being manned by humans, the courts are not perfect and are bound to

> make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the [ ] trial judge in this case.

Illinois v. Allen, 397 U.S. 337, 346-47 (1970).

I quote *Illinois v. Allen* "to acknowledge that constitutional rights must be asserted and exercised in a manner not inconsistent with the trial judge's control over the orderly administration of justice in [her] court." *Blankenship v. State,* 673 S.W.2d 578, 589 (Tx. App. 1984). Indeed, it is well-established that trial judges must strike "an appropriate balance between the questioned individual constitutional right and the necessity for orderly procedure in the courts of the land." *Id.* "A court should, of course, vigilantly protect a defendant's constitutional rights, but it was never intended that any of these rights be used as a ploy to frustrate the orderly procedures of a court in the administration of justice." *United States v. Lawrence,* 605 F.2d 1321, 1325 (4th Cir. 1979).

"Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates." *United States v. Shaffer Equip. Co.,* 11 F.3d 450, 461 (4th Cir. 1993). A trial court's inherent duty to preserve the integrity of the judicial process must be unwavering, and where a trial court believes a defendant asserts the right of self-representation for a manipulative purpose, "[i]t is not the accused's ignorance of the law which is critical, but rather his apparent willingness to be untruthful with the trial court to effect his own designs, which [ ] evince[s] an intent to abuse the judicial process." *Blankenship,* 673 S.W.2d at 591 n.13.

The majority finds fault with the trial court citing a rule of professional responsibility, Rule 3.3, RPC, Rule 407, SCACR. I agree that a defendant is not "bound" by the rules of professional conduct, but that misses the larger point. No one has the *right* to lie to the court and manipulate the proceeding. That, I believe, is the point being

made by the trial court in referencing the rules of professional conduct. *Cf. United States v. Stewart,* 931 F. Supp. 2d 1199, 1201 (S.D. Fla. 2013) (observing that a criminal defendant has no right, constitutional or otherwise, to be untruthful with the court).

I am persuaded by the Fourth Circuit's holding that a defendant asserting the right of self-representation assumes the responsibility of acting in a manner befitting an officer of the court. *See United States v. West,* 877 F.2d 281, 287 (4th Cir. 1989). Even assuming the Court is nevertheless correct in refusing to apply the rules of professional conduct to Petitioner, the duty of candor to the tribunal set forth in Rule 3.3 "takes its shape from the larger object of preserving the integrity of the judicial system," and does not "displace[ ] the broader general duty of candor and good faith required to protect the integrity of the entire judicial process." *Shaffer Equip. Co.,* 11 F.3d at 458.

> [T]ampering with the administration of justice . . .

> involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

"[T]he right of self-representation, unlike the right to counsel, is not a critical aspect of a fair trial but instead affords protection to the defendant's interest in personal autonomy." *State v. Turner,* 37 A.3d 183, 192 (Conn. 2012) (internal quotations and citation omitted). "'At bottom, the *Faretta* 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.* (emphasis added) (quoting *Frazier-El,* 204 F.3d at 560). And where a trial judge makes a finding on the record that a defendant's "real intent [i]s to exploit the right of self[-]representation to manipulative or disruptive ends," such a factual finding is entitled to deference from an appellate court. *Blankenship,* 673 S.W.2d at 590- 91; *see United States v. Mackovich,* 209 F.3d 1227, 1237-38 (10th Cir. 2000) (a finding that an accused's assertion of the right of self-representation is manipulative in nature and thus an abuse of the judicial process is a factual finding).

Here, the trial court judged Petitioner's credibility and found Petitioner was untruthful about his relationship with Mr. Grant in terms of having

received the criminal law handbook; the payment of a retainer on Petitioner's behalf; and that Petitioner would be receiving out-of-court coaching from Mr. Grant during the trial. The record also reveals that in thanking Mr. Grant, Petitioner attempted to insinuate Mr. Grant had been untruthful with the Court about assisting Petitioner; plus, immediately after Mr. Grant left the courtroom, Petitioner expressly claimed Mr. Grant had lied to the trial court about the purported arrangement with Petitioner. Thus, in light of the ample support the record, I believe the Court oversteps in disregarding the trial court's findings. Particularly since "[i]n ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation .." *Frazier-El,* 204 F.3d at 559 (quoting *United States v. Singleton, 107* F.3d 1091, 1102 (4th Cir. 1997)).

B.

As mentioned at the outset, the majority holds today that "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." This case illustrates a defendant's attempt to "knowingly, intelligently, and voluntarily" lie and manipulate the proceedings. And perhaps the result today reflects the success of Petitioner's efforts.

For example, the majority finds fault with the trial court's continuing admonition on the dangers of self-representation "[r]ather than concluding the *Faretta* colloquy." The majority further notes that [n]evertheless, the circuit judge continued her attempts to dissuade" Petitioner. First, I observe the *Bench Book for*, *United States District Judges* instructs "[t]he model *[Faretta]* inquiry is to be followed by a 'strong admonishment that the court recommends against the defendant trying to represent himself or herself.'" *United States v. Powell,* 847 F.3d 760, 774 (6th Cir. 2017) (quoting *United States v. Williams,* 641 F.3d 758, 767 (6th Cir. 2011)). Further, as a practical matter, it seems to me the Court is placing our trial court judges in a catch-22. On the one hand, it will be contended that a full warning on the dangers of self-representation is an encroachment of the right of

self-representation, just as the Court today implies; conversely, a lesser warning will be portrayed as inadequate. Criminal court judges are regularly confronting and navigating this very minefield. "[T]he right to counsel and its counterpart the right to proceed *pro se* put the trial court in a difficult position." *Hsu v. United States,* 392 A.2d 972, 983 (D.C. 1978). "If a defendant asks for self-representation, the court risks reversal for denying the request or granting it." *Id.* (internal citations omitted).

The majority finds support for its reversal in "the circuit judge repeatedly not[ing] how intelligent and articulate she found [Petitioner] to be." I fail to see how Petitioner's intelligence provides a helping hand in reversing the trial court. I view Petitioner's intelligence as bolstering the trial court's finding of manipulation. In any event, Petitioner's intelligence in no manner demonstrates an abuse of discretion in the finding of manipulation.

I also strongly reject the majority's take on the trial court's consideration of attorney Grant's testimony. The majority approaches the issue as follows: "[Petitioner] contends the circuit judge

impermissibly exceeded the scope of the *Faretta* inquiry by considering Grant's testimony to conclude [Petitioner] was attempting to manipulate the proceedings, thereby precluding him from proceeding *pro se.* We agree." The majority makes this finding in the face of Petitioner's acknowledgement that the trial court had the authority to summon Grant. Rather than criticize the trial court judge, I commend her. Petitioner's testimony gave the trial court judge concern, and she should be commended for wanting to have Grant, a local attorney, confirm Petitioner's testimony. *See Faretta,* 422 U.S. at 852 (Blackmun, J., dissenting) (observing " the right to assistance of counsel and the right to self-representation are mutually exclusive"); *Hsu,* 392 A.2d at 983 {"The only way to avoid the risk [of improperly denying one of these mutually exclusive rights], therefore, is for the trial court to conduct *a searching inquiry* into 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" (emphasis added) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938))).

Further, the majority incorrectly identifies this

inquiry as relating only to the issue of "[Petitioner's] competence to represent himself," which according to the majority, "is entirely irrelevant to the issue of whether he effectively invoked his right of self-representation." To the contrary, the requirement for a decision to proceed *pro se* to be knowing and voluntary "ensures the defendant 'actually *does* understand the significance and consequences of a particular decision and [that] the decision is uncoerced.'" *Edwards v. Com.,* 644 S.E.2d 396, 402 (Va. Ct. App. 2007) (quoting *Godinez v. Moran,* 509 U.S. 389, 401 n.12 (1993)). Indeed, this line of questioning by the trial court was wholly relevant -and quite necessary to prevent Petitioner "from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation," *Frazier-El,* 204 F.3d at 559, by later arguing his conviction should be reversed because his request to proceed *pro se* was unknowing and involuntary as it was premised upon Petitioner's belief that Mr. Grant would be providing him out-of-court assistance during his trial.

