



Kellum W. Allen, Esq.\*  
Kellum@TheAllenLawFirm.org

David K. Allen, Esq.  
David@TheAllenLawFirm.org

Mailing Address:  
P.O. Box 3241  
West Columbia, SC 29171

Physical Address:  
519 Meeting Street  
West Columbia, SC 29169

Office: (803) 764-2328  
Toll Free: (844) 839-5170  
Fax: (803) 764-2548

April 19, 2019

The Supreme Court of South Carolina  
ATTN: Daniel Shearouse, Clerk of Court  
PO Box 11330  
Columbia, SC 29211

**RECEIVED**

**APR 22 2019**

**S.C. SUPREME COURT**

Re: Notice of Intent to Appeal from:  
Glen K. LaConey, v. State of South Carolina;  
Case Number: 2015-CP-40-03441

Dear Sir or Madam:

**I was Court Appointed, and I expect appellate defense will probably handle the appeal.** Enclosed please find a Notice of Appeal, along with a Proof of Service and a copy of the Order being appealed. Also enclosed is a copy which I request you stamp as "filed" and return to me in the enclosed stamped envelope.

I do not believe a "Rule 243(c) explanation" is required in this matter as the dismissal of the underlying PCR was not based upon a ruling of untimeliness or on the basis of a successive application.

Thank you for your assistance.

Sincerely:

David K. Allen

DKA/idi  
Enclosures

cc: Mr. Glen K. LaConey  
Lindsey A. McCallister, Esq.

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No.  
(2015-CP-40-03441)

**ORIGINAL  
RECEIVED**

APR 22 2019

S.C. SUPREME COURT

Glen K. LaConey,.....Appellant

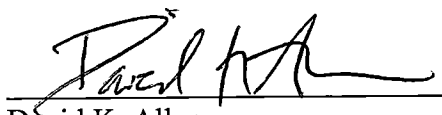
v.

State of South Carolina,.....Respondent.

NOTICE OF INTENT TO APPEAL

Appellant appeals the Order of Dismissal of his Application for Post-Conviction Relief filed April 8, 2019, and received by Counsel for Applicant on April 12, 2019. Appellant hereby files and serves this Notice of Intent to Appeal by regular mail today, April 19, 2019.

**THE ALLEN LAW FIRM, P.A.**



David K. Allen  
Attorney for Applicant  
3241 P.O. Box (29171)  
519 Meeting Street  
West Columbia, SC 29169  
(803) 764-2328  
(803) 764-2548 (fax)

**Lindsey A. McCallister, Esquire**  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

 ORIGINAL

J. Derham Cole, Circuit Court Judge

Case No.  
(2015-CP-40-03441)

Glen K. LaConey,.....Appellant

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

- Notice of Appeal (with attached Order)

I certify that the foregoing was served on the persons listed below by placing same in the U.S. Mail postage prepaid this day, April 19, 2019.

THE ALLEN LAW FIRM, P.A.



David K. Allen  
Attorney for Applicant  
3241 P.O. Box (29171)  
519 Meeting Street  
West Columbia, SC 29169  
(803) 764-2328  
(803) 764-2548 (fax)

***Lindsey A. McCallister, Esquire***  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-40-03441

Glen K. LaCONEY,  
Applicant,

The STATE of South Carolina,  
Respondent,

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other **PCR-** failed to meet burden.
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other


IT IS ORDERED AND ADJUDGED:  Formal order is attached;  Statement of Judgment by the Court:

This matter came before this court on an application for post-conviction relief filed pursuant to South Carolina Code Annotated Section 17-27-10 et. seq..

Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of counsel, and consideration of the applicable statutory and case law, this court finds that the applicant's request for post-conviction **RELIEF** should be and **IS** therefore **DENIED** and the application is **DISMISSED WITH PREJUDICE**.

Dated at Spartanburg, South Carolina, this 1<sup>st</sup> day of April, 2019.

