The Supreme Court of South Carolina

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Columbia, South Carolina
May 13, 2024

The Supreme Court of South Carolina

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N O T I C E

In the Matter of William E. Hopkins, Jr., Petitioner.

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on Thursday, June 27, 2024, beginning at 9:30 a.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

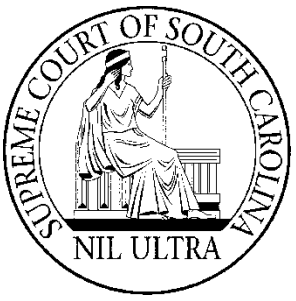
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 29, 2024

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 29, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2024-UP-201 – New Life Apostolic Church, Inc. v. Progressive Church of Our Lord Jesus Christ, Inc.

PETITIONS FOR REHEARING

6053 – Kaci May v. Dorchester School District Two	Denied 5/29/2024
6055 – Archie Patterson v. SCDEW	Pending
6057 – Khalil Abbas-Ghaleb v. Anna Ghaleb	Pending
6058 – SCCCL v. SCDHEC	Pending

EXTENSIONS TO FILE PETITION FOR REHEARING

None

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5933 – The State v. Michael Cliff Eubanks	Pending
5946 – The State v. Frankie L. Davis, III	Denied 5/21/2024
5965 – National Trust for Historic Preservation v. City of North Charleston	Pending
5975 – Rita Glenn v. 3M Company	Pending
5986 – The State v. James E. Daniels, Jr.	Pending
5987– The State v. Tammy C. Moorer	Pending
5992 – Rufus Rivers v. James Smith, Jr.	Pending
5994 – Desa Ballard v. Admiral Insurance Company	Pending

5995 – The State v. Kayla M. Cook	Pending
5996 – Palmetto Pointe v. Tri-County Roofing	Pending
5999 – Jerome Campbell v. State	Pending
6001 – Shannon P. Green v. Edward C. McGee	Pending
6004 – Joseph Abruzzo v. Bravo Media Productions, LLC	Pending
6007 – Dominic A. Leggette v. State	Pending
6011 – James E. Carroll, Jr. v. Isle of Palms Pest Control, Inc.	Pending
6016 – Vista Del Mar v. Vista Del Mar, LLC	Pending
6017 – Noel Owens v. Mountain Air Heating & Cooling	Pending
6019 – Portfolio Recovery Associates, LLC v. Jennifer Campney	Pending
6022 – J&H Grading & Paving v. Clayton Construction	Denied 5/22/2024
6025 – Gerald Nelson v. Christopher S. Harris	Pending
6028 – James Marlowe v. SCDOT	Pending
6029 – Mark Green v. Wayne B. Bauerle	Pending
6030 – James L. Carrier v. State	Pending
6031 – The State v. Terriel L. Mack	Pending
6032 – The State v. Rodney J. Furtick	Pending
6034 – The State v. Charles Dent	Pending
6037 – United States Fidelity and Guaranty Company v. Covil Corporation	Pending

6039 – Anita Chabek v. AnMed Health	Pending
6042 – Renewable Water Resources v. Insurance Reserve Fund	Pending
6044 – Susan Brooks Knott Floyd v. Elizabeth Pope Knott Dross	Pending
6047 – Amazon Services v. SCDOR	Pending
6048 – Catherine Gandy v. John Gandy, Jr.	Pending
2022-UP-380 – Adonis Williams v. State	Pending
2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust	Pending
2022-UP-425 – Michele Blank v. Patricia Timmons (2)	Pending
2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour	Pending
2023-UP-091 – The State v. Dale E. King	Denied 5/21/2024
2023-UP-138 – In the Matter of John S. Wells	Pending
2023-UP-143 – John Pendarvis v. SCLD	Pending
2023-UP-151 – Deborah Weeks v. David Weeks	Pending
2023-UP-178 – CRM of the Carolinas, LLC v. Trevor W. Steel	Granted 4/24/2024
2023-UP-201 – Nancy Morris v. State Fiscal Accountability Authority	Pending
2023-UP-241 – John Hine v. Timothy McCrory	Pending
2023-UP-246 – Ironwork Productions, LLC v. Bobcat of Greenville, LLC	Pending
2023-UP-258 – The State v. Terry R. McClure	Pending
2023-UP-260 – Thomas C. Skelton v. First Baptist Church	Pending
2023-UP-261 – Mitchell Rivers v. State	Pending

