STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Williamsburg County
The Honorable George M. McFaddin, Circuit Court Judge

Levern McCrea,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2020-001426

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 7

STANDARD OF REVIEW 9

ARGUMENT

Petitioner, well aware of his right to counsel and the dangers of self-representation, waived his right to counsel by conduct, and further forfeited his right to counsel by outrageous behavior that continued beyond warnings that he would be forced to represent himself or hire an attorney if he failed to conform his conduct 10

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) 11
Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) 9
Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) 9
Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) 9
Faretta v. California, 422 U.S. 806, 807 (1975) 10
Osbey v. State, 425 S.C. 615, 825 S.E.2d 48 (2019) 19
Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018) 9
State v. Bateman, 296 S.C. 367, 368, 373 S.E.2d 470, 470 (1988) 17
State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996) 11
State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992) 12
State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002) 13
State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 732 (2009) 10
State v. Suriano, 893 N.W.2d 543, 555 (Wis. 2017) 15
Stevenson v. State, 337 S.C. 23, 26, 522 S.E.2d 343, 344 (1999) 10
United States v. Goldberg, 67 F.3d 1092, 1100 (3d. Cir. 1995) 11
Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) 11

Rules

Rule 71.1(e), SCRCP 9

RESPONDENT'S STATEMENT OF THE ISSUE ON APPEAL

Petitioner, well aware of his right to counsel and the dangers of self-representation, waived his right to counsel by conduct, and further forfeited his right to counsel by outrageous behavior that continued beyond warnings that he would be forced to represent himself or hire an attorney if he failed to conform his conduct.

STATEMENT OF THE CASE

Each of Petitioner McCrea's three attorneys were relieved after McCrea subjected them to numerous derisive comments and proclaimed they were conspiring with the prosecution to convict him. This pattern continues in this PCR action as Petitioner has submitted pro se documents to this Court, moving to relieve opposing counsel after he was dissatisfied with the issues raised in the petition for writ of certiorari and claiming PCR counsel deliberately lost his case.

Petitioner retained Charles Barr, his first attorney, who then conspired with the prosecution, says Petitioner.

Before McKnight was appointed to represent Petitioner, Petitioner retained Charles Barr, Esquire. Subsequently, Petitioner fired Charles Barr because he "deliberately and intentionally ignored [his] letters and phone calls for nine and an a half weeks." App. p. 13, lines 6-8. Petitioner accused Charles Barr of "conspir[ing] with the State's attorney's office Ms. Kimberly Barr." App. p. 14, lines 5-6.

At the PCR hearing, Barr offered his perspective, advising the PCR court that an argument between them before the preliminary hearing led the hearing being cancelled and Barr being relieved. He explained Petitioner was mad because he felt Barr should have filed a Rule 5 hearing before the hearing and Petitioner was "talking a lot of trash to me. . . . I don't allow my clients to talk to me that way." App p. 946, line 19 – p. 947, line 1. Petitioner later wrote a letter accusing Barr with conspiring with the State and called Barr a bastard. App. p. 950 lines 8-11. Barr noted Petitioner threatened to destroy his business and claimed he had information about Barr's use of drugs. He threatened to send out hundreds of letters disparaging Barr. App. p. 953, lines 1-10.

The motion to relieve Cezar McKnight, Esquire, Petitioner's second attorney, in which

Judge James notes he is seeing a pattern.

On December 6, 2010, Cezar McKnight's motion to be relieved of counsel was heard by the Honorable George C. James, Jr. McKnight advised his relationship with Petitioner became acrimonious. He noted he was barraged from requests from Petitioner that were impossible for McKnight to perform. Petitioner wrote a letter telling him to go to hell. McKnight also referenced another letter from Petitioner laced with profanity and telling McKnight what he was doing was "basically BS." McKnight was concerned, given the souring of his relationship with his client, about being alone in isolation with Petitioner in the Florence County jail's holding area. App. pp. 1158-60.

McKnight advised the trial court he worked vigorously on the case and felt Petitioner even stood a good chance of being acquitted, but McKnight was concerned for his own safety. App. p. 1160, lines 16-25. Petitioner ultimately admitted he went "a little overboard" in his letters. Judge James retorted, "Yeah, you did. I'm reading the letters and you went overboard." Judge James advised he was not including the letters in the record because "they contain some frivolous communication." App. p. 1166, lines 10-16. Contrarily, Petitioner admitted to the court he requested McKnight to represent him. Petitioner opined that McKnight is a "great attorney." App. p. 1165, lines 21-23. Judge James advised Petitioner as follows:

> Some might say that you shoot yourself in the foot by helping create this situation. I'm not going to go further. I'm going to relieve him. I'm going to order that the Clerk's office to appoint the next named lawyer. I will tell you this, you can't play this game of being dissatisfied with things going along exactly as you want and provoking a change in lawyer. It's not going to happen again.

