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DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 09-0431 PRPC  
) 1 CA-CR 09-0757 PRPC  
Respondent, ) (Consolidated)  
)  
v. ) DEPARTMENT E  
)  
GREGORY B. GILL, ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
Petitioner. ) 111, Rules of the Arizona  
) Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR 2006-012840-002 DT  
CR 2007-009308-001 DT

The Honorable Kristin C. Hoffman, Judge

**REVIEW GRANTED; RELIEF GRANTED**

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**N O R R I S**, Judge

¶1 Gregory Benjamin Gill ("Gill") petitions this court to

review the superior court's denials of post-conviction relief. Presiding Judge Diane M. Johnsen, and Judges Patricia K. Norris and Philip Hall, have considered the petitions for review. For the reasons stated, we grant review and grant relief in both cases, and remand both matters for further proceedings.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶12 We discuss only the factual and procedural history necessary to our disposition of these matters. In Maricopa County Cause No. CR 2006-012840-002 DT (the "first case"), Gill was charged by indictment with 191 counts in connection with his alleged participation in schemes to defraud investors. The case was designated complex. Gill retained private counsel who entered an appearance on January 29, 2007. After various motions and hearings, on June 14, 2007, the superior court allowed Gill's counsel to withdraw because of nonpayment of fees. Though he was not present, the court ordered Gill to appear at the next status conference "with new counsel or sufficient documentation that he is indigent and unable to hire private counsel." The minute entry incorrectly listed July 26, 2007, as the date of the next status conference. The status conference was actually scheduled for June 29, 2007. The court corrected the error in a later minute entry but endorsed former counsel, not Gill.

¶13 Gill appeared at this status conference, but without

counsel. Gill explained he had been confused by the conflicting minute entries and stated it was his "desire to in fact get new counsel," and "the next hearing is the 26th [of July]. I could have counsel by that date." The court and the parties then discussed a pending motion to remand, and confirmed oral argument on the motion for July 26. The court advised Gill it would not continue the oral argument:

THE COURT: So what I don't want to happen is new counsel to come on and somebody say, well, now we can't go because we just got new counsel and we're just processing the information. I don't want that to happen. I want everybody to be ready on the 26th the way they need to be ready . . . .

¶14 On July 26, Gill appeared without counsel. Gill explained he had expected counsel to appear:

I found a firm that I like . . . . I made an arrangement with them. I was told that they would be here today to represent me . . . .

Tuesday at 4:10, I received a voice mail message informing me that they would not be here today to represent me . . . .

I'm here to ask the Court for additional time. . . . If the Court isn't going to grant me additional time, then I have no choice but to submit the motion. And I'm not prepared to orally argue the motion. If you have to go forward, I understand.

The court then denied the motion, after noting Gill had not presented argument on the motion and had submitted it "as is."

Because the State had tendered a plea offer to Gill, and the State and Gill were both interested in discussing settlement, the court ordered the parties to conduct good faith settlement discussions before the next status conference which the court set for October 12, 2007. The prosecutor then returned to the topic of Gill's efforts to retain counsel, saying he had exchanged messages with an individual we take to be the lawyer Gill expected to represent him. Nevertheless, the court announced Gill was "pro per":

As regards Gill's attorney, I don't know what the status is and I'm not -- I guess he doesn't. I didn't talk with Fred Petti [presumably the lawyer Gill referred to earlier]. I exchanged messages with him.

THE COURT: Until there is a notice filed with the Court, Mr. Gill represents himself. Okay. So you are free to engage in discussions with Mr. Gill. Until something is filed with the Court showing that they want to be counsel of record, Mr. Gill represents himself. He's pro per.

Although the trial court told the parties Gill was pro per, the court neither asked Gill whether he wanted to waive his right to counsel, nor did it warn him that his conduct could result in a waiver of his right to counsel.

¶15 The October 12 status conference went forward as planned. As the parties briefed the court regarding the status of settlement discussions, the court and the parties discussed Gill's efforts to obtain counsel. Gill and the prosecutor

advised the court that although Gill had not yet been able to retain counsel, Gill was receiving assistance in the settlement discussions from a California lawyer, Gerald Werksman, who had represented Gill before the Arizona Corporation Commission. The court informed Gill that unless counsel filed a notice of appearance, "as far as I'm concerned, you're representing yourself." Disagreeing with the court's view that he was not represented by counsel, Gill asserted "[t]here will be somebody coming forward." To this, the court responded: "So if you want to get counsel, get counsel, but I am proceeding as if you're representing yourself." The court did not warn Gill any further delay in retaining counsel in the case would result in a waiver of his right to counsel. Before the conclusion of the hearing, the court set trial for December 10, 2007.

