



IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |   |                               |
|--------------------|---|-------------------------------|
| ALEX RYLE,         | ) |                               |
|                    | ) |                               |
| Defendant Below,   | ) | I.D. No. 566, 2015            |
| Appellant,         | ) |                               |
|                    | ) |                               |
| v.                 | ) |                               |
|                    | ) |                               |
| STATE OF DELAWARE, | ) | On appeal from Superior Court |
|                    | ) | I.D. No. 1404000692           |
| Plaintiff Below,   | ) |                               |
| Appellee.          | ) |                               |

APPELLANT'S AMENDED OPENING BRIEF

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**TABLE OF CONTENTS**

Table of Citations..... ii

Nature and Stage of Proceedings ..... 1

Summary of Argument ..... 4

Statement of Facts ..... 6

Arguments

    I.    THE SUPERIOR COURT COMMISSIONER  
          DID NOT HAVE SUBJECT MATTER  
          JURISDICTION TO PERMIT DEFENDANT  
          TO WAIVE COUNSEL AND PROCEED  
          *PRO SE* AT TRIAL..... 14

    II.   THE SUPERIOR COURT (COMMISSIONER)  
          ABUSED ITS DISCRETION BY PERMITTING  
          THE DEFENDANT TO WAIVE COUNSEL AND  
          PROCEED *PRO SE* AT TRIAL WITHOUT  
          ADEQUATELY EXPLAINING TO HIM THE  
          HAZARDS OF SELF REPRESENTATION AND  
          BY FAILING TO MAKE A FINDING ON THE  
          RECORD THAT HIS WAIVER WAS  
          KNOWING AND INTELLIGENT..... 18

Conclusion ..... 28

Exhibit – Order of Judgment being appealed (attached hereto)

Exhibit 1 – Sentencing Order

## TABLE OF CITATIONS

|  |                  |
|--|------------------|
| <i>Boyer v. State</i> , 985 A.2d 389 (Del. 2009) .....                                 | 26               |
| <i>Briscoe v. State</i> , 606 A.2d 103-108 (Del. 1992). .....                          | 18, 21-22, 24-26 |
| <i>Faretta v. California</i> , 422 U.S. 806, 835 (1975). .....                         | 20               |
| <i>Gunn v. McKenna</i> , 116 A.3 <sup>rd</sup> 419 (Del. 2015). .....                  | 14               |
| <i>Hartman v. State</i> , 918 A.2d 1138, 1140. ((Del. 2007). .....                     | 18, 24           |
| <i>Morrison v. State</i> , 2016 WL 757575 (Del. 2016). .....                           | 23               |
| <i>State v. Ryle</i> , 2015 WL5004903 (Del. Super. 2015). .....                        | 2                |
| <i>State v. Smith</i> , 996 A.2d 786, 791 (Del. 2010). .....                           | 25               |
| <i>Stigars v. State</i> , 674 A.2d 477, 479 (Del. 1996).....                           | 20               |
| <i>Thompson v. Lynch</i> , 990 A. 2d 432 (Del. 2010). .....                            | 14               |
| <i>United States v. Welty</i> , 674 F. 2d 185, 187 (3 <sup>rd</sup> Cir., 1982). ..... | 20-22, 24        |
| Rules:   |                  |
| 10 Delaware Code Section 512.....  | 15               |
| Superior Court Criminal Case Management Plan for<br>New Castle County.....             | 16               |
| <i>Administrative Directive 2007-5, “Commissioners”</i> .....                          | 15               |
| Superior Court Criminal Rule 62(a)(4)(ii) .....  | 4, 14-15, 17     |
| United States Constitution, Amend., IV.....  | 19               |

## NATURE AND STAGE OF PROCEEDINGS

Defendant was arrested on April 12, 2014, and later indicted for Possession of a Firearm by Person Prohibited, Possession of Ammunition by a Person Prohibited, Possession of Controlled Substances with Aggravating Factor, and Carrying Concealed a Dangerous Weapon.

Defense counsel was appointed to represent Ryle. On September 15, 2016, Defendant filed a motion to dismiss current counsel and/or appoint new counsel. On October 16, 2014, defense counsel filed a motion to withdraw. On October 27, 2014, a hearing was held on defense counsel's motion to withdraw before Commissioner Lynne Parker. At that time, Commissioner Parker *sua sponte* addressed Defendant's desire to waive counsel and represent himself. She entered an order granting counsel's motion to withdraw and the Defendant's request authorizing him to proceed *pro se*.