App. p. 1166, line 21 – p. 1167, line 3.

The hearing did not end, however. Petitioner announced what he dubbed a "serious complaint of a Fourteenth Amendment violation." He then complained about not receiving a

preliminary hearing. App. pp. 1168-69. Judge James addressed the attorneys, but then needed to warn Petitioner not to interrupt him. App. p. 1169, lines 1-4. Judge James noted: "Let the record show that Mr. McCrea, all he chooses to do is when anybody else is talking, including me, is to sit there and smirk and shake his head. If you want to do that, as I told somebody earlier today, that doesn't help you." App. p. 1169, lines 6-11.

Judge James learned Petitioner did not receive his preliminary hearing because he argued with the first attorney, Barr, before the preliminary hearing. Because (1) it already was rescheduled beforehand, (2) the victim's family already came to court twice for the cancelled preliminary hearings, and (3) Petitioner caused the situation preventing the preliminary hearing going forward, the prosecutor decided to indict the charges instead. Petitioner later agreed with Judge James he felt he had two attorneys who conspired with the State. He proceeded to accuse the prosecutor of perjury. App. pp. 1172-75. This led to Judge James observing:

> All right. Now, again, you're presumed innocent, you're entitled to a fair trial but you have to examine your own attitude and conduct and I'm beginning to see a pattern. You've had two excellent attorneys represent you. You can't just . . . see that look you're giving me. That is a window to your attitude. Your attitude is that if somebody doesn't do exactly what you think ought to be done they're engaged in a conspiracy and they're not, and they're not doing their job. Your due process argument is rejected and another lawyer will be appointed.

App. p. 1175, lines 13-23.

The third and last attorney, Hank Anderson, is relieved, after Petitioner sends "one of the most vilest, worst letters," is warned by Judge King not to send any more abusive letters, and then sends an abusive letter demanding Anderson's firing.

Hank Anderson was appointed next, but Anderson also ended up filing a motion to be relieved. A hearing was held on June 22, 2011, in front of the Honorable Howard P. King. In

support of his motion to be relieved, Counsel Anderson noted (1) Petitioner filed complaints with the office of disciplinary counsel, (2) Petitioner questioned his motives and relationship with the State's attorney, and (3) Petitioner told Anderson he would no longer talk to him. App. pp. 8-9. Judge King noted Petitioner's letter dated February 9, 2011, was one of the most "vilest, worst letters" he ever read from a client to an attorney. App. p. 19, lines 18-22. Petitioner's responded with claims Anderson, and nearly everyone else, lied to him. App. pp. 18-22. Nonetheless, Petitioner equivocated as to whether he wanted Anderson relieved. At the conclusion of the hearing, Judge King advised Petitioner he would require Anderson to continue to represent him. However, Judge King advised Petitioner if he continued to disrespect Anderson, then he would waive his right to counsel and be required to proceed pro-se or retain private counsel. App. pp. 40-41. Following the hearing, Anderson submitted a second motion to be relieved citing various letters from Petitioner. In the letters, Petitioner stated "I no longer need your lying assistance. I will now represent myself in my case when the time comes. Now, you can put in the paper work to Judge King or Judge James, I don't give a damn!" App. p. 1209. The letter concludes with the declaration, "There are no more warnings for Mr. Anderson." App. p. 1209. Judge King issued an order dated September 14, 2011, relieving Anderson, advising Petitioner to retain counsel within fifteen days, and noting the case was set for date certain on October 17, 2011. App. pp. 1203-04.

Petitoner represented himself at trial on October 17-21, 2011 before the Honorable W. Jeffrey Young. The jury found Petitioner guilty of murder and possession of a weapon during a violent crime. Judge Young sentenced Petitioner to a life sentence, with a consecutive sentence of five years on the weapons charge, observing, "The jury, I believe, got it right and you just don't work well in a civilized community." App. p. 698, lines 8-10.

