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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICAH CHRISTIAN SYLVE BROWN,

APPELLANT

APPELLATE CASE NO. 2022-001605

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it denied Mr. Brown counsel in his trial for murder and attempted murder, where Mr. Brown did not waive his right to counsel by affirmative request or by misconduct, since an accused has the fundamental right to counsel?

STATEMENT OF THE CASE

During the April term of 2019, a Richland County Grand Jury indicted Micah Brown, the appellant, for two counts of murder and one count of attempted murder.[1]

On September 19, 2019, Mr. Brown appeared before the Honorable Casey Manning for an ex parte motion to relieve his counsel, Tracy Pinnock. The court granted the motion.[2]

On July 11, 2022, Mr. Brown appeared before the Honorable Clifton Newman for an ex parte motion to relieve his counsel, Judah VanSyckel. The court took the matter under advisement. On August 15, 2022, Mr. Brown reappeared before the Honorable Clifton Newman and the court granted the motion to relieve counsel. On October 14, 2022, Mr. Brown reappeared before the Honorable Clifton Newman for a status conference. Mr. Brown was not represented by counsel. Dale Scott represented the State. The court appointed Tivis Sutherland as standby counsel for Appellant.[3]

Appellant was tried before the Honorable DeAndrea Benjamin and a jury, from November 7 – 10, 2022. Mr. Brown appeared pro se, with Tivis Sutherland as standby counsel. Dale Scott prosecuted the case. Mr. Brown was convicted as indicted, and he was sentenced to serve

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[1] R. 308.

[2] It is undisputed the judge granted the motion. However, the court reporter "experienced a catastrophic failure of an external hard drive" and could not produce a transcript. Upon information and belief, undersigned counsel believes it was a very short hearing wherein Judge Manning granted the motion. The court's order relieving Ms. Pinnock is located at p. 305 of the Record on Appeal. The court reporter's email regarding the equipment failure is located at pp. 306-307 of the Record on Appeal.

[3] R. 1; R. 3, l. 1 – 5, l. 9; R. 32, ll. 2-18; R. 34; R. 36, ll. 7-22; R. 45, ll. 11-15; R. 47; R. 49, 4-15; R. 50, ll. 22-25.

concurrent terms of life without the possibility of parole for each count of murder, and thirty years for attempted murder.[4]

This appeal follows.

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[4] R. 53; R. 302, ll. 16-21; R. 314.

STANDARD OF REVIEW

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." *State v. Samuel*, 422 S.C. 596, 813 S.E.2d 487, 490 (2018). "[A]ppellate courts review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 194, 810 S.E.2d 836, 847 (2018). *See also United States v. Legree*, 205 F.3d 724, 729 (4th Cir. 2000) (review of alleged denial of due process in failing to appoint counsel is de novo).

ARGUMENT

I.

The court erred where it denied Mr. Brown counsel in his trial for murder and attempted murder, where Mr. Brown did not waive his right to counsel by affirmative request or by misconduct, since an accused has the fundamental right to counsel.

A. Introduction

Mr. Brown did not voluntarily waive his right to counsel—the court's decision that he would represent himself at trial was made over his repeated objection. Although the court stated that Mr. Brown appeared "difficult to get along with," he did not commit misconduct. *See State v. Boykin*, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996). He did not threaten or assault anyone. His requests were timely, and they were not dilatory. Mr. Brown had reasons for requesting substitute counsel. In particular, Mr. Brown had a legitimate complaint that counsel seemed insistent that he take a fifty-year plea offer, despite his right to a trial. Mr. Brown wanted a lawyer who was willing to try his case. The court did not find Mr. Brown had engaged in any misconduct, and instead it arbitrarily ruled that he waived his right to counsel by moving to relieve two attorneys over the course of four years: "I don't go past two lawyers."

The court's offer to appoint substitute counsel several months later, on the morning of trial, was not a substantial offer of assistance of counsel. Mr. Brown's rejection of this offer, in an attempt to protect his rights, did not waive his right to counsel. *See Powell v. Alabama*, 287 U.S. 45 (1932). Mr. Brown was forced to go to trial without counsel in a murder case. This error requires reversal. *See United States v. Cronic*, 466 U.S. 648, 658 (1984); *Chapman v. California*, 318 U.S. 18, 23 n. 8 (1967).