2023-UP-263 – Rory M. Isaac v. Laura Kopchynski Granted 5/22/2024

2023-UP-264 – Kathleen A. Grant v. Nationstar Mortgage, LLC Pending

2023-UP-283 – Brigette Hemming v. Jeffrey Hemming Pending

2023-UP-289 – R-Anell Housing Group, LLC v. Homemax, LLC Pending

2023-UP-290 – Family Services Inc. v. Bridget D. Inman Pending

2023-UP-291 – Doretta Butler-Long v. ITW Pending

2023-UP-293 – NCP Pilgrim, LLC v. Mary Lou Cercopely Pending

2023-UP-295 – Mitchell L. Hinson v. State Pending

2023-UP-311 – The State v. Joey C. Reid Pending

2023-UP-321 – Gregory Pencille, #312332 v. SCDC (2) Pending

2023-UP-324 – Marvin Gipson v. Coffey & McKenzie, P.A. Granted 5/22/2024

2023-UP-329 – Elisa Montgomery Edwards v. David C. Bryan, III Pending

2023-UP-343 – The State v. Jerome Smith Pending

2023-UP-346 – Temisan Etikerentse v. Specialized Loan Servicing, LLC Pending

2023-UP-352 – The State v. Michael T. Means Pending

2023-UP-355 – Terri Sciarro v. Matthew Sciarro Denied 5/21/2024

2023-UP-365 – The State v. Levy L. Brown Pending

2023-UP-366 – Ray D. Fowler v. Pilot Travel Centers, LLC Pending

2023-UP-369 – Harland Jones v. Karen Robinson Pending

2023-UP-375 – Sharyn Michali v. Eugene Michali	Pending
2023-UP-392 – Trina Dawkins v. Fundamental Clinical	Pending
2023-UP-393 – Jeffrey White v. St. Matthews Healthcare	Pending
2023-UP-394 – Tammy China v. Palmetto Hallmark Operating, LLC	Pending
2023-UP-396 – Kevin Greene v. Palmetto Prince George Operating, LLC	Pending
2023-UP-397 – Jennifer Rahn v. Priority Home Care, LLC	Pending
2023-UP-398 – The State v. Rashawn M. Little	Pending
2023-UP-399 – The State v. Donnielle K. Matthews	Pending
2023-UP-400 – Paulette Walker v. Hallmark Longterm Care, LLC	Pending
2023-UP-406 – Carnie Norris v. State	Pending
2024-UP-003 – The State v. Quintus D. Faison	Pending
2024-UP-005 – Mary Tisdale v. Palmetto Lake City – Scranton Operating, LLC	Pending
2024-UP-007 – Shem Creek Development Group, LLC v. The Town of Mount Pleasant	Pending
2024-UP-018 – Mare Baracco v. County of Beaufort	Pending
2024-UP-022 – ARM Quality Builders, LLC v. Joseph A. Golson	Pending
2024-UP-024 – Kacey Green v. Mervin Lee Johnson	Pending
2024-UP-033 – The State v. David A. Little, Jr.	Pending
2024-UP-037 – David Wilson v. Carolina Custom Converting, LLC	Pending
2024-UP-044 – Rosa B. Valdez Rosas v. Jorge A. Vega Ortiz	Pending

2024-UP-046 –The State v. James L. Ginther	Pending
2024-UP-049 – ARO-D Enterprises, LLC v. Tiger Enterprises	Pending
2024-UP-052 – Vicki Vergeldt v. John Vergeldt	Pending
2024-UP-053 – R. Kent Porth v. Robert P. Wilkins, Jr.	Pending
2024-UP-056 – Joe Clemons v. Peggy H. Pinnell Agency, Inc.	Pending
2024-UP-060 – The State v. Andres F. Posso	Pending
2024-UP-62 – Rachel Polite v. Karen Polite	Pending
2024-UP-70 – The State v. Sean D. James	Pending
2024-UP-78 – Stephanie Gardner v. Berkeley County Sheriff's Office	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Travis Hines, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2022-000341

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
The Honorable R. Lawton McIntosh, PCR Judge

Opinion No. 28205
Submitted December 15, 2023 – Filed May 29, 2024

AFFIRMED

Elizabeth Anne Franklin-Best, of Elizabeth Franklin-Best, P.C., of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Zachary William Jones, both of Columbia, for Respondent.

JUSTICE HILL: Travis Hines brought this post-conviction relief (PCR) action, seeking to set aside his guilty plea to distribution of heroin because he claims he was not adequately warned of the dangers of representing himself. He also claims the State violated discovery rules by refusing to let him watch a video police made of a confidential informant buying heroin from him. The PCR court dismissed Hines' petition, a ruling the court of appeals affirmed. The court of appeals held that the warnings Hines received about representing himself satisfied the Sixth Amendment to the United States Constitution. It further held there was no discovery violation.

We granted Hines' petition for a writ of certiorari to address his argument that the court of appeals erred in finding his waiver of counsel and ensuing guilty plea voluntary. We denied the writ as to the discovery issues.

I. FACTS

The court of appeals well canvassed the facts. *Hines v. State*, 435 S.C. 476, 481–86, 868 S.E.2d 387, 389–92 (Ct. App. 2021). The relevant backdrop for our purposes unfolds on May 21, 2014, when Hines sold heroin to someone who proved to be a confidential informant for the State. Hines was indicted for distribution of heroin in December 2014. He was appointed a public defender, and soon the State offered to let Hines plead guilty in exchange for a ten-year sentence. Hines discharged his public defender and hired Christopher Wellborn of the private bar. Mr. Wellborn filed a Rule 5, SCRCrimP discovery motion and a *Brady* motion. The State responded in part to these motions by sending Wellborn still photographs taken from the video of the heroin buy.

In August 2015, the State advised Wellborn that it was withdrawing the ten-year plea offer and replacing it with one for eighteen years. The State further noted that, due to Hines' criminal record, he could face a sentence of life without parole (LWOP).

Mr. Wellborn pressed the State to turn over the video of the heroin buy. The State responded that because the buy involved a confidential informant, its policy was to not produce the video for the defendant's inspection unless the defendant rejected the State's plea offer and was proceeding to trial.

The case beat on. The State at last permitted Wellborn (but not Hines) to view the video. After the screening, Wellborn concluded the video was incriminating enough to persuade a jury to convict Hines. The State reduced its offer to fifteen years, a deal Wellborn advised Hines to accept.

The parties were scheduled to appear before Judge Hall on December 3, 2015, to enter the plea, but this never occurred. Instead, Hines began having doubts about Wellborn's representation. On December 15, 2015, Judge Hall formally relieved Wellborn as Hines' counsel of record. The State simultaneously served Hines with notice of its intent to seek an LWOP sentence should Hines be convicted and announced a January 11, 2016 trial date. It also advised Hines the fifteen-year offer would expire at the end of the week.

Judge Hall asked Hines if he intended to represent himself. Hines replied he was planning to hire new counsel. Judge Hall advised Hines that "whoever your lawyer is, they are going to have to be prepared and ready for trial on January the 11th." Noting Hines had now relieved both appointed and retained counsel, Judge Hall explained, "the court would not appoint you any more lawyers." Judge Hall further stated that "at some point if you don't have an attorney, I will have to go through and warn you in detail about representing yourself . . . ." To that end, Judge Hall ordered that, if Hines had not hired a lawyer by January 4, he would need to appear in court at 10:00 a.m. on that day, "and we'll go over and make sure [you] understand your rights about representing yourself." Hines replied, "okay."

