No. 18-697

In the Supreme Court of the United States

TONY VON CARRUTHERS,
Petitioner,

v.

TONY MAYS, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Can a state court's decision that a criminal defendant implicitly waived and forfeited the Sixth Amendment right to counsel qualify as contrary to, or an unreasonable application of, this Court's "clearly established" precedents when the Court has not considered whether and when the right to counsel may be implicitly waived or forfeited?

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STATEMENT OF THE CASE

The petitioner was convicted by a jury in the Criminal Court for Shelby County, Tennessee, on three counts of first-degree premeditated murder for the killings of Marcellos "Cello" Anderson, Delois Anderson, and Frederick Tucker. The jury imposed a sentence of death on each conviction. The proof at trial established that the petitioner buried the victims alive inside a freshly dug grave, below a casket placed in the grave. *State v. Carruthers*, 35 S.W.3d 516, 527 (Tenn. 2000), *cert. denied*, 533 U.S. 953 (2001). The petitioner's motive for the murders was financial. *Id*. at 524. The petitioner confessed the crime to a fellow inmate. *Id*. at 529.

Pretrial Proceedings on the Appointment of Counsel for Petitioner

Shortly after the return of the petitioner's first indictment in 1994, the trial court granted leave to the petitioner's retained counsel, A.C. Wharton, Jr., to withdraw from further representation. *Id*. at 534. The court appointed Larry Nance to represent the petitioner and Craig Morton to serve as co-counsel. *Id*. The court authorized funding for the petitioner to employ an investigator, Arthur Anderson. *Id*. at 535.

The petitioner later moved for a substitution of appointed counsel. *Id*. Nance asked the court to appoint a different investigator and then requested leave to withdraw from further representation, due to the petitioner's "personal physical threats" against Nance. *Id*. The trial court appointed Coleman Garrett to represent the petitioner and James Turner to serve as third counsel acting as an investigator. *Id*. Turner

then withdrew due to other obligations in his solo law practice, and the trial court appointed Glenn Wright as the third attorney, to act as an investigator. *Id*. at 535-36.

The petitioner moved for another substitution of counsel, and Garrett, Morton, and Wright requested and received permission to withdraw from further representation of the petitioner. *Id*. The court then appointed William Massey and Harry Sayle to represent him. At Massey's request, Arthur Anderson was again retained as an investigator. *Id.* 536-38.

On December 19, 1995, Massey filed a motion to withdraw as counsel for the petitioner, due to "fear[] for his safety and those around him." *Id*. at 538. At a hearing on the motion, the trial court found that the petitioner's misconduct was "part of an overall ploy on his part to delay the case forever until something happens that prevents it from being tried." *Id*. at 539. Indeed, the petitioner pointed at Massey during the hearing "with some sort of threatening gesture." *Id*. Nevertheless, the trial court denied Massey's request to withdraw, and it rejected Massey's suggestion that the petitioner represent himself at trial. *Id*. at 539-40.

On January 2, 1996—six days before the petitioner's trial was scheduled to commence—Massey renewed his motion to withdraw, due to the petitioner's continued threatening letters and "concern[] for his daughter's safety because Carruthers had described the car she drove." *Id*. Following a hearing , the trial court denied the motion. But the court cautioned the petitioner that if he elected not to work with his attorneys to prepare for trial, then "he will go forward representing himself." *Id*. at 540-41. As the court explained,

> in my judgment, the only option that is still available if Mr. Carruthers chooses not to work with Mr. Massey and Mr. Sayle in going forward with this case next Monday, is for him to represent himself. And I'll provide him with a copy of the rules of Tennessee procedure, the rules of evidence. And he can sit at counsel table and voir dire the jury, and question witnesses, and give an opening statement, as any lawyer would, and he would be required to comply with all the rules as any lawyer would, if he chooses to go forward on his own. If he chooses to say nothing, then that's his prerogative, and—But that's what the situation will be next Monday.