2053

  
PRESIDING JUDGE, J. Derham Cole

This judgment was entered on the \_\_\_\_\_ day of April, 2019, and a copy mailed first class this 8<sup>th</sup> day of April, 2019 to attorneys of record or to parties (when appearing pro se) as follows:

David K. Allen, Esq.  
Post Office Box 3241  
West Columbia, South Carolina 29171

Lindsey A. McCallister, Esq.  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

ATTORNEY(S) FOR THE APPLICANT

ATTORNEY(S) FOR THE RESPONDENT

  
CLERK OF COURT, Jeanette W. McBride

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
) )  
Glen K. LaConey, )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
) )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-40-03441

**ORDER OF DISMISSAL**

RICHLAND COUNTY  
FILED  
2019 APR -8 PM 12:19  
JEANETTE W. MORRIS  
C. C. P. & G. S.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Glen K. LaConey (Applicant) on June 11, 2015. Respondent made its Return on October 1, 2015. An evidentiary hearing into the matter was convened on February 5, 2016, at the Richland County Courthouse before the undersigned. David K. Allen, Esquire, represented Applicant. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General’s Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Mathias Chaplin, Esquire; Joshua Koger, Esquire; and Ashley McMahan, Esquire, also testified for the State. This Court had before it a copy of the records of the Richland County Clerk of Court, the PCR application, Respondent’s Return, the trial transcript, and Applicant’s appellate records.

**PROCEDURAL HISTORY**

Applicant was indicted at the November 2011 term of the Richland County Grand Jury for two counts of second-degree harassment (2011-GS-40-05654, -05655). The charges stemmed from threats made by Applicant against various Fifth Circuit judges and the Richland County Judicial Center building. On July 7, 2014, Applicant appeared for the Honorable Clifton Newman for a jury trial, at which time his appointed counsel, Joshua Koger, Esquire, moved to be relieved

based on an irrevocable breakdown of the attorney/client relationship. Applicant agreed with the motion, which Judge Newman granted. Applicant then proceeded *pro se*. Ultimately, on the same day, Applicant pleaded guilty as indicted before Judge Newman, who sentenced him to thirty days' imprisonment, suspended upon time served. Applicant did not appeal his sentences or convictions.

### **ALLEGATIONS**

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "[U]nconstitutional denial of court appointed counsel."
2. "Indigent Defendant compelled to [d]efend pro se."
3. "Plea was involuntary, unintelligent and coerced."

At the call of the case, counsel for Applicant clarified Applicant wished to proceed on two allegations: (1) he was unconstitutionally denied the right to counsel; and (2) he was denied a mental health/competency evaluation, both of which lead to the entry of an involuntary guilty plea.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the PCR hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

1. Forfeiture of right to counsel

Applicant asserts his plea was involuntary because he was unconstitutionally deprived of counsel. The Sixth Amendment to the Constitution requires that in all criminal proceedings, the accused shall have the right to the assistance of counsel. U.S. Const. amend. VI. However, South Carolina Courts recognize "three different ways in which 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, 733 (2009), overruled on other grounds by



Osbey v. State, Op. No. 27866 (S.C. Sup. Ct. filed March 6, 2019) (Shearouse Adv. Sh. No. 10 at 31). When a defendant waives his right to counsel either by verbal request or by his conduct, the trial court is required to (1) advise the accused of his right to counsel, and (2) adequately warn the accused of the dangers of self-representation. Osbey, Op. No. 27866 (S.C. Sup. Ct. filed March 6, 2019) (Shearouse Adv. Sh. No. 10 at 31); Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990); Faretta v. California, 422 U.S. 806 (1975). However, such warnings are not required when a defendant forfeits his right to counsel. United States v. Goldberg, 67 F.3d 1092, 1101 (3d Cir. 1995) (“[A] true forfeiture can result regardless of whether the defendant has been warned about engaging in misconduct, and regardless of whether the defendant has been advised of the risks of proceeding *pro se*, as required by Faretta and Whey.”) (citations omitted); State v. Thompson, 355 S.C. 255, 267, 584 S.E.2d 131, 137 (Ct. App. 2003) (“A defendant can forfeit his right to counsel irrespective of his knowledge of either the consequences of his actions or the dangers of self-representation.”); see also Osbey, Op. No. 27866 (S.C. Sup. Ct. filed March 6, 2019) (Shearouse Adv. Sheet No. 10 at 31, n. 2) (noting the Court’s holding applies to all cases of waiver both verbal and by conduct, but not necessarily to cases of forfeiture).