Hines then began negotiating directly with the State. Two days later, on December 17, 2015, Hines appeared before Judge John C. Hayes. The assistant solicitor announced that Hines was prepared to represent himself and enter a guilty plea in exchange for a negotiated sentence of fourteen years. The assistant solicitor twice mistakenly stated Hines had already been advised of his right to counsel. After preliminary inquiry into Hines' education, intelligence, and experience, Judge Hayes advised Hines of his right to counsel and that he would be appointed a lawyer if he could not afford one. Judge Hayes told Hines it would be "dangerous" for him to proceed without a lawyer, and he would benefit from having one. Hines replied he understood, but he still wished to give up his right to counsel.

Judge Hayes later informed Hines of various constitutional rights he would enjoy at trial but that he must waive in order to plead guilty, including his right to a trial by a jury, the presumption of innocence, the requirement that the State prove guilt beyond a reasonable doubt, the right to remain silent, the right to confront witnesses against him, the right to compulsory process, and the right to present a defense. Importantly, Hines also signed a four-page waiver of rights form that explained these same constitutional rights he was giving up. This form also advised Hines of his right to counsel, including advice that having a lawyer would benefit Hines, and he

was in danger if he represented himself. The form concluded with a paragraph wherein Hines acknowledged that any "possible defenses" to the charges had been explained to him. Judge Hayes accepted Hines' plea and imposed the fourteen-year negotiated sentence.

Hines did not appeal, instead bringing this petition for PCR.

II. STANDARD OF REVIEW

Because Hines is attacking his uncounseled plea in a collateral, post-conviction action, he bears the burden of proving he did not competently and intelligently waive his Sixth Amendment right to the assistance of counsel. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004). Whether a waiver is valid is a mixed question of law and fact that we review de novo on direct appeal. *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). Although this is a PCR action, the yardstick is the same as used in *Samuel*.

III. WAIVER OF RIGHT TO COUNSEL

This case finds us once again at the intersection of the conflicting rights contained within the Sixth Amendment of the United States Constitution. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel; it also guarantees a defendant the right to represent himself. A defendant must necessarily choose between these guarantees. Courts safeguard a defendant's rights by ensuring the choice is knowingly and intelligently made. *Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938), *overruled on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981). The conflict sharpens when, as here, a defendant collaterally attacks his conviction by claiming that his choice was tainted and his right to the effective assistance of counsel was trampled upon because the trial court did not do enough to protect him from what he now claims was his own folly in pleading guilty to a crime without legal representation.

The Sixth Amendment requires that before a criminal defendant may represent himself, the trial court must hold a hearing to determine the defendant has knowingly and intelligently waived his right to counsel. *Watts v. State*, 347 S.C. 399, 402–03, 556 S.E.2d 368, 370 (2001). To that end, the defendant must be (1) advised of the right to counsel and (2) adequately warned of the dangers of representing himself. *Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990). The landmark decision in this field simply tells us a defendant wishing to represent himself must

be allowed to do so as long as he is "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 eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel McCann*, 317 U.S. 269, 279 (1942)).

Hines claims he did not competently waive his Sixth Amendment right to counsel because Judge Hayes failed to warn him of the specific dangers of proceeding without counsel. He contends a general danger warning was not enough to open his eyes to the risks of self-representation. In sum, he claims the inquiries into his understanding of the right he was abandoning were little more than canned questions to which he gave canned replies. He insists that had Judge Hayes questioned him about the details of his case, he would have discovered Hines' waiver of counsel and ensuing plea were defective and involuntary because they were coerced by the State's withholding of the video and its heavy-handed use of the LWOP notice.

We appreciate Hines' argument that the advice concerning his right to counsel–both the admonitions given by Judge Hayes and those contained on the waiver form–were general. We also agree with Hines that it is his understanding of the right—not the incantations of the trial judge or the words on a printed form—that controls our inquiry into whether the waiver is good. *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). Because the test is what the defendant understands about the scope of the right he wishes to discard, the United States Supreme Court has not mandated any script or magic words for a *Faretta* colloquy; rather, "[t]he information a defendant must possess in order to make an intelligent election, our decisions indicate, 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." *Tovar*, 541 U.S. at 88.

Tovar held that in Sixth Amendment cases, "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." 541 U.S. at 81. There is no dispute Hines understood the nature of the charges and the scope of the punishments he faced, so the only issue remaining is whether his understanding of "his right to be counseled regarding his plea" rose to the level the Sixth Amendment demands (there is no state constitutional claim before us).

We hold it did. *Tovar* does not elaborate upon what one must be told about the right to be counseled regarding a plea, and in fact, nothing in the opinion lets us know how Tovar was advised about his right to be counseled about his plea. All the Supreme Court shared is it was enough that Tovar had not claimed he was "unaware" of his right to be counseled before his plea. *Id*. at 93. But the Supreme Court did tell us that the Sixth Amendment does not require that a defendant appearing for a plea and wishing to represent himself be told that a lawyer will be able to provide an independent opinion about the wisdom of pleading guilty or may know of defenses the defendant has overlooked. *Id*. at 91–93.

As *Tovar* emphasized, an important aspect of the waiver analysis is at what point in the criminal process the warnings are given. *Id*. at 89–91. Where, as in *Faretta*, the defendant is venturing to represent himself at trial, the trial court must rigorously convey specific warnings of the pitfalls of going to trial without a lawyer. *Id*. at 89. By contrast, a waiver of counsel at earlier stages of the proceeding need not be as exacting. *Id*. (noting "at earlier stages of the criminal process, a less searching or formal colloquy may suffice"); *see also Patterson v. Illinois*, 487 U.S. 285, 293 (1988) (*Miranda* warnings, although related to the Fifth Amendment, are sufficient to yield knowing waiver of Sixth Amendment right to counsel at post indictment questioning by police).

The Supreme Court believes it has taken a "pragmatic" approach to the waiver issue that focuses on the usefulness of counsel at a particular stage and the danger of proceeding without counsel. *Patterson*, 487 U.S. at 298. *Tovar* explained that less rigorous warnings were required pretrial, mainly because at that point the risks and disadvantages of acting as one's own lawyer are "less substantial and more obvious to an accused than they are at trial." 541 U.S. at 90 (quoting *Patterson*, 487 U.S. at 299).

