GIDEON'S VUVUZELA[1]: RECONCILING THE SIXTH AMENDMENT'S PROMISES WITH THE DOCTRINES OF FORFEITURE AND IMPLICIT WAIVER OF COUNSEL

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[1] As those of us watching the 2010 FIFA World Cup came to learn, a vuvuzela (also known by its Tswana name, *lepatata Mambu*) is a plastic horn emitting a tone somewhat more diffuse and whiny than that of a trumpet.

INTRODUCTION

Dating back to the early decades of the twentieth century, the United States Supreme Court has articulated clear, venerable standards for the waiver of constitutional rights[2]—and in particular the right to counsel. This is a rich area for both litigation and teaching, if only to be able to repeat phrases such as "courts indulge every reasonable presumption against waiver" and "we do not presume acquiescence in the loss of fundamental

[2] *See, e.g.*, Swenson v. Bosler, 386 U.S. 258 (1967); Carnley v. Cochran, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938).

rights."[3] A defendant must proceed with "eyes open,"[4] and a waiver will not be presumed from a "silent record."[5] Consistently affirmed and reaffirmed by the United States Supreme Court and lower state and federal courts, these are cornerstones of our system of criminal justice.

However, a significant corpus of cases has developed that allows, under certain circumstances, a "forfeiture," an "implicit waiver," or a "waiver by conduct" of the right to counsel.[6] Given the scrutiny courts have extended to "knowing and intelligent" waivers of the right to counsel,[7] this is contradictory, if not troubling. These cases—from both federal and state appellate courts and the lower courts generating the litigation—seem to be in direct contravention of United States Supreme Court precedent on this matter. Under that jurisprudence, a defendant has an unequivocal right to certain information before a waiver is found, and a demand (contemporaneously and on later inquiry) for an unequivocal and intelligent relinquishment of those rights.[8] This newer "implicit waiver" bypasses that inquiry for a defendant who later finds himself without protection—or an attorney, for example—without having expressly decided to forego counsel's representation.[9]

A particular line of cases addressing circumstances unique to the stress of a trial has created the doctrines of forfeiture and implicit waiver of trial counsel.[10] A defendant, for example, may

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[3] *Johnson*, 304 U.S. at 464 (internal quotation marks omitted).

[4] Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 279 (1943)).

[5] Miranda v. Arizona, 384 U.S. 436, 498 (1966) (knowing and voluntary waiver of Fifth Amendment right not to be compelled to incriminate himself); *see, e.g.*, *Faretta*, 422 U.S. 806 (knowing and voluntary waiver of Sixth Amendment right to counsel); *Johnson*, 304 U.S. 458 (knowing and voluntary waiver of Sixth Amendment right to counsel).

[6] *Carnley*, 369 U.S. at 516 ("The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.").

[7] Gilchrist v. O'Keefe, 260 F.3d 87, 95 (2d Cir. 2001); *see also Johnson*, 304 U.S. at 464.

[8] *Adams*, 317 U.S. at 279.

[9] *See, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977).

[10] Commonwealth v. Means, 907 N.E.2d 646, 658 (Mass. 2009) ("Forfeiture is an extreme sanction in response to extreme conduct that imperils the integrity or safety of court proceedings.").

constructively waive the right to trial representation by agitating his lawyer, court personnel, or others in such a way as to deliberately delay or derail the trial.[11]

There is very little formal literature on this topic, although a very recent online ABA Journal has drawn attention to it in a fairly sensational way.[12] Otherwise, a survey of law reviews and other secondary literature reveals little explanation or insight.[13] The United States Supreme Court has never explicitly addressed the constitutionality of the waiver by conduct, constructive waiver, or forfeiture doctrines or the processes by which courts apply them.[14]

This project began with an attempt to define, describe, and disambiguate forfeiture from implicit waiver/waiver by conduct, and to discuss the rationales and policies behind why these doctrines have emerged (yet highlighting the reasons why criminal defendants might reasonably attempt to disrupt the process). Many of these court opinions explore puzzling, contradictory definitions of both the terms and application of the doctrines. But as the survey produced more and more shades of gray, sifting the doctrines and approaches became less interesting than looking beneath them for the analytical assumptions and legal underpinnings of these doctrines.

Ultimately, however, what may be most useful to courts and practitioners, as well as students of this area of the law, are ideas for avoiding the circumstances that bring such cases to the state

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[11] United States v. Green, 388 F.3d 918, 921 (6th Cir. 2004); United States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir. 1995); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976).

[12] Martha Neil, *Reportedly Stabbed in Neck by Client With Pencil During Court Hearing, Lawyer Stays on Case*, A.B.A. J. (May 10, 2011, 11:26 AM), http://www.abajournal.com/news/article/stabbed_in_neck_by_client_with_pencil_during_court_hearing_lawyer_stays_on_/.

[13] After an exhaustive search of scholarly essays, journals, and notes on the topic, only three appear to be relevant to the idea of implicit waiver or a forfeiture of counsel through conduct. *See* Jodie L. Carlson, State v. Jones *and Forfeiture by Wrongdoing: When is a Defendant's Behavior Bad Enough to Result in Forfeiture of the Right to Counsel?*, 37 WM. MITCHELL L. REV. 819, 823-25 (2011); Scott M. McLeod, *Constitutional Law—Sixth Amendment Right to Counsel—Forfeiture of the Right to Counsel in Tennessee*, 78 TENN. L. REV. 589 (2011); Jeffrey P. Willhite, *Rethinking the Standards for Waiver of Counsel and Proceeding Pro Se in Iowa*, 78 IOWA L. REV. 205 (1992).

[14] *See infra* Section III.

and federal appellate courts. Take, for example, *Davis v. Frazier*,[15] which illustrates the stakes for the defendant, the possibility of a full meltdown of the judicial process, and the vast expense (dare I say waste) of resources as it has wound its way through habeas and appellate courts for more than ten years.

Following his conviction for rape, child molestation, and kidnapping in 2000, Mr. Davis was appointed counsel to assist him in prosecuting an appeal, which included an allegation of ineffective assistance of trial counsel.[16] He proceeded to compile a lengthy list of appellate attorneys who endured a somewhat contentious relationship with Mr. Davis, who frequently demanded communication and visits from his attorneys. All six of these attorneys eventually withdrew or were dismissed—some because of Mr. Davis's complaints or behavior and others for reasons completely unrelated to Mr. Davis.[17] After his seventh appointed attorney withdrew (listing receipt of an angry letter from his client as his reason for doing so), the court informed Davis that he would have to retain counsel privately or represent himself.[18] No hearing was ever held warning Mr. Davis that complaints about or discord with his counsel might cause him to lose his right to counsel.

Over strenuous objections, Mr. Davis finally conducted his own Motion for New Trial hearing, which was subsequently denied.[19] He appealed pro se, lost, and then petitioned pro se for certiorari (which was dismissed as untimely). Still pro se, he filed a habeas petition in 2006 and appealed from that denial to the Supreme Court of Georgia. That court, perceiving a cognizable legal issue, remanded his case to the habeas court for the purpose

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[15] 673 S.E.2d 215 (Ga. 2009); Davis v. State, 628 S.E.2d 374 (Ga. 2006); Davis v. State, 615 S.E.2d 203 (Ga. Ct. App. 2005). This case is more than a mere illustration. I served as pro bono counsel in Mr. Davis's first case in the Georgia Supreme Court (after his pro se petition for certiorari was granted) and filed an amicus curiae brief on his behalf when he faced the supreme court again on a discretionary review from the denial of his habeas corpus petition. It is through my involvement in Mr. Davis's case that I became aware of and interested in this issue. The circumstances relayed here are, of course, limited to text from reported opinions and not to any privileged or confidential information.

[16] *Davis*, 673 S.E.2d at 216.

[17] *Davis*, 615 S.E.2d at 206-07.

[18] *Davis*, 673 S.E.2d at 216.

[19] *Id.*

of Mr. Davis being allowed to continue in his appeal—this time with counsel.[20]

Mr. Davis was convicted in 2000 and is only just now—in 2010—facing a motion for new trial with the assistance of counsel. Since his trial, his case has journeyed through a pro se motion for new trial, a pro se appeal, consideration on certiorari in the Georgia Supreme Court, a state habeas petition, and a state habeas appeal.[21] Would not a five-minute colloquy on the record, warning Mr. Davis of the dangers both of continuing his disruptive conduct and proceeding pro se, have been more judicially efficient than nearly ten years of appellate and post-conviction litigation?