The majority's retort that the judge's "questioning of Grant should have been limited to discerning

whether [Petitioner's] request was knowingly and voluntarily made" completely misses the mark, for no one has ever argued that Grant's testimony was primarily driven by his ability to assist the trial court in the narrow issue of a voluntary waiver. Grant never met with Petitioner. This relates to my view, made at the outset of this opinion, that the *Faretta* framework is more than formulaic responses to questioning; I do not view *Faretta* in isolation or as an obstacle to a trial court's duty to ensure the integrity of the proceedings. *See People* v. *Lewis,* 140 P.3d 775, 803 (Cal. 2006) (observing criminal defendants sometimes assert the right of self-representation for the purpose of "plant[ing] reversible error in the record).

At this point in the proceeding, the able trial judge made it clear she was poised to grant Petitioner's request, but her concern led her to summon Grant. I view the trial court's handling of the situation as a quintessential example of an appropriate exercise of discretion, as she took a reasonable and measured step to protect a defendant's right of self-representation while also ensuring the integrity of the proceeding. Grant's testimony flatly contradicted Petitioner's. Grant met with

Petitioner's mother, not Petitioner. The trial court determined Petitioner had lied in an effort to manipulate the proceedings, and this quite naturally led the trial court's ruling to deny Petitioner's request to proceed *pro se*.

The trial court's finding of manipulation is a factual determination that rests with the trial court, not this Court. Our standard of review on a trial court's factual finding is abuse of discretion, not de novo. The Court references "review[ing] a circuit judge's finding of historical fact for clear error," but ignores that deferential standard of review when the Court engages in its own fact-finding by noting "we discern no attempt by [Petitioner] to disrupt or manipulate the process here." To the contrary, Petitioner's complete lack of candor with the trial judge, his lies, and his distortions were a clear indication to the trial judge that a self-represented Petitioner would continue to be a disruptive force during the trial of the case. Such a conclusion is inescapably supported by facts in the record. [FN 10]

The majority goes even further and states that a defendant's manipulation is "not enough" to deny a request to proceed *pro se*. The Court's support for

this finding comes from a footnote in *State v. Barnes,* 413 S.C. 1, 774 S.E.2d 454 (2015), in which the *Barnes* majority responded to a statement by the *Barnes* dissent. Specifically, the *Barnes* majority's footnote observed there was no basis to deny a defendant's request for counsel simply because he had previously asserted (and obtained reversal of his conviction based on a violation of) his right to self- representation. *Id.* at 2 n.1, 774 S.E.2d at 455 n.l. The Court rejected the notion that "the erroneous denial of a defendant's sixth amendment right to self- representation at the first proceeding results in that defendant having a diminished sixth amendment right in a second trial." *Id.* at 7, 774 S.E.2d at 457. Here, we are not dealing with a request for counsel or multiple trials, so *Barnes* is procedurally and substantively inapposite. Further, in *Barnes,* the issue of manipulation by the defendant was introduced by the dissenting opinion of this Court; there was no factual finding of manipulative intent made by the trial court, as is the case here. In short, the Court simply disregards the applicable standard of review.

I wish to comment on what I believe is the majority's progression in its analysis that

transforms the actual issue presented and reframes it to suit the majority's preference. I view this case as an appellate court reviewing a trial judge's effort to protect a defendant's right to proceed *pro se* in a manner consistent with a trial judge's authority to ensure the integrity and orderly administration of justice in her court. Because there is clearly evidence to support the trial judge's finding of manipulation, I would affirm. Conversely, the majority maintains its narrow and categorical *Faretta* approach and then cautions trial courts from overstepping in warning of the dangers of self-representation. Trial judges, we are told, must safeguard a defendant's "right to represent himself and the almost sure disaster that will result from his self-representation." No one contends otherwise [FN 11] but that misses the point of this case and appeal. The trial judge was not seeking to protect Petitioner from himself; she was seeking to protect the justice system from manipulation.

Trial court judges have become accustomed navigating the efforts of some defendants to game the system. It is the trial judge who must ensure the integrity of the court and the proceedings. That is accomplished by the trial court's exercise

of discretion. That discretionary authority is essential to the proper functioning of the justice system, but courtesy of today's opinion, that discretion has been removed. What is the result of today's opinion-trial court proceedings are now "at the mercy of those who seek to disrupt the very process designed to protect them." *Blankenship,* 673 S.E.2d at 591 (Clinton, J., concurring).

I dissent.

JAMES, J., concurs.

[FN 1]422 U.S. 806 (1975).

[FN 2]Rule 3.3, Candor toward the Tribunal, reads in pertinent part:

> (A) A *lawyer* shall not knowingly:
> (1))make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (d) In an *ex parte* proceeding, a *lawyer* shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
>
> Rule 3.3, RPC, Rule 407, SCACR (emphasis added).

[FN 3]We note both Samuel and Grant explicitly stated that Grant had not been hired as Samuel's attorney nor would he be representing Samuel at trial. ·Indeed, the only discrepancy between their recitations of the situation was .regarding Grant's willingness and availability to provide advice and guidance to Samuel prior to and throughout the trial..

[FN 4]Contrary to the dissent's charge, we do not strip trial judges of their authority and discretion to maintain the integrity of the proceedings before them. Rather, we simply view the initial *Faretta* request through a different lens than the dissent. As this Court has previously stated, at the time a defendant invokes his constitutional right to proceed *pro se* the only relevant inquiry is that outlined in *Faretta-whether* the defendant is knowingly, intelligently, and voluntarily waiving the right to counsel. *Brewer,* 328 S.C. at 119, 492 S.E.2d at 98. ·The sufficiency of such a request is a question of law for this Court to review de novo. *Bush,* 404 F.3d at 270. However, once a defendant has been permitted to represent himself, the trial court has broad discretion to revoke that right for any of the reasons for which the dissent expresses concern. *West,* 877 F.2d at 285-86. Our holding does ·not require trial courts to suffer "mischief' or disruptive behavior in the courtroom with no recourse, but recognizes 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. Respectfully, however, that inquiry is separate from the issue we resolve today which focuses on the trial court's initial decision to permit a defendant to waive his right to counsel and proceed *pro se.*

[FN 5]The Respondent suggests that our statement in *Barnes* may conflict with *United States* v. *West,* 877 F.2d 281 (4th Cir. 1989). We disagree. In *West,* the district court revoked the defendant's right of self-representation after the judge gave specific cautionary instructions immediately prior to the defendant's opening statement, which he promptly disregarded. *Id* at 285-86. The Fourth Circuit Court of Appeals affirmed stating, "By asserting his right of self-representation, [the defendant] assumed the responsibility of acting in a manner befitting an officer of the court." 877 F.2d at 287. However, nothing in the *West* opinion suggests that criminal defendants should be bound by any specific rules applicable only to attorneys such that *Barnes* would conflict with its holding. Rather, in *West* the defendant blatantly disregarded the circuit judge's instructions, and it was due to his disregard for those rules that his right of self-representation was revoked. Therefore, we see no conflict between our position in *Barnes* and the Fourth Circuit's holding in *West.*

[FN 6]*Faretta v. California,* 422 U.S. 806 (1975).

[FN 7]Despite the majority's suggestion that Petitioner's co-defendant was the only "actual shooter," the record reveals that the victim was shot with three separate guns and that witnesses identified Petitioner and two other men as being responsible for the shooting.

[FN 8]The obstruction of justice charge was nolle prossed

following Petitioner's murder conviction.

[FN 9]Indeed, various courts have recognized situations in which an assertion of the right of self-representation may properly be refused. *See Indiana v. Edwards,* 554 U.S. 164 (2008) (mental capacity); *McKaskle v. Wiggins,* 465 U.S. 168, 173 (1984) (unable or unwilling "to abide by rules of procedure and courtroom protocol"); *Savage v. Estelle,* 924 F.2d 1459, 1464 (9th Cir. 1990) (substantial speech impediment); *Morris v. State,* 667 So. 2d 982, 987 (Fla. Dist. Ct. App. 1996) (poor physical health).

[FN 10]The majority opinion claims it does "not strip trial judges of their authority and discretion to maintain the integrity of the proceedings before them." In my judgment, the Court's holding does just that-it strips trial judges of authority and discretion to fully vet a defendant's motion to proceed *pro se* and instead mandates the trial court accept at face value whatever a defendant says. The majority opinion further assures that trial courts have "recourse" to prevent mischief or disruptive behavior. The majority's reasoning is premised on the notion that the trial court's concern with Petitioner's manipulation of the proceedings was speculative, which is a false premise. This reasoning ignores the reality that mischief and manipulative behavior had *already* occurred. The testimony of Mr. Grant (to which Petitioner has never objected) decisively debunked every statement Petitioner made about their purported relationship. Under these circumstances, the trial judge had the discretion (and "recourse") to nip in the bud Petitioner's effort to manipulate the proceedings . .