B. Relevant facts

Mr. Brown was charged with two counts of murder and one count of attempted murder. The charges arose from events that occurred on November 7, 2018. Mr. Brown was arrested within two days.[5] He was entitled to have a trial on the charges. He was also entitled to counsel, and to the effective assistance of counsel. He was entitled to discovery. Counsel was obliged to abide by Mr. Brown's decision as to the plea to be entered. *See* U.S. CONST. amend. VI; U.S. CONST. amend. XIV; *Cronic*, 466 U.S. at 653; Rule 5, SCRCrimP; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Strickland v. Washington*, 466 U.S. 668, 686 (1984); Rule 1.2, RPC, Rule 407, SCACR.

On September 9, 2019, Mr. Brown appeared before the Honorable L. Casey Manning for a motion to relieve his appointed counsel, Tracy Pinnock. Mr. Brown would later explain he was unhappy with Ms. Pinnock's representation because he had not received discovery thirty days after a motion to compel was granted. The court granted the motion to relieve counsel, and Judah VanSyckel was appointed.[6]

Several years later, on July 11, 2022, Mr. Brown appeared in front of the Honorable Clifton Newman for a motion to relieve his appointed counsel, Judah VanSyckel (counsel). At that point, trial was scheduled for October 31, 2022—over three and a half months away. Mr. Brown said he had attempted to have this motion heard "a year ago." Mr. Brown had complaints about counsel's performance. Of note, Mr. Brown was disquieted by counsel's seeming insistence that he take a fifty-year plea offer. "[Y]ou're telling me to take a plea of 50 years. He say I'll be 70 when I come

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[5] R. 308; R. 91, ll. 2-17.

[6] R. 11, ll. 14-23; R. 5, l. 16 – 6, l. 2; R. 305.

home and that's good." Mr Brown explained he did not ask for a plea offer and stated his position was that he was not guilty.[7]

Mr. Brown also expressed concern that counsel's behavior was dilatory. In particular, he was alarmed by counsel's remarks to him that counsel believed it was in Mr. Brown's interest if counsel sat on his "A-S-S" for a while, instead of trying to move the case forward. "[H]e even told me . . . I know I've been sitting on my, quote, A-S-S but sitting on my A-S-S is helping you. So you ain't doing nothing for me at all." "[M]y case is not a case where you're supposed to sit on your behind."[8]

Counsel told the court, "I certainly think that this is a tough case. There are statements by the victim of the alleged murder that . . . could be used to cross-examine [Mr. Brown] and I think that he would look bad." Counsel stated that Mr. Brown's rejection of a fifty-year plea offer had made his representation "extraordinarily difficult." "I had to beg for the offer that I was able to get . . ." Counsel claimed Mr. Brown said he would take twenty or thirty years for voluntary manslaughter and so counsel did not want to do anything that "spurs the court to go and put the case on a docket." However, there had never been an offer of voluntary manslaughter and the case was four years old.[9]

Counsel further stated he hired an investigator who, along with counsel, encouraged Mr. Brown to plead guilty: "[W]e encouraged him to plead." Counsel said he and the investigator told Mr. Brown, "[W]e've worked out an offer for you that's not life." Counsel told the court there had

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[7] R. 1; R. 4, ll. 3-6; R. 5, ll. 15-17; R. 14, ll. 23-25; R. 22, ll. 19-23; R. 28, ll. 19-24.

[8] R. 10, 10-15; R. 15, ll. 13-14.

[9] R. 7, l. 24 – 8, l. 22.

been a "breakdown" in his relationship with Mr. Brown. During one meeting with Mr. Brown: "I was repeatedly called a pussy ass."[10]

As the hearing went on, Mr. Brown understood the court to be encouraging him to accept the plea offer. "[H]e said he worked out a plea for you, so he didn't have to do all the stuff you're saying that he needed to do to be ready for a trial." The court stated that if the prosecution proved its case,

> . . . you're lucky not to get life . . . you have like a 75 percent chance of getting life. So he's working, trying to get you something less than that, you should be thanking him for trying to save you. You can't—
>
> THE DEFENDANT: Fifty years?
>
> THE COURT: Pardon?
>
> THE DEFENDANT: Are you trying to convince me to do 50 years?
>
> THE COURT: I'm just having a conversation because it's solely up to you. Chances are I'll be your judge on October 31st. And we'll be sitting and witness after witness and the jury will say whether guilty or not guilty. And if you're guilty, you get a sentence.[11]

At another point in the hearing, the following exchange occurred.

> THE DEFENDANT: I ain't taking 50 years either. I'm not signing something in blood.
>
> THE COURT: You don't have to take 50 years. You have the right to a jury trial?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And then if you're found guilty, it won't be what you take, it will be what the judge gives you. If the judge says life, that's it.[12]

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[10] R. 9, l. 1; R. 17, l. 18 – 18, l. 12; R. 26, ll. 4-8.