Petitioner filed an application for post-conviction relief (PCR) and a PCR hearing was held before the Honorable George M. McFaddin on June 1, 2018. Applicant was present and represented by his second PCR attorney, Lance Boozer, Esquire. Petitioner was previously represented by Charles Brooks, but Brooks was relieved as counsel after Petitioner filed two grievances against him, requested he be relieved, and displayed abusive behavior towards him. Assistant Attorney General Julie Coleman represented the State. Judge McFaddin initially granted relief by order issued October 29, 2019, but following a hearing on the State's Rule 59(e), SCRCP motion on December 20, 2019, Judge McFaddin granted the State's motion and denied relief by an order issued in September, 2020.

PCR counsel filed a notice of appeal on October 22, 2020. True to form, Petitioner filed a pro se notice of appeal on October 14, 2020. Petitioner later filed a pro se document accusing PCR counsel of "deliberately sabotaging the hearing. . . ." The supreme court transferred the case to this court by order dated October 28, 2020. Appointed counsel filed a petition for writ of certiorari on August 18, 2021. Petitioner filed a pro se petition and motion to relieve counsel for "incompetence" and requested to proceed pro se. Petitioner subsequently filed a pro se amended petition. The supreme court denied the motion to relieve counsel. Respondent filed its return on December 21, 2021. This Court granted certiorari as to issue #1 on December 7, 2023. The Brief of Petitioner was filed on January 30, 2024. This Brief of Respondent follows.

STATEMENT OF FACTS

Petitioner has a list of people to kill. Cora Brown, the victim, was on the list, along with Petitioner's mother, sister, and some others. App. pp. 143-44. Michael Brown crawled inside his sister Cora Brown's window in the evening on March 12, 2009, after being told by Cora's sisters that she did not show up at work that day. He found Cora dead, with a hole in her back. App. pp. 107-17. Michael opened the door for his sister, Patricia Brown, who testified Cora lay face down, not wearing a top. App. pp. 126-27. The pathologist testified Cora suffered three shots to the back of the head and a shot into her chest cavity. Soot around the entrance wound established the shots were close contact wounds – the gun was discharged within inches of the deceased. App. pp. 412-14.

Christopher Briggs testified he and Petitioner visited Roberta Smith, mother of Petitioner's child, in Mt. Olive, North Carolina, together on March 10, 2009. App. p. 164. According to Briggs, they left Mt. Olive that afternoon "about dark" in Smith's vehicle, leaving behind Petitioner's vehicle, purportedly to tow another vehicle he owned to his house. App. pp. 169-70. Briggs fell asleep during the drive and awoke in Smith's vehicle, now parked in Cora Brown's (Victim) front yard. Petitioner was not in the vehicle when he woke up. Briggs heard several gunshots from house. App. p. 170. A few moments later Petitioner walked out of the house "with a little speed" and carrying a little black bag and a purse. App. p. 177.

Petitioner told Briggs, "Man listen to me, listen man my life is in your hands. If you feel like you going to say something I can go ahead and take care of this now." Briggs understood that meant Petitioner would do him bodily harm if he did not keep quiet. App. pp. 178-79. Petitioner left the house wearing a "rubber glove . . . like they use in the hospital" on his right hand. App. p. 180. Petitioner changed the license plate on Smith's vehicle that night. Petitioner recounted to Briggs how he knocked on Victim's door, and when she cracked the door open, he forced his way into her

home. Petitioner explained, "I took care of that. Won't be calling nobody else no faggot." App. pp. 182-83. They drove Smith's vehicle back to North Carolina and stayed the night at Smith's house before leaving early in the morning. App. pp. 183-84. While there, Petitioner tried to sell the gun to Smith's brother, but the brother declined. App. p. 186.

On their way back to South Carolina, Applicant threw the gun in a wooded area. App. p. 188. Briggs later brought law enforcement to the area and they were able to recover the weapon. App. p. 192. In the weeks after Victim's murder, Petitioner told Briggs to go recover the gun and shoot Petitioner's sister, Stephanie, if Petitioner was arrested, so the police would think the killer is still out there. App. p. 196.

Roberta Smith verified Petitioner and Briggs visited her home in Mt. Olive. They swapped vehicles at the end of the visit, with Petitioner taking her vehicle. App. pp. 495-99. Smith confirmed Petitioner attempted to sell a gun to her brother. The brother did not have enough money. App. pp. 512-14. Petitioner later wrote her a letter telling her if contacted by police, tell them she does not know anything. App. p. 531. He later wrote asking her to say Petitioner was with her the week of the murder. App. p. 536.