Defendant filed pro-se motions (including motion to suppress, motion to sever, motion to dismiss and motion to disclose the identity of a confidential informant) which were docketed in November, 2014. All motions were ultimately denied. Similarly, a pro-se motion in limine was also denied.

Defendant's trial date scheduled for December 16, 2014 was rescheduled. On December 22, 2014, Defendant was re-indicted.

Defendant's arraignment for the re-indictment proceeded on January 20, 2015. Again, Defendant executed a waiver of counsel form and an order was entered authorizing him to proceed *pro se*.

Defendant filed numerous motions, all of which were addressed on January 20, 2015.

After a trial beginning on February 10, 2015 in which Ryle represented himself *pro se* without standby counsel, the Defendant was convicted by a jury for Possession of a Firearm by Person Prohibited, Possession of Ammunition by a Person and Carrying Concealed a Dangerous Weapon. The Court dismissed the drug related charge prior to trial due to a discovery violation.

On February 19, 2015, Defendant filed a Motion for New Trial which was denied by Order dated August 14, 2015.<sup>1</sup>

On August 19, 2015, Court ordered standby counsel for Defendant's sentencing. On September 30, 2015, Defendant filed Motion for assistance of counsel for his sentencing.

On February 16, 2015, the State filed a Motion to Declare Defendant a Habitual Offender. On October 8, 2015, the Motion to Declare Defendant a Habitual Offender was granted and he was sentenced as follows:

IN14-12-1394      PFBPP – PABBP (F) – 15 years L5

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<sup>1</sup> *State v. Ryle*, 2015 WL5004903 (Del. Super. 2015).

IN14-12-1396 CCDW – 8 years L5  
IN14-12-1395 PFBPP – PABPP – 8 years L5, suspended after 6 months L4  
DOC discretion for 2 years L3. (A-15-20)

The Defendant thereafter filed a timely notice of appeal. This is the Defendant's opening brief on direct appeal.

## SUMMARY OF ARGUMENT

- I. The Superior Court Commissioner did not have jurisdiction to enter an order permitting Defendant to waive his right to counsel and proceed *pro se* at trial. Even if the Commissioner had jurisdiction to permit Defendant to waive his right to counsel, her order was not valid because of the failure to comply with Superior Court Criminal Rule 62(a)(4)(ii).
  
- II. While addressing defense counsel's motion to withdraw as Defendant's attorney, the Superior Court Commissioner *sua sponte* conducted an inquiry on whether the Defendant wanted to waive counsel and represent himself. Following the colloquy, the Commissioner entered an order authorizing the Defendant to represent himself. The Superior Court Commissioner failed to adequately advise the Defendant of the hazards of self-representation. The Commissioner found that the Defendant wished to represent himself at trial, but did not find on the record that the Defendant's waiver of counsel was knowing and intelligent.  
  
After re-indictment, the Defendant was presented for arraignment in which the Commissioner ordered that he be permitted to proceed *pro*

*se* without conducting a colloquy to determine if his waiver was knowing and intelligent. The Commissioner found that the Defendant wished to represent himself at trial, but did not find on the record that the Defendant's waiver of counsel was knowing and intelligent.

The Superior Court Commissioner abused her discretion by permitting the Defendant to waive counsel at trial without adequately explaining to the Defendant the hazards of self-representation.



## STATEMENT OF FACTS

Ryle was charged with Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, Possession of a Controlled Substance with an Aggravating Factor, and Carrying Concealed a Deadly Weapon by Wilmington Police officers on April 12, 2014. The essential facts are that the Defendant was arrested for absconding from probation authorities. When two detectives searched Ryle incident to his arrest, they discovered a handgun. In a post-Miranda interview, Ryle confessed to possessing the handgun. Ryle was a person prohibited from possessing a gun based upon his prior convictions.

