STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas

The Honorable J. Derham Cole, Post-Conviction Relief Judge
The Honorable Clifton Newman, Plea Judge

Appellate Case No. 2019-00658

RECEIVED
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S.C. SUPREME COURT

Glen K. LaConey, # 602187,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED ON CERTIORARI

PETITIONER'S QUESTION PRESENTED

Did the PCR judge err in concluding Petitioner forfeited his right to counsel where there is no controlling precedent from this Court recognizing forfeiture of the right to counsel, and the Fourth Circuit Court of Appeals and the United States Supreme Court do not recognize forfeiture of the right to counsel? In the alternative, did the PCR judge err in finding Petitioner forfeited his right to counsel because his conduct was not egregious?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

Did the PCR court correctly find Petitioner was not unconstitutionally denied representation because Petitioner had no constitutional right to an attorney where he was sentenced only to time-served on a misdemeanor conviction, and in any event, Petitioner forfeited his right to counsel through his egregious conduct of repeatedly making specific threats to harm – both physically and professionally – his court-appointed attorney, the prosecuting attorneys, court staff, and the judiciary?

STATEMENT OF THE CASE

Glen K. LaConey (Petitioner) 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). On July 7, 2014, Petitioner 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. Petitioner did not oppose the motion, which Judge Newman granted. Petitioner then proceeded *pro se*. Ultimately, on the same day, Petitioner pleaded guilty as indicted pursuant to Alford[1] before Judge Newman, who sentenced him to thirty days' imprisonment, suspended upon time served. Petitioner did not appeal his sentences or convictions.

Petitioner filed an application for post-conviction relief 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 Honorable J. Derham Cole. David K. Allen, Esquire, represented Applicant. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf. Also testifying at the evidentiary hearing were Mathias Chaplin, Esquire; Joshua Koger, Esquire; and Ashley McMahan, Esquire. By written order filed April 8, 2019, the PCR court denied Petitioner's claims and dismissed his application for relief with prejudice.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief. On October 30, 2019, Petitioner, through counsel, filed a petition for writ of certiorari in this Court.

[1] Alford v. North Carolina, 400 U.S. 25 (1970).

STATEMENT OF THE FACTS

In January 2009, Petitioner began sending copious amounts of correspondence to both Judge Joseph Strickland and Judge Alison Lee. Law enforcement warned Petitioner to stop, but on July 25, 2011, Petitioner sent a fax to both judges consisting of a picture of nuclear bomb mushroom cloud accompanied by texting stating, "I have repeatedly filed proper motions from the court which you have repeatedly ignored. No problem. I have a way of forcing you to respond the hard way, as you will soon learn. I call it the great tribulation. Some might call it shock on (sic)." App. pp. 34, 169, 172.

Originally, the Public Defender's Office was assigned to Petitioner's case, but both that office as well as the Solicitor's Office were excused from the case due to a conflict of interest as potential victims of Petitioner's threat. App. pp. 11, 18-19. Mathias Chaplin, Esquire, was appointed to represent Petitioner and did so for approximately one year, before filing a motion to be relieved as counsel. App. pp. 128-29. Petitioner expressed concerns Chaplin had a conflict of interest because Chaplin practiced regularly in the Fifth Circuit with the lawyers and judges who were the potential victims of the harassment charges. App. p. 129. Chaplin and Petitioner agreed there was at least an appearance of a conflict on Chaplin's part, so Chaplin filed a motion at Petitioner's behest. App. pp. 129-30.

After Chaplin was relieved, Joshua Koger (Koger), Esquire, was appointed to represent Petitioner specifically because he did not often practice within the Fifth Circuit. App. p. 133. In April 2014, Koger met with Petitioner and conveyed an offer from the Attorney General of pre-trial intervention, which Petitioner rejected. App. p. 133. After that meeting, Koger learned Petitioner had posted disparaging remarks about him on the internet and had filed a complaint with the Office of Disciplinary Counsel. Koger moved to be relieved on the ground that the attorney-

client relationship had deteriorated to the point he could no longer represent Petitioner. App. pp. 5-6, 134. Judge Hood denied Koger's initial motion, and set the trial for a date certain on July 7, 2014. App. pp. 12-13, 134-36.

Upon learning of Judge Hood's decision not to relieve him as counsel, Koger attempted to contact Petitioner by phone, certified mail, and email to set up a time for them to meet and prepare for trial. App. pp. 4-6, 14-16, 136. Petitioner responded to Koger with a series of emails in which he threatened to file a malpractice lawsuit against Koger, as well as to physically harm Koger. App. pp. 14-16, 136-37. The email sent by Petitioner to Koger read, in pertinent part:

> You are a prosecuting defense attorney, and I will spend the rest of my life making you pay for your acts and omissions which have caused me irreparable injury. Read Malachi 4:1[2]. . . . I don't care which judge doesn't like it. There are a few surprises for the Richland County Judicial Center anyway. I don't make threats. I make devices.