Id. at 541. The court clarified that, if the petitioner proceeded to trial pro se, Massey and Sayle would continue as "elbow counsel" for the petitioner. *Id*.

At a hearing on January 3, 1996, the trial court saw the petitioner "glaring" at Massey while "gritting his jaw." *Id*. at 542. The court reminded the petitioner "that if it is his decision not to proceed with Mr. Massey and to proceed pro se . . . then he needs to understand that he will be held to the same standard that attorneys are held to during a trial." *Id*.

Following this hearing, Massey applied to the Tennessee Court of Criminal Appeals for an extraordinary appeal, to challenge the trial court's decision that Massey remain as counsel or as advisory counsel. *Id*. In an order filed January 8, 1996, the appellate court granted Massey leave to withdraw immediately. *Id*. at 542-43.

On that same date but before the trial court received notice of the appellate court's order, the trial court directed the petitioner to represent himself at trial and directed Massey and Sayle to serve as "elbow counsel." *Id*. at 543. In the trial court's view, "if the record isn't complete enough and replete enough with evidence of manipulative conduct and obstructionism, then I can't imagine ever there being a record for the appellate courts in Tennessee that would meet that criteria." *Id*. at 544. The court regarded the petitioner's attempt to waive any conflict with Massey as another tactic to delay the proceedings. *Id*.

On January 9, 1996, the Court of Criminal Appeals entered an addendum to its prior order and relieved Massey completely from further representation or participation as "elbow counsel." *Id*. Sayle stayed on the case as "elbow counsel." Then, during voir dire on January 11, 1996, the trial court granted the State's request for a continuance due to the hospitalization of a material witness. *Id*. At that time, the trial court denied the petitioner's motion for appointment of new counsel, and it rescheduled the trial to April 15, 1996. *Id*.

On January 16, 1996, the trial court approved the petitioner's request for funds to hire an investigator, and the court directed the investigator to contact the court directly if additional funds were needed. *Id*. at 544-545. In February 1996, the court allowed Sayle to withdraw as "elbow counsel" based on the petitioner's apparent lack of confidence or trust in Sayle and his personal, verbal attacks against Sayle. *Id*. at 545. The petitioner renewed his motions for appointment of

counsel on March 4, 1996, and on April 15, 1996, which were denied. *Id*.

Trial and Direct Appeal

The petitioner's trial commenced on April 15, 1996, and the petitioner represented himself during both the guilt and penalty phases of the trial. *Id*. Thereafter, the trial court appointed new counsel, Lee Filderman and Stephen Leffler, to represent the petitioner in his post-judgment motions and on direct appeal. Through new counsel, the petitioner filed motions for judgments of acquittal or a new trial, which were denied.

On direct appeal, the Tennessee Supreme Court considered and rejected the petitioner's claim that the trial court deprived him of the right to appointment of counsel, as guaranteed by the Sixth Amendment. In so doing, the court recognized that a waiver of the right to counsel ordinarily must be voluntarily, knowingly, and intelligently made, and that it typically occurs "after the trial judge advises a defendant of the dangers and disadvantages of self-representation and determines that the defendant 'knows what he is doing and his choice is made with eyes open.'" *Id*. at 546 (quoting *Adams v. United States, ex rel. McCann*, 317 U.S. 269, 279 (1942)). Nevertheless, "[m]any courts . . . have recognized that the right to counsel is not a license to abuse the dignity of the court or to frustrate orderly proceedings." *Id*.

Referencing *Illinois v. Allen*, 397 U.S. 337 (1970), and its holding that a criminal defendant might lose the right to remain present throughout the trial by persisting in disruptive behavior, the Tennessee Supreme Court noted that several courts had further

concluded that "the right to counsel can be implicitly waived or forfeited if a defendant manipulates, abuses, or utilizes the right to delay or disrupt a trial." *Id*. at 546-48 n. 27 (citations omitted). The court explained that an implicit waiver occurs when the court warns a criminal defendant that counsel will be lost if the defendant's "dilatory, abusive, or uncooperative misconduct continues" and the defendant "persists in such behavior." *Id*. at 548. "In contrast, forfeiture results regardless of the defendant's intent to relinquish the right and irrespective of the defendant's knowledge of the right." *Id*. If a defendant engages in "extremely serious misconduct," a finding of forfeiture is appropriate "even though the defendant was not warned of the potential consequences of his or her actions or the risks associated with self-representation." *Id*.