Defendant was appointed counsel but the issue of his representation by appointed counsel became contentious when counsel refused to file certain motions requested by Ryle. Defense counsel filed a motion to withdraw which was granted on October 27, 2014 after a hearing before Commissioner Lynn Parker. (A-29-46). Immediately following the Order granting the defense counsel's motion, the Commissioner *sua sponte* initiated an inquiry with the Defendant on whether he wanted to waive counsel and represent himself. The following colloquy took place:

THE COURT: So with those options, do you want to continue with your Public Defender?

THE DEFENDANT: No, ma'am. (A-31)

THE COURT: Do you want to hire private counsel?

THE DEFENDANT: No, I'll go *pro se*.

THE COURT: You're facing a lot of time.

THE DEFENDANT: Oh, I know.

THE COURT: So you filled out this waiver of Counsel form.

This is State versus Alex Ryle. And we just discussed today the various charges.

MR. WERB: There's six. There should be a total of six.

THE COURT: There should be a total of six. One, two, three, four, five, six charges. You've got one, two, three, four, five, six.

You understand that five of the six charges are felony charges?

THE DEFENDANT: Yes.

THE COURT: And that one, two, three – and that three of those I mean three of those charges are Class C felony charges where you could be facing up to 15 years for each.

THE DEFENDANT: I believe it's four.

MR. WERB: It's four Class D's, one carrying a concealed deadly weapon, which is zero to eight and one possession of marijuana, which is zero to six.

THE DEFENDANT: That wasn't marijuana.

MR. WERB: Of cocaine. Excuse me.

THE COURT: Zero to six months?

MR. WERB: On cocaine.

THE COURT: Right.

MR. WERB: Zero to eight on the carrying concealed deadly weapon.

THE COURT: And zero to 15 on the four?

MR. WERB: The person prohibited charge.

THE COURT: Okay. So that's 15, 30, 45, 68 plus six. 68 years plus six months.

You understand that you're facing a lot of jail time if convicted and given the maximum sentence?

THE DEFENDANT: Yes.

THE COURT: Okay. You have a 12<sup>th</sup> grade education?

THE DEFENDANT: Yes.

THE COURT: Do you have a high school diploma?

THE DEFENDANT: Yes.

THE COURT: You graduated from high school?

THE DEFENDANT: Yes.

THE COURT: Tell me about your experience in the criminal justice system.

THE DEFENDANT: As far as, like, courtroom or law library?

THE COURT: Yeah. Have you had any other prior cases, any other prior matters?

THE DEFENDANT: Yes. I had a Court of Common Pleas trial for some misdemeanors. Other than that, I never really had any trials.

THE COURT: Were you represented by Counsel in that Court of Common Pleas trial?

THE DEFENDANT: Yes, yes.

THE COURT: Did you have any matters in the Superior Court?

THE DEFENDANT: Yes. I never went to trial, though.

THE COURT: You --

THE DEFENDANT: I took pleas.

THE COURT: -- took pleas?

How many prior Superior Court cases?

THE DEFENDANT: I want to say three.

THE COURT: Three prior Superior Court cases that all resulted in pleas.

Is there any chance that you would be facing habitual charges?

Counsel, is there any chance –

MR. WERB: I don't have the file with me here. I don't know if that was the case for Mr. Ryle, from what I recall seeing.

THE COURT: So the possibility may exist that with your criminal history, that you would be facing habitual – charged as an habitual offender in which you could be facing charges of life imprisonment.

And I don't know, I don't have your prior files, your prior criminal history, but do you understand that.

THE DEFENDANT: Yes.

THE COURT: Do you have any convictions in any other states?

THE DEFENDANT: No, ma'am.

THE COURT: So your criminal history would be –

THE DEFENDANT: Delaware.

THE COURT: --confined to Delaware?

THE DEFENDANT: Yes.

THE COURT: One of the questions which you haven't circled, but you have participated in a trial before?

THE DEFENDANT: In the Court of Common Pleas.

THE COURT: Okay. Do you realize that most persons who are charged with criminal offenses chose to be represented by a lawyer and that the Constitution guarantees you, as an accused person, the right to a lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that a competent lawyer would be knowledgeable to court proceedings, Rules of Evidence, and the law that governed your trial. If this case is tried, there may be technical issues that would make it very difficult for you as a non-lawyer to assess.

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that a trial in this case will take place according to the established laws and rules of the Court, and that you do not have a Constitutional right to receive instruction from the trial judge on courtroom procedure.