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. The reviewing court gives deference to the PCR court's findings on matters of credibility because the appellate court lacks the opportunity to directly observe the witnesses. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Petitioner, well aware of his right to counsel and the dangers of self-representation, waived his right to counsel by conduct, and further forfeited his right to counsel by outrageous behavior that continued beyond warnings that he would be forced to represent himself or hire an attorney if he failed to conform his conduct.

Of course, Petitioner bears the burden of proving his PCR claims and the present case fails to show Petitioner would allow any attorney the opportunity to provide him effective representation. Petitioner had sufficient background to understand the disadvantages of self-representation, but forfeited his right to counsel with beyond-the-pale conduct. Further, the record supports the PCR court's finding that he waived his right to counsel by his conduct, even after being warned he would lose his right to counsel, and with warnings about the dangers of self-representation. Accordingly, the PCR court's denial of relief is supported by probative evidence.[1]

The Sixth Amendment guarantees criminal defendants a right to counsel. Stevenson v. State, 337 S.C. 23, 26, 522 S.E.2d 343, 344 (1999). There are three ways a defendant may relinquish his right to counsel: "(1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 732 (2009).

In the instant case, Petitioner, with eyes wide opened, waived his right to counsel by conduct with the understanding of the dangers of self-representation and his right to counsel. Therefore, the PCR court's ruling is supported by evidence. Petitioner received proper warnings pursuant to Faretta v. California, 422 U.S. 806, 807 (1975), by way of various statements and warnings made during the myriad of hearings throughout Petitioner's case, and these Faretta warnings, along with Petitioner's consistent and extreme behavior, support a finding of waiver by conduct. Further, Petitioner

[1] Undersigned counsel recognizes the work of the late David Spencer, who represented the State in its return to petition for writ of certiorari.

forfeited his right to counsel through outlandish and abusive conduct continuing after several warnings that demonstrated Petitioner would never allow any attorney to provide Petitioner effective representation.

A defendant may waive his right to counsel through his conduct. United States v. Goldberg, 67 F.3d 1092, 1100 (3d. Cir. 1995). Once a defendant is warned his misconduct will thereafter be treated as a waiver of his right to counsel, any subsequent misconduct will result in "waiver by conduct." Id. Most courts have held "waiver by conduct" occurs only if the defendant is first warned of the consequences of his actions. State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). "[T]o the extent that the defendant's actions are examined under the doctrine of 'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings." Goldberg, 67 F.3d at 1100.

To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992); Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) ("Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'") (citation omitted). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a pro se defense as required by the second Faretta prong, the appellate court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. Bridwell, 306 S.C. at 519, 413 S.E.2d at 31. Importantly, once a defendant is warned 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 690.

Petitioner sought representation several times throughout his case, and was appointed attorneys twice after firing his retained counsel. Accordingly, Petitioner clearly was aware of his right to counsel. Further, Petitioner held a sufficient background to make a knowing and intelligent waiver of counsel. In State v. Cash the court listed ten factors in determining whether a defendant had sufficient background to make a valid waiver of counsel. Specifically, the court listed: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether he knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992).

In State v. McLauren, the South Carolina Court of Appeals applied the Cash factors to determine whether defendant had a sufficient background to make a valid waiver of the right to counsel. State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002) (citing Cash, 309 S.C. at 43, 419 S.E.2d at 813). The Court noted McLauren was a mature man with both formal and informal education, and without physical or mental impairment. Id. at 495. McLauren was involved in prior criminal proceedings and knew of the nature of the charges. Id. McLauren

addressed questions by the court and made motions. Id. Although McLauren was not assigned an attorney before trial and appeared pro se at his arraignment, the court appointed him stand by counsel during trial. Id. There was no indication McLauren attempted to delay or manipulate the proceedings. Id. The record indicated McLauren knew to comply with the procedural rules and had at least some familiarity with the rules. Specifically, the Court cited the fact McLauren made motions, called several witnesses, and objected at times to the prosecutor's questions. Id. McLauren knew of the legal challenges he could raise in defense to the charges against him. Id. The Court of Appeals noted the exchange between McLauren and the court did not consist merely of pro forma questions. The language and actions at trial indicated he had an understanding of the legal system. Id. Finally, the Court noted the lack of evidence McLauren's waiver resulted from coercion or mistreatment. Id.