[FN 11]In his dissenting opinion in *Faretta,* Justice Blackmun observed, "If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself." *Id.* at 852.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Orangeburg County
The Honorable Diane Schafer Goodstein, Circuit Court Judge
Opinion No. 27768

THE STATE,

Respondent,

v.

LAMONT ANTONIO SAMUEL, Petitioner.

Appellate Case No. 2015-002401

PETITION FOR REHEARING

On February 28, 2018, this Court filed a published opinion in which a majority of the Court reversed a

decision of the Court of Appeals that had affirmed Petitioner Lamont Antonio Samuel's murder conviction and sentence. *State v. Samuel*, Op. No. 27768 (S.C. S.Ct., Feb. 28, 201) (Shear. Adv. Sheets vol. 9), reversing, *State v. Samuel*, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015). Contrary to the Court's recent unanimous decision in *City of Columbia v. Assa'ad-Faltas*, 420 S.C. 28, 45–46, 800 S.E.2d 782, 790–91 (*per curiam* 2017), *reh'g denied* (Aug. 17, 2017), the Court here concluded that the trial judge's denial of Petitioner's motion to represent himself at trial was error under *Faretta v. California*, 422 U.S. 806 (1975), because the trial judge erroneously considered upon the testimony of attorney Carl Grant, Esquire, even though Petitioner's responses to the trial judge's questioning indicated that Mr. Grant may have undertaken representation of him, in spite of Petitioner's representations that Mr. Grant did not represent him. *See Samuel*, at 47-49.

Although aware that Petitioner had not honestly responded to the trial judge's questioning, this Court further concluded that Petitioner had "made a knowing, intelligent, and voluntary request to proceed *pro se* as required by *Faretta*" because "a defendant's improper motive or unethical conduct is

not enough to preclude him from exercising his right to self-representation." *Samuel*, at 50 (citing *State v. Barnes*, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015). On the other hand, the dissent rejected the Court's narrow "categorical rule" because it "effectively precludes consideration of the trial court's exercise of discretion and places trial judge's at the mercy of those who seek to exploit the right to self-representation for manipulative or disruptive ends." *Id*. at 52 (Kittredge, J., dissenting). The dissent found that the trial judge had not abused her discretion because it construed the inquiry permitted under *Faretta* "more broadly to allow for a trial court's exercise of discretion where, as here, the knowingly, intelligently, and voluntarily asserted right of self-representation is accompanied by a circumstance that undermines the integrity of the proceedings and the orderly administration of justice." *Id*.

Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing [FN 1] because the State respectfully believes this Court misapprehended and overlooked the following facts and points of law:

1. In footnote 4 of its Opinion, the Court stated that

"we do not strip trial judges of their authority and discretion to maintain the integrity of the proceedings before them." *Samuel*, at 49 n. 4. However, by concluding that the trial judge was obligated to accept at face value Petitioner's responses even though they are now known to all as false, and by finding that the trial judge erred by vetting those responses, the Court may have overlooked that it has implicitly granted criminal defendants a right to lie to trial judges during a *Faretta* hearing, without fear of repercussion. The Court's decision thereby allows a defendant to abuse the integrity and dignity of the judicial system with impunity. Also, because these responses occurred during a *Faretta* hearing, the Court has added a constitutional dimention to this "right" to lie that has not heretofore existed and which is inconsistent with the foundation of our judicial system. *See Samuel*, at 52 (Kittredge, J., dissenting) ("More broadly, my concern is that the Court's categorical rule—that an absolute right to proceed *pro se* automatically follows formulaic responses to Faretta inquiry—will invite mischief in the trial courts of this state while tying the hands of our trial court judges. Granted, in the vast majority of cases, requests to proceed *pro se* will be regularly and properly granted, but trial court discretion must

always be present to address the particular circumstances of the case, such as where this right is asserted to serve manipulative, disruptive, or dilatory ends. Trial court discretion ensures the integrity of our justice system"). *See also id*. at 60-62 Kittredge, J., dissenting). This is particularly true since these known lies call into question the veracity of each response that Petitioner gave the trial judge in the hearing.

2. First, the Court may have overlooked that in its *per curiam* Opinion in *City of Columbia v. Assa'ad-Faltas*, *supra*, which was decided after the Court heard oral arguments in this case and less than a year before it issued the Opinion in this case, the Court favorably and unanimously quoted the Court of Appeals' decision in *Samuel*, as well as the more case specific view of a proper *Faretta* inquiry advanced by the dissent and in the Brief of Respondent. Specifically, the Court in *Assa'ad-Faltas* quoted the following that is inconsistent with the majority Opinion in this case:

> "A defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments." *State v. Samuel*, 414 S.C. 206, 211, 777 S.E.2d

398, 401 (Ct. App. 2015) (quoting *Faretta*, 422 U.S. at 807, 95 S.Ct. 2525). "However, the right of self-representation is not absolute." *Id.* (quoting *United States v. Frazier–El,* 204 F.3d 553, 559 (4th Cir. 2000)). "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525 (1975).

Indeed, "[t]he right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." *Samuel*, 414 S.C. at 212, 777 S.E.2d at 401 (citation omitted). "A trial judge may refuse to permit a criminal defendant to represent himself when he is 'not able and willing to abide by rules of procedure and courtroom protocol.' " *Id.* (quoting *United States v. Lopez–Osuna,* 242

F.3d 1191, 1200 (9th Cir. 2001)). "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*. (citing *Frazier–El,* 204 F.3d at 560).

In evaluating Appellant's claim that the municipal court infringed upon her constitutional right of self-representation, we must first determine whether Appellant effectively invoked this right during proceedings before the municipal court. To be effective, "[a]n assertion of the right of self-representation therefore must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." *Frazier-El*, 204 F.3d at 558 (internal citations omitted). "The particular requirement that a request for self-representation be clear and unequivocal is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of

self-representation." *Id*. (internal quotation marks and citations omitted).

"At bottom, the *Faretta* 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." *Id*. (internal quotation marks and citation omitted). Where the circumstances surrounding an accused's purported assertion of the right to proceed without counsel suggest "a manipulation of the system [rather] than an unequivocal desire to invoke [the] right of self-representation" and "dispense with the benefits of counsel," a court is justified in insisting that the accused proceed with the assistance of counsel. *Id*. at 560 (refusing to let a defendant proceed pro se as part of a manipulative strategy to advance frivolous arguments counsel had previously refused to make).

Assa'ad-Faltas, 420 S.C. at 45-46, 800 S.E.2d at 790-91.

The Court in *Assa'ad-Faltas* found that the defendant had not "unequivocally raised or asserted" her right to self-representation in the municipal court. *Id*. at 46-47, 800 S.E.2d at 791. However, the Court added that:

> Additionally, even had the issue been unequivocally and timely raised to the municipal court, we find the municipal court would have been justified in insisting that Appellant proceed with the assistance of counsel. Indeed, Appellant's long history of abusing the judicial process, coupled with her conduct in this case in abusing and harassing courts and court officers; disrupting, delaying, and prolonging proceedings; and persistently disregarding and circumventing the orders of this Court aimed at curbing her improper conduct all underscore the Court's interest in preventing Appellant's further manipulation of

the system and "in ensuring the integrity and efficiency of the trial." *Frazier-El*, 204 F.3d at 558; *see State v. Hester*, 324 S.W.3d 1, 33 (Tenn. 2010) ("Disingenuous invocations of the right of self-representation that are designed to manipulate the judicial process constitute an improper tactic by a defendant and are not entitled to succeed.") (citing *United States v. Welty,* 674 F.2d 185, 187 (3d Cir.1982)); *id*. ("A court may deny a manipulative request for self-representation, distinguishing between a genuine desire to invoke a right of self-representation and a manipulative effort to frustrate the judicial process." (citations omitted)); *Tanksley v. State*, 113 Nev. 997, 946 P.2d 148, 150 (1997) (observing "[a] defendant's right to self-representation does not allow him to engage in uncontrollable and disruptive behavior in the courtroom," and finding "**the defendant's pretrial activity is relevant if it affords a strong indication that the defendant [ ] will disrupt the**

> **proceedings in the courtroom**" (internal quotation marks and citations omitted)).