THE DEFENDANT: Yes, Ma'am.

THE COURT: You do not have the right to have the trial judge take over the chores for you that would normally be attended to by a trained lawyer as a matter of course if you had legal representation.

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that if you become confused or frustrated, that would be no basis to interrupt the trial, nor would it be a license for you to raise improper objections or representations?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Do you understand that if you fail to conduct yourself with due respect for the laws and rules governing your trial, or should you become disruptive, it is possible that the trial court may then appoint a lawyer to represent you whether you liked it or not?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that the Court in its discretion may appoint a standby lawyer to assist you and to offer consultation whether you desire a standby lawyer or not?

THE DEFENDANT: Meaning having a lawyer in defense?

MR. WERB: You're not going to get another lawyer. You will have me –

THE DEFENDANT: Somebody sitting on the side?

THE COURT: Right, sitting on the side.

THE DEFENDANT: Yes, yes. (A- )

THE COURT: and the Court may or may not have someone sitting on the side, but it's going to be up to the Court to decide.

THE DEFENDANT: Yes.

THE COURT: Do you understand that there are definite hazards in representing yourself?

THE DEFENDANT: Yes, ma'am.

THE COURT: Nevertheless, you want to represent yourself in your case and you do so knowingly, intelligently and voluntarily waive your right to a lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you have anything you want to raise prior to my ruling on your request?

THE DEFENDANT: I want to know if I'll be able to have more time to prepare for trial now that I am representing myself.

THE COURT: No. You're going to have a final Case Review December eighth, 2014, and you're going to trial December 16, 2014.

THE COURT: And I am telling you, it's the Court's expectation that you're going to go on trial on December 16<sup>th</sup>. (A-41)

THE DEFENDANT: Okay.

THE COURT: And so, does that change –

THE DEFENDANT: No, it doesn't change anything.

THE COURT: Okay. You still want to represent yourself?

THE DEFENDANT: Yes.

THE COURT: Okay. Any other issues?

Anything else you would like to raise?

THE DEFENDANT: Like my attorney just said, I want to know if the things that I have already submitted that's documented in the Prothonotary's Office, do I have to resubmit that or will they get heard now if you grant my motion?

Defendant signed a waiver of counsel form. (DKT-13, waiver of counsel form).

### REINDICTMENT ARRAIGNMENT

On December 22, 2014, the Defendant was re-indicted. His arraignment on the re-indictment was held on January 20, 2015. Again, the issue of Defendant's desire to waive counsel and represent himself was addressed by the Commissioner:

THE COURT: Mr. Ryle, can I talk you into counsel? (A-48)

THE DEFENDANT: No ma'am. I'm all right going pro se.

THE COURT: Well, now, you have two new charges. Can I have a blank form, because now he has two new charges. Do you have a waiver of counsel form there?

THE DEFENDANT: Yes, I just filled out another one. I think they faxed it over.

The Commissioner proceeded to explain all charges in the re-indictment and the maximum amount of incarceration he was facing, including his potential penalty if sentenced has a habitual offender. The issue of his representation was addressed as follows:

THE COURT: We went through the colloquy before on October 27, 2014. Have any of your answers changed? (A-53)

THE DEFENDANT: No ma'am.

THE COURT: You still want to represent yourself?

THE DEFENDANT: Absolutely. (Balance of response omitted).

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THE COURT: You're your counsel. Are you sure you don't want counsel? Your counselor could – you could get counsel.

THE DEFENDANT: No. We settled that on October 27, 2014 in front of you. I'm okay. (A-55)

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THE COURT: So, you want to represent yourself. Okay. This is your arraignment on your re-indictment. How do you plead?

THE DEFENDANT: Not guilty. (A-56)

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THE COURT: Okay. So, maybe – and if he wants to continue, we went through an extensive colloquy on October 27, 2014. And Mr. Ryle still holds firm in his desire to represent himself; is that correct?

THE DEFENDANT: Absolutely.

THE COURT: And you signed the waiver of counsel form today? (DKT-26, waiver of counsel form).

THE DEFENDANT: Yes ma'am. Okay.

THE COURT: Then he'll continue to represent himself pro se for the reasons set forth on October 27, 2014 and is supplemented by today, January 20, 2015. (A-56)

The Defendant's jury trial commenced on February 10, 2015. He was convicted on all charges on February 11, 2015.