[11] R. 28, ll. 9-11; R. 20, l. 15 – 21, l. l. 8.

[12] R. 18, ll. 13-20.

However, the court also stated that Appellant could have a jury trial, and if the jury found him not guilty, he would be free to go.[13]

The court expressed an unwillingness to appoint successive counsel. “I don’t appoint lawyer after lawyer after lawyer . . . he can’t pick and choose saying I like this lawyer, I don’t like that one, I want this one, I don’t want that one.” “**I don’t go past two lawyers**.” “I don’t just name lawyer after lawyer after lawyer because I’m convinced that no one can satisfy you. That’s why you’re in the situation you’re in because you’re difficult to deal with and you’re under a lot of pressure. You’re under a lot of stress.”[14]

The court also stated that if it relieved counsel, Mr. Brown would likely have to represent himself. THE COURT: “If I let him go, if I let you relieve him, then you won’t have a lawyer because I’m not going to appoint another one because if you can’t get along with Pinnock and you can’t get along with VanSyckel, then you won’t be able to get along with another one either.” THE DEFENDANT: “I probably would, you never know until you try it.”[15]

The court asked Mr. Brown whom he wanted appointed. “[**Y**]**ou can tell you’re difficult to get along with, don’t you think**?” Mr. Brown eventually named two public defenders. However, the court noted one of them was retiring, and an intern in the courtroom said the other one was moving home to Seattle. The court asked, “Who else you want?” and Mr. Brown replied, “Whoever you put me with.”[16]

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[13] R. 15, ll. 1-4; R. 15, ll. 1-4.

[14] R. 9, ll. 4-10; R. 20, ll. 3-4 (emphasis added); R. 26, ll. 13-17.

[15] R. 21, l. 23 – 22, l. 4.

[16] R. 23, ll. 5-8 (emphasis added); R. 24, l. 12 – 25, l. 19.

The court again stated that if it relieved counsel, then Mr. Brown "might have to handle this one yourself." THE COURT: "You have a Constitutional right to represent yourself." THE DEFENDANT: "I can't handle it myself. I can't . . . I ain't want no plea." The court stated it would reconvene the hearing at a later date.[17]

The hearing reconvened on August 15, 2022. Mr. Brown again asked counsel be relieved. The court stated, "You can represent yourself. You don't have a right to pick and choose. You've been given how many lawyers now?" "You have not convinced me of any legitimate reason why he should be removed other than that's what you want."[18]

Mr. Brown again repeated his complaints, in conjunction with which, Mr. Brown stated for the first and only time during any of the proceedings, that he would rather represent himself than take the plea offer. The court again stated that if it relieved counsel, Mr. Brown would have to represent himself. Counsel stated that when he went to meet with Mr. Brown after the last hearing, Mr. Brown did not want to meet with him. Mr. Brown again asked to have counsel relieved.[19]

The court ruled that counsel was relieved, Mr. Brown would represent himself, and that standby counsel would be appointed. Mr. Brown repeated that he did not want to represent himself.[20]

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[17] R. 30, l. 7-13; R. 31, ll. 12-13.

[18] R. 34; R. 37, l. 3 – 38, l. 1.

[19] R. 38, l. 2 – 43, l. 18.

[20] R. 45, 11-18.

Two months later, on October 14, 2022, Mr. Brown and the solicitor appeared before the court for a status conference. The solicitor stated that he wanted to "make sure that everybody is on the same page that you will proceed November 7th with Mr. Brown representing himself on these charges." Mr. Brown stated, "It wasn't my decision to go pro se . . . When I come in here doing pro se, I'm not saying not a word. I'm not capable of representing myself, so y'all have to do what y'all have to do."[21]

The court stated that it would appoint Tivis Sutherland to serve as standby counsel. The court further stated, "Mr. Brown has been advised of the dangers of self-representation. He did not want to have a lawyer that was provided to him, so he has to represent himself."[22]

The trial convened on November 10, 2022, in front of the Honorable DeAndrea Benjamin and a jury. The court asked Mr. Brown if it was correct that he wished to represent himself. Mr. Brown stated: "Well, Your Honor, no offense, but I was forced to represent myself. But I don't know his name, so I'm not trippin', but I'm just going to exercise my right to remain silent. I'm just not going to say anything from this point forward." However, the court and Mr. Brown engaged in a colloquy about his right to counsel.[23]

The court confirmed that Tivis Sutherland had been appointed as standby counsel, and Mr. Sutherland explained that he had met with Mr. Brown on the Thursday prior to trial, and had gotten the discovery the following day. Mr. Sutherland stated that he offered to represent Mr. Brown but

[21] R. 47; R. 49, l. 4 – 50, l. 4.