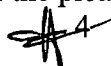
In Thompson, the Court of Appeals explained, “[s]ituations where a defendant’s own conduct forfeits his right to counsel are unusual, typically involving a manipulative or disruptive defendant.” 355 S.C. at 267, 584 S.E.2d at 137. For example, “a defendant who is abusive toward his attorney may forfeit his right to counsel.” United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995) (finding defendant forfeited his right to an attorney when he was verbally abusive to his attorney, threatened to kill the attorney, threatened to sue the attorney, and tried to persuade the attorney to engage in unethical conduct). See also United States v. Thompson, 335 F.3d 782, 785 (8th Cir. 2003) (finding defendant forfeited his right to counsel when he threatened to kill his

attorney if the attorney did not withdraw); United States v. Leggett, 162 F.3d 237, 250 (3d Cir. 1998) (finding defendant who launched an unprovoked physical attack on his attorney had forfeited his right to counsel).

This Court finds the plea court appropriately determined Applicant forfeited<sup>1</sup> his right to counsel based on his egregious conduct in threatening not only counsel's life, but the lives of any person present in the Richland County Judicial Center. This Court further finds this level of conduct is serious enough to constitute forfeiture, rather than merely waiver by conduct. See Goldberg, 67 F.3d at 1101 (“[F]orfeiture 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.”). Courts at both the state and federal level have recognized forfeiture of the right to counsel based on similar conduct. See, e.g., Gilchrist v. O’Keefe, 260 F.3d 87, 89-90 (2d Cir. 2001) (finding, “under the deferential standard applied in habeas review, that the state courts here [did not act] in a manner that was contrary to, or an unreasonable application of, clearly established federal law as determined by the [United States] Supreme Court” in refusing to assign the defendant a new attorney after he punched his counsel in the face, causing the attorney to withdraw). Accordingly, this Court finds the allegation should be denied and dismissed.

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<sup>1</sup> Applicant argues Respondent is precluded from raising forfeiture as a defense because it was not pled in Respondent's Return. However, the Return is based on Applicant's characterization of his claims as contained in the application, which does not mention forfeiture or waiver and merely alleges Applicant was unconstitutionally denied counsel. Accordingly, this Court finds Applicant was on notice both waiver and forfeiture were potential defenses to his claim. The Court finds Applicant had notice of a potential forfeiture defense as it was explicitly the plea court's basis for reliving Applicant's counsel on the day of the plea. Motion Hearing Tr. p. 28.



2. Competency to stand trial and criminal responsibility

Applicant also alleges his conviction was unconstitutional because he did not receive a necessary evaluation for competency and criminal responsibility. The Court finds the plea court properly questioned Applicant regarding this issue and determined Applicant did not need an evaluation, as Applicant was able to engage in a lengthy conversation with the plea court regarding his case without difficulty. Plea Tr. p. 22. Further, in order to prevail on this issue, Applicant should have presented evidence of an evaluation showing he was either incompetent to stand trial and/or unable to conform his conduct to the requirements of the law at the time of the commission of the crimes of which he was convicted. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .”). Applicant failed to present any such evidence, and therefore, he has failed to meet his burden of proving he was prejudiced by the lack of an evaluation. Accordingly, this Court finds this allegation should be denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel’s receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-



conviction relief. Rule 71.1(g), SCRCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED.**

4/2, 2019

  
\_\_\_\_\_  
J. DERHAM COLE  
Presiding Circuit Court Judge  
Fifth Judicial Circuit





David K. Allen, Esq.  
The Allen Law Firm, P.A.  
P.O. Box 3241  
West Columbia, SC 29171

The Supreme Court of South Carolina  
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