It clearly would have been more efficient, and some jurisdictions require these sorts of warnings before counsel can be waived or forfeited by conduct. Other states and federal circuits, however, do not require special warnings, hearings, or other process before criminal defendants are forced to proceed without counsel. This Article attempts to not only catalogue jurisdictional approaches to this problem but to consider the values and principles underlying the variety of approaches on the subject. And while no one-size-fits-all answers will magically clarify puzzles that have perplexed a number of state and federal appellate judges, there is enough of a problem here to warrant some study, organized thinking, and perhaps even modification of existing approaches.

I. WAIVERS AND CONSTITUTIONAL RIGHTS, GENERALLY

A. The Right to Counsel and Waivers Thereof

Though it has not always been so, the right to appointed counsel for indigent defendants is now a bedrock of the U.S. judicial system.[22] The assistance of counsel has always been understood to be "of fundamental character" and after *Gideon v.*

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[20] *Id.* at 217-18.

[21] *Id.* at 216.

[22] U.S. CONST. amend. VI. The Sixth Amendment of the Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

Wainwright[23] and *Alabama v. Shelton*,[24] states are required to provide competent counsel to defendants facing even the possibility of a prison or jail sentence.

Because counsel's assistance is so elementary—from meeting the state's evidence to navigating important choices through the process of a criminal case—there is a "[presumption] that the defendant requests the lawyer's services at every critical stage of the prosecution."[25] And, consistently, the law is clear that in order to sustain a waiver of a constitutional right—including the right to counsel—the "record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[26]

Put a little differently, "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty *unless* he has or waives the assistance of counsel."[27]

The inquiry, by now is universal and standard: Was the defendant informed that the right to counsel existed?[28] Did he waive that right understanding what he was losing?[29] Do court records reflect both the information and the intelligent, voluntary waiver?[30] If the answers to these questions are "no," then most United States Supreme Court precedent—at least as related to the

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[23] 372 U.S. 335 (1963).

[24] 535 U.S. 654 (2002).

[25] Michigan v. Jackson, 475 U.S. 625, 633 (1986), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009).

[26] Carnley v. Cochran, 369 U.S. 504, 516 (1962).

[27] Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (emphasis added).

[28] Shafer v. Bowersox, 329 F.3d 637, 648 (8th Cir. 2003) ("[A] trial court cannot accept a defendant's mere assurance that he has been informed of his right to counsel and desires to waive it.").

[29] United States v. Woodard, 291 F.3d 95, 109 (1st Cir. 2002) ("A defendant who seeks to relinquish her right to counsel must so state in unequivocal language. . . . The waiver must be knowing, intelligent and voluntary. . . . The trial judge must explicitly make the defendant 'aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.'").

[30] *Johnson*, 304 U.S. at 465 ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.").

waiver of the right to counsel—prohibits a later finding of the loss of that right.[31]

There are few exceptions to this, and those are at least practical under the circumstances. For example, although criminal defendants have the right to effective court-appointed counsel, it is also within their rights to waive this right or to choose to represent themselves.[32] *Faretta* explained the right, co-existent with the right to representation, to dispense with counsel and navigate the process pro se.[33] However, courts are not required to inform every defendant of his right to self-representation, and before it is permitted, the court must confirm that he "knowingly and intelligently" gives up "the traditional benefits associated with the right to counsel."[34] As with a general waiver of the right to counsel, before a defendant is permitted to proceed pro se,[35] the law requires that the defendant is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made

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[31] Beyond the right to counsel or to self-representation, waivers of other constitutional rights must also be made knowingly and voluntarily. For example, jurisprudence on the waiver of the right to trial is similarly clear and iron-clad. *See* Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."). In order for a guilty plea to be found valid on later inquiry, a criminal defendant must fully understand both the meaning and consequences of that plea. *Id*. at 242. To ensure that a criminal defendant waives his constitutional rights with "eyes wide open," before accepting a guilty plea, a trial court must apprise a criminal defendant of the constitutional rights that are being waived: (1) the right against self-incrimination, (2) the right to a jury trial, and (3) the right of confrontation. *Id*. at 243.

[32] Faretta v. California, 422 U.S. 806, 819-20 (1975).

[33] *Id*.

[34] *Id*. at 835 (internal quotation marks omitted); *see also* United States v. Frechette, 456 F.3d 1, 12 (1st Cir. 2006); United States v. Schmidt, 105 F.3d 82, 88 (2d Cir. 1997); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986); United States v. Welty, 674 F.2d 185, 191 (3d Cir. 1982).

[35] *See* Frederic Paul Gallun, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under* Faretta, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 559 (1997) ("Almost sixty years ago, the Supreme Court recognized the risks of pro se representation and stated that the Framers based the Sixth Amendment on 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take away his life or liberty.'").

with eyes open.'"[36] Some jurisdictions have added further factors to the general *Faretta* test, such as warning a defendant about the technical problems a defendant may face or the risks of unsuccessful pro se litigation.[37] This must all take place in open court and on the record, as "[t]he right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms" but are protected by the Sixth Amendment.[38]

"Shadow" or "standby counsel" is frequently afforded after counsel is waived in a *Faretta* hearing. The beginnings of the use of shadow counsel—more usual in federal court than in state courts—may reach back to dicta in the *Faretta* decision itself.[39] Although the appointment of "standby" or "shadow" counsel is a topic for an entire article—indeed, it has been—it merits a discussion here. Many jurisdictions—seeming uncertain of how to approach a difficult or delaying defendant—will take this middle path.

In its discretion, a court may appoint standby or shadow counsel to a defendant—even over his objection.[40] "Standby counsel acts as a safety net to insure the defendant receives a fair trial and to allow the trial to proceed without the undue delays likely to arise when a defendant represents him- or herself."[41]

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[36] *Faretta*, 422 U.S. at 835 (internal citations omitted). *But see Trials: Right to Counsel*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 507, 519 (2010) ("However, the right to proceed pro se is not absolute. A judge may reject a defendant's request to proceed pro se if the request is untimely and may terminate self-representation if the defendant lacks sufficient mental capacity to conduct his defense without representation, or is unable to abide by the rules of procedure or courtroom protocol.").

[37] *Welty*, 674 F.2d 185.

[38] *Faretta*, 422 U.S. at 815-16 (quoting Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

[39] *Id.* at 806 (explaining that a court may, in its discretion, terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct and appoint "standby counsel" to aid the accused).

[40] Michael J. Kelly, *Making* Faretta v. California *Work Properly: Observations and Proposals for the Administration of Waiver of Counsel Inquiries*, 20 ST. JOHN'S J. LEGAL COMMENT. 245, 262 (2005) ("Most of the problems with standby counsel relate to the decision of the trial court to appoint counsel. Finally, the right to waive counsel can be 'effectively denied' if appointed standby counsel interfere in the pro se defendant's case in any way. Thus, while standby counsel can benefit the defendant, problems may cause 'animosity between standby counsel and the defendant.'").

[41] 21A AM. JUR. 2D *Criminal Law* § 1160 (2011).

B. The Foundations of Constructive Waivers, Implicit Waivers, and "Forfeiture" of the Right to Counsel

Courts' treatment of non-explicit waivers of counsel (whether styled as constructive waiver, waiver by conduct, implicit waiver, or forfeiture) is the main focus of this Article. We know a defendant can waive counsel knowingly and voluntarily after having received a *Faretta* warning. But—although various jurisdictions define the circumstances differently—nearly every state and circuit has a mechanism by which a defendant may be forced to proceed pro se without having elected to represent himself (or at least not in the same way anticipated in *Faretta*).

As background, however, it is useful to discuss the first-known cases in this area and historical treatments of these circumstances. The forfeiture/implicit waiver cases seem to stem from a few related but distinct roots of cases: cases relating to a delaying defendant; cases relating to a disruptive or potentially violent defendant;[42] and cases in which a defendant at some point expresses a wish to defend himself (but who later changes his mind about self-representation).