## ARGUMENT I

### **THE SUPERIOR COURT COMMISSIONER DID NOT HAVE SUBJECT MATTER JURISDICTION TO PERMIT DEFENDANT TO WAIVE COUNSEL AND PROCEED *PRO SE* AT TRIAL.**

#### 1. Question Presented

The question presented is whether Superior Court Commissioner had subject matter jurisdiction to permit Defendant to waive his right to counsel and proceed *pro se* at trial. Defendant did not preserve this issue below.<sup>2</sup> Whether a court lacks subject matter jurisdiction may be raised at any time.<sup>3</sup>

#### Standard and Scope of Review

The standard and scope of review to determine if the Commissioner lacks subject matter jurisdiction is *de novo*.<sup>4</sup> If the court lacked subject matter jurisdiction there would be no power to exercise and its order would be a nullity.<sup>5</sup>

#### Merits of Argument

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<sup>2</sup> As noted herein, the Court did not comply with Superior Court Criminal Rule 62(a)(4)(ii) by sending a copy of the order to Defendant, thereby triggering the 10 day period to contest the order.

<sup>3</sup> *Gunn v. McKenna*, 116 A.3<sup>rd</sup> 419 (Del. 2015).

<sup>4</sup> *Gunn v. McKenna*, 116 A.3<sup>rd</sup> 419 (Del. 2015).

<sup>5</sup> *Thompson v. Lynch*, 990 A. 2d 432 (Del. 2010).

A Superior Court Commissioner has authority to act pursuant to statute,<sup>6</sup> Rules of Criminal Procedure<sup>7</sup> and Administrative Directive.<sup>8</sup>

While a Commissioner has authority to act on a broad range of pretrial non-case dispositive criminal matters, she is not specifically authorized to conduct a hearing, and enter an order, on a defendant's request to waive his constitutional right to counsel and defend himself against felony charges. That authority appears to be reserved to the Office Judge who "shall handle

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<sup>6</sup> 10 Delaware Code Section 512, entitled "Jurisdiction and powers of Commissioners of the Superior Court" provides, in pertinent part, as follows:

- (a) Each Commissioner serving under this chapter shall have:
- (1). All powers and duties conferred or imposed upon commissioners by law or by the Rules of Criminal and Civil Procedure for the Superior Court;
  - (3). The power . . . to appoint counsel to represent indigent defendants;
- (b) Commissioners may be designated to perform the following with the approval of the President Judge or his designee;

(1)(a) A judge may designate a Commissioner to hear and determine any pretrial matters pending before the court, except a motion for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case.....

<sup>7</sup> Superior Court Criminal Rule 62, entitled "Commissioners", provides in pertinent part, as follows:

- (A) Each Commissioner shall have all powers and duties conferred or imposed upon Commissioners by law, by the Rules of Criminal Procedure for the Superior Court, and by Administrative Directive of the President Judge, including, but not limited to:
- (2) the power to .... appoint counsel to represent indigent defendants;
  - (4) Non-case – dispositive matters. The power to conduct non-case dispositive hearings, including non-case dispositive evidentiary hearings (excluding motions to suppress evidence in a criminal case) and the power to hear and determine any pretrial or other non-case – dispositive matter pending before the Court.

<sup>8</sup> (A-24-28, *Administrative Directive 2007-5, "Commissioners"*)

certain....criminal duties,” including the duty to “Review of pro se applications where the applicant has not been sentenced.”<sup>9</sup>

There is no express indication that the President Judge ever designated Commissioners to preside over hearings to determine if a defendant has made a valid waiver of his constitutional right to counsel.

It makes sense that the power to determine whether a defendant has properly waived his constitutional right to counsel is reserved for a Superior Court judge. A Superior Court judge, more than a commissioner, is in a better position to address a defendant regarding the hazards of self-representation, and to evaluate whether a waiver of counsel is valid.

A defendant’s decision to proceed *pro se* implicates a waiver of his Sixth Amendment right to counsel. It is no less serious than when a defendant waives his constitutional trial rights in order to enter a felony plea agreement. Only a Superior Court judge has the authority to determine if a defendant has made a knowing, intelligent and voluntary waiver of constitutional rights in a guilty plea proceeding. If a Commissioner does not have the power to accept a felony plea agreement following a waiver of constitutional rights, how does it follow that it has the power to determine if a critical constitutional right has been waived in a different context of equal magnitude?

