

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

GLEN K. LACONEY,

**ORIGINAL**

**RECEIVED**

OCT 30 2019

PETITIONER S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000658  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## **ISSUE 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?

## STATEMENT

On November 3, 2011, a Richland County grand jury indicted Petitioner for two counts of harassment in the second degree (2011-GS-40-5654; -5655). App. 168-169; App. 171-172. The state, represented by Ashley McMahan, called the case to trial before the Honorable Clifton Newman on July 7, 2014. App. 1. Joshua Koger, Jr., appeared with Petitioner. App. 3, ll. 9-13. Judge Newman granted Koger's request to be relieved. App. 24, l. 14; App. 28, ll. 8-25.

Thereafter, the state requested a competency evaluation for Petitioner. App. 29, ll. 2-22. Petitioner agreed to the request. App. 30, ll. 16-19. Petitioner was evaluated by a psychiatrist in the early 1980s. App. 30, l. 22 – App. 31, l. 3. When he was between the ages of 14 and 17, he experienced mental health problems. App. 31, ll. 11-14. The trial judge expressed some doubts as to the need for an evaluation. App. 32, l. 17 – App. 34, l. 1. Appellant told the judge he was “overwhelmed,” and he wanted the evaluation. App. 34, ll. 3-4; App. 39, ll. 2-3. The judge then ordered Petitioner to be evaluated. App. 39, ll. 4-6. However, at the judge's urging, the state and Petitioner met to discuss a resolution of the charges. App. 47, ll. 11-22.

Thereafter, Petitioner entered a guilty plea to both charges pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). App. 57, ll. 11-14. During the plea hearing, Petitioner expressed his desire for mental health counseling because he and his mother had noticed changes in his behavior. App. 72, ll. 8-21. He explained he felt “turmoil and pressure, depression, and anxiety.” App. 72, ll. 24-25. On this point, the judge expressed his determination that it was “clear” that Petitioner was competent. App. 74, ll. 12-13. According to the judge, delusional people were not competent, and he surmised that Petitioner was “not delusional” because he was “articulate and easy to communicate with.” App. 74, ll. 15-18. Then, the judge sentenced

Petitioner to thirty days imprisonment suspended upon time served. App. 75, ll. 20-22; App. 170; App. 172.

On June 11, 2015, Petitioner filed his application for post-conviction relief (PCR). App. 78-86. The matter proceeded to an evidentiary hearing on February 5, 2016, before the Honorable J. Derham Cole. App. 93. David K. Allen represented Petitioner, and J. Clayton Mitchell, III, represented the state. App. 93. By an order filed on April 8, 2019, Judge Cole denied Petitioner relief. App. 162-167.

Petitioner served his notice of appeal on April 19, 2019. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred 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, Petitioner did not forfeit his right to counsel because his conduct was not egregious, and he did not waive his right to counsel through his conduct where the record failed to disclose any warnings to Petitioner.

Petitioner respectfully requests this Court grant certiorari in this case to determine whether South Carolina recognizes that a criminal defendant may forfeit his right to counsel. While the South Carolina Court of Appeals has decided several cases discussing forfeiture of the right to counsel, this Court has never held that a criminal defendant may forfeit his right to counsel. See State v. Boykin, 324 S.C. 552, 558, 478 S.E.2d 689, 692 (Ct. App. 1996) (declining to “decide whether South Carolina should embrace the doctrine of forfeiture”). Although this Court cited to Boykin, *supra*, for the proposition that “[c]ourts have recognized three 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,” this Court only addressed waiver by conduct in the opinion. State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009), *overruled by Osbey v. State*, 425 S.C. 615, 825 S.E.2d 48 (2019). Ten years later, this Court overruled Roberson, but did not address the question of whether a defendant may forfeit his right to counsel. Osbey v. State, 425 S.C. 615, 618, 825 S.E.2d 48, 50 (2019).

Further, as will be discussed *infra*, the Fourth Circuit Court of Appeals does not recognize forfeiture of the right to counsel, and the United States Supreme Court has never addressed whether a person may forfeit his right to counsel.

This Court should grant certiorari to resolve this unanswered question.