The application of the Cash factors in Petitioner's case is similar to McLauren. Both Petitioner and McLauren showed no signs of mental or physical impairment. Petitioner, like McLauren, gained some knowledge of criminal proceedings by prior involvement in criminal proceedings. Like McLauren, Petitioner was aware of the charges against him and his defenses, and participated in his own criminal proceedings in this case by making arguments and asking questions. Additionally, like the trial court in McLauren, the trial court in Petitioner's case did not merely ask Petitioner pro forma questions. Moreover, the waiver in both cases clearly was not the result of coercion or mistreatment.

Applying the Cash factors:

First, Petitioner was forty-seven years old at the time of trial. There was no evidence in the record of any physical or mental impairment.

Second, Petitioner was previously involved in criminal proceedings. The record

indicates criminal record dates back to 1986 and involves numerous contacts with the legal system, although he avoided conviction in several instances. His only conviction, remarkably, was a drug conviction in 1993. App. pp. 693-95. On cross-examination, Petitioner showed agreement with the assistant attorney general's assertion that he was "fairly familiar" with the criminal justice system and has "kind of seen the inside of a courtroom and seen how they function" by answering, "I have been in some trouble. Yes, ma'am." App. p. 939, lines 16-22.

Third, Petitioner was well aware of the nature of the charge. T he prosecutor recited the charges against Petitioner and provided a summary of the evidence against Petitioner during the motion for Anderson to be relieved. App. pp. 2-4. Furthermore, Petitioner continuously claimed he was not facing a "shoplifting charge." App. p. 1228, lines 14-16; p. 1229, lines 6-11. It is readily apparent Petitioner understood the serious nature of the charges he faced.

Fourth, Petitioner was represented by three separate attorneys prior to trial. PCR testimony shows the two appointed attorneys advised him of the difficulty he would have in representing himself. McKnight was blunt, telling Petitioner if he represented himself, he would have a fool for a client. App. p. 963. He told Petitioner the prosecutor would "eat you alive. They're not gonna play with you. I know – I know how this ends." McKnight explained he knew the strengths and weaknesses of the prosecutors. App. p. 964, lines 8-17. McKnight remembered specifically warning Petitioner it would not be a good idea to represent himself, explaining, "You're gonna be out here on your own and it's not a good thing." App. p. 964, line 23 – p. 965, line 5. Anderson advised Petitioner of Anderson's qualifications and experience when he first undertook representation. App. p. 982. Anderson later explained to Petitioner that if he was not trained in the law, his best bet was to have an attorney. App. p. 987, lines 11-14.

Fifth, Petitioner, did not appear to be trying to delay trial, although both his rantings and his hot and cold conduct seems manipulative. Regardless, this should not weigh in favor of Petitioner's quest for relief, given Petitioner's determination to not be deterred. See State v. Suriano, 893 N.W.2d 543, 555 (Wis. 2017) (rejecting Suriano's contention that he could not forfeit right to counsel unless the conduct was for the purpose of delay: "Tying the frustration of the orderly and efficient progression to a defendant's motivation or purpose for engaging in dilatory tactics would not provide a workable standard, ...").

Sixth, Petitioner was not appointed standby counsel. However, Petitioner's conduct throughout establishes an undeniable expectation that standby counsel would not be workable.

Seventh, the record is clear Petitioner knew he was required to comply with procedural rules and he was somewhat familiar with the rules. Petitioner made several motions, legal arguments, cross-examined several witnesses, and objected to the prosecutor's questions. During a pre-trial conference, Petitioner claimed the State violated Rule 5 and Brady. The Court engaged in lengthy colloquy regarding whether the State had complied with Brady and Rule 5. Furthermore Petitioner requested a list of the State's witnesses and the juror list prior to trial. App. p. 1263. Petitioner continually requested either documents or arguments should be noted for the record. App. p. 1215, lines 6-19; p 1259.

Eighth, the record reveals Petitioner knew of the legal challenges he could raise in his defense to the charges against him. During a pre-trial conference he told the judge about a list of witnesses and provided their names and information to the court in an effort to subpoena them for trial. App. pp. 1266-67. The court specifically noted it "provided reasonable assistance for [Petitioner] to get witnesses for his defense." App. p. 1267, lines 23-24. Petitioner provided the court with various documents he intended to introduce at trial. Petitioner further requested

copies of Investigator Brown, Investigator Wayne McFadden, and Investigator Lambert's infractions or complaints. App. p. 1252, lines 4-8.