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<sup>9</sup> (A-21-23, Superior Court Criminal Case Management Plan for New Castle County) (pertinent portion).

Since a Commissioner does not have specific authorization to act on a request to waive counsel and proceed *pro se*, and since *pro se* applications are specifically reserved for the Office Judge, then it follows that the Commissioner lacked authority to order that Defendant waived his right to counsel in this matter.

Even if the Commissioner did have authority to act in this matter, the Order is not valid because the procedure under Criminal Rule 62(a)(4)(i) was not followed. Under that section, the Commissioner was required to send a copy of the order to the Defendant. Under 62(a)(4)(ii), Defendant then would have 10 days to file a Motion for Reconsideration of Commissioner's Order. To the extent that the Court did not comply with Rule 62(a)(4)(ii) by failing to properly send a copy of the Order to Defendant, then it is not valid under Criminal Rule 62.

## ARGUMENT II

**THE SUPERIOR COURT (COMMISSIONER) ABUSED ITS DISCRETION BY PERMITTING THE DEFENDANT TO WAIVE COUNSEL AND PROCEED *PRO SE* AT TRIAL WITHOUT ADEQUATELY EXPLAINING TO HIM THE HAZARDS OF SELF REPRESENTATION AND BY FAILING TO MAKE A FINDING ON THE RECORD THAT HIS WAIVER WAS KNOWING AND INTELLIGENT.**

### 1. Question Presented

The question presented is whether the Defendant knowingly and intelligently waived his right to counsel at trial. The question was preserved by defense counsel's motion to withdraw followed by Defendant's request to represent himself. (A-29-46). The question was further preserved by the re-indictment arraignment proceedings. (A-48-56).

### 2. Standard and Scope of Review

The standard and scope of review is de novo.<sup>10</sup> "A determination of whether a defendant has intelligently waived his right to counsel depends upon particular facts and circumstances surrounding that case, including the background, experience and conduct of the defendant."<sup>11</sup>

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<sup>10</sup> *Hartman v. State*, 918 A.2d 1138, 1140. (Del. 2007).

<sup>11</sup> *Briscoe v. State*, 606 A.2d 103, 107 (Del. 1992).

### Merits of Argument

Prior to Defendant's waiver of counsel on October 27, 2014, the Commissioner conducted *sua sponte* a colloquy addressing Defendant's desire to represent himself at trial. (A-29-46). Following Defendant's re-indictment, the Commissioner again addressed Ryle regarding his desire to waive counsel and represent himself, although in a more abbreviated fashion. (A-48-56). Neither colloquy was sufficient to support a knowing and intelligent waiver of Defendant's constitutional right to counsel consistent with the law on this issue. Moreover, the Commissioner did not make a finding on the record that his waiver was knowing and intelligent. The record in this case is deficient in significant respects as a basis to uphold the Defendant's waiver of counsel.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right.... To have the assistance of counsel for his defense."<sup>12</sup> The Sixth Amendment right to counsel applies to all state criminal prosecutions where the defendant is accused of a felony. The right to counsel attaches at or after the initiation of the adversarial judicial proceedings "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" if the request for counsel need be made by the accused.

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<sup>12</sup> United States Constitution, Amend., IV

A defendant's decision to proceed *pro se* implicates a waiver of his Sixth Amendment right to counsel.<sup>13</sup> The decision to waive the right to counsel must be made knowingly and intelligently.<sup>14</sup>

In prior review of a defendant's waiver of counsel, the Court has said that “[b]efore a trial court may permit a defendant to represent himself, the court must: 1) determine that the defendant has made a knowing and voluntary waiver of his constitutional right to counsel; and 2) inform the defendant of the risks inherent in going forward in a criminal trial without the assistance of legal counsel.”<sup>15</sup>

In *Faretta v. California*, the United States Supreme Court held that “although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with open eyes.’<sup>16</sup> The Commissioner’s limited colloquy with the defendant failed to provide an adequate basis to determine that the defendant was “aware of the dangers and disadvantages of self-representation.”<sup>17</sup> The

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<sup>13</sup> *United States v. Welty*, 674 F. 2d 185, 187 (3<sup>rd</sup> Cir., 1982).