App. pp. 15-16. Koger interpreted this final email as "a bomb threat to the people here, and to me because I was going to be here on that particular day at the Richland County Courthouse."[3] App. pp. 136-37.

Koger made a report of the threat to the Richland County Sheriff's Office and, when the case was called for trial on July 7, 2014, he made a second motion to be relieved as Petitioner's counsel based on the threats received after his initial motion was denied. App. pp. 1-8, 133-37. Petitioner agreed with Koger that the attorney-client relationship was beyond repair and did not oppose Koger's motion to be relieved. App. pp. 8, 22. Judge Clifton Newman relieved Koger and

[2] "For, behold, the day cometh, that shall burn as an oven; and all the proud, yea, and all that do wickedly, shall be stubble: and the day that cometh shall burn them up, saith the Lord of hosts, that it shall leave them neither root nor branch." Malachi 4:1 (King James).

[3] In light of the factual background of the offense on which Koger represented Petitioner, this was a logical interpretation.

refused to appoint new counsel for Petitioner, finding Petitioner "forfeited" his right to counsel. App. p. 22, 28.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court correctly found Petitioner was not unconstitutionally denied representation because Petitioner had no constitutional right to an attorney where he was sentenced only to time-served on a misdemeanor conviction, and in any event, Petitioner forfeited his right to counsel through his egregious conduct of repeatedly making specific terroristic threats to harm his court-appointed attorney, the prosecuting attorneys, court staff, and the judiciary.

The PCR court found Petitioner was not unconstitutionally deprived of his right to counsel because Petitioner had forfeited that right when he repeatedly threatened physical and professional harm to his attorney and the Richland County judiciary. App. pp. 163-65. Petitioner argues in this holding was in error because, according to Petitioner, neither this Court, the Fourth Circuit, or the United States Supreme Court have recognized forfeiture of counsel. PWC p. 4. Petitioner further argues, in the alternative, his conduct was not so egregious as to constitute forfeiture. PWC p. 4. On the contrary, the PCR judge's finding of forfeiture was legally and factually correct and supported by the record due to the outrageous nature of Petitioner's conduct, and in any event, Petitioner had no constitutional right to an attorney where he was sentenced only to time-served on a misdemeanor conviction.

A. Petitioner was not unconstitutionally denied representation because he had no constitutional right to an attorney where he was sentenced only to time-served for a misdemeanor offense.

In this case, Petitioner received a thirty-day, time-served sentence for each count of the misdemeanor charge of second-degree harassment. Therefore, Petitioner's constitutional right to counsel was not triggered because no sentence of imprisonment was actually imposed upon Petitioner.[4] Scott v. Illinois, 440 U.S. 367 (1979) ("[T]he Sixth and Fourteenth Amendments...

[4]Respondent argues this issue as an additional sustaining ground. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court

require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel. . . ."); Glaze v. State, 366 S.C. 271, 274, 621 S.E.2d 655, 656-57 (2005) ("In Scott v. Illinois, the [Supreme Court] clarified that when imprisonment is an authorized punishment but is not actually imposed on an unrepresented defendant convicted of a misdemeanor, there is no abrogation of the right to counsel.").

In Glaze, the petitioner argued his trial counsel was ineffective for failing to object to the trial court sentencing Glaze as a three-time offender because one of his previous convictions was an uncounseled misdemeanor marijuana conviction for which he had been sentenced to time-served of ten days. 366 S.C. at 273-75, 621 S.E.2d at 656-57. This Court held Glaze's counsel was not constitutionally ineffective because the conviction was constitutional under Scott. Id. at 274, 621 S.E.2d at 656. This Court explained "[t]he reason [Glaze] spent ten days in jail is he was charged with a misdemeanor and could not post bail. He was subjected to no period of confinement as a result of his uncounseled marijuana conviction. . . ." Id. at 657, 621 S.E.2d at 275.

Petitioner's case mirrors the situation presented in Glaze. Here, Petitioner pleaded guilty under Alford to two counts of second-degree harassment, which is a misdemeanor. App. 168-73. See S.C. Code § Ann 16-3-1710(A) (2019) ("[A] person who engages in harassment in the second degree is guilty of a misdemeanor. . . "). Petitioner received a sentence of thirty days suspended to time-served, with no period of probation, parole, or supervision, and no way in which the sentence could be revoked to impose further jail time. Accordingly, his right to assistance of

should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.")

counsel was never triggered. See Glaze, 336S.C. at 274, 621 S.E.2d at 656-67 ("[A]ctual imprisonment is the event that triggers the right to counsel.").

Therefore, the PCR court correctly denied relief, and this Court should deny certiorari.