[22] R. 50, l. 5 – 51, l. 3.

[23] R. 53; R. 61, ll. 4-10.

Mr. Brown declined. The court told Mr. Brown that he had the right to an attorney and that the court was willing to appoint Mr. Sutherland to represent him.[24]

> THE COURT: . . . we haven't started the trial . . . if you wish to have Mr. Sutherland represent you, I can appoint him to represent you. But my understanding is, is that you do not wish for him to represent you; is that correct?
>
> THE DEFENDANT: I mean, I don't know the man, Your Honor. Like I say, no offense, I just—I really ain't got nothing to say to him if I ain't allowed.
>
> THE COURT: All right. So you wish to represent yourself?
>
> THE DEFENDANT: No. I was forced to represent myself. It's just what's going on.
>
> THE COURT: All right. Well, but you have—Judge Newman—you had two previous attorneys, and Mr. Sutherland has agreed to represent you, but you do not wish for him to represent you; is that correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: All right. And, sir. You understand self-representation can be dangerous, and you have the right to have the assistance of a lawyer at all stages of the proceeding? You understand that?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Sir, you understand that criminal defense is a highly specialized and technical area of law. You understand that?
>
> THE DEFENDANT: Yes, ma'am. **I just feel like, since I don't know him—he ain't been on my case too long or nothing like that, so I just don't—there's no way that can happen like that**.[25]

The court continued its colloquy with Mr. Brown, and explained that Mr. Sutherland was an experienced, trained criminal defense attorney while Mr. Brown was not. Mr. Brown and Mr. Sutherland were permitted to briefly confer off the record. When proceedings resumed, Mr. Brown

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[24] R. 61, l. 24 – 62, l. 15.

[25] R. 61, l. 11 – 64, l. 1 (emphasis added).

stated, "Like I say, Your Honor, I just really don't have nothing to say, Your Honor. I ain't going to lie. I just don't want to talk."[26]

> THE COURT: So you're going to represent yourself.
>
> THE DEFENDANT: I'm going to exercise my right to remain silent.
>
> THE COURT: All right. Well, I guess, do you want me to appoint Mr. Sutherland as your attorney?
>
> THE DEFENDANT: I'm going to exercise my right to remain silent, Your Honor. Nobody speaking or nothing like that.[27]

The colloquy continued, with the court advising Mr. Brown of the dangers and disadvantages of self-representation, and the consequences of conviction. Mr. Brown reiterated that he did not wish to represent himself but desired to remain silent. The court again offered to appoint Mr. Sutherland.[28]

> THE COURT: . . . If you don't wish to represent yourself, I'll appoint Mr. Sutherland to represent you, and you're going to still remain silent because he'll do all the talking. If—but you keep telling me you don't want Mr. Sutherland to represent you.
>
> THE DEFENDANT: I just don't—I ain't really—can't really say too much, I just want to save my right to remain silent. I'm going to remain silent. I ain't trying to disrespect you or nothing like that. I just ain't really got nothing to say.
>
> THE COURT: So, do you want me to appoint Mr. Sutherland or not?
>
> THE DEFENDANT: I ain't got nothing to say.[29]

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[26] R. 64, l. 2 – 65, l. 9.

[27] R. 65, ll. 10-16.

[28] R. 65, l. 17 – 67, l. 16.

[29] R. 66, l. 18 – 67, l. 5.

The court stated, "Mr. Sutherland is there as standby counsel to assist you with procedural. He cannot give you any advice but he can assist you procedurally as to how things work." The court ruled, "[I]t appears that the defendant is going to represent himself. I've offered to appoint Mr. Sutherland, and it's my understanding he does not want Mr. Sutherland appointed, and so, therefore, I do find that he has a constitutional right to proceed without an attorney, and so we will proceed without an attorney."[30]

C. Discussion

i. Mr. Brown was entitled to the assistance of counsel.

The Sixth Amendment right to counsel is a fundamental right made obligatory on the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.'" *United States v. Cronic*, 466 U.S. at 653 (quoting *Gideon*, 372 U.S. at 344). "Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' as this Court has recognized repeatedly." *Id.*, 466 U.S. at 653-54 (quoting *Powell v. Alabama*, 287 U.S. at 53.

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Id.*, 466 U.S. at 654. "Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'" *Cronic*, 466 U.S. at 656 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980)). Mr. Brown had a fundamental right to counsel. Forcing him to represent himself at trial for two counts of murder and one count of attempted murder was error.