<sup>14</sup> *Faretta v. California*, 422 U.S. 806, 835 (1975).

<sup>15</sup> *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996).

<sup>16</sup> *Faretta v. California*, 422 U.S. at 835 (internal citation omitted).

<sup>17</sup> *Id.*

Commissioner's colloquy at Ryle's re-indictment arraignment was even more deficient.

The Court has previously said that, "A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances," and only after bringing home to the defendant the perils that he faces in dispensing with legal representation."<sup>18</sup> The limited colloquy below, addressing only the Defendant's previous trial experience and a superficial review of the hazards of self-representation did not satisfy the requirement of a "penetrating and comprehensive examination of all of the circumstances" behind the Defendant's waiver of counsel at trial. In addition, "the fact that an accused may tell the trial court that he is aware of his right to counsel, and desires to waive that right, does not eliminate the trial court's responsibility to conduct a "searching inquiry."<sup>19</sup> The record below fails to support a finding that the Defendant "truly appreciate[d] the 'dangers and disadvantages of self-representation,' because the Commissioner did not "advise the defendant in unequivocal terms both of the technical problems which may be encountered in

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<sup>18</sup> *Briscoe v. State*, 606 A.2d at 107 (quoting *United States v. Welty*, 675 F.2d at 189).

<sup>19</sup> *Briscoe v. State*, 606 A.2d at 107 "quoting *United States v. Welty*, 674 F.2d at 189).



acting as his own attorney and of the risk involved if his defense efforts are unsuccessful.”<sup>20</sup>

In *Briscoe*, the court adopted guidelines from the Third Circuit’s decision in *Welty* for determining whether a defendant is knowingly and intelligently waiving the Sixth Amendment right to counsel: “the trial court should advise the defendant, for example:

1. That the defendant will have to conduct his defense in accordance with the rules of evidence and criminal procedure, rules which he may not be familiar;
2. That the defendant may be hampered in presenting his best defense by his lack of knowledge of the law;
3. That the effectiveness of his defense may well be diminished by his dual role as attorney and accused;
4. The nature of the charges,
5. The statutory offenses included within them;
6. The range of allowable punishments thereunder;
7. The possible defenses to the charge and circumstances and mitigation thereof; and
8. All other facts essential to a broad understanding of the whole matter.<sup>21</sup>

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<sup>20</sup> *Briscoe v. State*, 606 A.2d at 107 “quoting *United States v. Welty*, 674 F.2d at 188).

<sup>21</sup> *Id.* at 188 – 189.

In the first colloquy with the Defendant on October 27, 2014, the Commissioner only addressed a few of these eight concerns. Ryle was not fully apprised of the dangers of self-representation. The Commissioner touched on the nature of the charges and the range of allowable punishment. Ryle was advised that there would be “definite hazards in representing yourself” and that “there may be technical issues that would make it very difficult for you as a non-lawyer to assess”, and that the trial would take place “according to the established laws and rules of the court.” The Commissioner did not touch upon the possible defenses to the charges and circumstances in mitigation thereof, or clearly explain that he would have to “conduct his defense in accordance with the rules of evidence and criminal procedures, rules which he may not be familiar.” The Commissioner did not clearly explain that he “may be hampered in presenting his best defense by his lack of knowledge of the law” or that “the effectiveness of his defense may well be diminished by his dual role as attorney and accused.” Like the trial judge in *Morrison v. State*, the Commissioner in Ryle’s case failed to conduct “a penetrating and comprehensive examination of all the circumstances” in order to find a proper waiver.<sup>22</sup> The perfunctory

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<sup>22</sup> 2016 WL 757575 (Del. 2016).

inquiry was insufficient to support a finding of a knowing and intelligent waiver of counsel at trial.<sup>23</sup>

Even if the Defendant's waiver of counsel was sufficient to establish it was knowing and voluntary at the first colloquy, the Commissioner was obligated to undertake an additional, separate colloquy at his arraignment following his re-indictment. The Commissioner was obligated to conduct a new colloquy regarding the waiver of counsel issue since the re-indictment included at least one new offense that was not charged at the time of the initial colloquy. That did not occur. Instead, the Commissioner simply mentioned that she was incorporating the substance of the previous colloquy after defendant expressed that he wanted to proceed *pro se*. The only *Welty* factors addressed involved the nature of the charges and potential penalties. There was no "searching inquiry" under *Briscoe*.