Ninth, the exchange between Petitioner and the court did not consist of merely pro forma questions. To the contrary, the Petitioner was advised by several different courts about the right to counsel and the dangers of proceeding pro-se. Specifically, Judge James advised Petitioner in December 6, 2010, that he cannot continue to "play this game of being dissatisfied with things going exactly as you want and provoking a change in lawyer. It's not going to happen again." App. p. 1168, line. 25—p. 1169, line 1. Petitioner indicated he understood. Judge James further advised Petitioner "You're presumed innocent, you're entitled to a fair trial but you have to examine your own attitude and conduct and I'm beginning to see a pattern. You've had two excellent attorneys represent you....your attitude is that if somebody doesn't do exactly what you think out to be done they're engaged in a conspiracy." App. p. 1175, lines 13-21. Judge King advised Petitioner he did not get his choice of appointed counsel. App. p. 10, lines 14-17. Judge King advised Petitioner that Counsel Anderson was a highly respected and well thought-of criminal defense attorney and that Petitioner was not an attorney. App. p. 11, lines 7-9; p. 32, lines 10-12. Judge King further advised Petitioner that Counsel Anderson knows "what is appropriate to do... **he has the judgement and the training to do those things that are appropriate to be done, not you Mr. McCrea. You have admitted to me that you are not an attorney."** App. p. 32, lines 5-10. Judge King advised Petitioner if he relieved Anderson, the court would not appoint a new lawyer and Petitioner could either retain counsel or appear pro se if he wanted to relieve Anderson. App. p. 35, lines 1-8. Petitioner initially advised Judge King he wanted to relieve Anderson and proceed pro se. App. p. 35, lines 2-8. However, Petitioner expressed reluctance to represent himself and later chose to proceed to trial with Anderson,

claiming he had no choice. App. p. 40, lines 13-15.

Lastly, no evidence indicates Petitioner's waiver resulted from coercion or mistreatment. While Petitioner claimed he was "forced" to relieve all three attorneys for conspiring with the State, three separate circuit court judges rejected Petitioner's claims. Instead, three experienced criminal defense attorneys were relieved due to Petitioner's repeatedly abusive, threatening, and coercive behavior towards his various counsels.

Compare this with State v. Bateman. There, a group of eight "root doctors" were indicted for drug charges. Their leader "served as spokesperson for all appellants and informed the court that they did not want an attorney." State v. Bateman, 296 S.C. 367, 368, 373 S.E.2d 470, 470 (1988). "The judge addressed the remaining appellants only long enough to ascertain the identity of each." Id. The supreme court held the record did not demonstrate these individuals made a knowing and intelligent waiver.

By contrast, Petitioner possessed a sufficient background and sufficient information to make a knowing and intelligent waiver of counsel. An application of the Cash factors to Petitioner's case supports the PCR court's finding that Petitioner knowingly and intelligently waived his right to counsel.

Petitioner was made aware of the dangers of self-representation.

Importantly, Petitioner was advised of the dangers of proceeding pro se through his various hearings on his counsel's motions to be relieved. Specifically, Judge James advised Petitioner on December 6, 2010, he could not continue to "play this game of being dissatisfied with things going exactly as [he] want[s] and provoking a change in lawyer. It's not going to happen again." App. p. 1166, line 25 – p. 1167, line 3. Petitioner indicated he understood.

Judge James further advised Petitioner, "You're presumed innocent, you're entitled to a fair trial but you have to examine your own attitude and conduct and I'm beginning to see a pattern. You've had two excellent attorneys represent you....your attitude is that if somebody doesn't do exactly what you think ought to be done, they're engaged in a conspiracy." App. p. 1175, lines 13-21.

Judge King advised Petitioner that Anderson was a highly respected and well thought of criminal defense attorney and Petitioner was not an attorney. App. p. 11, lines 7-9; p. 32, lines 10-12. Judge King further advised **Petitioner that Anderson knows "what is appropriate to do... he has the judgement and the training to do those things that are appropriate to be done, not you Mr. McCrea. You have admitted to me that you are not an attorney."** App. p. 3, lines 5-10.