Relying on numerous cases from other jurisdictions supporting its decision, the Tennessee Supreme Court concluded that a criminal defendant may implicitly waive or forfeit the Sixth Amendment right to counsel. *Id*. at 549. An implicit waiver may be found when the trial court "advises the defendant the right to counsel will be lost if the misconduct persists and generally explains the risks associated with self-representation." *Id*. "[A] finding of forfeiture is appropriate only where a defendant egregiously manipulates the constitutional right to counsel so as to delay, disrupt, or prevent the orderly administration of justice." *Id*. at 550.

In the court's view, the record supported an implicit waiver of the right to counsel "because, after being warned by the trial court that he would lose his attorney if his misconduct continued, Carruthers

persisted in his misconduct." *Id*. But even if the trial court's warnings to the petitioner were insufficient for an implicit waiver, the petitioner's conduct was "sufficiently egregious" to support a forfeiture of the right. *Id*. at 550.[1]

State and Federal Court Collateral Review

Upon completion of the direct appeal, the petitioner pursued a petition for post-conviction relief in the trial court, which was denied, and that decision was affirmed on appeal. *Carruthers v. State*, No. W2006-00376-CCA-R3-PD, 2007 WL 4355481 (Tenn. Crim. App. Dec. 12, 2007), *perm. app. denied* (Tenn. May 27, 2008). His state-court request for a writ of habeas corpus was likewise unsuccessful. *Carruthers v. Worthington*, No. E2007-01478-CCA-R3-HC, 2008 WL 2242534 (Tenn. Crim. App. June 2, 2008), *no perm. app. filed*.

Thereafter, he filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee, which denied and dismissed the petition on March 31, 2014. On the Sixth Amendment claim, the district court concluded that the petitioner could not show under 28 U.S.C. § 2254(d) that the Tennessee Supreme Court's resolution of his claim was contrary to, or an

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[1] In a subsequent decision clarifying its holding in *Carruthers*, the Tennessee Supreme Court characterized *Carruthers* as "an extreme case, involving a significant pattern of verbal threats and manipulation of the system resulting in the ultimate withdrawal of seven lawyers and deliberate delay of the judicial process, all occasioned by the defendant." *State v. Holmes*, 302 S.W.3d 831, 841 (Tenn. 2010).

unreasonable application of, clearly established federal law as determined by this Court. (Pet. Apx. 144a-147a.)

On appeal, the Sixth Circuit affirmed. Regarding the Sixth Amendment claim, the court stated that, because the state court decided the claim on the merits, its own consideration was limited to the deferential review mandated by 28 U.S.C. § 2254(d). *Carruthers v. Mays*, 889 F.3d 273, 289 (6th Cir. 2018). Applying that level of review to the Tennessee Supreme Court's merits determination, the court concluded that the state court's decision was not contrary to this Court's precedents because the Court "has never addressed whether a criminal defendant may forfeit his right to counsel by effectively rejecting appointed counsel after filing complaints against and threatening multiple court-appointed attorneys." *Id*. at 290. Likewise, the state court did not unreasonably apply federal law when denying relief. "Given the lack of Supreme Court precedent on this issue, and considering the close interplay between the right to counsel and the right to self-representation, we cannot say that the state court erred so clearly as to entitle Carruthers to habeas relief." *Id*. Nor did the state court unreasonably determine the facts in light of the evidence before it. *Id*. at 291-92.

ARGUMENT

The State Court Did Not Contravene or Unreasonably Apply Clearly Established Precedent From This Court When Concluding That the Petitioner Implicitly Waived and Forfeited the Right to Counsel Because the Court Has Never Before Considered That Claim.