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[30] R. 68, ll. 8-11; R. 69, ll. 15-20.

ii. Mr. Brown did not waive his right to counsel by affirmative request or by misconduct. The court's failure to appoint substitute counsel was arbitrary.

The courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Courts have recognized three ways in which a defendant may relinquish his right to counsel. First, a defendant may waive his Sixth Amendment right to counsel. A waiver is an intentional and voluntary relinquishment of a known right." *State v. Boykin*, 324 S.C. at 556, 478 S.E.2d at 690 (citing *United States v. Goldberg*, 67 F.3d 1092, 1099 (3d Cir. 1995)). *See Faretta v. California*, 422 U.S. 806, 835 (1975) (defendant must be informed of the dangers and disadvantages of self-representation, or record must show he had sufficient background to appreciate them before he waives his right to counsel); *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (for a knowing and intelligent waiver to occur, defendant must be advised of right to counsel and adequately warned of dangers of self-representation).

Mr. Brown never asked to proceed pro se. The only time he stated he would proceed pro se was, as seen, when he stated he would rather represent himself than plead guilty.[31] He did not affirmatively request to represent himself. *See Osbey v. State*, 425 S.C. 615, 620, 825 S.E.2d 48, 51 (2019) (*Faretta* applies to any waiver, whether by affirmative verbal request or by conduct).

"A defendant may also waive his waive his right to counsel through his conduct. Once a defendant has been warned that his misconduct will thereafter be treated as a waiver of his right to counsel, any subsequent misconduct is treated as a 'waiver by conduct.'" *Boykin*, 324 S.C. at 556, 478 S.E.2d at 691 (cleaned up) (quoting *Goldberg*, 67 F.3d at 1100). "Most courts have held there

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[31] R. 38, ll. 4-18.

can be no 'waiver by conduct' unless the defendant is first warned of the consequences of his actions." *Id. Faretta* warnings apply to waiver by conduct. *Osbey*, 425 S.C. at 620, 825 S.E.2d at 51. "Finally, some courts have held a defendant may forfeit his Sixth Amendment right to counsel. Forfeiture results in the loss of the right regardless of the defendant's knowledge of either the consequences of his actions or the dangers of self-representation." *Boykin*, 324 S.C. at 556, 478 S.E.2d at 691 (citing *Goldberg*, *supra)* (footnote omitted).[32]

Mr. Brown did ask to represent himself, and he did not commit misconduct such that he waived his right to counsel (or forfeited it, if that doctrine were to be recognized in this state). He did not attempt to delay or fail to appear for court, and he was indigent. *See State v. Fairey*, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007) (finding defendant engaged in deliberate and dilatory conduct sufficient to waive his right to counsel by conduct where he failed to appear for trial, failed to pay his retained attorney, failed to cooperate with his public defender, and he engaged in delay tactics such as moving throughout the country, making motions to continue the case, and failing to sign and return acknowledgements); *State v. Cain*, 277 S.C. 210, 284 S.E.2d 779 (1981) (waiver of right to counsel is inferable from defendant's failure to fulfill conditions of his appearance bond and fact he neglected to keep in contact with his attorney).

State v. Gill, 355 S.C. 234, 241-45, 584 S.E.2d 432, 436-38 (Ct. App. 2003) (waiver of counsel may be inferred from actions of defendant who did not qualify for public defender, where

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[32] "[B]ecause of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a 'waiver by conduct' could be based on conduct less severe than that sufficient to warrant a forfeiture." *Boykin*, 32 S.C. at 556, 478 S.E.2d at 691. "While a number of courts have recognized the existence of forfeiture of right to counsel, only two courts have held a defendant's conduct serious enough to warrant a forfeiture, particularly in the absence of any prior warning by the court." *Id.* "[W]e need not decide whether South Carolina should embrace the doctrine of forfeiture . . ." *Id.*, 324 S.C. at 558, 748 S.E.2d at 692.

defendant repeatedly assured trial judge he could hire an attorney but failed to do so, failed to appear for court and was tried after he was picked up on a bench warrant, and where he had been allowed a reasonable time to hire counsel); *State v. Jacobs*, 271 S.C. 126, 128, 245 S.E2d 606, 608 (1978) (non-indigent defendant waived his right to counsel where court urged him to retain counsel, he was given additional time to retain counsel, and on day of trial could not name his attorney or indicate when counsel would be available). *Cf. Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (holding there is no Sixth Amendment right to a meaningful attorney-client relationship, and trial judge did not err by denying mid-trial continuance motion since court could have concluded defendant's requests to be represented by his prior attorney "were not made in good faith but were a transparent ploy for delay").