Cases as early as the 1940s reflected courts' frustrations with clients perceived to be derailing the process by delaying hiring counsel.[43] Courts have long held that a defendant does not have an unrestricted right to counsel of his own choosing. But what is the appropriate remedy if a defendant does not secure an attorney's representation in advance of a trial?

The foundation for the current body of case law related to forfeiture or waiver by conduct may also have been laid in cases related to a client's disruptive presence in the courtroom. A series of United States Supreme Court decisions addressed this problem

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[42] *See, e.g.*, United States v. Travers, 996 F. Supp. 6, 17 (S.D. Fla. 1998) (finding forfeiture as a result of the defendant's "persistently abusive, threatening and coercive" dealings with his attorney and noting that the defendant had been repeatedly warned that his failure to cooperate could result in a finding of forfeiture).

[43] *See, e.g.*, Spevak v. United States, 158 F.2d 594, 596 (4th Cir. 1947) ("It seems clear that an accused who is able to employ counsel and fails to do so after being afforded opportunity, thereby waives the right and may not urge lack of counsel as excuse for delay.").

in the early 1970s and concluded that a defendant could lose his constitutional right to presence through his conduct.[44]

So while it is difficult to fully trace the origins of the doctrines of implied/constructive waiver or forfeiture of counsel, it appears that they emerged at the intersection of cases allowing the loss of a constitutional right to presence during a trial (for disruptive conduct) and the potential loss of counsel after a refusal to hire an attorney. Only a handful of appellate opinions on the subject pre-date the early 1970s, but beginning in the 1980s, perhaps as courts began to smooth out any procedural wrinkles after *Gideon*, litigation and opinions on these subjects expanded remarkably. What we have now is a jumble of cases from nearly every state supreme court and federal circuit court of appeals that cover a broad range of defendants' behavior and various responses.

The *McLeod*[45] and *Goldberg*[46] opinions are the earliest ones that offer more than a passing discussion of the underlying problems. But even in those cases (and those citing them), it is difficult not to become mired in the terminology.[47]

Forfeiture, according to *Goldberg*, can result in the complete deprivation of counsel (though often limited to proceedings other than a criminal trial) and is permitted in circumstances of extreme disruption of the criminal trial process[48]—usually if a

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[44] *See* Taylor v. United States, 414 U.S. 17, 20 (1973); Illinois v. Allen, 397 U.S. 337, 345-46 (1970).

[45] United States v. McLeod, 53 F.3d 322 (11th Cir. 1995).

[46] United States v. Goldberg, 67 F.3d 1092 (3d Cir. 1995).

[47] *See infra* Section II.

[48] These circuits and states recognize the doctrine of forfeiture: Second Circuit (Gilchrist v. O'Keefe, 260 F.3d 87 (2d Cir. 2001)); Third Circuit (United States v. Leggett, 162 F.3d 237 (3d Cir. 1998)); Sixth Circuit (Gray v. Moore, 520 F.3d 616 (6th Cir. 2008)); Eighth Circuit (United States v. Thompson, 335 F.3d 782 (8th Cir. 2003)); Eleventh Circuit (United States v. McLeod, 53 F.3d 322 (11th Cir. 1995)); Alaska (Gladden v. Alaska, 110 P.3d 1006 (Alaska Ct. App. 2005)); Arizona (State v. Rasul, 167 P.3d 1286 (Ariz. Ct. App. 2007)); Arkansas (Beyer v. State, 962 S.W.2d 751 (Ark. 1998)); California (King v. People, 132 Cal. Rptr. 2d 585 (Cal. Ct. App. 2003)); Colorado (People v. Alengi, 148 P.3d 154 (Colo. 2006)); Delaware (Bultron v. State, 897 A.2d 758 (Del. 2006)); Idaho (State v. Lindsay, 864 P.2d 663 (Idaho Ct. App. 1993)); Illinois (People v. Tucker, 889 N.E.2d 733 (Ill. App. Ct. 2008)); Indiana (Jackson v. State, 868 N.E.2d 494 (Ind. 2007)); Maryland (Felder v. State, 666 A.2d 872 (Md. Ct. Spec. App. 1995)); Massachusetts (Commonwealth v. Means, 907 N.E.2d 646 (Mass. 2009)); New York (People v. Smith, 705 N.E.2d 1205 (N.Y. 1998)); North Dakota (City of Grand Forks v. Corman, 767 N.W.2d 847 (N.D. 2009)); South Carolina (State v. Roberson, 675

defendant threatens his attorney with violence. In some jurisdictions, forfeiture is a potential consequence when a defendant engages in dilatory or other tactics to stall the legal process.[49]

Commonwealth v. Means[50] also explains that the federal courts, and several state courts, recognize the doctrine of "forfeiture."[51] From a review of a number of forfeiture cases, the Massachusetts court concluded that there are four considerations that relate to whether forfeiture is appropriate: (1) forfeiture is typically applied in cases where a defendant had more than one appointed counsel; (2) forfeiture is rarely applied to deny a defendant representation *during a trial* but rather at other stages of a criminal matter; (3) forfeiture may be an appropriate response to a defendant's threats or acts of violence against defense counsel and others; and (4) forfeiture should be a last resort response to only the gravest and most deliberate misconduct.[52]

Means further distinguished between forfeiture, waiver by conduct (abandonment), and waiver (voluntary waiver).[53] *Goldberg* also differentiates: while forfeiture involves extreme behavior—with violence or threats of violence being the *baseline* of the inquiry—waiver by conduct, implicit waiver, and constructive waiver (used interchangeably in this Article and in most authority) involve a lesser form of disruption.[54]

In circumstances less egregious than threatened or actual violence, but which are still disruptive to the criminal process, a number of states and circuits recognize or allow an "implicit waiver" of counsel.[55] This waiver by conduct more usually requires

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S.E.2d 732 (S.C. 2009)); Tennessee (State v. Holmes, 302 S.W.3d 831 (Tenn. 2010)); Utah (State v. Pedockie, 137 P.3d 716 (Utah 2006)); Washington (City of Tacoma v. Bishop, 920 P.2d 214 (Wash. Ct. App. 1996)); Wisconsin (State v. Cummings, 546 N.W.2d 406 (Wis. 1996)).

[49] *Goldberg*, 67 F.3d at 1094 ("[T]here are circumstances in which the dilatory tactics of a defendant can amount to a forfeiture of his right to counsel.").

[50] 907 N.E.2d 646 (Mass. 2009).

[51] *Id.* at 659.

[52] *Id.* at 659-60.

[53] *Id.* at 656-59.

[54] *Goldberg*, 67 F.3d at 1101.

[55] These circuits and states recognize the doctrine of implicit waiver: Fifth Circuit (United States v. Davis, 269 F.3d 514 (5th Cir. 2001)); Sixth Circuit (King v. Bobby, 433 F.3d 483 (6th Cir. 2006)); Seventh Circuit (United States v. Bauer, 956 F.2d 693

a warning—though not necessarily in a hearing or colloquy—and continued behavior may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel.[56]

It is these two methods of conduct amounting to waiver that is the focus of this Article—whether it is consistent with constitutional principles, what "warnings" are sufficient, and what behavior may be deemed sufficiently egregious. Before a defendant can be deemed to have "waived" his right to counsel—either through constructive waiver or forfeiture—many jurisdictions require that he had been given at least some warning about the consequences of his actions. More specifically, in some jurisdictions,

> 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 at trial or otherwise, she must first conduct a hearing at which the defendant has a full and fair opportunity to offer evidence as to the totality of the circumstances that may bear on the question whether the sanction of forfeiture is both warranted and appropriate.[57]

For the purposes of this Article, however, it is the jurisdictions that do not require a hearing or colloquy before

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(7th Cir. 1992)); Eighth Circuit (United States v. Crawford, 487 F.3d 1101 (8th Cir. 2007)); Ninth Circuit (United States v. Sutcliffe, 505 F.3d 944 (9th Cir. 2007)); Eleventh Circuit (United States v. Garey, 540 F.3d 1253 (11th Cir. 2008)); Alabama (Harris v. State, 27 So. 3d 582 (Ala. 2008)); Arizona (State v. Hampton, 92 P.3d 871 (Ariz. 2004)); Colorado (People v. Alengi, 148 P.3d 154 (Colo. 2006)); Florida (Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992)); Georgia (Jones v. State, 536 S.E.2d 511 (Ga. 2000)); Hawaii (State v. Maelega, 88 P.3d 1208 (Haw. 2004)); Idaho (State v. Lindsay, 864 P.2d 663 (Idaho Ct. App. 1993)); Kentucky (Depp v. Commonwealth, 278 S.W.3d 615 (Ky. 2009)); Maine (State v. Watson, 900 A.2d 702 (Me. 2006)); Maryland (Felder v. State, 666 A.2d 872 (Md. Ct. Spec. App. 1995)); Rhode Island (State v. Snell, 892 A.2d 108 (R.I. 2006)); Tennessee (State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000)); Utah (State v. Pedockie, 137 P.3d 716 (Utah 2006)); Washington (City of Tacoma v. Bishop, 920 P.2d 214 (Wash. Ct. App. 1996)); Wisconsin (State v. Cummings, 546 N.W.2d 406 (Wis. 1996)); Wyoming (Trujillo v. State, 2 P.3d 567 (Wyo. 2000)).