The petitioner argues that the Court should grant a writ of certiorari because lower courts have disagreed for a number of years on whether and when a criminal defendant may implicitly waive or forfeit the Sixth Amendment right to counsel. But as the district court and the Sixth Circuit both rightly recognized below, federal court review of the petitioner's claim at this juncture is limited to a consideration of whether the Tennessee Supreme Court's decision rejecting the petitioner's claim—and finding both an implicit waiver and a forfeiture of the right—was contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. 28 U.S.C. § 2254(d). Every circuit court to review the claim through that lens has concluded that, because the Court has never held that the right to counsel may not be impliedly waived or forfeited, the state court's rejection of the claim does not contravene or unreasonably apply this Court's "clearly established" decisions. The Sixth Circuit correctly denied habeas corpus relief here.

Through the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress limited the availability of federal habeas corpus review "with respect to any claim" that a state court "adjudicated on the merits." 28 U.S.C. § 2254(d). Habeas relief is not authorized for a federal claim decided on the merits in

state court, unless the state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." This means the law at the time of the state-court adjudication. *Greene v. Fisher*, 565 U.S. 34, 39-40 (2011); *see also Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) ("State-court decisions are measured against this Court's precedents as of the time the state court renders its decision.") (internal quotation marks omitted).

A state-court decision is "contrary to" federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state-court decision involves an "unreasonable application" of federal law if "the state-court decision identifies the correct governing legal principle in existence at the time" but "unreasonably applies that principle to the facts of the prisoner's case." *Pinholster*, 563 U.S. at 182 (internal quotation marks and citation omitted). "[T]he ruling must be 'objectively unreasonable, not merely wrong; even clear error will not suffice.'" *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (quoting *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015)). An "unreasonable application" of federal law is one "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

When none of the Court's decisions "confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding from this Court." *Donald*, 135 S. Ct. at 1377 (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014)). Likewise, when "[n]o precedent of this Court clearly forecloses" a state-court decision, it cannot be an unreasonable application of federal law as decided by this Court. *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016).

A number of circuit courts have concluded that, because the Court has not decided that the right to counsel may never be subject to an implicit waiver or forfeiture—and the Court has recognized that some trial rights guaranteed by the Sixth Amendment may be forfeited—a habeas petitioner cannot show that the state-court rejection of a claim challenging the implicit waiver or forfeiture of the right to counsel is contrary to, or an unreasonable application of, this Court's "clearly established" precedents. In *Fischetti v. Johnson*, 384 F.3d 140 (3rd Cir. 2004), the Third Circuit considered a habeas corpus petitioner's challenge to a state court's decision that the petitioner must proceed to trial with his then-current counsel or with no counsel. The Third Circuit correctly observed that the issue "is not whether the state court order was simple error, but whether it was error that contradicted or unreasonably applied Supreme Court precedent." *Id.* at 150. Because this Court's "established precedent in this area has not expressly dealt with the matter of forfeiture of counsel," it necessarily follows that the state-court decision "was not contrary to federal law as articulated by decisions of the Supreme Court." *Id.*; *see also Gilchrist v. O'Keefe*, 260 F.3d 87, 97 (2nd Cir. 2001) ("Having thus

established that Supreme Court precedent recognizes a distinction between waiver and forfeiture of constitutional rights, and that there is no Supreme Court holding either that an indigent defendant may not forfeit (as opposed to waive) his right to counsel through misconduct nor a general Supreme Court holding that a defendant may not forfeit a constitutional right, we conclude that the state court rulings were not 'contrary to' clearly established federal law as determined by the Supreme Court.").