Nor did Mr. Brown did seek to raise frivolous defenses or abuse the court process. *Cf. State v. Samuel*, 422 S.C. at 606, 813 S.E.2d at 493 ("In most cases where a court has found a defendant to be manipulative, the defendant was clearly attempting to dispense with counsel in order to make impermissible arguments or raise invalid defenses at trial—in effect, to 'beat the system'—rather than to waive the benefits of counsel."); *United States v. Moore*, 706 F.2d 538, 539 (5th Cir. 1983) (defendant's dismissal of four appointed attorneys and several of their law partners for frivolous reasons—that one was a former prosecutor, that another had formerly worked for the Internal Revenue Service—with the last dismissal coming four days before trial, was functional equivalent of voluntary and knowing waiver of right to counsel).

Mr. Brown did not harm, assault, or threaten anyone. Nor did he attempt to sow disorder. *See United States v. Jennings*, 855 F. Supp. 1427, 1445 (M.D. Pa. 1994), *aff'd*, 61 F.3d 897 (3d Cir. 1995) (indigent defendant who, without provocation or justification, physically assaults court-appointed counsel, thereby waives right to appointed counsel); *United States v. McLeod*, 53 F.3d

322, 323-26 (1995) (in trial for retaliating against a witness, defendant's conduct forfeited his right to counsel where he was abusive and threatened to harm counsel, repeatedly threatened to sue counsel, and asked counsel to engage in unethical conduct); *Commonwealth v. Means*, 907 N.E.2d 646, 658 (Mass. 2009) ("The acts leading to waiver by conduct need not be violent, but they must be highly disruptive of orderly or safe court proceedings.").

The hearing (July 11, 2022) took place several months before the scheduled trial date (October 31, 2022). This was not a morning-of-trial attempt to delay. Had substitute counsel been appointed when counsel was relieved on August 15, 2022, he or she would have had two and a half months to prepare for trial. Mr. Brown expressed a legitimate complaint that counsel seemingly insisted he plead guilty to murder when he did not want to plead guilty to murder. *See Cronic*, 466 U.S at 656, n. 19 (even when no theory of defense is available, once the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt); Rule 1.2, RPC, Rule 407, SCACR (lawyer shall abide by client's decision, after consultation with lawyer, as to plea to be entered). Counsel did not identify any reason to think a favorable plea offer would be made. It was undisputed Mr. Brown unequivocally rejected the fifty-year plea offer that was extended.

Mr. Brown's complaint that counsel stated he was sitting on his "A-S-S" in a four-year-old murder case also appears legitimate, although this may have been due to miscommunication based on an unfortunate choice of words. *See* Rule 3.2, RPC, Rule 407, SCACR (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client). The court should have

relieved counsel and appointed new counsel. Courts should indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. at 464.[33]

The court did not identify any misconduct by Mr. Brown that would support a finding of waiver of counsel by conduct, although the court noted Mr. Brown appeared "difficult to get along with." Instead, a fair reading of the record shows the judge offered his opinion to Mr. Brown that he should plead guilty. The judge told Mr. Brown that "[c]hances are" he would be the trial judge, that if the State proved its case Mr. Brown had a "seventy-five percent chance of getting life," and "[i]f the judge says life, that's it." The judge told Mr. Brown he should thank counsel for getting him a fifty-year plea offer, and that Mr. Brown would have to represent himself if he wanted counsel to be relieved.[34]

The court should not have made these improper remarks that were contrary to law. *See State v. Pierce*, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986) (overruled on other grounds by *State v. Torrance*, 305 S.C. 45, 406 S.E.2d 315 (1991) (reversal required where judge stated that although he would instruct jury they could not hold it against the defendant if he chose not to testify, "they are human beings and you know and I know that any twelve people who have been called upon to resolve some dispute cannot help but have it in their mind and wonder why he did not tell us his side of it," since these comments were "erroneous, improper and contrary to South Carolina law"); *State v. Crisp*, 362 S.C. 412, 415-26, 608 S.E.2d 429, 432 (2005) (reversed due to judge's comments to defendant regarding his waiver of right to jury trial, that potential jurors could

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[33] As seen, the transcript of the motion to relieve Ms. Pinnock could not be obtained. However, Mr. Brown would later testify he was unhappy with Ms. Pinnock because he had not received discovery thirty days after a motion to compel was granted. R. 5, l. 14 – 6, l. 2; R. 11, ll. 14-23. Mr. Brown was entitled to view discovery in his case. *See* Rule 5, SCRCrimP; *Brady v. Maryland*, 373 U.S. at 87.

[34] R. 20, l. 11 – 23, l. 8.