Furthermore, after the "searching inquiry" required under *Briscoe* and "penetrating and comprehensive examination of all of the circumstances" behind the defendant's waiver of counsel at trial," also required by *Briscoe*,

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<sup>23</sup> Compare, *Hartman v. State*, 918 A.2d 1138, 1141 – 1142 (Del. 2007) ("the record reflects that the trial judge imparted clearly to Hartman that he must comply with rules of evidence and procedure; that his defense efforts will be hampered by a lack of legal knowledge and training; and that his defense will likely be less effective if he acts as his own attorney. The trial judge also reviewed with Hartman the charges he faced and the extensive potential penalties if he were convicted. At each step, Hartman indicated his understanding of what he was being told and indicated an unambiguous and unequivocal desire to go *pro se*, notwithstanding the knowledge and advice he was given.")

‘whether there is a proper waiver should be clearly determined by the trial court,’ and that determination must appear upon the record.”<sup>24</sup> The record below only shows that the Commissioner asked Ryle if he knowingly, intelligently and voluntarily wanted to waive his right to a lawyer, but did not make a finding on the record that his waiver was knowing, intelligent and voluntary. At the second colloquy, the Commissioner again failed to make a finding on the record that Defendant’s waiver was proper. The Commissioner’s mere finding that Defendant desired to represent himself at trial was insufficient to support a finding that Defendant’s waiver of counsel was knowing and intelligent. The lack of a determination by the Commissioner, on the record, that Defendant’s waiver of counsel was knowing, intelligent and voluntary, is fatal to any claim that the legal requirements for a valid waiver were met.

The Commissioner seemed persuaded by the Defendant’s expression of his desire to represent himself, but that factor alone is not a substitute for the court’s obligation to conduct a “searching inquiry” of the defendant in order to determine that his decision to waive counsel was understanding and voluntary.<sup>25</sup> In *Smith*, the Court “recognized that a judge may face a defendant who adamantly states that he is aware of his right to counsel and wishes to waive that right; however, those statements do not alleviate the judge’s responsibility

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<sup>24</sup> *Briscoe v. State*, 606 A.2d at 108 (internal quotation and citation omitted).

<sup>25</sup> *State v. Smith*, 996 A.2d 786, 791 (Del. 2010).

to conduct a comprehensive evidentiary area hearing to explore and explain the defendant's options."<sup>26</sup>

Finally, although the Defendant was granted the right to represent himself at trial, he was not provided with standby counsel at that trial.

The Defendant's motivation to represent himself originated primarily with his objective of moving to suppress evidence, and for the disclosure of a confidential informant, which his counsel would not file. After he was permitted to represent himself, the Superior Court denied his motions. Defendant did not understand that the issues he raised pretrial were no longer relevant at his trial and his effort to incorporate his pretrial claims during his trial was highly prejudicial and unproductive.

Defendant's self-representation was a disaster. He had no viable defense strategy following the denial of his motions. His intent was to provide an innocent explanation as to why he possessed the gun to persuade the jury that he did not have any ill intent. However, he was barred from presenting this defense as his intent for possessing a gun was not relevant. His examination of prosecution witness, and his testimony regarding the facts of his arrest, were highly incriminating. Ryle was clearly overwhelmed by the proceedings.

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<sup>26</sup> Id. at 791 (citing, *Boyer v. State*, 985 A.2d 389 (Del. 2009), and *Briscoe v. State*, 606 A.2d at 107).

During the trial he asked for the assistance of stand by counsel which was denied.

In this case, the Commissioner did not sufficiently discuss with the defendant, at either colloquy, “the risks inherent in going forward in a criminal trial without the assistance of legal counsel.” While the Commissioner engaged in a dialogue with the Defendant, it was not the “searching inquiry” on which a knowing and voluntary waiver of the Constitutional right to counsel must be conditioned.

## CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant submits that his convictions and sentences should be reversed.

Respectfully submitted

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