We are not sure how pragmatic this approach really is, but we are bound to follow it. Some of the benefits of a lawyer's help in a criminal case do not depend upon whether the defendant is pleading guilty or going to trial. The typical criminal defendant travels down a well-defined road. He may, and often does, end his journey by a plea. The Supreme Court seems satisfied that at the guilty plea stage the defendant's "eyes are open," so long as he is warned that some general, undefined danger lurks ahead. *Id*. at 88, 92. A defendant's waiver of his right to counsel on the eve of trial, however, is good only if he knows of the precise dangers trials pose for the uncounseled. *See generally* La Fave, *Criminal Procedure* § 11.5(c) (listing factors and topics trial court should review with defendant seeking to represent

himself at trial). Judge Hall was mindful of this, which is why he scheduled the January 4 hearing to further address Hines' decision to go it on his own should he decide to push to trial.

Like the court of appeals, we are convinced the information Hines had about his right to counsel far exceeded that found to be enough in *Tovar*. Judge Hayes warned Hines generally of the dangers of representing himself, as did the waiver form. Both Judge Hayes and the form advised Hines of the nature of the charge, the allowable sentences, and the constitutional rights he must shed to enter his plea. Even if that was not sufficient, we may consider the whole picture before us, including Hines' education and experience and whether he had another source of knowledge about the assistance of counsel. *Prince*, 301 S.C. at 424, 392 S.E.2d at 463. The record shows that at the time of his plea, Hines was a twenty-nine-year-old college student who had previous experience in the criminal justice system going back some ten years. It is plain Hines understood the nuances of having legal representation, given he had already had two lawyers in this single case. Further, he had been "counseled regarding his plea," for Mr. Wellborn, an experienced and respected criminal defense lawyer, had advised Hines to plead guilty. We also observe that this was a straightforward, single sale drug case, not a complex prosecution such as a long running fraud or conspiracy.

At the PCR hearing, Hines testified Judge Hayes should have recognized he did not want to proceed pro se, but was being pressured into doing so because Judge Hall told him he would not appoint him another lawyer and the trial date was so close he could not find a lawyer willing to try the case on such short notice. Yet, Judge Hayes and the plea waiver form advised Hines that if he could not afford a lawyer, one would be appointed for him, advice Hines did not further question or challenge at the time. Nor do we find the State's handling of the video or the LWOP notice diluted his intelligent and knowing waiver. Hines has not met his burden of proving his waiver was involuntary.

Our good colleague in dissent argues Hines was not warned adequately about the dangers of self-representation. The dissent maintains that the *Tovar* standard only applies in "garden variety" guilty pleas, and the nature of Hines' case–and his choices regarding his representation–changed utterly when the State served the LWOP notice on him in December after he had successfully released Wellborn, his retained counsel. According to the dissent, this sequence of events exerted great pressure on

Hines, for he "was therefore required to evaluate the significance of the mandatory life notice for the first time and weigh the prospect of mandatory life against the State's fifteen-year-offer–a choice he had never faced before."

We agree with the dissent that the specter of a mandatory life sentence would have caused Hines to do some hard thinking about his future. But this was no "December surprise" to Hines. As we have already mentioned, back in August, the State had told Wellborn, Hines' retained lawyer, that an LWOP notice was on the table. At the PCR hearing, Hines admitted Wellborn warned him about the LWOP possibility, and that he knew about it at least by October. As we have said, Wellborn later advised Hines to accept the fifteen-year negotiated plea.

We disagree that this was not an otherwise "garden variety" case. Drug prosecutions like this based on a single undercover buy captured on video are depressingly common. They are also straightforward, as the facts are few and the law certain. At any rate, *Tovar* does not use the phrase "garden variety," or limit its holding to a certain type of case. Instead, it permits us to consider–as we already have–the specific circumstances of the case, including its complexity and Hines' sophistication, in deciding whether the waiver was good.

The dissent also speculates Hines may have been confused about whether he could be appointed yet another lawyer. We agree that Judge Hayes' advice that he would appoint Hines a lawyer conflicted with Judge Hall's earlier statement. But Hines could have taken Judge Hayes at his word and taken him up on the offer to appoint him counsel; at the very least, he could have sought clarification.

The dissent tells us that Hines' waiver of counsel would have been voluntary had Judge Hayes told Hines he would benefit from having a lawyer because a lawyer could have advised him as to whether to take the plea. But Hines had already been told by Wellborn to take the fifteen-year deal, knowing the LWOP sword was hanging over him. The evidence had not changed. Deciding whether to take a negotiated plea for fourteen years did not require additional legal advice; it only required Hines to do the math.

We add three quick things. First, trial judges are free to engage in a more detailed *Faretta* dialogue at the plea stage than what this case and *Tovar* require. In many cases, a more expansive inquiry may better serve justice, and prevent future battles over whether the waiver was intelligently and voluntarily made.

Second, although we declined the writ as to the issue concerning the State's withholding of the drug buy video and we appreciate the sensitivity surrounding disclosure of evidence involving confidential informants, we caution prosecutors that using such evidence in crude carrot and stick routines that exceed the bounds of settled authority and due process do so at their peril. *See Hyman v. State*, 397 S.C. 35, 45–47, 723 S.E.2d 375, 380–81 (2012), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Roviaro v. United States*, 353 U.S. 53, 62–65 (1957).

Third, this case presents a prime example of the persistent problem that confronts busy circuit court judges almost every day: the reality that, when the State calls a case for plea or trial, there is, as Justice James has well put it, "typically no clear way to verify whether *Faretta* warnings have ever been given to the unrepresented defendant." *Osbey v. State*, 425 S.C. 615, 622, 825 S.E.2d 48, 52 (2019) (James, J., dissenting). Verification was even more elusive here as the assistant solicitor mistakenly told Judge Hayes that Judge Hall had already covered the "right to counsel" ground. *See generally* General Sessions Docket Management Order, S.C. Sup. Ct. Order dated May 24, 2023 at 5, 8 (providing "*Faretta* warnings shall be given to a defendant who desires to represent himself" at the initial appearance if a circuit court judge is presiding; if a circuit court judge does not preside at the initial appearance, *Faretta* warnings will be given at the second appearance).