¶16 The State moved to continue trial because plea negotiations were underway. A hearing on the State's motion was held before a different judge. Gill was not present at the hearing. The prosecutor did not, however, request a bench warrant because of Gill's absence, explaining Gill had agreed to participate in a settlement conference later in the week. The prosecutor advised the court he had been in contact with Werksman, "who's unofficially representing Mr. Gill." The court granted the continuance, vacated the December 2007 trial setting, and set a status conference before the trial judge on

December 3, 2007.

¶17 The settlement conference referenced by the prosecutor took place on November 30, 2007. Gill appeared without counsel. At the beginning of the conference, the prosecutor informed the court and Gill that at the hearing on the State's motion to continue, the court had ordered applications for pro hac vice admissions be filed by December 3, 2007. Because Gill had not been at the hearing on the State's motion and the court's order regarding pro hac vice admissions was not mentioned in the minute entry of the hearing distributed by the clerk of the court to the parties, he had not known of the court's order regarding pro hac vice admissions. The court then told Gill he was representing himself "right now," and if Werksman was going to represent him "formally here he has to file papers with the judge." To this, Gill responded, "Right. And my understanding is he's prepared to do so." Gill then explained Werksman had met with the prosecutor regarding settlement and that he and Werksman were in the process of setting up another meeting to negotiate settlement. The parties and the court agreed to continue the settlement conference to December 21, 2007.

¶18 At the December 3, 2007 status conference, Gill appeared without counsel. The prosecutor told the court he would be submitting a plea offer to Gill with a December 31, 2007 deadline, and because the settlement conference was

scheduled for December 21, "we" would know by the end of the year whether Gill would go to trial. Accordingly, with no objection from Gill, the court set trial for February 19, 2008.

¶19 On December 21, the same day as the settlement conference, the State charged Gill in a separate case, Maricopa County Cause No. CR 2007-009308-001 DT (the "second case"), with three more felonies. Based on the new charges, the State sought to revoke Gill's release in the first case, and at a hearing on December 24 in the second case, the court discussed Gill's representation. The court provided Gill an opportunity to apply for appointed counsel but he declined:

I will get representation here if could could [sic] put this out five days or a week or something. I'm not claiming indigency, simply saying I'm not prepared to go forward.

. . . .

THE COURT: And will you be able to get a private lawyer by then or appoint a public defender now and if you get one, they'll back out?

[GILL]: I appreciate that. I'd like to talk to a lawyer if I may before I go back to --

THE COURT: I'll appoint the Public Defender's Office now to discuss it with you but I will continue this to December 31.

However before Gill could consult with the Public Defender, the Public Defender objected to the appointment because Gill stated

he was not indigent. The court then granted a continuance and told Gill, "I will leave it up to you to get a lawyer. You have to understand that on December 31, if you don't have a lawyer, the case may still go on."

¶10 Gill retained counsel in the second case, but on February 12, 2008, appeared at a trial management conference in the first case without counsel. The prosecutor advised the court he continued to deal "with a California lawyer [Werksman], who was unofficially representing Mr. Gill," and Werksman had advised him he had met with and discussed the plea offer with Gill, but Gill had rejected the offer. When Gill disputed this account, the superior court stated:

We're not dealing with anybody except Mr. Gill from now on, and that's the Court's directive.

And at this point, given the history of this case, it is very apparent to me, Mr. Gill, that you have forfeited your right to counsel.

We're ready to go to trial on the 19th.

[GILL]: May I be heard?

THE COURT: I've seen you more than one occasion, and on each occasion you have told me, "I am going to be represented by counsel." You have yet to show up with counsel, sir.

[GILL]: First of all, this Court has told me that I'm representing myself. It's never been my desire, nor would I ever represent myself in a complex case. That



would be literally impossible.

. . . .

I'm asking the Court today to appoint counsel to represent me. That's what I'm asking.