Assa'ad-Faltas, 420 S.C. at 47-48, 800 S.E.2d at 791-92 (emphasis added).

Assa'ad-Faltas is clearly relevant, if not dispositive, of the issue before this Court. And, that decision provides trial judges with the necessary authority to preserve the "integrity and efficiency" of the judicial proceeding when faced with an accused who would manipulate the proceedings for his or her own improper purposes(s). *Assa'ad-Faltas* likewise makes it clear that the trial judge does not have to wait until the accused engages in manipulative acts during the trial. Rather, it unerringly states that the trial judge has the authority to deny the request for self-representation if "the defendant's pretrial activity … affords a strong indication that the defendant [ ] will disrupt the proceedings in the courtroom." *Id.* at 48, 800 S.E.2d at 792. That is precisely what occurred here: Petitioner's lies indicated he intended to manipulate the subsequent trial.

Yet, the Court in this case does not mention *Assa'ad-Faltas* in its Opinion. Separate and apart

from the question of whether the doctrine of *stare decisis* compels affirmance of the Court of Appeals' decision - and, hence, the trial judge's ruling - the Court may have overlooked that its decision in *Samuel* cannot be reconciled with the unanimous decision in *Assa'ad-Faltas*. More importantly, the Court has now given trial judges two separate and distinct paths when conducting a *Faretta* hearing.

Does a trial judge follow the Court's most recent pronouncement in this case, even though it is a 3-2 decision with a vigorous dissent? Or, does she (or he) follow the unanimous, *per curiam* decision of *Assa'ad-Faltas*, which provides the trial judge with the correct and necessary authority to deal with a potentially manipulative defendant in a manner that preserves the integrity of the judicial system? [FN 2] Thus, the Court may have overlooked that its decision needlessly makes a trial judge's already difficult task of navigating the "minefield" known as a *Faretta* hearing all the more difficult and confusing. *See Samuel*, at 64 (Kittredge, J., dissenting); *Martinez*, 528 U.S. at 164 (Breyer, J., concurring) ("I note that judges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*'s] holding"). *See also Marshall v. Rodgers*, 569 U.S. 58, 62, 63 (2013)

(recognizing that "there can be some tension" between the Sixth Amendment right to counsel and a defendant's Sixth Amendment right to self-representation); *United States v. Reddeck*, 22 F.3d 1504, 1510 (10th Cir. 1994) ("We have repeatedly shown concern with the use of the right to waive counsel as a 'cat and mouse' game with the courts"); *Hsu v. United States*, 392 A.2d 972, 983 (D.C. 1978) ("If a defendant asks for self-representation, the court risks reversal for denying the request or granting it"); *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc). [FN 3] *Cf. Faretta*, 422 U.S. at 837 (Burger, C.J., dissenting) ("the Court's holding … can only add to the problems of an already malfunctioning criminal justice system"); *id.* at 846 (Blackmun, J., dissenting) ("I fear that the right to self-representation constitutionalized today frequently will cause procedural confusion without advancing any significant strategic interest of the defendant").

3. Further, the Court may have overlooked that the result it reached in this case is contrary to *Faretta*, its progeny, and other well-settled United States Supreme Court precedent. An accused's right to self-representation at trial is not absolute. *Faretta*,

422 U.S. at 835. Rather, *Faretta* clearly held that "an accused has a Sixth Amendment right to conduct his own defense, provided … that he knowingly and intelligently forgoes his right to counsel and that **he is able and willing to abide by rules of procedure and courtroom protocol**." *McKaskle v. Wiggin*s, 465 U.S. 168, 173 (1984) (emphasis added). *See also Faretta*, 422 U.S. at 834 n. 46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law"); *Indiana v. Edwards*, 554 U.S. 164, 185 (2008) (Scalia, J., dissenting). And, the Supreme Court has admonished that "[e]ven at the trial level … 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." *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000).

Also, both before and after its decision in *Faretta*, the United States Supreme Court has consistently held that he has absolutely "no right whatever-constitutional or otherwise" to testify falsely or to "use false evidence." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). The Supreme Court has

likewise made clear that if an accused does testify falsely, the trial court, the prosecution and even trial counsel have recourse to deal with that perjury. *E.g.*, *Id.* at 171 (counsel's threat to inform court and to seek to withdraw if client-defendant lied on witness stand did not violate Sixth Amendment right to effective assistance of counsel: "Whether [counsel's] conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a 'threat' to withdraw from representation and disclose the illegal scheme, [counsel's] representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*"); *id.* at 173 ("*Harris* and other cases make it crystal clear that **there is no right whatever-constitutional or otherwise-for a defendant to use false evidence**") (emphasis added); *United States v. Havens*, 446 U.S. 620, (1980) (a prosecutor may use illegally seized evidence to impeach perjurious testimony by defendant on cross-examination); *id.* at 626–27 ("We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences. …. The defendant's obligation to testify truthfully is fully binding on him when he is cross-examined. His privilege

against self-incrimination does not shield him from proper questioning"); *Harris v. New York*, 401 U.S. 222, 225 (1971) (in the course of holding that statements of defendant taken in violation of his *Miranda* rights were admissible to impeach defendant's testimony on direct examination, the Court explained, "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury"); *Grayson v. United States*, 438 U.S. 41, 54 (1978) ("[If] the sentencing judge's consideration of defendant's untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury"); *id*. at 54 ("The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath-unless we are to say that the oath is mere ritual without meaning"). *See also Samuel*, at 62 (Kittredge, J., dissenting) (a criminal defendant has no right, constitutional or otherwise, to be untruthful with the court). Yet, the result of the Court's decision in the present case is to grant a Sixth Amendment right to criminal defendants to testify falsely when questioned by the trial court, which is contrary to the above-cited cases.

4. Indeed, the Court may have overlooked that there is no more fundamental rule of "courtroom protocol," *see McKaskle*, 465 U.S. at 173, than the obligation of the parties and their attorneys to be truthful and candid with the trial court because

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. **Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then**

justified in abandoning support for the system in favor of one where honesty is preeminent.

United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993) (emphasis added). *See also Id.* at 458 ("The general duty of candor and truth thus takes its shape from the larger object of preserving the integrity of the judicial system"); *Grayson*, 438 U.S. at 54; *Samuel*, at 62-63, Kittredge, J., dissenting) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944); Stephen J. Safranek, *The Legal Obligation of Clients, Lawyers, and Judges to Tell the Truth*, 34 Idaho L. Rev. 345, 366 (1998) ("The importance of truth in our legal system is recognized in the rules that regulate the actions of clients, lawyers, and judges. Although justice is the end of the legal system, a failure to act in accordance with the truth not only constitutes a breach of the rules that guide the conduct of the participants in the legal process, but also threatens the trust that each of the participants in the system must have in the other participants"); *id.* at 357-58 ("The legal system is entirely dependent upon the client's and witness's willingness to be a truth teller. If such expectations do not exist, then the system breaks down at a critical stage"). *Cf.* Rule 11(a), SCRCP.

This Court found that "the circuit judge's reliance on Rule 3.3 RPC and [*Gardner v. State*, 351 S.C. 407, 411, 570 S.E.2d 184, 186-87 (2002)] is misplaced." *Samuel*, at 50. However, the State submits the dissent correctly states that:

> I am persuaded by the Fourth Circuit's holding that a defendant asserting the right of self-representation assumes the responsibility of acting in a manner befitting an officer of the court. *See United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989). Even assuming the Court is nevertheless correct in refusing to apply the rules of professional conduct to Petitioner, the duty of candor to the tribunal set forth in Rule 3.3 "takes its shape from the larger object of preserving the integrity of the judicial system," and does not "displace[ ] the broader general duty of candor and good faith required to protect the integrity of the entire judicial process." *Shaffer Equip. Co.*, 11 F.3d at 458.

See Samuel, at 62 (Kittredge, J., dissenting).

Therefore, regardless of whether or not Petitioner was bound by the ethical requirements of Rule 3.3, Rule 407, SCACR, he was unquestionably obligated to comply with the requirement of being honest and candid with the trial judge in order to appear *pro se*. *Accord McKaskle*, 465 U.S. at 173; *see also United States v. Fennell*, 553 F. Supp. 2d 1303, 1306 (N.D. Okla. 2008) ("It is the absolute duty of the defendant to be honest and truthful with the Court during the plea hearing"). However, he repeatedly and deliberately violated this requirement, even after the trial judge had denied his request for self-representation. See ***R. p. 75, line 22 – p. 76, line 2***.