B. Even if Petitioner had a constitutional right to counsel, he forfeited that right through his egregious conduct in making specific terroristic threats to harm his court-appointed attorney, the prosecuting attorneys, court staff, and the judiciary.

a. Precedent exists in both stated and federal law for denying appointment of counsel based on forfeiture by egregious or outrageous conduct.

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, despite Petitioner's assertion to the contrary, South Carolina courts have long recognized forfeiture of counsel as a possibility, explaining there are "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, 425 S.C. 615, 825 S.E2d 48 (2019) (overruling Roberson to the extent it suggested waiver by conduct did not have to be knowingly and intelligently made, while recognizing "[p]erhaps" the result of Roberson could nonetheless "be justified on the basis of forfeiture"). 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, 425 S.C. at 621, 825 S.E.2d at 51; 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. See 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 Farretta and Whey." (internal 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, 425 S.C. at 621 n. 2, 825 S.E2d 51 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).

"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." State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996). 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, some courts considering the issue have found "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).

Thus, Courts at both the state and federal level have, at least in some instances, recognized forfeiture of the right to counsel based on egregious or outrageous conduct. Accordingly, both the plea court and the PCR court appropriately considered forfeiture of counsel as a basis for denying Petitioner's request for a new attorney.

b. Petitioner's conduct in this case was so egregious as to constitute a forfeiture of the right to assistance of counsel.

Moreover, the plea court correctly determined Petitioner forfeited any right he had to appointed counsel based on his egregious conduct, which includes the terroristic threats made against not only Koger's life, but the lives of all persons present in the Richland County Judicial Center on the day his trial was set to begin.

The charges in this case originated because Petitioner made a bomb threat against two judges, even after repeated warnings about his conduct from law enforcement. App. pp. 34, 169, 172. After he was charged with those offenses and appointed counsel,[5] Petitioner asked to have his attorney, Matthias Chaplin, relieved due to Petitioner's perception Chaplin also had a conflict of interest since Chaplin practiced regularly in the Fifth Circuit with attorneys and judges who were potential victims of Petitioner's original threat. App. pp. 129-30. Notably, however, Petitioner did not raise this concern until a year into Chaplin's representation of him. App. p. 128. Nonetheless, Chaplin was relieved, and Koger was next appointed to represent Petitioner. App. p. 12.

Koger also represented Petitioner for approximately a year before Petitioner's case was scheduled for trial. After meeting with Petitioner to convey a plea offer, Koger learned Petitioner had posted disparaging remarks aimed at undermining Koger's professional reputation on a website called "Ripoff Report," as well as filed a complaint with the Office of Disciplinary Counsel. App. pp. 5-6, 134. Koger moved to be relieved on the ground that the attorney-client

[5] Petitioner's case was initially assigned to the Richland County Public Defender's Office, but as potential victims of the initial bomb threat, both the Solicitor's Office and the Public Defender's Office had a conflict of interest in the case. App. pp. 10-11.

relationship had deteriorated to the point he could no longer represent Petitioner, but Judge Hood denied his motion. App. p. 6, 134-35.

When Koger contacted Petitioner to let him know the judge's decision and begin preparing for trial, Petitioner responded with a series of emails in which he threatened to file a malpractice lawsuit against Koger, as well as to physically harm Koger. App. pp. 136-37. The final email sent by Petitioner to Koger declared Petitioner's intention to "spend the rest of [his] life making [Koger] pay," ending with a thinly veiled bomb threat of a similar nature as the threat that brought about the very charges on which Koger was representing Petitioner. App. pp. 15-16. That Petitioner made another terroristic bomb threat while charges were pending against him for the same behavior demonstrates Petitioner's intention to engage in conduct he knew would result in serious consequences.

Both the plea court and the PCR court correctly found this level of conduct is serious enough to constitute forfeiture, rather than merely waiver by conduct. Petitioner's behavior went merely being uncooperative or hostile to his appointed attorney. Petitioner took actionable steps to harm his attorney's professional reputation and economic livelihood, and, most significantly, he made a specific physical threat against his attorney's life, which also indirectly threatened the lives of hundreds of other people, *while he had criminal charges pending for the same behavior*. Petitioner's conduct therefore went beyond the bounds of simply being a difficult client and into the realm of egregiousness sufficient to constitute a forfeiture of his right to counsel without the usual required warnings, as found in other the cases discussed above involving physical threats or physical harm to the defendant's attorney. 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."). If making a threat to

your attorney's physical safety and professional livelihood while simultaneously engaging in an effort to damage that attorney's reputation and career is not conduct of a sufficiently egregious nature to forfeit the right to have yet another attorney appointed, it is frightening to think what other acts must be inflicted upon an attorney in our state in order for forfeiture to properly occur. As Judge Newman stated in granting Koger's motion to be relieved, "There is no way anyone should be forced at their own peril to represent someone." App. p. 22.

Thus, the PCR court correctly found Petitioner did not suffer an unconstitutional deprivation of his right to counsel and denied relief, and this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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