[56] *See, e.g.*, United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (finding that failure to hire counsel where defendant has financial ability to do so constitutes a waiver by conduct), *cert. denied*, 506 U.S. 882 (1992); United States v. Allen, 895 F.2d 1577, 1579 (10th Cir. 1990) (finding that the district court properly treated defendant's dilatory conduct as request to proceed pro se).

[57] Commonwealth v. Means, 907 N.E.2d 646, 652 (Mass. 2009).

denying a defendant his right to counsel that may be most interesting—because of a potential conflict with *Faretta* and jurisprudence protecting the right to counsel.

II. SURVEYING THE LANDSCAPE OF WAIVER AND FORFEITURE BY CONDUCT

Because of the lack of broad or comparative information on the doctrines of forfeiture and constructive waiver of counsel, this Article will lay out the variety of practices and conditions the circuit courts and state courts have addressed. Most jurisdictions have confronted the scenario described in the Introduction in one way or another, but as described previously, the terminology describing forfeiture, implicit waiver, and waiver by conduct is intertwined and ambiguous.

Some courts use different terminology to describe the same conduct (or court response), other courts appear to use the terms synonymously, and still others attempt to make distinctions among definitions. From the Third Circuit's *United States v. Goldberg* case, a fundamental opinion on the subject, readers gain no more insight to the doctrine despite lengthy discussion and attempted differentiation between forfeiture and traditional or implicit waiver.[58] Forfeiture is used when a court is not referring to an intentional waiver of rights, and *Goldberg* explains the importance of defining both "waiver by conduct" and "forfeiture," since appellate review of alleged Sixth Amendment violations may depend a good deal on the applicable doctrine and procedure.[59] There, forfeiture is defined in the lack of intentionality of a waiver (triggered by extreme conduct); however, other jurisdictions require a hearing or warning before finding "forfeiture," just as many do not require a hearing before finding implicit waiver or waiver by conduct. On the other side of this problem are cases such as *State v. Lindsay*,[60] an Idaho case from the mid-1990s,

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[58] *Goldberg*, 67 F.3d 1092. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Id.* at 1100.

[59] *Id.* at 1101.

[60] 864 P.2d 663 (Idaho Ct. App. 1993). The court ostensibly discusses waiver by conduct, not forfeiture as established in *Goldberg*, which was decided and became so

which uses the terms synonymously.[61] The problem with using the terms interchangeably, however, is that each has become a term of art in other jurisdictions, though even the terminology varies in definition across jurisdictional lines.[62]

It is useful, however, to become aware of the range of approaches and court reasoning, even if analytically there is little to gain from naming approaches differently or organizing a survey according to terminology. The language, in the end, does not matter. The result (and legal analysis leading to that result) means a great deal. Because, in these circumstances, courts have gone to great lengths to discuss a defendant's offending behavior (ranging from complaints to threats to physical violence) to match the required procedural approaches, this survey tracks a defendant's behavior rather than the court terminology for that behavior. Comparing apples to apples (or dilatory tactics to dilatory tactics), the conversation then becomes more useful and reveals sharp divisions among judicial responses, state supreme court opinions, and a federal circuit split on the issue.

A. Delay and "Dilatory Tactics": Approaches and Procedures

State and federal courts have developed a variety of approaches to defendants who attempt to delay, or otherwise derail, the process toward a trial, including postponing the retention of counsel or failing to cooperate with appointed counsel. While some courts require that trial courts thoroughly warn defendants of the possible repercussions (which may include being forced against their will to proceed pro se), others ensure that defendants receive and assent to this warning (in the form of a

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influential after the opinion in this case. This conflicting terminology, however, occasionally persists in jurisdictions that have not explicitly adopted the forfeiture doctrine of the Third and other federal circuits.

[61] *Id.* at 667 (stating that the defendant "impliedly waived or 'forfeited' that right [to counsel] by appearing at the . . . hearing without an attorney after having been given the opportunity to retain one").

[62] *See, e.g.*, Harris v. State, 27 So. 3d 564, 573 (Ala. Crim. App. 2007) (conflating implied waiver with forfeiture of the right to counsel); Beyer v. State, 962 S.W.2d 751, 755 (Ark. 1998) (finding that a defendant "forfeits" his right to counsel by delaying trial); People v. Alengi, 148 P.3d 154 (Colo. 2006); People v. Tucker, 889 N.E.2d 733, 736-37 (Ill. App. Ct. 2008) ("[D]efendant . . . in an attempt to delay trial and thwart the effective administration of justice may forfeit his right to counsel of choice.").

colloquy or dialogue with the court), and still others require no warning at all. A number of jurisdictions have not encountered this problem at the appellate level and are therefore not included in this discussion.[63]

1. Jurisdictions Requiring a Warning or Hearing Before a Defendant Can Lose His Right to Counsel Through Delay

The approach seemingly most consistent with other precedent related to waivers of a constitutional right requires a hearing, transcribed and on the record in open court, before a defendant may lose his right to counsel as a result of his behavior.

In fact, several cases and states' approaches, though described as a waiver or forfeiture by conduct, may be more accurately described as a waiver by *in*action—the failure to make a decision, to retain counsel, or the like.[64] A Sixth Circuit case illustrates this well. As in many other cases described here, the defendant first delayed retaining counsel, then was appointed standby counsel who later attempted to withdraw. The court's ultimate decision in that case reflected its reasoning that by rejecting all options other than self-representation (even after receiving minimum *Faretta* warnings), the defendant had effectively "chose[n] self-representation."[65]

Circumstances of delay frequently occur around a defendant's financial inability to retain counsel despite not qualifying for a public defender's services. Even in these cases, so long as a defendant has been warned of the consequences, courts are empowered to find a waiver or forfeiture of counsel and his trial

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[63] This could be the case for a number of reasons: the issue has not occurred in that jurisdiction (unlikely), the issues have not been selected for review in appellate courts, or the issues have otherwise not percolated their way into an appellate opinion.

[64] *See Alengi*, 148 P.3d at 160 (finding that defendant forfeited his right to counsel—after explicit warnings from the court—even though he made no deliberate decision to forgo that right); City of Tacoma v. Bishop, 920 P.2d 214, 217 (Wash. Ct. App. 1996) (appellate court requires *Faretta* warnings and a colloquy about "the nature of the charge, the maximum penalty, and technical rules that he must follow" when a defendant fails to retain counsel or delay a trial); Trujillo v. State, 2 P.3d 567 (Wyo. 2000) (holding that a "waiver of counsel by conduct is not knowingly and voluntarily made when the criminal defendant has not been warned that waiver will be the result of his continued dilatory and obstructive behavior").

[65] King v. Bobby, 433 F.3d 483, 485-86, 492 (6th Cir. 2006).

may proceed without a defense attorney's participation.[66] This is often described as a "delay" problem, though the real problem is likely one of financial reality when a criminal defendant finds himself caught between the poverty line and his available line of credit. The Fifth and Seventh Circuits similarly require a hearing before a defendant loses his right to counsel, though that right can be lost (presuming it is lost knowingly and after appropriate warnings) for failure to retain counsel. Neither circuit requires a "sacrosanct litany"[67] when explaining the risks of both failure to retain counsel and the risks of continuing without representation, but appropriate and thorough information is required in all cases.