The court denied Gill's request for appointed counsel stating, "I believe that the record is clear that you have forfeited your right to counsel based on your actions up to this point, sir."

The court granted Gill's request for time to speak to the prosecutor about the plea offer, and after discussions, the State extended the offer for two days until the consolidated release hearing.

¶11 At the consolidated release hearing on February 14, Gill appeared with counsel he had retained in the second case. As to the first case, counsel expressed concern about Gill's representation, stating:

[I]t's my understanding -- and I'm sure [the prosecutor] will jump in if I'm being inaccurate -- [Gill] asked for court-appointed counsel in that [first] case and does not agree with the Court's ruling that he is not entitled to the court-appointed counsel. He certainly does not agree that he has forfeited that right and would ask, I believe in this court, that this Court appoint counsel for this case in the [first case].

. . . .

I think if [the prosecutor], if I'm not mistaken, made a record that there had never been a time when the Court had given Mr.

Gill the typical warnings required under the Constitution and law that the fool for a client, for lack of a better word, warnings, No. 1.

No. 2, that he had never said I waive counsel. He always said I'm hoping to get counsel. He waived counsel I believe one time or refused the public defender in December for purposes of his settlement conference.

So for this hearing, he will confirm that I'm sure he is requesting counsel be appointed.

The court noted the trial judge in the first case had already found Gill had forfeited his right to counsel, and stated he "would honor [that] determination."

¶12 On February 19, Gill appeared for trial without counsel. Werksman was present, but did not appear on his behalf. After reviewing the State's plea offer, Gill requested an opportunity to confer with his counsel in the second case. The State had no objection as it had extended an offer in the second case. The court contacted counsel, and allowed Gill to have a private conversation with him. Afterwards, Gill asked that the plea agreements be faxed to counsel, and the matter be continued until the next morning for a possible change of plea. The court agreed to continue trial to the next day, but informed Gill that if the matter was not resolved, he should be prepared to go to trial.

¶13 The next morning, Gill stated he wanted to settle the

case and asked for a short continuance. He told the court his counsel in the second case had suggested they "spend some time with [the prosecutor] and see if we could work out some of the language." The court denied the request:

You asked me for some additional time. I gave it to you. Today is the day that you need to make a decision, because I'm going to send my bailiff downstairs to get the jury, if you're not ready, sir.

[GILL]: As I am trying to indicate to the Court, I do not wish to waste the Court's time. I'm incapable of acting as my own counsel in this complex case. I've stated that over and over. So I'm asking the Court to either allow me to have a -- Mr. Feder's [retained counsel in the second case] suggestion was to have a settlement conference on Friday, and I would abide by whatever that settlement was, and that was his suggestion.

. . . .

THE COURT: . . . Are you prepared to enter a plea today?

. . . .

[GILL]: As I stated a minute ago, I have no desire to go forward with a trial, take up the Court's time and so forth, so I guess I would be in a position to sign this plea.

The parties executed a plea agreement which the court then accepted.

¶14 Gill appeared at sentencing with retained counsel. The court denied counsel's motion to continue, and sentenced

Gill to consecutive, maximum ten year prison terms, followed by probation. Gill also pled guilty in the second case. The court sentenced him to a prison term concurrent with the sentences in the first case.

¶15 Gill filed petitions for post-conviction relief in both cases.<sup>1</sup> In the first case, he argued the court had denied his constitutional right to counsel. He also argued the court had improperly denied his request to continue sentencing. In the second case, he argued the crimes alleged had not been committed in Arizona and thus the court lacked subject matter jurisdiction, and the State's request to transfer this case to the judge assigned to the first case amounted to impermissible forum shopping. Finding no colorable claims, the court denied relief in both matters. Gill timely petitioned this court for review.