Petitioner initially advised Judge King he wanted to relieve Counsel Anderson and proceed pro se. App. p. 35, lines 2-8. However, after asking several times, Petitioner chose to proceed to trial with Counsel Anderson. Judge King advised Petitioner if he did not treat Counsel Anderson with respect, then he would sign an order relieving Counsel Anderson and requiring Petitioner to proceed pro se. App. pp. 40-41

Notably, Petitioner exclaimed, "The 6th Amendment guarantees me the right to effective assistance of counsel, Your Honor." App p. 36, lines 18-20. Petitioner asserted, "I am not ignorant of the fact of some of the law myself." App. p. 38, lines 18-20. Then Petitioner agreed with Judge King he was not trained in the law, "I'm not." App. p. 38, lines 21-23. He added, "Of course I'm not, Your Honor." App. p. 38, line 25 – p. 39, line 1. Petitioner decided to keep Anderson claiming he had no choice. App. p. 39.

Petitioner received sufficient Faretta warnings by way of colloquies during various hearings throughout the duration of Petitioner's case. Petitioner clearly held a sufficient background to make a knowing waiver of his right to counsel and understood his communications with the trial court. As shown above, the dangers of self-representation were discussed several times with the attorneys and judges involved in the case. Despite being informed by the trial court of the consequences of continuing his abusive and disrespectful behavior, Petitioner engaged in such behavior in the face of these warnings.

Petitioner relies on Osbey v. State, 425 S.C. 615, 825 S.E.2d 48 (2019), which holds a defendant must be made aware on the dangers of self-representation even in situations of waiver by conduct. Factually, that case bears no relation to the instant case. In that case, Osbey, charged with drug offenses, was warned on three occasions he must submit an application to the public defender's office if he wished to have counsel appointed. Osbey failed to do so, but claimed he went to the public defender's office a week before trial and was told he was too late. He denied making a decision not to be represented by counsel. Nonetheless, the plea court found he waived counsel by conduct. Osbey pled guilty and filed an application for post-conviction relief. The supreme court determined the plea court failed to warn Osbey of the dangers of self-representation. Aside from two prior convictions, a probation violation, and a parole violation, **nothing else** in the record indicated Osbey was aware of the dangers of self-representation. Id. at 620-21, 825 S.E.2d at 51. In contrast, the record in the instant case is replete with warnings to Petitioner about the danger of representing himself.

Forfeiture

This case presents the unusual situation that calls for the forfeiture of the right to counsel. Justice James, who in the present case relieved McKnight and Petitioner's first PCR counsel, Charles

Brooks, III, wrote an important concurring opinion, joined by Justice Kittredge, in which Justice James noted the practical challenges for a trial judge:

> [T]he trial judge (or plea judge) has the ultimate responsibility of warning the unrepresented defendant of the dangers of self-representation immediately before the trial or plea is to begin. That paves the way for the dilatory defendant to manipulate the process for further delay, because the trial judge or the plea judge does not become involved until the tail end of the prosecution. Perhaps the most efficient way for this problem to be avoided is for the solicitor, when it becomes apparent a plea or trial is imminent, to bring the unrepresented defendant before the circuit court for the stated purpose of curing any Faretta ills. Even that approach would invite further dilatory conduct by the defendant.
>
> There are obvious practical barriers to ascertaining whether an unrepresented defendant has been warned of the dangers of self-representation.

Oseby at 622-23, 825 S.E.2d at 52 (J. James, concurring). The present case, of course, presents a defendant – while enjoying and abusing the benefit of counsel – bent on manipulating the process by creating disorder and challenging the considerable patience of the judges.

It is hard to imagine Justice James wrote his concurrence without some recollection of his dealings with Petitioner. Petitioner was memorable and Justice James had two opportunities to endure Petitioner's unflappable determination to upset the proceedings.

The Wisconsin Supreme Court took a sensible approach in reviewing the actions of a defendant acting similarly insensible as Petitioner did in this case. State v. Suriano, 893 N.W.2d 543 (Wisc. 2017). The issue was framed as follows:

> We review whether Jack Suriano's actions, which caused three attorneys appointed by the State Public Defender to withdraw in rapid succession, constituted forfeiture of his right to counsel, and whether the right-to-counsel warnings and procedure this court recommended in State v. Cummings, 199 Wis.2d 721, 546 N.W.2d 406 (1996), should be mandatory. We conclude that Suriano forfeited his constitutional right to counsel by repeatedly refusing to cooperate with his attorneys, constantly complaining about their performance,

> verbally abusing them, and triggering one lawyer's fear of physical threat. Suriano's dilatory and manipulative game-playing frustrated the progression of this case and interfered with the proper administration of justice.

Id. at 545.