To sum up, we hold only that, under the specific circumstances of Hines' case, his waiver of his Sixth Amendment right to counsel at the plea stage was valid. Accordingly, the decision of the court of appeals is

AFFIRMED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. FEW, J. dissenting in a separate opinion.

JUSTICE FEW: I respectfully dissent. Given the particular facts and circumstances in this case, it is clear to me Hines's choice to waive his Sixth Amendment right to counsel was not "made with eyes open." *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975). I would hold the plea court erred by failing to ensure Hines understood the dangers of self-representation before allowing him to plead guilty without an attorney.

This Court has consistently enforced the federal constitutional requirement that a criminal defendant who wishes to represent himself must be "adequately warned of the dangers of self-representation." *Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 582); *see also State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020) ("For a knowing and intelligent waiver to occur, the defendant must be '(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation.'" (quoting *Prince*, 301 S.C. at 424, 392 S.E.2d at 463). The pivotal word in this requirement is "adequately." Whether a trial court's warning of the dangers of self-representation was "adequate" depends on the facts and circumstances of that individual case.

The majority—as did the court of appeals—relies on *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004). In *Tovar*, the Supreme Court addressed the "narrow[] question" whether—in a garden-variety guilty plea—"the Sixth Amendment require[s] a court to give a rigid and detailed admonishment to a *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense." 541 U.S. at 91, 124 S. Ct. at 1389, 158 L. Ed. 2d at 222. The case before us now is not a garden-variety case, and *Tovar* should not be read as broadly as the majority suggests. The majority writes—citing *Tovar*—"The Supreme Court seems satisfied that at the guilty plea stage the defendant's 'eyes are open,' so long as he is warned that some general, undefined danger lurks ahead." In this statement, the majority overlooks the *Tovar* Court's instruction that "the information a defendant must have to waive counsel intelligently will 'depend, in each case, upon the particular facts and circumstances surrounding that case[.]'" 541 U.S. at 92, 124 S. Ct. at 1390, 158 L. Ed. 2d at 223 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938)). The necessity of this fact-specific inquiry is where the majority misses the import of *Tovar*.

Here, given the specific facts and circumstances preceding and surrounding Hines's guilty plea, a more extensive warning was required than the brief colloquy conducted by the plea court. When Hines appeared before Judge Hall on December 15 for the hearing on his motion to relieve counsel, Judge Hall asked Hines if he planned to represent himself. Hines answered "no" and indicated he would hire attorney Jack Swerling to represent him. Judge Hall then relieved Hines's lawyer. During the hearing, the State notified Judge Hall it intended to call the case for trial in less than a month—January 11, 2016—and notified Hines for the first time it intended to seek a mandatory sentence of life without parole. Judge Hall informed Hines, "The court would not appoint you any more lawyers." Presumably because Hines told the judge he did not plan to proceed without a lawyer, but instead would "hire Mr. Swerling," Judge Hall said almost nothing about any risk to Hines of representing himself. In fact, Judge Hall stated, "At some point if you don't have an attorney I will have to go through and warn you in detail about representing yourself because that will be what you are left with." He then told Hines "you need to be here at ten o'clock on January the fourth and we'll go over and make sure you understand your right about representing yourself." Judge Hall clearly believed he did not need to warn Hines on December 15 of the dangers of self-representation, so he did not.[1]

Hines apparently contacted Swerling on December 15, but was told Swerling would not represent him because the trial was set for January 11, which would not give him time to prepare. Two days later—December 17, 2015—Hines appeared before Judge Hayes to plead guilty without an attorney. The assistant solicitor began the hearing by representing to Judge Hayes "he has been advised of his right to counsel." The assistant solicitor certainly did not intend to mislead Judge Hayes, but if his statement was not flatly incorrect, it was misleading. As we have held many times, the Sixth Amendment requires that a defendant who wishes to proceed without a lawyer must be both "advised of his right to counsel" *and* "adequately warned of the dangers of self-representation." *Dial*, 429 S.C. at 133, 838 S.E.2d at 504 (quoting *Prince*, 301 S.C. at 424, 392 S.E.2d at 463). The assistant solicitor's statement to Judge Hayes incorrectly implied Judge Hall did both. Judge Hayes then told Hines

[1] The judge should not have hesitated. *See Osbey v. State*, 425 S.C. 615, 622, 825 S.E.2d 48, 52 (2019) (James, J., concurring) ("Perhaps the ideal time for giving *Faretta* warnings to the unrepresented defendant would be during either the defendant's first appearance or second appearance."). Certainly, whenever a criminal defendant raises the prospect of representing himself he should be immediately warned of the dangers of self-representation.

"if you cannot afford one . . . you would be appointed an attorney to represent you if you wish." This statement is in in direct contradiction to Judge Hall's statement two days earlier that the court "would not appoint you any more lawyers."

The obvious question that hangs over the December 2015 sequence of events is why Hines told Judge Hall he did not want to represent himself and intended to hire an attorney, yet two days later he appeared before Judge Hayes—representing himself—to plead guilty. A brief inquiry into that question by Judge Hayes would have revealed a true "danger of self-representation" Hines faced that would not be present in the garden-variety guilty plea the Supreme Court addressed in *Tovar*. The danger was that on December 15—immediately after Judge Hall relieved Hines's lawyer—the State informed Hines for the first time that he faced a mandatory life sentence if convicted. The State had given Hines until the end of the week to accept its plea offer of fifteen years. Hines was therefore required to evaluate the significance of the mandatory life notice for the first time and weigh the prospect of mandatory life against the State's fifteen-year offer—a choice he had never faced before. And he had to do so between Tuesday December 15 and Friday December 18, without a lawyer.