Because he was unwilling or unable to act as an officer of the court, the trial judge properly denied his request for self-representation. *Id*. *See also Faretta*, 422 U.S. at 834 n. 46; *United States v. West, et al.*, 877 F.2d 281, 287 (4th Cir. 1989) ("By asserting his right of self-representation, Mills assumed the responsibility of acting in a manner befitting an officer of the court. By flouting the responsibility, he forfeited the right"); *Martinez*, 528 U.S. at 162; *McKaskle*, 465 U.S. at 173; *Smith v Stat*e, 267 Ind. 167, 368 NE2d 1154(1977) (a

defendant acting as his own counsel, of necessity, must be held to the established rules of procedure, the same as trained legal counsel); *State v Sheets*, 564 SW2d 623 (Mo App. 1978) (since it was conceivable that the retrial of the case would result in further appellate review, it seemed proper to caution the defendant that although he has the constitutional right to represent himself, he is held to the same standard of compliance with trial and appellate court rules and procedures as are those who are admitted to the practice of law); *People v. Tatum*, 329 Ill. Dec. 497, 906 N.E.2d 695 (App. Ct. 1st Dist. 2009) (A *pro se* defendant is held to the same standards as an attorney); .

5. After hearing Mr. Grant's testimony, the trial judge denied Petitioner's request for self-representation because she found that Mr. Grant's sworn testimony revealed that Petitioner had not been candid in response to her questioning of him, she could not trust his responses to her, and she was afraid that he was attempting to manipulate the proceedings. ***R. p. 73, line 20 – p. 75, line 19***. *Cf. Assa'ad-Faltas*, 420 S.C. at 45-46, 800 S.E.2d at 790-91. Before the trial judge ruled, Petitioner "thanked" Mr. Grant in a manner that insinuated Mr. Grant had been untruthful with the

trial judge about assisting Petitioner and he dodged the trial judge's questions as to what he had meant. Also, after Grant left the courtroom, Petitioner stated that Grant had told Petitioner he would lie if questioned under oath. ***R. p. 68, lines 12-24; p. 69, line 20 – p. 70, line 19***. Even after the trial judge had denied his motion, Petitioner again contended that Mr. Grant had been untruthful about assisting Petitioner because "he don't want his reputation ruined." (Sic). ***R. p. 75, line 22 – p. 76, line 2***.

In finding that "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation," *Samuel*, at 50 (citing *State v. Barnes*, 413 S.C. at 3 n.1, 774 S.E.2d at 455 n.1, *see also Samuel*, at 49 n. 4, the Court may have overlooked that its decision is inconsistent with *Martinez*, *McKaskle*, and *Faretta*, as well as its own decision in *Assa'ad-Faltas*. Furthermore, the Court may have overlooked that "[i]t would be a nonsensical and needless waste of scarce judicial resources to [grant a request for self-representation and] proceed to trial when, as here, [the] defendant has shown by his conduct during pretrial proceedings that he is unable to conform to procedural rules and protocol." *People v. Watts*, 173

Cal.App.4th 621, 630, 92 Cal.Rptr.3d 806 (2009); *see also United States v. Keiser*, 319 Fed. Appx.457, 2008 WL 4280003 at *1 (9th Cir. Sept.17, 2008) ("the right to self-representation does not overcome the court's right to preserve courtroom order"). And, the Court may have overlooked that " '[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.' " *United States v. Bush*, 404 F.3d 263, 271 (4th Cir. 2005) (emphasis added) (quoting *United States v. Frazier–El*, 204 F.3d 553, 560 (4th Cir. 2000). *See also Assa'ad-Faltas*, 420 S.C. at 45, 800 S.E.2d at 791; *Blankenship v. State*, 673 S.W.2d 578, 589 (Tex. Crim. App. 1984) ("…constitutional rights must be asserted and exercised in a manner not inconsistent with the trial judge's control over the orderly administration of justice in his court"). [FN 4]

6. The majority Opinion concluded that "the only inquiry the circuit judge may make is that required by *Faretta*," *Samuel*, at 47, and that the trial judge erroneously relied upon the testimony of attorney Carl Grant, Esquire, in denying Petitioner's request to appear *pro se*, *Samuel*, at 49. The Court found

that the trial judge had the authority to have Grant come to court and testify, but stated that "her questioning of Grant should have been limited to discerning whether Samuel's request was knowingly and voluntarily made." *Id.* at 49.

In making these conclusions, the Court may have overlooked that the United States Supreme Court has stated, "We have not … prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election … will depend on a **range of case-specific factors**, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (emphasis added). The Court may have also overlooked that "the trial judge is not simply an automaton who insures that technical rules are adhered to. [Trial judges] are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." *Faretta*, 422 U.S. at 839 (Burger, C.J., dissenting). *See also Samuel*, at 66 (Kittredge, J., dissenting) ("the *Faretta* framework is more than formulaic responses to questioning").

The Court states, "We are unaware of any cases in which a circuit judge has relied on testimony from a third party witness, such as Grant, to determine whether a defendant has effectively invoked the right to proceed *pro se*." *Samuel*, at 49. [FN 5] Yet, "[j]ust as defendants have certain rights in court, so do courts have the power to preserve their dignity and their basic ability to function." *People v. Howze*, 85 Cal.App.4th 1380, 1398-99 (2001). Here, the record unequivocally reflects that Mr. Grant was not merely "a third party witness."

To the contrary, in the course of responding to the trial judge's inquiry of whether he had ever studied the law, Petitioner stated that "I studied a little bit of law during the -- a law book I used during the course of -- to look at the procedure to stand trial, self-representation. And I look at all the rules and regulations [that are] supposed to be appropriate while I'm standing trial." He explained that the book he was using was entitled *Criminal Law Handbook*; that it had been mailed to him; and that Mr. Grant had told his mother about it. ***R. p. 34, line 20 – p. 36, line 3***.

Moments later, Petitioner again mentioned Mr. Grant. When asked if he understood the South Carolina Rules of Evidence, he indicated that he did from reading the book he mentioned earlier that his mother had sent him. He further claimed that "basically ... Mr. Grant, he tried to coach me on it a little bit" on the rules of evidence. ***R. p. 37, lines 85-16***. He thereafter made two more references to his mother having paid Mr. Grant "a good bit amount of money" to "coach" or "educate" him and he state that Grant would assist him, but that Mr. Grant did not represent him because Petitioner was related to a paralegal in Mr. Grant's office. ***R. p. 44, line 21 – p. 45, line 12; p. 53, line 24 – p. 54, line 3***.

At that point, the trial judge said that she was going to tell the State that she was inclined to grant Petitioner's motion, but she wanted to speak with Mr. Grant, so that she could more fully understand Mr. Grant's relationship to the case and what discussions he had with Petitioner about the case. ***R. p. 54, line 14 – p. 55, line 22***. She subsequently explained that she had Mr. Grant attend the hearing and testify "out of concern that whether Carl Grant had undertaken representation of you and whether or not he would be acting as stand-by counsel in some form or fashion if you were

to be self-representing yourself." ***R. p. 73, lines 6-10***.

Her concerns were justified because Petitioner's references to Mr. Grant's involvement in the case, if accepted as true as the trial judge apparently did, suggested that Mr. Grant may have been representing Petitioner or, at least, may have had some role in assisting him during the trial. "A person attains the status of 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice." *Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct.App.1984). "[T]he existence of a retainer is not in and of itself dispositive of whether an attorney is representing a client. *See In re Broome,* 356 S.C. 302, 315, 589 S.E.2d 188, 195-96 (2003) ("[A] signed retainer agreement is not essential to create [an attorney-client] relationship."). Instead, a person can be deemed a client when he seeks legal advice and discusses those matters with a lawyer in confidence for the purpose of obtaining such advice. *Id.*" *In re Carter*, 400 S.C. 170, 176, 733 S.E.2d 897, 900 (2012). [FN 6]

Thus, the Court may have overlooked that rather than erroneous, the trial judge's decision to

question Mr. Grant was proper, if not mandatory. *See Martinez*, 528 U.S. at 161 ("Although we found in *Faretta* that the right to defend oneself at trial is 'fundamental' in nature, … it is clear that it is representation by counsel that is the standard, not the exception") (citation added); *Patterson v. Illinois*, 487 U.S. 285, 307 (1988) (Stevens, J., dissenting) (noting the "strong presumption against" waiver of right to counsel). *See also United States v. Purnett*, 910 F.2d 51, 54 (2nd Cir. 1990) ("The right to self-representation and the assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin"); *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997) (explaining that "courts have assumed that the right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and thus that assertion of one constitutes a de facto waiver of the other. … Of the two rights, however, the right to counsel is preeminent and hence, the default position").