The reverse of this circumstance involves cases in which a defendant complains about his counsel's performance—often to the level of requesting or demanding new counsel. Some of the appellate opinions examining such situations focused on the level of the defendant's understanding and perceived manipulation of the system. In two such cases, certiorari was denied after an appellate court upheld a finding of waiver/forfeiture without a full warning or hearings. In *State v. Carruthers*, the Supreme Court of Tennessee similarly held that "an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings."[68] Finding that Carruthers' conduct and dilatory behavior had escalated with the successive appointments of new counsel, and that he understood the dangers of proceeding without counsel, the appellate court explained "in situations such as this one, a trial court has no other choice but to find that a defendant has forfeited the right to counsel; otherwise, an intelligent defendant 'could

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[66] City of Grand Forks v. Corman, 767 N.W.2d 847, 850 (N.D. 2009) ("This right to be represented by counsel may be waived or forfeited, but first the district court must inform the defendant of the right and afford a reasonable opportunity for the defendant to secure counsel."); *see also Alengi*, 148 P.3d at 161-62.

[67] United States v. Davis, 269 F.3d 514, 519-20 (5th Cir. 2001) (defendant was not sufficiently warned of the risks of proceeding pro se and so there was not a knowing and intelligent waiver of counsel when failing to retain counsel); United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (minimum *Faretta* warnings required before a defendant may lose his right to representation after repeated failure to retain counsel).

[68] 35 S.W.3d 516, 549 (Tenn. 2000), *cert. denied*, 533 U.S. 953 (2001). On the other hand, that court opined that "the distinction between these two concepts is slight" and found both forfeiture and waiver in that case. *Id*.

theoretically go through tens of court-appointed attorneys and delay his trial for years.'"[69]

Previously, the Kentucky Supreme Court[70] established bright-line requirements for a *Faretta* inquiry, but this approach was later rejected in favor of a more practical and flexible approach that looked to the entire record to see if the defendant has knowingly and intelligently waived his right to counsel.[71] The Kentucky Supreme Court has extended its pragmatic, flexible approach by recommending the model inquiry from the *Benchbook*[72] but leaving open the possibility of determining sufficiency of the waiver of the right to counsel by other means—essentially holding that a *Faretta* inquiry is still a technical requirement, but that the form the inquiry takes cannot be prescribed.[73]

In addition to requiring a hearing on the subject, some courts have found a way to further warn a defendant that his continued behavior will result in the loss of representation even when a defendant does not indicate a decision to expressly or verbally waive that right. A Missouri appellate court case has advised trial courts to prepare a written notice of waiver even where the defendant's waiver of the right to counsel is said to be implied by his conduct. [74] In recommending the written waiver of counsel "out of an abundance of caution," the court urged trial court judges to present the waiver to the defendant to sign so that any refusal to sign is on the record.[75]

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[69] *Id.* at 550 (quoting State v. Cummings, 546 N.W.2d 406, 419 (Wis. 1996)).

[70] Hill v. Commonwealth, 125 S.W.3d 221 (Ky. 2004).

[71] Depp v. Commonwealth, 278 S.W.3d 615, 617-19 (Ky. 2009).

[72] Section 1.02(C) of the Benchbook for U.S. District Court Judges provides district court judges with guidance on how to handle defendants who wish to represent themselves. FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 1.02(C) (4th ed. 2000). Namely, there is a list of fourteen suggested questions the judge should ask the defendant. *See* United States v. Garey, 540 F.3d 1253, 1267 n.8 (11th Cir. 2008) (suggesting the questions as a form of model inquiry); United States v. McBride, 362 F.3d 360, 366 (6th Cir. 2004) (using the questions as a model inquiry to which other inquiries should be substantially similar); United States v. Peppers, 302 F.3d 120, 136 (3d Cir. 2002) (recommending the questions as guidelines for inquiry). *But see* United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) ("[T]he catechism in the [*Benchbook*] . . . is not part of the sixth amendment.").

[73] Commonwealth v. Terry, 295 S.W.3d 819, 822 (Ky. 2009).

[74] State v. Wilkerson, 948 S.W.2d 440, 444 (Mo. Ct. App. 1997).

[75] *Id.* at 445.

Each of these procedures is entirely consistent with constitutional jurisprudence on knowing and intelligent waivers. They acknowledge the dilemma of disruptive or dilatory behavior but hold that even in these problematic circumstances, a warning of some sort must be given to the defendant as though he had walked into court announcing his desire to proceed without a lawyer.

2. Jurisdictions Recommending—Not Requiring—a Hearing Before a Finding of Implicit Waiver

A number of cases have held that a hearing in circumstances of implicit waiver of the right to counsel is not required, but the courts *recommend* an on-record hearing as the preferred mechanism to determine the validity of a defendant's waiver of the right to counsel.

In *United States v. Garey*, the Eleventh Circuit explained that "the best practice is for district courts to begin by attempting to engage the defendant in a full discussion of the dangers of self-representation whenever a defendant expresses a desire to waive his right to counsel, whether affirmatively *or by his conduct*."[76] The court distinguishes here between a dialogue or colloquy with the defendant and a mere warning, holding that a warning is sufficient, though an on-record colloquy is preferable.[77]

In Maine, a defendant may waive his right to counsel by causing a delay or by obstructing the court process without having first been warned, but only under unusual circumstances.[78] Though a waiver apart from an in-court warning should be unusual, "[a] defendant's 'stubborn failure' to hire counsel or apply for court-appointed counsel . . . may form the basis for a voluntary, knowing, and intelligent waiver if the court also finds that the

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[76] 540 F.3d 1253, 1267 (11th Cir. 2008) (emphasis added) (adding that "[a] dialogue cannot be forced; therefore, when confronted with a defendant who has voluntarily waived counsel by his conduct and who refuses to provide clear answers to questions regarding his Sixth Amendment rights, it is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a pro se litigant").

[77] *Id.* at 1269-70.

[78] State v. Watson, 900 A.2d 702 (Me. 2006).

defendant fully understood the right to counsel and the dangers of self-representation *apart from the court's Faretta warnings*."[79]

Utah has a similar approach.[80] The Utah Supreme Court noted, however, that the case presented was "a prime example of the confusion and inconsistency that can permeate proceedings in the absence of an explicit warning and colloquy regarding the right to counsel."[81]

3. When a Hearing is Not Required or Recommended After Dilatory Conduct

Not all jurisdictions, however, require that trial courts warn defendants in a hearing or colloquy—many have held that it is sufficient if the "entire record" demonstrates that the defendant understands the risks of continued dilatory or obstructionist behavior. As discussed above, most courts recommend a hearing or colloquy of some sort before a waiver is found, but some jurisdictions have failed to even recommend a hearing under circumstances of dilatory or other difficult conduct.

In Georgia, the supreme court has made clear "that it is not incumbent upon the trial court to make each of these inquiries [relating to the nature of the charges, the range of allowable punishments, potential defenses and mitigating circumstances, and any lesser included offenses]."[82] So long as the record as a whole reflects that a defendant understands these matters, a hearing may not be required before he loses his right to counsel.[83]

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[79] *Id.* at 712 (emphasis added) (internal citation omitted).

[80] State v. Pedockie, 137 P.3d 716, 724 (Utah 2006) ("While we have urged that trial courts engage in an on-the-record colloquy with defendants to ensure that they are aware of the dangers . . . of self-representation, we have not imposed an absolute requirement that they do so.").

[81] *Id.* at 725; *see also* United States v. Crawford, 487 F.3d 1101, 1105-06 (8th Cir. 2007) (a defendant's waiver will be upheld if either "(1) the district court adequately warns the defendant about the dangers and disadvantages of proceeding pro se or (2) the record as a whole demonstrates 'that the defendant knew and understood the disadvantages of self-representation.' An on-the-record colloquy is . . . recognized as the preferred [but not required] method . . ." (quoting Gladden v. State, 110 P.3d 1006 (Alaska Ct. App. 2005))).

[82] Jones v. State, 536 S.E.2d 511, 513 (Ga. 2000).