Suriano's first attorney was relieved following his motion to withdraw in which Suriano's goals in the case, as stated by the attorney, was to frustrate the legal system and "to be an ass." Id. The second attorney appointed quickly moved to withdraw, asserting "a significant" conflict developed preventing her from effectively representing Suriano. The trial court advised Suriano he was having the third attorney appointed and was unlikely to have another appointed. This third attorney advised at a status conference that significant "discord" already existed between him and Suriano, Suriano was completely dissatisfied with the attorney.

When questioned as to whether he wanted the attorney to continue to represent himself, Suriano refused to answer the question directly multiple times, although he encouraged the attorney to withdraw and criticized the attorney's representation. The attorney outlined Suriano's resistance to communicate on several occasions. Based on his refusal to answer whether or not he wanted the attorney to continue representation, the attorney remained counsel of record. A month later, the attorney moved to withdraw based on Suriano's accusations the attorney was a liar, his e-mails that included disparaging remarks and accusations against the attorney, and Suriano's claim he had not received adequate representation. Id. at 547-48. Suriano again refused to answer directly whether he wanted the attorney to withdraw and "launched into a complaint about [the attorney] that covers three transcript pages." He did not deny sending the e-mails but asserted he would send them all over again. Id. at 549-50. The trial court granted the attorney's motion to withdraw, noting Suriano "'clearly' had a problem getting along 'with any attorney.'" The trial court explained it was done

playing Suriano's game: "Yes. It's a game, Mr. Suriano, and I'm done playing it." Id. at 550.

The Wisconsin Court referenced its own authority, explaining, "The triggering event for forfeiture is when the court becomes convinced that the orderly and efficient progression of the case is being frustrated. . . . Scenarios triggering forfeiture include: (1) a defendant's manipulative and disruptive behavior; (2) withdrawal of multiple attorneys based on a defendant's consistent refusal to cooperate with any of them and constant complaints about the attorneys' performance; (3) a defendant whose attitude is defiant and whose choices repeatedly result in delay, interfering with the process of justice . . . ; and (4) physical or verbal abuse directed at counsel or the court." Id. at 552 (citations and internal quotation marks omitted).

The Wisconsin Court observed that although the United States Supreme Court has not discussed forfeiture, the Wisconsin Court adopted this rule in 1996 and it has not been rejected. "Further, the test has provided a workable test and clear guidance for circuit courts lawyers, and litigants . . . ." Id. at 554. Finding the trial court did not abuse its discretion, the Wisconsin court observed:

> Suriano did not say he wanted to represent himself, but his repeated dilatory tactics and abusive behavior expressed loudly and clearly that he would make it impossible for any attorney to represent him. This is sufficient to satisfy the forfeiture standard and supports the circuit court's finding of forfeiture in this case.

Id. at 555.

Likewise, Petitioner's outlandish conduct inside and outside the courtroom in the instant case expressed "loudly and clearly" he would make it impossible for an attorney to provide him effective representation. Petitioner's beyond-the-pale conduct calls for, in this case, what should remain the rarely utilized determination of forfeiture. This Court should affirm the denial of relief.

CONCLUSION

For all of the foregoing reasons, the order of the lower court should be affirmed.

Respectfully submitted,

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June 26, 2024

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

Court of General Sessions
The Honorable George McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2020-001426

Levern McCrea, Petitioner,

v.

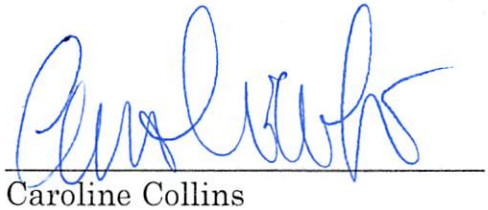
State of South Carolina, Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Brief of Respondent on Wanda Carter, Esquire, counsel of record for Respondent, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 26th day of June, 2024.



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From:	Caroline Collins
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Cc:	Leverett, Scott; Josh Edwards
Bcc:	Victim Services
Subject:	Levern McCrea v. State of South Carolina (2020-001426)
Date:	Wednesday, June 26, 2024 3:22:00 PM
Attachments:	image001.png MCCREA Levern - Brief of Respondent (03617553xD2C78).PDF

Good Afternoon Ms. Carter,

Attached please find the Brief of Respondent in Levern McCrea v. State of South Carolina (2020-001426). This will be submitted to the South Carolina Court of Appeals today via the AIS OneDrive System.

If you will, please confirm receipt.

Thank you,

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