If, in fact, Mr. Grant was representing Petitioner under *In re Carter*, then an effective waiver of the right to counsel required Mr. Grant's presence. [FN 7] *See also Samuel*, at 65-66

(Kittredge J., dissenting). Even though it subsequently became clear that Mr. Grant had not undertaken representation, the trial judge's actions were more than reasonable and, as the dissent correctly observed, this was "a quintessential example of an appropriate exercise of discretion, as she took a reasonable and measured step to protect a defendant's right of self-representation while also ensuring the integrity of the proceeding." *Samuel*, at 66 (Kittredge, J., dissenting).

Likewise, the trial judge's stated reason for having Mr. Grant answer questions concerning his involvement in this case was to establish that Petitioner's decision on whether or not to represent himself "was 'made with eyes open,' *Faretta*, 422 U.S. at 835[…], specifically with regard to what coaching or assistance, if any, Petitioner could expect Mr. Grant to provide him throughout the trial." *Samuel*, at 55 (Kittredge, J., dissenting)..

7. Also, this Court found that "whether Grant would be available to advise or coach Samuel throughout the trial relates to his competence to represent himself which, as discussed *supra*, is entirely irrelevant to the issue of whether he effectively invoked his right of self-representation."

Samuel, at 49 (footnote omitted). However, this conclusion overlooks the trial judge's duty to determine whether Petitioner had retained Mr. Grant, whether Mr. Grant otherwise represented him or whether Grant had agreed to provide assistance to Petitioner. Her duty to inquire was necessitated by Petitioner's equivocation on what role, if any, Mr. Grant had in the case (*e.g.*, "' I know he's not representing me, but he is coaching me"), since the alleged assistance from Mr. Grant was inextricably tied to Petitioner's alleged desire to waive counsel. *See In re Carter*, 400 S.C. at 176, 733 S.E.2d at 900. Therefore, her decision was reasonable because Mr. Grant's testimony was clearly relevant on these issues.

The Court may have likewise overlooked that to the extent that Petitioner truly believed that he had received assistance and advice in the case from Mr. Grant even though this did not occur, then his waiver of the right to counsel was not knowing and intelligent under *Faretta*. As discussed, he persisted in asserting that Mr. Grant had assisted him even after the trial judge had ruled, and he stated that Mr. Grant had told him that Grant would lie under oath if questioned about involvement. The Court "may affirm any ruling, order, decision or judgment

upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Therefore, the Court may have overlooked that this case should be affirmed on the ground that Petitioner did not make a knowing and intelligent waiver of his right to counsel because he held a false belief that counsel had assisted him and would continue to do so, when there was no basis in reality for his belief.

8. The Court may have overlooked that it erroneously applied de novo review to the trial judge's finding that Petitioner's request for self-representation was "manipulative," since a finding that an accused's assertion of the right of self-representation is manipulative in nature and, thus, an abuse of the judicial process is a factual finding. *United States v. Mackovich*, 209 F.3d 1227, 1237-38 (10th Cir. 2000); *United States v. Egwaoje*, 335 F.3d 579, 586 (7th Cir. 2003) (same)); *Hamilton v. Groose*, 28 F.3d 859, 862 (8th Cir. 1994) (the question of whether a defendant invoked his right to self-representation in an unequivocal manner is a question of fact); *Howze*, 85 Cal.App.4th at 1397 (applying abuse its discretion standard to findings that defendant's *Faretta* motion "was manipulative and that defendant was obstreperous and created a risk of disrupting the proceedings"); *State v. Rasul*,

216 Ariz. 491, 495, 167 P.3d 1286, 1290 (Ct. App. 2007) ("We defer to the trial court's findings [that defendant was disruptive and manipulative] because the record supports them").

As correctly noted by the dissent, despite this Court's statement that "we review a circuit judge's findings of historical fact for clear error," *Samuel*, at 47, the Court thereafter ignored this deferential standard of review and engaged in its own fact-finding. Specifically, the Court found that "the only discrepancy between [Petitioner's and Grant's] recitations of the situation was Grant's willingness and availability to provide advice and guidance to Samuel prior to and throughout the trial." *Id*. at 49. Also, the Court "discern[ed] no attempt by Samuel to disrupt or manipulate the process here." *Id*. at 51. Again, the trial judge's findings are supported by the record and are not clearly erroneous. Moreover, even if de novo review was the appropriate standard, the Court may have overlooked that its contrary findings are not supported by the record.

There was not a simple "discrepancy" or simply "disparate testimony" between Petitioner's claims of Mr. Grant's involvement in the case and Mr. Grant's testimony. Petitioner testified that Mr. Grant had

told his mother of the *Criminal Law Handbook* that she sent him; that she had paid a significant amount of money to Mr. Grant; that Mr. Grant had "educated" and "coached him;" and that Mr. Grant would be available to assist him in the future. On the other hand, Mr. Grant's sworn testimony was that (1) he had not provided Petitioner with "any kind of copy of the rules of evidence or rules of criminal procedure or offered my assistance in any way;" (2) that he would have only gotten involved in the case if Petitioner had retained him; (3) that he had not been retained in this case; and (4) that he would be available to provide assistance to Petitioner, as stand-by counsel, if Petitioner did appear *pro se*. ***R. p. 65, line 20 – p. 68, line 9***.

Obviously, Petitioner's representations and Mr. Grant's sworn testimony squarely conflicted with one another, their representations could not both be true, and someone had testified falsely. Because the trial judge resolved the question of credibility against Petitioner, the veracity of his other responses during the hearing was undermined. This Court and the United States Supreme Court have made clear that it is the province of the trial judge, and not an appellate court, to resolve issues of witness credibility. *E.g.*, *Teva Pharm. USA, Inc. v.*

Sandoz, Inc., 135 S.Ct. 831, 850 (2015) ("We have recognized, however, that trial courts have a special competence in judging witness credibility and weighing the evidence"); *Miller v. Fenton*, 474 U.S. 104, 114 (1985) ("when an "issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court"); *Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) (" 'The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire' ") (citation omitted); *State v. Alston*, No. Op. No. 27774, 2018 WL 1177699, *10 (S.C. Mar. 7, 2018) ("Because Alston's statements conflicted with Deputy Gilbert's testimony, it was within the province of the trial judge, as the trier of fact, to determine this issue of credibility"); *State v. Blackwell*, 420 S.C. 127, 143 n. 12, 801 S.E.2d 713, 722 n. 12 (2017) ("The dissent agrees there is evidence to support the trial court's conclusion; however, it finds the decision is against the preponderance of the evidence. In reaching this conclusion, the dissent disregards our deferential

standard of review and effectively acts as a trial court rather than an appellate court"), *cert. denied,* No. 17-6882, 2018 WL 942570 (U.S.S.C. Feb. 20, 2018).

9. The Court also criticized the trial judge because she repeatedly stressed the dangers and disadvantages of self-representation despite Petitioner's assurances that he understood her explanation. *Samuel*, at 45, 48. However, the State respectfully submits that the Court may have overlooked that although *Faretta* held "that the right to defend oneself at trial is 'fundamental' in nature, … it is clear that it is representation by counsel that is the standard, not the exception." *Martinez*, 528 U.S. at 161 (citation omitted). *See also Purnett*, 910 F.2d at 55 ("Because the assistance of counsel in a criminal proceeding is constitutionally guaranteed, a district court must inquire into defendant's full understanding of the disadvantages of proceeding *pro se,* before it finds a waiver of counsel"); *Singleton*, 107 F.3d at 1096 (explaining that "courts have assumed that the right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and thus that assertion of one constitutes a de facto

waiver of the other. … "Of the two rights, however, the right to counsel is preeminent and hence, the default position"); *Assa'ad Faltas*, 420 S.C. at 46-47, 800 S.E.2d at 791.