**Relevant facts**

Initially, the Richland County Public Defender's Office was assigned to represent Petitioner. App. 9, ll. 10-12; App. 99, ll. 12-14; App. 128, ll. 19-22. The Public Defender's Office withdrew from representation based upon a conflict of interest. App. 9, ll. 10-12; App. 17, ll. 18-25; App. 99, ll. 15-23; App. 131, ll. 6-10. Mathias Chaplin was then appointed to represent Petitioner on January 5, 2012. App. 9, ll. 1-12; App. 12, ll. 5-7; App. 100, ll. 16-24; App. 128, ll. 19-22.

Chaplin moved to be relieved, stating “[t]he circumstances have developed in the course of the representation to cause irremediable breakdown in the attorney/client relationship that would prevent the other side counsel from providing effective assistance.” App. 12, ll. 8-11; App. 100, l. 25 – App. 101, l. 6. During the hearing on the motion to be relieved, Petitioner and Chaplin expressed their desire for a change of counsel because Chaplin practiced principally in Richland County and in front of the Richland County judges who were alleged to be the victims of the harassment charges. App. 101, ll. 17-21. Chaplin explained that most of his work was in the Fifth Circuit, and because of that Petitioner expressed concern that Chaplin “may not be impartial” and “may not be as fair to him” due to Chaplin’s “dealings with these people in the future.” App. 129, ll. 8-14; App. 150, ll. 12-20. Chaplin agreed that Petitioner expressed “a valid concern.” App. 129, ll. 14-15; App. 130, ll. 4-6. In fact, the attorney for the state “could understand [Petitioner]’s consternation with the fact that he was appointed an attorney with the Fifth Circuit.” App. 141, ll. 9-11. On March 17, 2013, the judge relieved Chaplin. App. 12, ll. 14-16; App. 130, ll. 16-17.

Joshua Koger was appointed to represent Petitioner on March 17, 2013, primarily because he did not practice in Richland County. App. 12, ll. 14-16; App. 7-15; App. 101, ll. 21-22; App. 132, l. 21 – App. 133, ll. 7; App. 145, ll. 21-24; App. 150, ll. 20-24. Over a year later, he met with Petitioner for the first time on April 17, 2014, when the prosecutor introduced the two. App. 5, ll. 21-22; App. 8, ll. 7-12; App. 17, ll. 1-3; App. 19, ll. 21-25; App. 133, ll. 16-23; App. 142, ll. 5-10. Later that week, Koger discovered Petitioner had “reported” him to a “website called ripoffreport” and wrote disparaging things about him. App. 6, ll. 1-2; App. 134, ll. 2-3; App. 135, ll. 1-14. Further, Petitioner filed a complaint against Koger with the Commission on Lawyer Conduct. App. 6, ll. 2-4; App. 134, ll. 5-7. This caused Koger to “cut off all communications” with Petitioner. App. 6, ll. 8-11; App. 134, ll. 12-16. After Koger met with Disciplinary Counsel, the complaint was dismissed. App. 6, ll. 12-15.

In the interim, Koger filed a motion to be relieved as counsel for Petitioner, which was heard by the Honorable Robert Hood. App. 6, ll. 16-17; App. 12, ll. 17-25; App. 134, l. 17; App. 135, ll. 15-17; App. 142, ll. 14-18. Judge Hood denied Koger’s request to be relieved on June 19, 2014. App. 6, ll. 17-19; App. 13, ll. 15-16; App. 135, ll. 17-19. Judge Hood then ordered Petitioner’s trial to start on July 7, 2014. App. 13, ll. 16-19; App. 135, ll. 20-21; App. 142, ll. 18-21. In fact, the prosecutor had given notice to Koger in May that Petitioner’s trial would start the week of July 7, 2014. App. 142, ll. 18-21.

The state called Petitioner’s case to trial on July 7, 2014, before the Honorable Clifton Newman. App. 1. At that time, Petitioner’s counsel, Koger, moved to be relieved. App. 3, ll. 16-20; App. 102, ll. 1-3; App. 136, ll. 5-8. During the hearing on the motion, it was revealed that Koger sent an email to Petitioner on June 30, 2014, advising him of his court date – seven days away – and requesting to meet with him on Tuesday, Wednesday, and Thursday, in order to

prepare for trial. App. 4, ll. 1-11; App. 136, ll. 8-10. Koger explained that he had “dedicated that week to come up to speed and to prepare to take the case to trial.” App. 136, ll. 10-12.