As for whether the state-court decision was an unreasonable application of the Court's precedents, the Third Circuit considered not only *Allen* and its conclusion that the right to be present at trial may be forfeited but also *Taylor v. United States*, 414 U.S. 17 (1973), and its holding that the trial of an absconded defendant may continue regardless whether the defendant was previously warned that the trial could continue without him. *Id*. at 151. The Court's decisions in *Allen* and *Taylor* "certainly provide a basis to conclude, as the state judge did in this case, that defiant behavior by a defendant can properly cost that defendant some of his Sixth Amendment protections if necessary to permit a trial to go forward in an orderly fashion." *Id*. This cuts against a finding that the state court unreasonably applied the Court's precedents. *Id*.

The Third Circuit also considered decisions from other jurisdictions that had approved of forfeitures of the right to counsel, and those decisions recognized "that the Supreme Court's general right to counsel decisions are reasonably read as qualified by the trial court's power to remedy abuse of that right through forfeiture." *Id.* at 152. This "canvass of decisions of our

own and sister courts reinforces our view that the state court order that Fischetti proceed without counsel was not an objectively unreasonable application of Supreme Court case law under the Sixth Amendment." *Id*. (citing *William*, 529 U.S. at 409-10); *see also Wilkerson v. Klem*, 412 F.3d 449, 455-56 (3rd Cir. 2005) ("Because no clear forfeiture standard has been articulated by the Supreme Court, it cannot be said that the state court in this case acted unreasonably when it found forfeiture."); *Gilchrist*, 260 F.3d at 97 ("[G]iven the Supreme Court's recognition that other important constitutional rights may be forfeited based on serious misconduct, we cannot say that the state courts were unreasonable in determining that the right to counsel could be forfeited based on petitioner's physical assault on his attorney.").

More recently, in *Vreeland v. Zupan*, 906 F.3d 866 (10th Cir. 2018), the Tenth Circuit considered a case in which the petitioner sought the appointment or retention—and then the replacement—of multiple attorneys. The trial court concluded that this was an attempt to abuse the process and delay the trial proceedings. The state appellate court held that the petitioner implicitly waived the Sixth Amendment right on counsel. On habeas corpus review, the Tenth Circuit initially concluded that, because this Court "has never addressed whether a defendant can implicitly waive the right to counsel via his or her conduct," the state court decision based on the petitioner's conduct was not contrary to the Court's precedents. *Id*. at 878.

Next, the Tenth Circuit considered whether the state court unreasonably applied this Court's precedents when finding an implicit waiver. The petitioner challenged the absence of express warnings that his continued conduct might result in the loss of the right to counsel. In response, the Tenth Circuit looked to *Taylor* and the fact that the defendant in that case was not warned that voluntarily absconding from trial would result in a waiver of his right to be present for the remainder of the trial. *Id*. at 880 (citing *Taylor*, 414 U.S. at 19-20). The state court did not unreasonably apply "clearly established" precedents from this Court because "[r]easonable jurists could conclude that, under *Taylor*, an express warning from the trial court isn't a necessary precondition for holding that a defendant impliedly waived his or her constitutional rights." *Id*.; *see also Higginbotham v. Louisiana*, 817 F.3d 217, 223 (5th Cir. 2016) (concluding that the state court's decision that the petitioner implicitly waived the right to counsel through dilatory tactics to delay or disrupt the trial proceedings was neither contrary to, nor an unreasonable application of, the Court's precedents, because the Court has not previously addressed the issue).

Under the governing standard applicable to the petitioner's claim decided on the merits in state court then raised anew in federal court, the Sixth Circuit correctly concluded that the petitioner cannot prove his entitlement to relief under 28 U.S.C. § 2254(d). The present case and the above-referenced decisions show that at least five of the circuit courts have concluded that a state court's finding of an implicit waiver or a forfeiture of the right to counsel is not contrary to, or

an unreasonable application of, "clearly established" federal law because the Court has not before addressed that issue. The petitioner has offered no argument as to how these cases were wrongly decided under 28 U.S.C. § 2254(d), nor has he offered any contrary authority applying 28 U.S.C. § 2254(d) differently. In fact, the petitioner has provided minimal analysis on the application of AEDPA's deferential review standard to this case. (Petition, pp. 26-27.) Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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