[83] *See* Harris v. State, 27 So. 3d 582 (Ala. 2008); People v. Tucker, 889 N.E.2d 733 (Ill. App. Ct. 2008).

In these cases, absence from one's trial seems to complicate both the analysis and the outcome. In a South Carolina case complicated by the defendant's absence from his trial, the court found a waiver by conduct of the right to counsel "inferable" from the defendant's actions and "[found] . . . *Faretta* inapplicable to the instant case."[84] Formalistically finding that since the defendant had not indicated that he wished to proceed pro se, *Faretta* did not apply. This is true, of course, but the jurisprudence of waiver leading to *Faretta* went unexamined.[85] Likewise, the defendant's absence seems to be a dispositive factor in Indiana's consideration of the implicit waiver issue.[86]

B. The Loss of Counsel After Defendants' "Egregious Conduct"

1. States Which Do Not First Require a Hearing

Some jurisdictions do not require a hearing before a defendant loses his right to representation as a direct and immediate result of "egregious behavior"—usually actual or threatened violence. The theory, perhaps, is that the defendant's behavior is so extreme as to make a hearing inappropriate, or that some behavior is automatically understood to justify waiver. Yet these jurisdictions define "egregious" along different points of a spectrum and make no clearer differentiation between the need for counsel at pre-trial or trial proceedings than any other jurisdictions discussed herein.

In *Gilchrist v. O'Keefe*, the Second Circuit acknowledged the doctrine and analyzed it along the line of cases allowing forfeiture of presence at trial (rather than along the line of *Faretta* and its progeny). In that case, the court concluded that hearings and warnings are not constitutionally required in forfeiture circumstances,[87] which are typically triggered by violence or

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[84] State v. Roberson, 675 S.E.2d 732, 733 (S.C. 2009).

[85] *Id.* at 733-34.

[86] Jackson v. State, 868 N.E.2d 494 (Ind. 2007). "[The court] cannot expect a trial court to hunt down a defendant to admonish him about the dangers and disadvantages of self-representation if the defendant has made no indication to the trial court that he intends to proceed pro se and then subsequently does not show up for trial." *Id.* at 501.

[87] Gilchrist v. O'Keefe, 260 F.3d 87, 97 (2d Cir. 2001). "Here, however, given 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

threats of violence. Similarly, in *United States v. Leggett*, the Third Circuit found a valid forfeiture of counsel—without requiring a hearing—when the defendant punched, attacked, and spat upon his attorney. [88] Further, when the defendant in *United States v. Thompson* threatened to kill his appellate attorney, the Eighth Circuit upheld the lower court's finding that he had forfeited—without a hearing or warning—his right to counsel. [89]

Just as one begins to believe that physical violence might be the hallmark of "egregious conduct" that always leads to an immediate forfeiture of counsel, there is a twist in the authority. Consider the Delaware Supreme Court's explanation that "[v]iolence is not the *sine qua non* of extremely serious misconduct," such that so long as the conduct is "sufficiently egregious, it will constitute forfeiture." [90] This can occur regardless of whether the defendant has received a warning indicating that his actions could lead to a forfeiture or the disadvantages of proceeding as a pro se litigant. Similarly, another intriguing approach is a hybrid forfeiture procedure, requiring a hearing in the "gray area" sorts of cases and conduct. For example, in California's *King v. Superior Court*, readers learn that "in instances where the misconduct does not rise to the most serious level, a warning should be given. The warning will serve to alert the defendant to the seriousness of his misconduct and perhaps

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unreasonable in determining that the right to counsel could be forfeited based on petitioner's physical assault on his attorney." *Id.*

[88] 162 F.3d 237, 250 (3d Cir. 1998), *cert. denied*, 528 U.S. 868 (1999). The defendant's "unprovoked physical battery" of his counsel qualifies as the type of "extremely serious misconduct" meriting a forfeiture of the right to counsel, "regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Id.*; *see also* People v. Smith, 705 N.E.2d 1205 (N.Y. 1998) (finding waiver of right to counsel where defendant threatened his attorney exclaiming that, if convicted, he would put a knife in the attorney's head).

[89] 335 F.3d 782, 785 (8th Cir. 2003), *cert. denied*, 540 U.S. 1134 (2004). "A criminal defendant may, however, by virtue of his actions forfeit his constitutional rights." *Id.*; *see also* United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995) (defendant engaged in "pervasive misconduct" that was egregious enough to warrant forfeiture of the right to counsel); State v. Rasul, 167 P.3d 1286, 1289 (Ariz. Ct. App. 2007) ("Forfeiture, only appropriate in cases of 'severe misconduct or a course of disruption aimed at thwarting judicial proceedings,' does not require a prior warning.").

[90] Bultron v. State, 897 A.2d 758, 765-66 (Del. 2006) (quoting United States v. Thomas, 357 F.3d 357, 363 (3d Cir. 2004)); *see also Gilchrist*, 260 F.3d at 100 ("[W]e do not mean to suggest that any physical assault by a defendant on counsel will automatically justify constitutionally a finding of forfeiture of the right to counsel.").

forestall future misconduct."[91] In *King*, however, the defendant (who did receive a warning) had grabbed his first attorney and threatened a second, and there is little guidance given about how "serious misconduct" might be defined.

2. Loss of Counsel Through Egregious Conduct Possible After a Hearing

One of the most recent—and more comprehensive—explorations of this appears in *Commonwealth v. Means*.[92] Forfeiture, it explains, should be a "last resort" response to only the "grave[st] and [most] deliberate" misconduct, "in light of the fundamental constitutional rights at stake."[93] *Means* emphasized both that "denying an indigent defendant the assistance of counsel at trial or otherwise" is an "extreme sanction," and that the appropriate response is "a hearing at which the defendant has a full and fair opportunity to offer evidence as to the totality of the circumstances that may bear on the question whether the sanction of forfeiture is both warranted and appropriate."[94]

In *Bultron v. State*, Delaware's key forfeiture case, the court makes clear that, "the trial judge must first give certain warnings" —in both waiver and waiver by conduct cases—"before a trial court may determine that a defendant has waived his right to counsel and must proceed pro se."[95] The court further clarified, citing to both *Faretta* and *Goldberg*, "to the extent that the defendant's actions are examined under the doctrine of 'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives *Faretta* warnings."[96]

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[91] 132 Cal. Rptr. 2d 585, 596 (Cal. Ct. App. 2003). The court further stated:

> Balancing the great importance of the right to counsel against the need to protect counsel and the orderly administration of justice, we conclude an accused may forfeit his right to counsel by a course of serious misconduct towards counsel that illustrates that lesser measures to control defendant are insufficient to protect counsel and appointment of successor counsel is futile.

Id. at 588.

[92] 907 N.E.2d 646 (Mass. 2009).

[93] *Id.* at 652, 660.

[94] *Id.* at 652.

[95] 897 A.2d 758, 764 (Del. 2006).

[96] *Id.* (quoting United States v. Goldberg, 67 F.3d 1092, 1100 (3d Cir. 1995)).

Tennessee falls into this category as well, requiring a hearing (at which the defendant is present and permitted to testify) before forfeiture can be found.[97] Notably, that state classifies an attack upon counsel as "serious misconduct" but not necessarily as "*extremely* serious misconduct sufficient to warrant forfeiture of counsel at trial without prior warning."[98]

Gray v. Moore very explicitly took on the reasoning that underlies other jurisdictions' acceptance of the *Allen-Gilchrist-McLeod* cases allowing forfeiture without a warning or hearing.[99] "[I]n light of the explicit language used by the Supreme Court," it explained, "we conclude that the Ohio appellate court unreasonably applied *Allen* when it affirmed Gray's removal despite the absence of a prior warning by the trial court."[100] However, "no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior."[101] Further, the Sixth Circuit declined to accept a true forfeiture doctrine as established in cases like *Gilchrist* and *McLeod* because the defendant had not exhibited behavior that was extreme enough to warrant a sanction without a warning as required by *Illinois v. Allen*.[102]

C. Concluding Tallies and Synthesis of the Cases and Splits

After a thorough review of the available appellate cases, circuit and state splits as related to courts' procedures regarding a

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[97] Another case espousing similar tenets, but not discussed here in detail, is *United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007) (recognizing that defendant implicitly waived his right to counsel after being warned he would lose the right if he persisted in sabotaging his relationships with his attorneys).