Initially, Petitioner responded by asking questions about the proceedings. App. 4, ll. 12-14; App. 14, ll. 17-24; App. 138, ll. 1-6. Then, according to Koger, Petitioner threatened to file a legal malpractice suit against Koger. App. 4, ll. 14-17; App. 15, ll. 1-2; App. 136, ll. 20-21. In a subsequent email, Petitioner told Koger that his rights were being denied and he did not want to participate. App. 4, ll. 18-21. Finally, in an early morning email, Petitioner, according to Koger, stated he would spend the rest of his life making Koger pay for his acts and omissions that caused irreparable injury to Petitioner. App. 4, l. 21 – App. 5, l. 8; App. 15, ll. 23-25; App. 136, ll. 21-23. The email went on to say, “There are a few surprises for the Richland County Judicial Center anyway, and I don’t make threats. I make devices.” App. 5, ll. 9-15; App. 16, ll. 2-5; App. 136, l. 24 – App. 137, l. 5; App. 138, l. 25 – App. 139, l. 2. In response to the email, Koger contacted the police. App. 5, ll. 16-19; App. 136, ll. 24-25; App. 138, ll. 8-11.

Koger informed the judge that he could not “provide effective legal counsel” to Petitioner. App. 5, ll. 20-24. Citing Rule 6.2(c), RPC, Rule 407, SCACR, Koger told the judge that he found Petitioner “so repugnant” that he was unable to represent him. App. 7, ll. 1-10. Petitioner agreed that the attorney-client relationship was “irreparably injured,” and he expressed no objection to the motion to be relieved. App. 8, ll. 18-20; App. 118, l. 22 – App. 119, l. 2.

After counsel’s presentation, the judge relieved counsel. App. 22, ll. 14-15; App. 24, ll. 14-21; App. 102, ll. 4-9; App. 137, ll. 15-17. When the judge indicated Petitioner would have to represent himself, Petitioner informed the judge that he wanted a lawyer. App. 25, ll. 9-11; App. 102, l. 19 – App. 103, l. 7; App. 107, ll. 17-23. Thereafter, the judge informed Petitioner that in addition to his constitutional right to self-representation, he had “a responsibility” to represent

himself. App. 25, ll. 16-20. When Petitioner countered that he also had a constitutional right to counsel, the judge informed him that because he was “unable to get along with counsel” he was “standing alone.” App. 25, l. 24 – App. 26, l. 4. Thereafter, the judge found Petitioner “forfeited [his] right to appointed counsel.” App. 28, ll. 20-21.

During the PCR hearing, Petitioner explained that he pled guilty pursuant to Alford because he was “[f]aced with the prospect of no primary counsel” and “no continuance to prepare” for trial. App. 103, l. 25 – App. 104, l. 5; App. 123, ll. 1-13. Petitioner emphasized that he was denied his right to court appointed counsel, which resulted in his Alford plea. App. 112, ll. 3-4.

In his order denying post-conviction relief, the PCR judge found “[c]ourts at both the state and federal level have recognized forfeiture of the right to counsel based on similar conduct.” App. 165. According to the PCR judge, “this level of conduct is serious enough to constitute forfeiture, rather than merely waiver by conduct.” App. 165. Thus, the PCR judge found “the plea court appropriately determined [Petitioner] forfeited 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.” App. 165 (internal footnote omitted).

## **Discussion**

Pursuant to the Sixth Amendment to the United States Constitution, a defendant charged with a criminal offense has the right to the effective assistance of counsel. U.S. Const. amend. VI; see also Gideon v. Wainwright, 372 U.S. 335, 340-341 (1963); Strickland v. Washington, 466 U.S. 668, 685-686 (1984); Osbey v. State, 425 S.C. 615, 618, 825 S.E.2d 48, 50 (2019). “The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he

can be validly convicted and punished by imprisonment.” State v. Thompson, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003) (quoting Faretta v. California, 422 U.S. 806, 807 (1975)). “[A]n indigent criminal defendant may request the court to appoint an attorney to represent him.” Id. “The erroneous deprivation of a defendant’s fundamental right to the assistance of counsel is per se reversible error.” Id.; see also United States v. Gonzalez-Lopez, 548 U.S. 140, 148-151 (2006); United States v. Cronin, 466 U.S. 648, 654 (1984).