"testify under oath that they are for the death penalty when they're not," since the comments "were fundamentally erroneous and constitute prejudicial error").

State v. Owens, 362 S.C. 175, 178, 607 S.E.2d 78, 80 (2004) ("Although the trial court must strive to ensure that a criminal defendant's waiver of the right of a jury trial is knowing and voluntary, the court should never inject its personal opinion into that decision. The comments here impermissibly did so."); *State v. Jenkins*, 436 S.C. 362, 375, 872 S.E.2d 620, 627 (2022) ("while discussing with a defendant a choice the defendant must make about a constitutional right, the trial court may not make an inaccurate statement of law nor inject its personal opinion into the defendant's analysis"). Mr. Brown had the right to make the decision of whether to go to trial or plead guilty free of any influence or coercion from the motions judge. He had not committed misconduct. The court's failure to appoint substitute counsel when it relieved his counsel was arbitrary and improper: "I don't go past two lawyers." U.S. CONST. amend. VI; U.S. CONST. amend. XIV; *see United States v. Meeks*, 987 F.2d 575, 579 (9th Cir. 1993) (court erred in denying defendant's motion to substitute counsel while at same time granting attorney's motion to withdraw—by doing so, it waived defendant's right to counsel for him, leaving him without representation).

iii. The court's finding that Mr. Brown wished to proceed pro se, based on his rejection of the court's morning-of-trial offer to appoint substitute counsel, was error.

Mr. Brown's refusal of the trial judge's offer to appoint standby counsel as his lawyer on the morning of trial did not effect a waiver of his right to counsel, since it was not a substantial offer of counsel. A fair reading of this record shows that Mr. Brown was legitimately concerned standby counsel had not had enough time to prepare for trial in this double murder and attempted

murder trial.[35] Mr. Brown's repeated statements that he wanted to remain silent also indicate that he wanted to protect his constitutional rights, but he did not know how to do so.

The trial judge engaged in a *Faretta* colloquy with Mr. Brown. As seen, Mr. Brown stated he did not wish to represent himself. Yet the trial court found that he was entitled to proceed pro se.[36] This was error, since Mr. Brown did not affirmatively request to represent himself. "The most common method of waiving a right is by an affirmative, verbal request." *State v. Boykin*, 324 S.C. at 556, 478 S.E.2d at 690 (citing *Goldberg*, 67 F.3d at 1099). "The Supreme Court has held that a waiver of the right to counsel must be knowing, voluntary, and intelligent." *Id.* (citing *Johnson v. Zerbst*, 304 U.S at 465). "The defendant must be informed on the record of the dangers and disadvantages of self-representation, or the record must indicate the defendant had sufficient background to understand the disadvantages of self-representation before he waives the right to counsel." *Id.* (citing *Faretta v. California*, 422 U.S. at 835).

Mr. Brown's refusal of counsel appointed on the morning of trial (Monday), who had first met with him four days before (Thursday), and gotten the discovery three days before (Friday), was legitimate. The chance that any counsel appointed the morning of a double murder and attempted murder trial could provide effective representation was so remote that this was not a fair offer. *See State v. Reed*, 332 S.C. 35, 44, 503 S.E.2d 747, 751 (1998) (court did not err by denying defendant's request to have standby counsel represent him on eve of sentencing phase—court was faced with allowing standby counsel to step in and cross-examine witnesses on less than twenty-four hours preparation); *Cronic*, 466 U.S. at 659-60 (Adversary process is presumptively unreliable when "although counsel is available to assist the accused during trial, the likelihood that

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[35] R. 63, l. 23 – 64, l. 1.

[36] R. 69, ll. 15-20.

any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.").

Powell v. Alabama is instructive. In *Powell*, 287 U.S. at 53, no lawyer had been named or definitely designated to represent the defendants until the morning of trial. "[S]uch designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id.*, 287 U.S. at 57.

The Supreme Court decried the trial of defendants who "were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." *Id.*, 287 U.S. at 58. The duty of the court, pursuant to the Sixth and Fourteenth Amendments, to assign counsel, "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id.*, 287 U.S. at 65. Absent an opportunity to prepare the case, morning-of-trial appointment of counsel in this murder case would have still left Mr. Brown with an inherently unfair trial, as he would not have been "accorded the right of counsel in any substantial sense." *Id.*, 287 U.S. at 58.

iv. The appointment of standby counsel did not satisfy the guarantee of counsel.

The appointment of standby counsel was insufficient to fulfill Mr. Brown's constitutional right to counsel. The appointment was problematic on these facts, as it provided a veneer of

propriety without conferring concrete protections.[37] *Cf. Powell v. Alabama*, 287 U.S. at 56 ("this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one").