[98] State v. Holmes, 302 S.W.3d 831, 847 (Tenn. 2010). The court stated:

> We do not imply by our decision in this case that a criminal defendant may not be found to have forfeited his right to counsel in the absence of a physical assault. A forfeiture (or an implicit waiver) may withstand constitutional scrutiny where, for instance, a defendant repeatedly threatens harm to his lawyer and/or his lawyer's family and it is apparent that the defendant has the ability to deliver on his threats.

Id. at 847 n.10.

[99] 520 F.3d 616 (6th Cir. 2008).

[100] *Id* at 623.

[101] *Id*.

[102] 397 U.S. 337, 346 (1970).

defendant's delay or "egregious conduct" come into relief. Of course, some jurisdictions do not recognize either of the doctrines of forfeiture or waiver by conduct,[103] while others have no authority for one doctrine[104] or the other.[105]

Of the jurisdictions recognizing the doctrine of forfeiture or the loss of counsel after the manifestation of "egregious conduct," a number of these states[106] and federal circuits[107] require a defendant to have been warned in a court hearing. One example of this approach is illustrated by *Commonwealth v. Means*, which requires a "full and fair opportunity" to be heard before a court may impose "the extreme sanction of denying an indigent defendant the assistance of counsel."[108]

On the other hand is Delaware's rule, which unapologetically allows for an immediate loss of counsel "[i]f a defendant's behavior is sufficiently egregious" (whatever that may mean) and requiring

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[103] An exhaustive search revealed that the following are jurisdictions that do not recognize the loss of counsel through *either* egregious or dilatory conduct: First Circuit, Fourth Circuit, Tenth Circuit, Connecticut, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Vermont, Virginia, and West Virginia.

[104] After an exhaustive search, the following jurisdictions presented no appellate court authority recognizing the loss of counsel through *dilatory conduct*: Second Circuit, Ninth Circuit, California, Delaware, Massachusetts, New York, and North Carolina.

[105] A similarly thorough search revealed no appellate court authority for the loss of counsel through *egregious conduct* in the following jurisdictions: Fifth Circuit, Seventh Circuit, Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Minnesota, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, Wisconsin, and Wyoming.

[106] These states require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *egregious conduct*: Delaware (Bultron v. State, 897 A.2d 758, 765 (Del. 2006)); Massachusetts (Commonwealth v. Means, 907 N.E.2d 646, 658 (Mass. 2009)); New York (People v. Smith, 705 N.E.2d 1205, 1208 (N.Y. 1998)); Tennessee (State v. Holmes, 302 S.W.3d 831 (Tenn. 2010)).

[107] The Sixth Circuit (Gray v. Moore, 520 F.3d 616, 620 (6th Cir. 2008)) and Ninth Circuit (United States v. Sutcliffe, 505 F.3d 944, 954 (9th Cir. 2007)) require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *egregious conduct*.

[108] 907 N.E.2d 646, 652 (Mass. 2009).

no "*Faretta* warnings or a warning to discontinue disruptive conduct."[109]

The Second, Third, Eighth, and Eleventh Circuits do not require a hearing, warning, or colloquy before removing counsel from a defendant who engages in egregious conduct.[110] Several states also follow this approach,[111] and this creates both a circuit and state split on procedures related to egregious conduct.

Similarly, related to a defendant's persistent inaction, delay, or failure to retain counsel, some jurisdictions, such as the Eleventh Circuit, hold "in some instances a defendant's conduct will reveal a voluntary decision to choose the path of self-representation over the continued assistance of counsel" and "[s]o long as a defendant knows the risks associated with self-representation, it is irrelevant for constitutional purposes whether his understanding comes from a colloquy with the trial court, a conversation with his counsel, or his own research or experience."[112] The Third Circuit[113] and a number of states[114] have followed this approach.

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[109] Bultron v. State, 897 A.2d 758, 765 (Del. 2006) (quoting United States v. Thomas, 357 F.3d 357, 363 (3d Cir. 2004)).

[110] *See* United States v. Thompson, 335 F.3d 782, 785 (8th Cir. 2003); Gilchrist v. O'Keefe, 260 F.3d 87, 95 (2d Cir. 2001); United States v. Leggett, 162 F.3d 237, 250 (3d Cir. 1998); United States v. McLeod, 53 F.3d 322, 324-25 (11th Cir. 1995).

[111] These states do not require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *egregious conduct*: Arizona (State v. Rasul, 167 P.3d 1286, 1289 (Ariz. Ct. App. 2007)); California (King v. Superior Court, 132 Cal. Rptr. 2d 585, 592 (Cal. Ct. App. 2003)); New York (People v. Smith, 92 N.Y.2d 516, 521 (N.Y. 1998)); North Carolina (State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000)).

[112] Jones v. Walker, 540 F.3d 1277, 1289, 1293 (11th Cir. 2008).

[113] The Third Circuit does not require a hearing, warning, or colloquy to remove counsel from a defendant for *dilatory conduct*. *See* United States v. Kosow, 400 F. App'x 698, 702 (3d Cir. 2010); United States v. Thomas, 357 F.3d 357, 362 (3d Cir. 2004).

[114] These states do not require a hearing, warning, or colloquy to remove counsel from a defendant for *dilatory conduct*: Alabama (Harris v. State, 27 So. 3d 582, 586 (Ala. 2008)); Alaska (Gladden v. State, 110 P.3d 1006, 1011 (Alaska Ct. App. 2005)); Georgia (Jones v. State, 536 S.E.2d 511, 513 (Ga. 2000)); Illinois (People v. Tucker, 889 N.E.2d 733, 739 (Ill. App. Ct. 2008)); Indiana (Jackson v. State, 868 N.E.2d 494, 503 (Ind. 2007)); Maine (State v. Watson, 900 A.2d 702 (Me. 2006)), North Carolina (State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000)); Pennsylvania (Commonwealth v. Lucarelli, 971 A.2d 1173 (Pa. 2009)); Rhode Island (State v. Snell, 892 A.2d 108, 120 (R.I. 2006)); South Carolina (State v. Roberson, 675 S.E.2d 732, 733 (S.C. 2009)); Utah (State v. Pedockie, 137 P.3d 716, 722 (Utah 2006)); Wisconsin (State v. Cummings, 546 N.W.2d 406, 418 (Wis. 1996)).

Other state courts, such as those in Colorado and Delaware, have a vastly different practice.[115] Allowing for the possibility of a waiver triggered by disruptive conduct, Colorado makes clear that "[a] defendant may waive assistance of counsel either expressly or impliedly through his or her conduct."[116] However, citing presumptions against the waiver of a constitutional right, appellate courts make clear that trial courts have a duty "to make a careful inquiry about the defendant's right to counsel and his or her desires regarding legal representation."[117] In Delaware, a "'waiver by conduct' requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se."[118] This stands in contrast to Delaware's rule that forfeiture may be imposed for violent or especially outrageous behavior (without warnings, colloquy, or a hearing).[119] Likewise, in contrast to those identified above, a number of federal circuits have made the same determination: counsel may not be lost without an in-court inquiry on the subject of whether the defendant understands the risks of his behavior and the risks of proceeding without counsel.[120]

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[115] These states require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *dilatory conduct*: Arizona (Hampton v. State, 92 P.3d 871 (Ariz. 2004)); Arkansas (Beyer v. State, 962 S.W.2d 751, 754 (Ark. 2004)); California (King v. Superior Court, 132 Cal. Rptr. 2d 585 (Cal. Ct. App. 2003)); Colorado (People v. Alengi, 148 P.3d 154, 159 (Colo. 2006)); Delaware (Bultron v. State, 897 A.2d 758, 764 (Del. 2006)); Florida (Waterhouse v. State, 596 So. 2d 1008, 1014 (Fla. 1992)); Hawaii (State v. Maelega, 88 P.3d 1208 (Haw. 2004)); Idaho (State v. Lindsay: 864 P.2d 663, 666 (Idaho Ct. App. 1993)); Kentucky (Depp v. Commonwealth, 278 S.W.3d 615 (Ky. 2009)); Maryland (Felder v. State, 666 A.2d 872, 876 (Md. 1995)), Massachusetts (Commonwealth v. Means, 907 N.E.2d 646, 652 (Mass. 2009)); Minnesota (State v. Jones, 772 N.W.2d 496, 504 (Minn. 2009)); North Dakota (City of Grand Forks v. Corman: 767 N.W.2d 847, 850 (N.D. 2009)); Ohio (State v. Constable, No. CA2003-12-107, 2005 WL 637792 (Ohio Ct. App. Mar. 21, 2005)); Tennessee (State v. Carruthers, 35 S.W.3d 516, 549 (Tenn. 2000)); Washington (City of Tacoma v. Bishop, 920 P.2d 214, 219 (Wash. Ct. App. 1996)); Wyoming (Trujillo v. State, 2 P.3d 567, 575 (Wyo. 2000)).