### *Forfeiture*

Importantly, the Fourth Circuit Court of Appeals has “never endorsed” that “a defendant can forfeit the right to counsel.” United States v. Ductan, 800 F.3d 642, 651 (4th Cir. 2015). The Fourth Circuit noted that “at least four Justices of the Supreme Court have concluded that while ‘[s]ome rights may be forfeited by means short of waiver ... others may not,’ and identified the right to counsel as one that can only be relinquished intentionally.” Id. (quoting Freytag v. Comm’r of Internal Revenue, 501 U.S. 868, 894 n.2 (1991)). “The Supreme Court has neither recognized nor approved the concept of a forfeiture of the right to counsel.” Stephen A. Gerst, Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution, 58 Clev. St. L. Rev. 97, 110 (2010).

In keeping with this Court’s pronouncement that this Court must not “extend[] federal constitutional protections beyond the boundaries the Supreme Court itself has set,” this Court must not allow those constitutional protections to be eroded in ways that the Supreme Court itself has not held to pass constitutional muster. See State v. Slocumb, 426 S.C. 297, 306-307, 827 S.E.2d 148, 153 (2019) (refusing “to extend federal constitutional protections under the Eighth Amendment beyond the boundaries the Supreme Court set” in a prior case). Further, this

Court often defers to Fourth Circuit decisions interpreting federal law, which in this case would necessitate a ruling that a defendant, including Petitioner, could not forfeit his right to counsel.

“The right to counsel is fundamental to our system of justice; beyond protecting individual defendants, it is ‘critical to the ability of the adversarial system to produce just results.’” Ductan, 800 F.3d at 648 (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984)). A defendant’s right to counsel implicates a defendant’s ability to assert other rights; thus, the Fourth Circuit has determined the right to counsel is preeminent and the default position. Id. at 649; see also City of Columbia v. Assa’ad-Faltas, 420 S.C. 28, 47, 800 S.E.2d 782, 791 (2017). Based upon the preeminence of the right to counsel, this Court should reject the PCR court’s determination that Petitioner forfeited his right to counsel. Further, this Court should make clear that South Carolina does not recognize forfeiture of the right to counsel.

If this Court holds that a criminal defendant may forfeit his right to counsel, forfeiture must be permitted only in cases of egregious conduct. “To forfeit the right to legal representation, a defendant must engage in ‘extremely serious misconduct.’” United States v. Leggett, 162 F.3d 237, 250 (3d Cir. 1998) (quoting United States v. Goldberg, 67 F.3d 1092, 1102 (3d Cir. 1995)). The Third Circuit Court of Appeals held Leggett forfeited his right to counsel where he committed “an unprovoked physical battery” upon his lawyer. Id. The Third Circuit concluded that “such an attack” was “the sort of extremely serious misconduct that amount[ed] to the forfeiture of the right to counsel.” Id. (internal quotation omitted); see also United States v. McLeod, 53 F.3d 322, 326 (11th Cir. 1995) (holding McLeod forfeited his right to counsel by engaging in behavior that was “repeatedly abusive, threatening, and coercive”). “Because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct.” Thompson, 355 S.C. at 267, 584 S.E.2d at 137 (quoting Goldberg, 67 F.3d at

1101). “Situations where a defendant’s own conduct forfeits his right to counsel are unusual, typically involving a manipulative or disruptive defendant.” Id.

The Supreme Court of Tennessee held a defendant did not forfeit his right to counsel where he told his appointed lawyer he knew how to get “rid” of the lawyer, and, at a subsequent meeting, physically assaulted the lawyer by striking the lawyer’s glasses with his finger. State v. Holmes, 302 S.W.3d 831, 833 (Tenn. 2010). The court explained that although the defendant’s physical attack on his lawyer was “serious misconduct,” it was not “extremely serious misconduct” warranting immediate forfeiture. Id. After surveying federal and state cases, the court noted that “only the most egregious misbehavior will support a forfeiture of [the] right [to counsel] without warning and an opportunity to conform his or her conduct to an appropriate standard.” Id. at 846. Further, the court held that forfeiture was an “extreme sanction” and should only be used as “a last resort” “in response to extreme conduct that imperils the integrity or safety of the court proceedings.” Id. at 847 (internal quotation omitted).