The practical duties of standby counsel seem to vary from courtroom to courtroom, despite the fact that hybrid representation is not permitted in South Carolina.[38] A comparison of the following cases illustrates the inconsistent manner in which standby counsel is employed in this state. *See State v. Sanders*, 269 S.C. 215, 217, 237 S.E.2d 53, 54 (1977) (public defenders acted as accused's "standby counsel and advisors"—"judge permitted Sanders to have the advice and assistance of two Public Defenders while he represented himself."); *State v. Porter*, 389 S.C. 27, 38, n. 7, 698 S.E.2d 237, 243 (Ct. App. 2010) ("neither Porter nor his standby counsel moved to be admitted to any bench conferences either before or during the trial"); *State v. Giles*, 407 S.C. 14, 17, 754 S.E.2d 261, 262 (2014) (standby counsel made argument to trial judge on behalf of defendant); *State v. Campen*, 321 S.C. 505, 508, 469 S.E.2d 619, 621 (Ct. App. 1996) (overruled by *State v. Lewis*, 328 S.C. 273, 494 S.E.2d 115 (1997)) ("Campen's standby counsel sat with him throughout the trial, made motions on his behalf, and advised him on several occasions"); *State v.*

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[37] It is unclear, for example, the extent to which standby counsel owes a pro se defendant ethical duties. "[T]here is considerable confusion among both judges and defense counsel concerning the ethical obligations of and limitations on standby counsel." Peter A. Joy & Kevin C. McMunigal, Ethical Responsibilities of Standby Counsel, Crim. Just., Summer 2021, at 49. *See also* ABA Formal Op. 07-448 (2007).

[38] *See State v. Rivera*, 402 S.C. 225, 239, 741 S.E.2d 694, 701 (2013) (there is no constitutional right to hybrid representation at trial or on appeal); *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) (standby counsel may "steer a defendant through the basic procedures of trial;" may "relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles"); *Faretta v. California*, 422 U.S. at 834 n. 46 (State may, even over objection of accused, appoint standby counsel "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.").

Reed, 332 S.C. at 43, 503 S.E.2d at 751 (trial court "allowed counsel to sit beside appellant as standby counsel and aid appellant to the extent he desired").

In this case, the court ruled that "standby counsel [is here] to assist you with procedural. He cannot give you any advice but he can assist you procedurally as to how things work."[39] Standby counsel, who was not Mr. Brown's advocate and could not advise him on substantive matters, was an insufficient bulwark against the State in this murder trial, and Mr. Brown was left without counsel as guaranteed by the Sixth and Fourteenth Amendments.

v. Mr. Brown is entitled to a new trial as a matter of law.

The denial of counsel entitles Mr. Brown to a new trial. "The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is *per se* reversible error." *State v. Boykin*, 324 S.C. at 555, 478 S.E.2d at 690 (citing *Chapman v. California*, 386 U.S. at 23 n. 8). "[T]here are some constitutional rights so basic to a fair trial that their infractions can never be treated as harmless error." This includes the right to counsel. *Chapman*, 386 U.S. at 23. "[A] trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 659.

Some errors "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149-50 (2006) (cleaned up) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). "Such errors include the denial of counsel[.]" *Id.* (citing *Gideon v. Wainwright*, 372 U.S. at 345). "Refusing to permit a defendant to receive the assistance of any counsel is the epitome of fundamental unfairness[.]" *Gonzalez-Lopez*, 548 U.S. at 159. (Alito, J., dissenting). *See also Holloway v. Arkansas*, 435 U.S. 475, 489 (1978).

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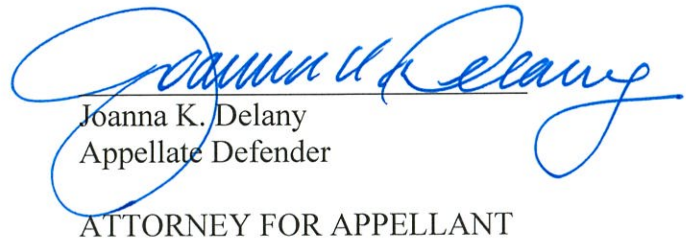
[39] R. 68, ll. 8-11.

Mr. Brown was erroneously denied the fundamental right to counsel in his trial for murder and attempted murder. This was a structural error which requires reversal. *Gideon*, 372 U.S. at 344; *Chapman*, 386 U.S. at 23 n. 8.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



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ATTORNEY FOR APPELLANT

This 29th day of November, 2023.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 29, 2023

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