#### DISCUSSION

¶16 We review Gill's Sixth Amendment denial of the right to counsel claim de novo. *State v. Glassel*, 211 Ariz. 33, 50, ¶ 59, 116 P.3d 1193, 1210 (2005). The right to counsel is

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<sup>1</sup>In the second case, the court noted Gill argued he "pleaded guilty in this case only because he pleaded guilty in [the first case], and that he should have Rule 32 relief in this case if he obtains the Rule 32 relief he requested in the [first] case. The State agrees with the defendant." Because of our resolution of Gill's petition for review in the first case, we need not address Gill's denial of a continuance claim, or the claim presented in the second case.

fundamental. *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 795, 9 L. Ed. 2d 799 (1963). It is so fundamental to our adversarial system its deprivation can never be deemed harmless. *Chapman v. California*, 386 U.S. 18, 23 & n.8, 87 S. Ct. 824, 828 & n.8, 17 L. Ed. 2d 705 (1967); see also *State v. Ring*, 204 Ariz. 534, 552, ¶¶ 45-46, 65 P.3d 915, 933 (2003) (deprivation of right to counsel is structural error, and reversal is "automatic[]"). Of course, like any constitutional right, the right to counsel may be expressly waived. *Faretta v. California*, 422 U.S. 806, 820, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975); *State v. Dann*, 220 Ariz. 351, 360, ¶ 24, 207 P.3d 604, 613 (2009). But waiver of such a fundamental constitutional right is valid only if voluntary, and made with an understanding of the consequences. *Faretta*, 422 U.S. at 835-36, 95 S. Ct. at 2541; *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884, 68 L. Ed. 2d 378 (1981).

¶17 In some circumstances, the right can be waived by conduct, but only after the court warns the defendant further disruptive or dilatory conduct may result in a waiver of the right to counsel, and explains the implications of such waiver, including the risks and dangers of self-representation. *State v. Hampton*, 208 Ariz. 241, 244, ¶ 7, 92 P.3d 871, 874 (2004).

¶18 A defendant can also lose his right to counsel through "forfeiture." Although the Arizona Supreme Court has not

expressly applied forfeiture as a basis for loss of the right to counsel, in discussing the doctrine it has explained that a number of cases "suggest that a defendant can 'forfeit' his right to counsel without prior warning if he engages in severe misconduct or a course of disruption aimed at thwarting judicial proceedings." *Hampton*, 208 Ariz. at 244, ¶ 8, 92 P.3d at 874. However, "[t]hese cases suggest that forfeiture is reserved for the most severe cases of misconduct and should result only when less restrictive measures are inappropriate." *Id.* The supreme court also noted that in a few cases, courts have found misconduct extremely "dilatatory" when a defendant's actions in obtaining counsel have led to excessive delay. See e.g. *United States v. Mitchell*, 777 F.2d 248, 257-58 & n.2 (5th Cir. 1985). "Because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatatory conduct." *United States v. Goldberg*, 67 F.3d 1092, 1101 (3d Cir. 1995).

¶19 Here, Gill did not expressly waive his right to counsel, and the record does not demonstrate he waived his right to counsel by conduct because it is devoid of the required warnings. As discussed above, at the February 12, 2008 trial management conference, the superior court found Gill had

forfeited his right to counsel.<sup>2</sup> Therefore, unless Gill forfeited his right to counsel, he was denied his right to counsel and we must vacate his convictions and sentences.

¶20 The record does not show Gill forfeited his right to counsel. Specifically, the record fails to demonstrate Gill engaged in severe misconduct. Although the record reflects at various times the court told Gill he needed to obtain counsel, and Gill failed to do so, Gill's failure to do so did not delay trial. His motions to continue were denied, and the case proceeded as scheduled. The court continued trial only once and that was at the State's request. Further, Gill made no threats or engaged in any misconduct directed towards counsel. His retained counsel withdrew after months of representation because of nonpayment of the remainder of fees.<sup>3</sup> The record reflects Gill attempted to retain other counsel.

¶21 Moreover, even if Gill's conduct could be considered "severe misconduct or a course of disruption aimed at thwarting judicial proceedings," before it could conclude Gill had forfeited his right to counsel, the superior court was required

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<sup>2</sup>In denying Gill's petition for post-conviction relief, the court found the record supported the superior court's finding Gill had forfeited his right to counsel.

<sup>3</sup>At least one court has suggested that under similar circumstances, the trial court has a due process obligation to independently evaluate a defendant's financial circumstances for purposes of appointment of counsel. *Potter v. State*, 547 A.2d 595, 599 (Del. 1988).

to consider "less restrictive measures" when Gill failed to appear with counsel. See *Hampton*, 208 Ariz. at 244, ¶ 8, 92 P.3d at 874. For example, the court could have appointed counsel and ordered Gill to contribute to the cost if he were able. See Ariz. R. Crim. P. 6.7(d). The superior court, however, never considered any less restrictive measures.