According to some courts, “[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.” Thompson, 355 S.C. at 267, 584 S.E.2d at 137 (citing United States v. Goldberg, 67 F.3d 1092, 1100 (3d Cir. 1995)). However, Massachusetts requires the trial judge to “first conduct a hearing at which the defendant has a full and fair opportunity to offer evidence as to the totality of the circumstances” “before a judge finds that a defendant has forfeited his right to counsel and imposes the extreme sanction of denying an indigent defendant the assistance of counsel.” Commonwealth v. Means, 907 N.E.2d 646, 652 (Mass. 2009). Petitioner respectfully requests that if this Court recognizes forfeiture of the right to counsel, then this Court should require a hearing like the one required by Massachusetts – with the defendant present and permitted to

testify. See id. Additionally, Petitioner respectfully requests that the burden of proof that the defendant committed the actions to justify a forfeiture be placed on the state. See Holmes, 302 S.W.3d at 839.

In State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996), the Court of Appeals examined a case similar to the present one. The Court explained that where the record showed Boykin was not warned of the consequences of his actions, nor the dangers inherent in self-representation, Boykin could not have waived his right to counsel, either expressly or by his conduct. Id. at 558, 478 S.E.2d at 692. Thus, the issue before the court was whether “Boykin’s actions were so severe as to constitute a forfeiture.” Id.

Specifically, Boykin’s court appointed lawyer claimed that when he visited Boykin at the detention center, Boykin “kept wanting to know what [the lawyer] was going to tell the jury, what his defense was going to be.” Id. at 554, 478 S.E.2d at 689. The lawyer told Boykin that “his defense was going to be whatever his witnesses had to say and whatever he had to say if he chose to testify, and that was going to be the defense.” Id. At this Boykin “became more and more hostile.” Id. When the lawyer told Boykin to get ready whatever “he thought up” that he wanted to use as a defense, Boykin, followed the lawyer down the hall, cursing him, as the lawyer tried to leave the detention center. Id. Upon hearing this, the trial judge relieved the appointed lawyer and refused to appoint substitute counsel. Id. at 555, 478 S.E.2d at 690. The Court of Appeals did not condone Boykin’s conduct, but held his behavior was not “so severe as to permanently deprive him of appointed counsel.” Id. at 558, 478 S.E.2d at 692.

Likewise, the first communication from Petitioner to Koger was to inquire about the proceedings. Understandably, Petitioner was upset that he received only one week’s notice of his trial date that accompanied a demand for an audience with Koger in order to prepare for the

trial. Petitioner's reaction was disproportionate to Koger's conduct, but it was understandable in light of the circumstances. Petitioner told Koger he would spend the rest of his life making Koger pay for his acts and omissions. He also told Koger that there were a few surprises for the courthouse and that he made devices. It was this email that Koger alleged was a threat to his personal safety. This email is a far cry from the physical violence other courts have found sufficiently egregious to warrant application of forfeiture. Further, this email was more akin to the cursing and aggressive behavior displayed by Boykin, which the Court of Appeals deemed was not so severe as to deprive the defendant of counsel. The judge erred in determining Petitioner forfeited his right to counsel, and the PCR judge compounded the error by finding likewise.

To the extent this Court adopts forfeiture of the right to counsel, Petitioner respectfully request this Court not permit forfeiture "on the basis of a single incident of physical violence unless the violence was extreme and (1) the defendant was previously warned that he could lose the right to counsel for such behavior; (2) there is evidence that the defendant engaged in the violence in order to manipulate the court or delay the proceedings; or (3) it is not possible to take other measures that will protect the safety of counsel." State v. Holmes, 302 S.W.3d 831, 847 (Tenn. 2010) (citing Gilchrist v. O'Keefe, 260 F.3d 87, 89 (2001)). Further, Petitioner respectfully requests that the following factors be considered by the trial court (and the appellate court on review): "(1) whether the defendant has had more than one appointed counsel; (2) the stage of the proceedings, with forfeiture rarely ... applied to deny a defendant representation during trial; (3) violence or threats of violence against appointed counsel; and (4) measures short of forfeiture have been or will be unavailing." Id. at 839 (internal quotation omitted). Put

succinctly, Petitioner respectfully requests this Court follow the Tennessee Court by requiring the following:

[W]here a criminal defendant is alleged to have physically attacked his lawyer, we suggest that the following procedure be followed. Counsel should be allowed to withdraw if requested. Then, unless the attack occurred in full view of the court, the trial court should conduct promptly an evidentiary hearing, with the defendant present and permitted to testify, and make findings of fact on the basis of the proof presented. The trial court should determine, on the basis of the facts found, whether the defendant engaged in “extremely serious misconduct” sufficient to justify the extraordinary sanction of an immediate forfeiture (or implicit waiver) of counsel. In making this determination, the trial court should consider (a) the stage of the proceedings; (b) whether the lawyer attacked is initial counsel or is a successor to other lawyers allowed to withdraw due to problems with the defendant; (c) whether the defendant had previously been warned about the potential loss of counsel as a result of misbehavior; (d) whether the defendant engaged in the misconduct deliberately and with the aim of disrupting, delaying, or otherwise manipulating the proceedings; (e) the degree of violence involved and the seriousness of any injury inflicted; and (f) whether measures short of forfeiture will be adequate to protect counsel. If the trial court concludes that the defendant did not commit “extremely serious misconduct” so as to justify a forfeiture, the trial court should (1) appoint new counsel (assuming prior counsel withdrew); (2) inform the defendant of the potential consequences of future misbehavior and the risks of proceeding pro se; and (3) order such measures as are necessary to protect new counsel from future misbehavior by the defendant.

Id. at 848.

### *Waiver*

Although neither the plea judge nor the PCR judge addressed a waiver of counsel by conduct, Petitioner addresses this issue in light of Rule 220(c), SCACR, which permits affirming a lower court’s ruling based on any ground appearing in the record. “A defendant may waive his Sixth Amendment right to counsel.” Thompson, 355 S.C. at 262, 584 S.E.2d at 134. “A waiver is an intentional and voluntary relinquishment of a known right.” Id. Courts must “indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights.” Id. (citing Johnson v. Zerbst, 304 U.S.

458, 464 (1938)). “Waiver requires a party to have known of a right and known that right was being abandoned.” Osbey v. State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019).

Typically, one waives his right to counsel through an affirmative, verbal request. Thompson, 355 S.C. at 262, 584 S.E.2d at 134. In order to waive his right to counsel, a defendant must be advised of his right to counsel and of the dangers of self-representation. Id. at 262, 584 S.E.2d at 134-135; see also Faretta v. California, 422 U.S. 806 (1975).

Additionally, “[a] defendant may waive his right to counsel through his conduct.” Thompson, 355 S.C. at 263, 584 S.E.2d at 135. “Deliberate and dilatory conduct on behalf of a defendant can suffice to waive the right to counsel.” State v. Fairey, 374 S.C. 92, 103, 646 S.E.2d 445, 450 (Ct. App. 2007). A waiver of counsel by conduct “must be knowing and intelligent.” Osbey, 425 S.C. at 620, 825 S.E.2d at 50. In order “[f]or a waiver to be ‘knowing and intelligent,’ the defendant ‘should be made aware of the dangers and disadvantages of self-representation.’” Id. (quoting Faretta, 422 U.S. at 835). Additionally, the defendant must be made aware that he might lose his right to counsel based upon his conduct. Id. at 620, 825 S.E.2d at 51 (explaining that where a defendant knew he might lose his right to counsel if he failed to obtain counsel prior to his guilty plea, the Court would examine the record to determine whether the defendant was adequately apprised of the dangers of self-representation).