More importantly, the Supreme Court stated in *Patterson* that "recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." See 487 U.S. at 298. *See also id*. at 299-300 ("we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during postindictment questioning—not because postindictment questioning is 'less important' than a trial (the analysis that petitioner's 'hierarchical' approach would suggest)—but because the full 'dangers and disadvantages of self-representation,' *Faretta*, *supra*, 422 U.S. at 835, … during questioning are less substantial and more obvious to an accused than they are at trial"); . Additionally, it is clear that "the more searching the inquiry at this stage the more likely it is that any decision on the

part of the defendant is going to be truly voluntary...." *People v. Brooks*, 293 Mich.App 525, 538; 809 NW2d 644 (2011), *vacated in part on other grounds*, 490 Mich. 993 (2012) (citation and quotation marks omitted). Therefore, the Court may have overlooked that the trial judge's inquiry was proper in the context of a *Faretta* hearing.

10. Finally, the majority of this Court also focused upon the trial judge's repeated comments that she found Petitioner "intelligent," "bright," and articulate." *See Samuel*, at 45, 48. The State respectfully submits that - rather than providing a basis on which the trial judge's ruling should be reversed – her finding that he was intelligent bolsters her finding of manipulation, *see id*. at 64 (Kittredge, J., dissenting), since it supports the conclusion that his responses concerning Mr. Grant's involvement were deliberate lies (told with the intent to deceive the trial judge, so that he could gain control of the proceedings), as opposed to the misunderstandings of a man with a limited intellect.

Moreover, the trial judge's finding that he was not candid with respect to Mr. Grant's involvement undermines any confidence in the truthfulness of Petitioner's other responses to the

trial judge that might otherwise exist. "In any event, Petitioner's intelligence in no manner demonstrates an abuse of discretion in the finding of manipulation." *Id*. *See also Blankenship*, 673 S.W.2d at 591 n.13 ("It is not the accused's ignorance of the law which is critical, but rather his apparent willingness to be untruthful with the trial court to effect his own designs, which [ ] evince[s] an intent to abuse the judicial process").

WHEREFORE, based on the foregoing argument and the arguments raised in the Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Petitioner's conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy
Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

DAVID M. PASCOE, Jr.
Solicitor, First Judicial Circuit

BY:/s/ William Edgar Salter, III
WILLIAM EDGAR SALTER, III
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTONEYS FOR RESPONDENT

March 15, 2018.

[FN 1]Alternatively, the State would ask the Court to grant its Motion for Limited Remand, which is also filed today, so that a hearing may be held to determine whether Petitioner still wishes to proceed *pro se*, or whether he wishes to abandon his previously made request for self-representation and thereby potentially obviate the necessity of a retrial.

[FN 2]In light of the fact Justice Few was recused in this matter because he was on the panel of the Court of Appeals that affirmed Petitioner's conviction, another obvious question is will a different result be had in a future case involving similar facts. It is only fair to trial judges that this Court provide more definitive guidance on the parameters of an appropriate inquiry under *Faretta* than the Court has in this case.

[FN 3]In *Fields*, the Fourth Circuit Court of Appeals explained that:

> A trial court evaluating a defendant's request to represent himself must 'traverse ... a thin line' between improperly allowing the defendant to proceed pro se, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. A skillful defendant could manipulate this dilemma to create reversible error.

Id. (Citations omitted).

[FN 4]The record of the subsequent *Jackson v. Denno* hearing demonstrates that Petitioner was repeatedly contentious with his attorneys and both contentious and argumentative with the Assistant Solicitor. *See* ***R. pp. 90-146***. This continued at trial and the trial judge had to admonish him several times to be either responsive to a question asked of him or not to be argumentative. *See* ***R. pp. 150-236***. *See also Samuel*, at 60

(Kittredge, J., dissenting). Thus, the trial judge's concerns that he was trying to manipulate the proceedings proved to be correct.

[FN 5]The State respectfully submits that the appropriate inquiry is not whether there are any cases holding that a trial judge "has relied on testimony from a third party witness … to determine whether a defendant has effectively invoked the right to proceed *pro se*." Rather, the proper question is are there any cases from this Court or the United States Supreme Court that have held it is improper for a trial judge to follow this procedure? Because the answer to this query is "No," the trial judge in this case did not abuse her discretion by following this procedure. Or, as stated by the dissent, "… trial court discretion must always be present to address the particular circumstances of the case, such as where this right is asserted to serve manipulative, disruptive, or dilatory ends. Trial court discretion ensures the integrity of our justice system." *Samuel*, at 52 (Kittredge, J., dissenting).

[FN 6]In response to questioning by the Court at oral argument, the State began to cite this authority at approximately one minute and forty-two seconds into its oral argument. This is found at 10:40 into the video of the oral argument. However, the State was asked further questions by the Court before the citation was given.

[FN 7]"Deprivation of the right to [one's] preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it

would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification." *Hagood v. Sommerville*, 362 S.C. 191, 197-98, 607 S.E.2d 707, 710 (2005). Additionally, the Sixth Amendment provides some protection to a criminal defendant's the right to an attorney of his or her choice. "Where this Sixth Amendment right is invoked, the court must balance the defendant's right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility." *State v. Sanders*, 341 S.C. 386, 390, 534 S.E.2d 696, 697-98 (2000).

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Orangeburg County
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27768

THE STATE,

RESPONDENT,

v.

LAMONT ANTONIO SAMUEL,

PETITIONER.

Appellate Case No. 2015-002401

RETURN TO PETITION FOR REHEARING

The trial judge did everything she could think of to deny petitioner the right to represent himself. She told petitioner that he was bright enough and that the constitution said he was entitled to represent himself. But then she said, " I don't want you to represent yourself, but I can't violate the law." R. 50, 11. 6-9. She admitted, "You don't have a problem that I'm aware of that I can use, in all candor, to keep you from representing yourself." R. 53, 11. 15-17. After taking a break to do some research she cited Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002) and said petitioner was trying to "manipulate" the proceedings and that he was not allowed to "disrupt" the proceedings. R. 71, I. 3 – 75, 1. 14.

This Court correctly found that under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1995) petitioner met the standards to represent himself:

> In *Faretta,* the United States Supreme Court held that criminal defendants have a fundamental right to self-representation

under the Sixth Amendment. 422 U.S. at 819-21, 95 S.Ct. 2525. Inorder to effectively invoke this right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently, and voluntarily. *United States v. Frazier-El,* 204 F.3d. 553, 558 (4th Cir. 2000). Where a defendant invokes his right of self-representation before trial, the only inquiry the circuit judge may undertake is that required by *Faretta. State v. Barnes,* 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus,

> 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. Reed,* 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). A circuit judge's denial of a defendant's knowing and voluntary request to proceed *pro se* is a structural error requiring automatic reversal and a new trial. State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694,705 (2013).

State v. Samuel,_____S.C.2d(2018).

This Court also found that there was no attempt by petitioner to disrupt or manipulate the process.

In City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 800 S.E.2d 782 (2017) this Court gave examples of disruptive and manipulative conduct that would not allow self-representation:

> Additionally, even had the issue been unequivocally and timely raised to the municipal court, we find the municipal court would have been justified in insisting that Appellant proceed with the assistance of **792 counsel. Indeed, Appellant's long history of abusing the judicial process, coupled with her conduct in this case in abusing and harassing courts and court officers; disrupting, delaying, and prolonging proceedings; and persistently disregarding

and circwnventing the orders of this Court aimed at curbing her improper conduct all underscore the Court's interest in preventing Appellant's further manipulation of the system and "in ensuring the integrity and efficiency of the trial." *Frazier-El,* 204 F.3d at 588; *see State v. Hester,* 324 S.W.3d 1, 33 (Tenn. 2010) ("Disingenuous invocations of the right of self-representation that are designed to manipulate the judicial process constitute an improper tactic by a defendant and are not entitled to succeed.") (citing *United States v. Welty, 614* F.2d. 185, 187 (3d Cir.1982)); *id.* ("A court may deny a manipulative request for self-representation, distinguishing between a

> genuine desire to invoke a right of self-representation and a · manipulative effort to frustrate the judicial process."(citations o mitted)); *Tanksley v. State,* 113 Nev. 997, 946 P.2d 148, 150 (1997) (observing "[a] defendant's right to self-representation does not allow him to engage in uncontrollable and disruptive behavior in the courtroom," and finding "the defendant's pretrial activity is relevant if it affords a strong indication that the defendant [ ] will *48 disrupt the proceedings in the courtroom" (internal quotation marks and citations omitted)).