In addition, the conflicting information Hines received regarding whether he could have an attorney appointed for him created a strong possibility of confusion about whether an attorney could be made available to help him make this choice. This is important in understanding the pressure Hines was facing to quickly decide whether to take a plea deal without an attorney. The simple inquiry whether he understood that a lawyer could help him understand and make this difficult choice would have rendered his decision to proceed without a lawyer voluntary. But on the record before us, we have no idea whether Hines understood the difficult choice he faced, and he never had a lawyer to consult about it. Judge Hayes's summary statement, "Its dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney represent you," simply did not meet the Sixth Amendment standard.

The specific facts and circumstances of Hines's case distinguish it from *Tovar* and required the plea judge to do more than just recite that Hines had the right to counsel and that "some general, undefined danger lurks ahead." I would reverse the court of appeals.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kaci May and Kaci May as guardian ad litem for A.R.M., J.H.M., J.T.M., C.B.M., J.R.M., and J.W.M., Appellants,

v.

Dorchester School District Two, South Carolina Department of Social Services, Michael Leach, and Jasmine Flemister, Respondents.

Appellate Case No. 2020-001352

Appeal From Dorchester County
Maite Murphy, Circuit Court Judge

Opinion No. 6053
Heard June 7, 2023 – Filed March 13, 2024
Withdrawn, Substituted, and Refiled May 29, 2024

AFFIRMED

Deborah J. Butcher and Robert J. Butcher, both of The Camden Law Firm, PA, of Camden, for Appellant.

Kenneth P. Woodington and William H. Davidson, II, both of Davidson, Wren & DeMasters, of Columbia, for Respondents South Carolina Department of Social Services, Michael Leach, and Jasmine Flemister; and Thomas Kennedy Barlow, Susan Marie Fittipaldi, and Dwayne Traynor Mazyck, all of Halligan, Mahoney, &

Williams, of Columbia, for Respondent Dorchester School District Two.

MCDONALD, J.: Kaci May filed this circuit court action seeking to enjoin the South Carolina Department of Social Services (DSS) from interviewing her children at school and to prevent Dorchester School District Two (School District) from facilitating such interviews without a court order, warrant, subpoena, or new allegation of abuse or neglect. May appeals the order denying injunctive relief and challenges the circuit court's finding that because Respondents acted within their express statutory authority, their efforts to interview the children did not implicate the Fourth Amendment. We affirm the well-reasoned order of the circuit court.

Facts and Procedural History

Kaci and Warren May (collectively, the Mays)[1] were the parents of seven children: four biological children (J.T.M., C.B.M., A.R.M., and J.W.M.) and an adopted sibling group (J.H.M., J.R.M., and L.C.M.).[2] One or more of the adopted children suffered severe sexual abuse while with their biological family.

On March 27, 2017, the Mays attended a daylong meeting with School District personnel at Sand Hill Elementary School to discuss four of the children. At this meeting, May alleged in graphic detail that one of the adopted children had brutally raped one or more children in the May home. May called this child, who was present at the meeting, a rapist and made other concerning statements.

The School District reported May's statements to DSS, which opened an investigation. As a part of the investigation, DSS conducted—or attempted to conduct—interviews with the five school-aged children at Sand Hill Elementary School on March 29 and March 30. On March 31, two DSS caseworkers went to the family home in an effort to contact May and see the children they were unable

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[1] Warren May passed away in 2020.

[2] The Mays adopted J.H.M., J.R.M., and L.C.M. from foster care in June 2015. At the time of the circuit court's bench trial, at least two of the adopted children had been moved from the May home to residential facilities.

to interview at school, but May would not allow the caseworkers to enter the home and did not allow them to interview the children. DSS continued to investigate, and caseworkers conducted a combined school interview of three of the children on May 12.[3] Later that day, DSS indicated a case of physical neglect against May; the Mays subsequently filed an administrative appeal of that determination.

On June 15, 2017, Dorchester County DSS Director John Dunne advised the Mays that he had conducted an interim review of the case and "concluded that the decision to indicate the case for Neglect is supported by a preponderance of the evidence." Dunne also informed the Mays that DSS would seek intervention in family court. On June 23, DSS stayed the administrative appeal pending the outcome of the family court case.

Despite the serious safety concerns she had raised, May resisted all DSS efforts to contact the children or visit their home during June, July, and August 2017. Instead, she referred the caseworkers to her attorney.[4] At the start of the new school year, May instructed the School District that no further interviews with her children were to occur without someone first contacting May or her counsel.[5] On September 13 and 14, 2017, May withdrew J.H.M. and J.R.M. (two of the adopted children) from Sand Hill Elementary and Gregg Middle School and transferred them to Connections Academy, South Carolina's virtual charter school.

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[3] DSS was later able to interview two of the children on May 25. May conceded she did not object to DSS interviewing the children at school while the case was still within the investigative period.

[4] DSS's concerns are reflected in the caseworker's September 22, 2017 notes: "Kaci and Warren May have not allowed the department in their home. No assessments have been made for this family. The [Mays] have not been in direct contact with the department. The family's attorney is not responding to emails to schedule visits. . . . The department is concerned about the allegations and the inability to get in the home. The department is unable to properly assess for the safety and wellbeing of the minor children."

[5] The Sand Hill Elementary principal disregarded these instructions because the School District needed "a court order signed by a judge to make this happen."

DSS filed a family court case seeking non-emergency removal of the children from the May home on September 14, 2017. May counterclaimed, seeking, among other things, an order restraining DSS caseworkers from speaking with the Mays about legal issues in the case. She also filed a motion seeking an order restraining DSS from "interrogating [her] children at school."
DSS conducted additional in-school interviews in the fall of 2017. Three of the children were interviewed on September 18, one child was interviewed on September 22, and DSS conducted a brief, combined interview with three of the children on November 20.[6]

On December 7, 2017, May, individually and as guardian ad litem for the seven children, filed this circuit court action seeking preliminary and permanent injunctive relief to prevent DSS from interviewing her children at school. She also sought to enjoin the School District from facilitating such interviews unless DSS presented a court order, warrant, subpoena, or new allegation of abuse or neglect.