¶122 Both parties agree *State v. Rasul*, 216 Ariz. 491, 167 P.3d 1286 (App. 2007), governs forfeiture of the right to counsel. The *Rasul* court noted no Arizona court had expressly found forfeiture of the right to counsel. *Id.* at 494, ¶ 9, 161 P.3d at 1289. The court then surveyed jurisdictions that had found forfeiture, and concluded forfeiture is reserved for those cases in which the defendant's conduct is extremely egregious. *Id.* at 494-95, ¶¶ 9-17, 167 P.3d at 1289-90. As detailed in *Rasul*, most, though not all, cases of forfeiture involve violence, or threats of violence by the defendant. *Id.*

¶123 On the record presented, the *Rasul* court agreed the defendant there had forfeited his right to counsel. *Id.* at 495, ¶ 17, 167 P.3d at 1290. He had gone through a succession of 18 court-appointed lawyers, refused the assistance of advisory counsel, and chose to absent himself from trial. *Id.* at 493, ¶ 5, 167 P.3d at 1288. He had threatened the safety of two of his attorneys, made repeated demands for appointment of different counsel, accused several lawyers of unsatisfactory



representation, and filed state bar complaints against some of them. *Id.* at 495, ¶¶ 14-15, 167 P.3d at 1290. One of his 18 lawyers "stated in open court, after expressing fear for his personal safety, that he would not continue to represent Rasul, even if it meant being held in contempt of court." *Id.* at ¶ 16. Further, the trial court had attempted to implement less restrictive measures in response to Rasul's initial improper behavior by appointing replacement lawyers. *Id.* at ¶ 15. Simply put, the facts presented in this case stand in stark contrast with the facts presented in *Rasul*.<sup>4</sup>

¶24 The record, we acknowledge, supports a finding Gill was dilatory in obtaining counsel or requesting court appointed counsel. Indeed, at the July 26, 2007 hearing, the court told Gill he was representing himself because he had appeared at the hearing without counsel after previously being told he needed to obtain counsel. At that point, if the court had warned Gill his continued conduct could constitute a waiver of his right to

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<sup>4</sup>Even in *Hampton*, in which the defendant made credible death threats against two of his lawyers causing each to withdraw from further representation, our supreme court refused to find forfeiture. "Although it might be possible to conclude Hampton's conduct is so egregious as to constitute a forfeiture of his right to counsel on appeal, we do not today so hold." 208 Ariz. at 245, ¶ 9, 92 P.3d at 875. Instead, the court remanded the matter and warned Hampton "that any future misconduct can be deemed a waiver of his right to counsel and may result in him being forced to represent himself." *Id.* at ¶ 10.

counsel and informed him of the dangers and disadvantages of self-representation, it would be possible to conclude Gill had waived his right to counsel by his conduct. No court is required to tolerate a defendant's manipulation of the right to counsel for the purpose of securing delay. But, the court did not take that step, and instead subsequently decided<sup>5</sup> Gill had forfeited his right to counsel. As discussed, however, Gill's conduct was not sufficiently egregious to support a finding of forfeiture, especially when the court failed to consider less restrictive means to control his conduct. See *Daniel Y. v. Ariz. Dep't of Econ. Sec.*, 206 Ariz. 257, 262-63, ¶¶ 24-25, 77 P.3d 55, 60-61 (App. 2003).

#### CONCLUSION

¶25 The record does not support a finding Gill's conduct constituted a forfeiture of his right to counsel, and the deprivation of this right is structural error. Therefore, we grant review and grant relief in Cause Nos. CR 2006-012840-002 DT and CR 2007-009308-001 DT. We vacate the court's orders dated May 7, 2009, and September 14, 2009, which denied relief. We remand this matter to the superior court with instructions to

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<sup>5</sup>In its response to Gill's petition, the State asserts the record reflects Gill was "officially and unofficially represented by counsel throughout this case." Although the record reflects Gill was working with Werksman and eventually counsel in the second case in settlement discussions with the State, the record contains no evidence Gill had obtained counsel to represent him at trial.

vacate the convictions and sentences in both cases, and to  
reinstate all charges in those cases.

/s/

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PATRICIA K. NORRIS, Judge

/s/

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DIANE M. JOHNSEN, Presiding Judge

/s/

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PHILIP HALL, Judge