420 S.C. at 47-48, 800 S.E.2d 791-792.

Petitioner did not conduct himself in that manner.

CONCLUSION

The petition for rehearing should be denied.

Respectfully Submitted,
/s/ Robert M. Pachak

This 29th day of March, 2018.

THE SUPREME COURT OF
SOUTH CAROLINA

The State, Respondent,

v.

Lamont Antonio Samuel, Petitioner.

Appellate Case No. 2015-002401

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded. Accordingly, the petition for rehearing is denied.

/s/ Donald W. Betty .J.
/s/ Kaye G. Hearn J.
/s/ J. Cordell Maddox, Jr. AJ

I would grant the petition for rehearing.

/s/ John Kittredge_____J.
/s/ George C. James, Jr. J.

Columbia, South Carolina
May 25, 2018

cc:
Robert M. Pachak, Esquire
Alan McCrory Wilson, Esquire
W. Edgar Salter, III, Esquire
David Michael Pascoe, Jr., Esquire
J. Robert Bolchoz, Esquire
Donald J. Zelenka, Esquire
Winnifa Brown-Clark

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lamont Antonio Samuel, Appellant.

Appellate Case No. 2013-001342

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 5346
Heard February 12, 2015 -Filed August 26, 2015

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

HUFF, J.: Lamont Antonio Samuel appeals his conviction for murder, arguing the trial judge erred in refusing to allow him to represent himself. We affirm.

FACTUAL/PROCEDURAL HISTORY

Samuel, who was indicted for the murder of Taneris Hamilton, was provided appointed counsel. Prior to trial, Samuel moved to represent himself. The trial judge conducted a hearing to consider the motion. Samuel explained he wanted to represent himself because he had been in jail for fourteen months

despite maintaining his innocence. He complained his appointed counsel would not let him contact the solicitor on the case and bring the solicitor a letter Samuel's co- defendant had written in which the co-defendant confessed. Samuel asserted he understood he was charged with murder and the maximum sentence the charge carries. He stated he was twenty-one years old and graduated from high school in 2010 with a 4.0 in honors classes. He claimed he was enlisted and waiting to go into the Navy. He declared while he was waiting, he worked with the recruiting office at Fort Jackson.

Samuel testified he had been reading a book entitled *Criminal Law Handbook,* which his mother helped him obtain at the recommendation of attorney Carl Grant. He also claimed Grant had coached him on the South Carolina Rules of Evidence. Samuel acknowledged Grant was not representing him but maintained the attorney was going to coach him. He explained:

> [M]y mama, basically paid Mr. Grant a good bit amount of money.

> The reason why he couldn't represent me is because my family--1guess his paralegal is related, you know, in some manner. So he had decided to just go over the steps with me day by day. I go through the trial, I got back to him. I talk to him, he'll tell me things or he won't -- he's not going to be in the courtroom, present.

After completing the *Faretta* [FN 1] colloquy, the trial judge noted Samuel was bright, educated, and did not have drug, alcohol, or mental health problems. She acknowledged to Samuel: "You don't have a problem that I'm aware of that I can use, in all candor, to keep you from representing yourself." The judge then summoned Grant to come to the courtroom to explain his relationship with Samuel.

Grant testified he had not been retained to represent Samuel. He explained the only discussion he had with Samuel's mother pertained to the legal fees to represent Samuel but the mother never brought him the fees. He maintained he had not given Samuel a copy of the rules of evidence or of criminal procedure or offered his assistance in any way. He stated: "Either you're going to retain me to represent you or you're not." He informed the judge he would not be available to provide Samuel with any assistance in any capacity if Samuel represented himself.

Samuel thanked Grant "for your information you provided me. I thank you for your advice and everything . . . ." When the judge asked him what advice and information he meant, Samuel responded: "Everything he said." The judge further questioned Samuel if he meant what was said that day. Samuel stated: "I'm just saying in general. Everything he said makes a whole lot of sense." Samuel acknowledged he understood the extent of Grant's relationship and he could not depend on Grant's assistance. However, after Grant left the courtroom, Samuel claimed the

reason Grant testified as he did was because of the kinship between Grant's paralegal and Samuel and Grant's "reputation was on the line." Samuel explained the reason his expression did not change during Grant's testimony was "because he already had told me and stated if it came down to him coming in front of a judge in front of the attorneys he was going to state that."

After taking a brief recess, the trial judge informed Samuel she did not believe what Samuel had told her concerning his relationship with Grant and Grant's willingness to coach him. She ruled: "The reason that I am disallowing your self-representation is because it is impossible for me to [try] a case if l do not have candor from those who are making representations to the court." Even after the judge made the ruling, Samuel continued to claim Grant said what he did because "he did not want his reputation ruined."

After delays unrelated to Samuel's request for self-representation, the case proceeded to trial with appointed counsel representing Samuel. The jury found Samuel guilty of murder. The trial judge sentenced him to fifty years imprisonment.

This appeal followed.

ISSUE

Did the trial judge err by refusing to allow Samuel to represent himself?

STANDARD OF REVIEW

"The question of whether court appointed counsel should be discharged is a matter addressed to the discretion of the trial judge. Only in a case of abuse of discretion will this [c]ourt interfere." *State v. Sims,* 304 S.C. 409, 414, 405 S.E.2d 377, 380(1991); *see State v. Barnes,* 407 S.C. 27, 48, 753 S.E.2d 545, 556 (2014) (Toal,C.J., dissenting) (applying abuse of discretion standard to review of denial of motion for self-representation). An abuse of discretion occurs when the decision of the trial judge is based upon an error of law or upon factual findings that are without evidentiary support. *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

Samuel argues the trial judge erred in refusing to allow him to represent himself. We disagree.

A defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments. *Faretta v. California,* 422 U.S. 806, 807 (1975). However, the right of self-representation is not absolute. *United States* v. *Frazier- El,* 204 F.3d 553, 559 (4th Cir. 2000). The Supreme Court in *Faretta* noted "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. " *Faretta,* 422 U.S. at 834 n.46. It explained: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Id.* "Even at the trial level . . . 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." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 162 (2000).

A defendant's assertion of his right to self-representation must be: "(1) clear and Unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." *Frazier-El,* 204 F.3d at 558 (citations omitted). The right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process. *Id.* at 560. A trial judge may refuse to permit a criminal defendant to represent himself when he is "'not able and willing to abide by rules of procedure and courtroom protocol.'" *United States* v. *Lopez-Osuna,* 242 F.3d 1191, 1200 (9th Cir. 2001) (quoting *Savage* v. *Estelle,* 924 F.2d 1459, 1463 (9th Cir. 1991)). "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." *Frazier-El,* 204 F.3d at 560.

In *United States* v. *West,* 877 F.2d 281, 287 (4th Cir. 1989), the Fourth Circuit held a trial court was not required to make a finding the defendant disrupted a trial to support its removal of him as pro se counsel. It found the defendant "directly attacked the [trial] court's integrity and dignity by

characterizing it as the 'home team' on the side of the government and accusing it of imposing upon him a presumption of guilt." *Id.*

As the Fourth Circuit recognized in *West,* a defendant like Samuel who chooses self-representation assumes the responsibility of acting as an officer of the court. *See id.* This responsibility includes displaying candor toward the court. *See* Rule 3.3(a)(l), RPC, Rule 407, SCACR (stating a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"). The trial judge considered Samuel's and Grant's conflicting testimony concerning Grant's alleged assistance for Samuel's trial and found Samuel not credible. It was within the province of the trial judge, as the fact-finder in the *Faretta* hearing, to weigh the credibility of the witnesses. *See State v. Dorce,* 320 S.C. 480, 483, 465 S.E.2d 772, 773 (Ct. App. 1995) ("The trial judge was presented with contradicting testimony, and it was within his province, as the trier of fact, to weigh the credibility of the evidence presented to determine

which witnesses he deemed credible."). As the record supports the trial judge's determination Samuel displayed an unwillingness to act as an officer of the court through his lack of candor, we find the trial judge did not abuse her discretion in denying his request to represent himself.

AFFIRMED.

FEW, C.J., and WILLIAMS, J., concur.

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