When a defendant is not warned of the dangers of self-representation, the reviewing court must look to the record to determine if record provides evidence that the defendant is sufficiently aware of the dangers of self-representation. Osbey, 425 S.C. at 620, 825 S.E.2d at 51. According to this Court, “a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d

575, 576 (1990).<sup>1</sup> Therefore, “[i]n 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 reviewing court] will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source.” Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, “[i]f the record demonstrates the defendant’s decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.” Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

According to the Court of Appeals, a variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

- (1) the accused’s age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
- (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
- (5) whether the accused 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 the accused knew the legal challenges he could raise in defense to the charge(s) 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.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

This Court held the record failed to provide a sufficient basis that a defendant “actually understood the dangers of self-representation” where the plea court did not mention the dangers of self-representation and the defendant had two prior convictions for possession with intent to

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<sup>1</sup> The trial judge must “make a meaningful inquiry into [a defendant’s] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel.” Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

distribute cocaine base, a probation violation, and a subsequent parole violation. Osbey, 425 S.C. at 620-621, 825 S.E.2d at 51.

The record is devoid of any warning to Petitioner that he would waive his right to counsel through his conduct. The South Carolina cases addressing this matter require that a criminal defendant receive a warning regarding the effects of certain conduct. Here, the judge never warned Petitioner about the consequences of his conduct. While it is true that Koger was Petitioner's third lawyer, the two prior lawyers were relieved for matters unrelated to any actions by Petitioner. The public defender maintained he had a conflict of interest, and the first appointed lawyer agreed with Petitioner that there was an appearance of a conflict of interest due to the lawyer's concentrated practice in the Fifth Circuit. Therefore, Petitioner was not on notice as to the consequences of any conduct that led to Koger's motion to be relieved.

According to the evidence in the record, Petitioner's age and educational background militated in favor of his awareness of the dangers and disadvantages of self-representation. However, the concerns over his mental health counseled against such awareness. The state expressed doubts about Petitioner's competency and ability to conform his conduct to the requirements of the law. Further, Petitioner told the judge that he was concerned about his mental health as he and his mother had noticed a change in his behavior.

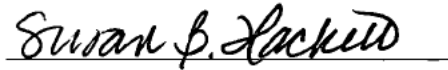
There was no evidence that Petitioner was previously involved in criminal trials. Petitioner represented himself, or his company, in a civil action, but he had no experience with the criminal justice system. Petitioner made clear to the judge that he was not comfortable with representing himself in the criminal justice system despite his prior self-representation in the civil courts. Petitioner seemed aware of the dangers of self-representation and expressed his fear of those dangers when he repeatedly requested the appointment of counsel.

While the state may argue that Petitioner was engaging in dilatory conduct, the record fails to support such a conclusion. The charges against Petitioner were old, but the first trial date presented to Petitioner was the one where Koger moved to be relieved. It was undisputed that Koger was appointed to represent Petitioner for over a year before he made any effort to speak with Petitioner. It was also undisputed that Koger cut off all communications with Petitioner after Petitioner filed a complaint with the Commission on Lawyer Conduct despite the fact that Koger had not been relieved from representation and was required by the Rules of Professional Conduct to represent Petitioner diligently and communicate with him reasonably – even while the complaint was pending. It was also undisputed that Koger gave Petitioner only one week’s notice of his trial date, and demanded that Petitioner meet with him on certain dates in order to prepare for trial. Koger had taken no action to prepare for Petitioner’s trial in the years during which he had been appointed to represent Petitioner. Petitioner’s desire for representation by someone other than Koger was not an delay tactic – instead, it was an effort for representation by a lawyer who would be prepared for trial and communication with him throughout the representation.

Thus, the lack of warning that Petitioner’s conduct may result in the waiver of counsel and the lack of evidence in the record that Petitioner was apprised of the dangers and disadvantages of self-representation by the judge or otherwise require this Court not find Petitioner waived his right to counsel by conduct.

**CONCLUSION**

Petitioner respectfully requests this Court hold that South Carolina does not recognize forfeiture of counsel. In the alternative, if this Court recognizes forfeiture, Petitioner respectfully requests this Court hold Petitioner neither forfeited nor waived by conduct his right to counsel.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30<sup>th</sup> day of October, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Richland County

J. Derham Cole, Circuit Court Judge  
—————

GLEN K. LACONEY,

PETITIONER

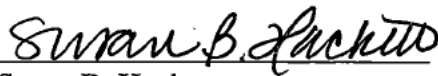
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

—————  
CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Glen K. LaConey at 1427 Pickens Street, Columbia, SC 29201, this 30<sup>th</sup> day of October, 2019.

  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 30<sup>th</sup> day of October, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: September 30, 2029