On June 14, 2018, the family court action was dismissed by voluntary stipulation. DSS agreed the "investigation beginning on or about March 28, 2017[,] resulting in a finding of abuse and/or neglect on or about May 12, 2017[,] is hereby overturned." DSS closed its case on June 21.

Following a hearing, the circuit court denied May's motion for a temporary restraining order, finding May failed to establish irreparable harm or the lack of an adequate remedy at law. The School District and DSS then moved to dismiss. The circuit court granted these motions in part and dismissed the individual School District defendants. The remaining governmental defendants answered May's complaint and denied she was entitled to permanent injunctive relief. At the subsequent August 2020 bench trial, the circuit court directed a verdict for the School District and DSS. May timely appealed.

Analysis

"To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Richland County v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (quoting *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470

[6] DSS did not seek to interview the May children after November 20, 2017.

(2010)). "An injunction is a drastic equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party . . . . and only where no adequate remedy exists at law." *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). Although an order granting or denying a request for injunctive relief is generally reviewed for abuse of discretion, "where the decision turns on statutory interpretation . . . this presents a question of law." *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 8, 760 S.E.2d 785, 788 (2014). An appellate court "reviews questions of law de novo." *Id*. at 7, 760 S.E.2d at 788 (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

I. Irreparable Harm

May argues the circuit court erred in finding she failed to demonstrate irreparable harm. We disagree.

Initially, we note it is undisputed that DSS's last interview with any of the May children occurred in November 2017, and DSS closed its family court case in June 2018. Before both the family and circuit courts, May failed to offer any evidence of threatened or pending DSS investigations or of further DSS plans to interview her children at a school. Two of the three adopted children no longer live with the biological May family.

Significantly, May has not identified any injury aside from inconvenience or mild upset at the prospect of DSS returning to interview her children. The children testified that they knew they did not have talk to DSS, and some exercised their right not to answer questions. There is no evidence in the record that any of the children's grades suffered or that any of the children were harmed, much less to an extent that might have outweighed DSS's need to interview them regarding May's own report that one or more of her children had suffered sexual abuse by another child in the May home. Although May testified the children were upset by the DSS interviews, there is simply no evidence to support a claim that any of the May children have been harmed or would suffer harm in the absence of injunctive relief.

At least two of the adopted children had significant prior physical and psychological challenges, including but not limited to the horrific sexual abuse they suffered while with their biological family. These prior experiences caused stress and emotional harm far beyond any issue raised in the current matter. Thus,

it is difficult to comprehend how the emotional difficulty alleged could be attributed to the DSS interviews which, as discussed below, were appropriate and authorized by statute. Notably, May failed to demonstrate that DSS returning to a school to interview her children was anything more than a hypothetical possibility insufficient to support her claim for injunctive relief.[7] Accordingly, the circuit court properly found May failed to show the required irreparable harm.

II. Likelihood of Success on the Merits

May next argues the circuit court erred in finding she failed to establish a likelihood of success on the merits and in ruling section 63-7-920 of the South Carolina Code (2010) "was not limited by her constitutional protections." But the circuit court made no such ruling. As to May's constitutional claims, the circuit court recognized the United States Supreme Court "has never held that a social worker's warrantless in-school interview of a child pursuant to a child abuse investigation violates the Fourth Amendment." *See*, *e.g.*, *Camreta v. Greene*, 563 U.S. 692, 710–14 (2011) (examining in-school interviews in Fourth Amendment context but ultimately leaving the issue undecided and disposing of the case on mootness grounds). The circuit court then noted the DSS interviews here were authorized by statute and that May failed to show either DSS or the School District acted unreasonably by interviewing the children or permitting the interviews.[8] We agree with the circuit court.

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[7] We decline to dismiss May's appeal as moot because her case presents an issue that is capable of repetition but usually becomes moot before it may be reviewed. *See Wardlaw v. S.C. Dep't of Soc. Servs.*, 427 S.C. 197, 204, 829 S.E.2d 718, 721 (Ct. App. 2019) (finding that an appellate court may address a matter despite mootness where it raises an issue capable of repetition that "usually becomes moot before it may be reviewed" (citing *S.C. Dep't of Mental Health v. State*, 301 S.C. 75, 76, 390 S.E.2d 185, 185 (1990)). The interviews May challenges occur early in the process of abuse and neglect investigations, and a family court's review in such cases would be complete before any related civil action could be considered. *See*, *e.g.*, *Rainey v. S.C. Dep't of Soc. Servs.*, 434 S.C. 342, 351, 863 S.E.2d 470, 475 (Ct. App. 2021) (noting statutorily mandated timelines for investigation once DSS receives a report of possible abuse or neglect).

[8] The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against

Within twenty-four hours of receiving a report of suspected child abuse or neglect, DSS "must begin an appropriate and thorough investigation to decide whether the report should be 'indicated' or 'unfounded.'" *See* S.C. Code Ann. § 63-7-920(A)(1) (2010); *see also Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 331–32, 377 S.E.2d 102, 106–07 (Ct. App. 1988) (holding South Carolina Child Protection Act mandating "an 'appropriate and thorough' investigation," of an allegation of child abuse imposed a ministerial duty of care on county officials). Regarding investigations and case determinations, section 63-7-920(C) provides:

> The department or law enforcement, or both, may interview the child alleged to have been abused or neglected and any other child in the household during the investigation. The interviews may be conducted on school premises, at childcare facilities, at the child's home or at other suitable locations and in the discretion of the department or law enforcement, or both, may be conducted outside the presence of the parents. To the extent reasonably possible, the needs and interests of the child must be accommodated in making arrangements for interviews, including time, place, method of obtaining the child's presence, and conduct of the interview. The department or law enforcement, or both, shall provide notification of the interview to the parents as soon as reasonably possible during the investigation if notice will not jeopardize the safety of the child or the course of the investigation. All state, law enforcement, and community agencies providing child welfare intervention into a child's life should coordinate their services to minimize the number of interviews of the child to reduce potential emotional trauma to the child.

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unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend IV. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *Elkins v. United States*, 364 U.S. 206, 223–24 (1960), including public school officials, *New Jersey v. T.L.O.*, 469 U.S. 325, 336–37 (1985).

In our view, the language of § 63-7-920(C) establishes the circuit court correctly found May failed to demonstrate a likelihood of success on the merits. However, we must also address May's arguments that (1) the probable cause standard for warrants issued under § 63-7-920(B) applies to interviews conducted pursuant to § 63-7-920(C) and (2) the interviews here violated the Fourth Amendment.

Section 63-7-920(B) provides:

> The department may file with the family court an affidavit and a petition to support issuance of a warrant at any time after receipt of a report. The family court must issue the warrant if the affidavit and petition establish probable cause to believe the child is an abused or neglected child and that the investigation cannot be completed without issuance of the warrant. The warrant may authorize the department to interview the child, to inspect the condition of the child, to inspect the premises where the child may be located or may reside, and to obtain copies of medical, school, or other records concerning the child.

May's assertion that the probable cause standard for warrants issued under subsection (B) applies to interviews conducted under subsection (C) is foreclosed by the plain language of subsection (C), pursuant to which DSS conducted the in-school interviews of the May children. While subsection (B) does contain a warrant provision, its terms apply only when "the investigation cannot be completed without issuance of the warrant." § 63-7-920(B). Among other things, subsection (B) authorizes DSS to inspect the premises where an abused or neglected child may be located or may reside. *Id.* In other words, DSS *may* seek a warrant when other authorized means, such as in-school interviews, are unavailable.[9] Moreover, subsection (C) states DSS "may interview the child alleged to have been abused or neglected and any other child in the household during the investigation" and such interviews "may be conducted on school premises, at childcare facilities, at the child's home or at other suitable locations and in the discretion of the department or law enforcement, or both, may be conducted outside the presence of the parents." § 63-7-920(C).

[9] In practice, and as referenced by May's counsel at trial, such warrants are referred to as "inspection warrants."

In her appellate brief, May arguably concedes subsection (B) is inapplicable to in-school interviews conducted under subsection (C) by stating "schools are often the only places SCDSS and/or law enforcement may have contact with a child without the undue influence of an abusive or neglectful caregiver." In either case, we find the plain language of subsection (C) permits DSS to interview children at school and—in the discretion of DSS or law enforcement—such interviews may be conducted "outside the presence of the parents." § 63-7-920(C).[10]

With respect to May's Fourth Amendment argument, "[i]n determining whether a search and seizure is reasonable, we must balance the government's need to search with the invasion endured by the plaintiff." *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993); *see also*, *State v. Houey*, 375 S.C. 106, 111, 651 S.E.2d 314, 316–17 (2007) (finding "the State's need to search must be balanced against the invasion occasioned by the search, and the search will be reasonable if the State's interest outweighs the interest of the individual" in cases involving the "health and safety of victims."). Like the circuit court, we have found no case in which our supreme court has determined a social worker's warrantless in-school interview of a child for purposes of a statutorily mandated investigation following a report of abuse or neglect violates the Fourth Amendment or the protections of the South Carolina Constitution.

In sum, May failed to show either that DSS acted unreasonably by interviewing her children at school or that the School District unreasonably permitted the in-school interviews expressly authorized by statute.[11] Based on the largely undisputed testimony, we agree with the circuit court that the interviews here were reasonable in inception and scope following May's own report of sexual abuse; her subsequent refusal to allow DSS to interview the children in their home necessitated that they be interviewed at school. And, May admits legitimate circumstances may exist in

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[10] This might be a different case had the governmental defendants even arguably abused their statutory discretion in investigating the actions May reported at her initial meeting with the School District. There simply are no facts here to support such a claim.

[11] Although May's appellate brief cites several cases containing broad statements of general legal principles, she fails to cite any case actually finding the kind of interviews DSS conducted here might violate a child's (or parent's) Fourth Amendment rights.

some cases for DSS to interview a child at school without a court order or a warrant. Concessions aside, we find § 63-7-920(C) expressly authorizes DSS to interview children at school without a warrant when conducting an investigation mandated by § 63-7-920(A)(1). Additionally, we find meritless May's claim that the either the School District or DSS unreasonably "seized" her children, or otherwise violated their constitutional rights by calling them from class and asking limited, basic questions for a short period of time. In light of the state's significant interest in interviewing the children following May's report, the circuit court properly found the in-school interviews did not violate the family's constitutional rights. It follows that the circuit court correctly denied May's request for injunctive relief in light of her inability to show a likelihood of success on the merits.

III. Adequate Remedy at Law

May next argues the circuit court erred in finding she would have an adequate remedy at law to address any harm she or the children might suffer from future "interrogations." Again, we disagree.

Although May was required to offer evidence demonstrating that at some point in the future, DSS is likely to again interview her children at school in direct contravention of her wishes, she failed to do so. While it is always possible that future events could lead to another DSS investigation, it is speculative to assume such will actually take place. In the event another DSS investigation does take place, May agreed she would "not [be] opposed to DSS interviewing the children that may be subject to a report of abuse and neglect. . . ." Nor would she object to additional interviews in a case "still in the investigation period." However, May would object to interviews conducted after the conclusion of an investigation resulting in an indication.

We find May has failed to establish the lack of an adequate remedy at law to address future harm that might result from subsequent DSS interviews. May's decision to forgo a state law damages claim and pursue only injunctive relief does not render the remedy at law inadequate for a case that might merit relief. Here, the circuit court properly found May failed to show she lacked an adequate remedy at law for harm that might result from "future interrogations."

Conclusion

Certainly, there may be—and have been—situations in which state actors overreach or otherwise act in a manner requiring constitutional scrutiny. There may be—and have been—cases in which the actions of DSS caseworkers or other agents or employees rise to the level necessary for injunctive relief in the constitutional context. This is not such a case. For these reasons, the circuit court's order denying injunctive relief is

AFFIRMED.[12]

THOMAS and HEWITT, JJ., concur.

[12] As our findings here are dispositive, we decline to address Respondents' additional sustaining grounds. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when a prior issue was dispositive).