[116] People v. Alengi, 148 P.3d 154, 159 (Colo. 2006).

[117] *Id.*

[118] Bultron v. State, 897 A.2d 758, 764 (Del. 2006) (citing United States v. Goldberg, 67 F.3d 1092, 1101 (3d Cir. 1995)).

[119] *Id.*

[120] These circuits require a hearing, warning, or colloquy before removing counsel from a defendant who engages in *dilatory conduct*: Fifth Circuit (United States v. Davis, 269 F.3d 514 (5th Cir. 2001)), Sixth Circuit (King v. Bobby, 433 F.3d 483 (6th

III. THE U.S. SUPREME COURT'S . . . OPINION?

The United States Supreme Court has found no reason to differentiate between a waiver of counsel expressed through words and a waiver of counsel expressed through conduct—and its only word on waiver of counsel requires a hearing and a knowing, intelligent, and voluntary relinquishment.

If examining *Boykin*, *Faretta*, and the "knowing, intelligent, and voluntary" jurisprudence on the one hand, and this body of forfeiture and implicit waivers on the other, something seemingly does not quite fit with cases allowing a waiver without warning. Those cases holding the same or similar view to the following—"A 'waiver by conduct' requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se"[121]—seem the most constitutionally sound and allow trial courts the flexibility of finding a forfeiture or waiver while still protecting a defendant's rights. The United States Supreme Court has not addressed the issue of the constitutionality of forfeiture or of implicit waiver. As the Ninth Circuit Court of Appeals has recently acknowledged, "Although the Supreme Court has never directly held that the right to counsel can be forfeited, the Court has also never held to the contrary . . . ."[122]

While true, denial of certiorari, however, is difficult to decipher. Traditionally, students of law learn the "orthodox view" that the denial of certiorari is not an indication of the Court's view on the merits of a case.[123] Some have been so glib as to suggest the process as the product of a "a fit of absentmindedness" or a matter of "serendipity."[124] The Court's own explanations include a disclaimer that a denial of certiorari means only that "for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits

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Cir. 2006)), Seventh Circuit (United States v. Bauer, 956 F.2d 693 (7th Cir. 1992)), Eighth Circuit (United States v. Crawford, 487 F.3d 1101 (8th Cir. 2007)).

[121] *Bultron*, 897 A.2d at 764 (citing United States v. Goldberg, 67 F.3d 1092, 1101 (3d Cir. 1995)).

[122] Chandler v. Blackletter, 366 F. App'x 830 (9th Cir. 2010).

[123] *See* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1228 (1979).

[124] Book Review, *The Uncertainty of Cert*, 105 HARV. L. REV. 1795 (1992) (reviewing H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991)).

taken by a majority of the Court, there were not four members of the Court who thought the case should be heard."[125]

In at least some instances, a denial of certiorari is a simple way of affirming a lower court decision.[126] However, it has also been suggested that although it is wise practice to be wary of attributing a decision on the merits to a denial of certiorari, denial *may* offer tentative views on the merits that are helpful in predicting the course of future developments. Denial may be particularly meaningful if there are obvious factors that would call for review if the lower court's decision seemed wrong. The most useful of these factors are the apparent national importance of the case denied review, the existence of a conflict in lower court decisions, or the presence of a strong dissent from the denial of review.[127]

The problem with assuming this to be the case with forfeiture or constructive waiver cases is that the Court has denied certiorari in a number of cases standing for opposite propositions. A number of legal teams have sought United States Supreme Court review on related issues—all without success. The most recent of these are described below, though as described in Section I, the Court has denied certiorari in these issues since the early 1940s.[128]

A. Loss of Counsel Requiring a Hearing

Of the denials of certiorari discovered during research for this Article, a number of these were in cases ultimately requiring some sort of hearing on the record before a defendant was able to waive counsel with his conduct. *United States v. Bauer*, for one, held that *Faretta* did not preclude the concept of waiver by conduct so long as a defendant receives minimal warnings on the record.[129] Applying similar reasoning, the Ninth Circuit in *United States v.*

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[125] Brown v. Allen, 344 U.S. 443, 491-92 (1953) (Justice Frankfurter explaining the position of the Court).

[126] Linzer, *supra* note 123, at 1283-86.

[127] *Id.* at 1304.

[128] Spevak v. United States, 158 F.2d 594 (4th Cir. 1947).

[129] United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992), *cert. denied*, 506 U.S. 882 (1992). Under *Faretta*, the court was required to give the defendant warning about pro se representation, which it did, but nothing more. *Id.*

Meeks determined that the defendant's right to counsel had been violated by the trial court's finding of a waiver by conduct.[130] The Sixth Circuit in *King v. Bobby* held that even though the defendant actually signed a waiver of counsel, when he did not expressly waive his right to representation, he was entitled to "the minimum" *Faretta* warnings.[131]

United States v. Garey offered a slightly different approach to the issue, requiring warnings before finding a constructive waiver but not necessarily a dialogue or colloquy with the defendant.[132] The Eleventh Circuit also acknowledged the lack of guidance from the United States Supreme Court.[133] The opinion includes strong, clear language about the importance of protecting defendants' right to counsel:

> We continue to stress that when a right as fundamental as the right to counsel is at stake, it is important for trial courts to do all in their power to ensure every defendant, from the most cooperative to the most obstreperous, is informed of the risks of proceeding pro se and is prevented from waiving counsel without sufficient knowledge of the protections he is surrendering. . . . To that end, the best practice is for district courts to begin by attempting to engage the defendant in a full discussion of the dangers of self-representation whenever a defendant expresses a desire to waive his right to counsel, whether affirmatively or by his conduct.[134]

And so, while the Eleventh Circuit requires no magic words on the subject, at least in relation to dilatory conduct, it does not allow

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[130] 987 F.2d 575, 579 (9th Cir. 1993), *cert. denied*, 510 U.S. 919 (1993). "The court did not make Meeks aware of the dangers of proceeding pro se, nor does the record indicate that he knew of them." *Id.*

[131] King v. Bobby, 433 F.3d 483 (6th Cir. 2006), *cert. denied*, 549 U.S. 1001 (2006).

[132] United States v. Garey, 540 F.3d 1253, 1267-68 (11th Cir. 2008), *cert. denied*, 555 U.S. 1144 (2009) ("[A] *Faretta*-like monologue will suffice. . . . [I]t is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a pro se litigant.").

[133] *Id.* at 1263 ("The Supreme Court has never confronted a case in which an uncooperative defendant has refused to accept appointed counsel or engage in a colloquy with the court. Consequently, the Court has never been asked to determine whether a defendant may waive counsel without making an explicit, unqualified request to represent himself.").

[134] *Id.* at 1267.

lower courts to impute understanding to defendants about the consequences of their conduct or of their (eventual) loss of the right to counsel.

Similarly, the United States Supreme Court denied certiorari for *State v. Jones*.[135] In *Jones*, the trial court conducted a brief colloquy during which Jones acknowledged that he had the right to an attorney, but that he did not qualify for representation by a public defender.[136] Although after appropriate warnings, he agreed that he would represent himself, Jones told the trial court that he considered himself "a sitting duck, basically a target" without counsel.[137] Although the appellate court held the record did not support a conclusion that Jones had waived his right to counsel, it held that Jones had *forfeited* it in his extremely dilatory conduct and failure to engage counsel despite acknowledging the risks of proceeding pro se.[138] The court in *Wilkerson v. Klem* reached a similar conclusion, upholding a finding of forfeiture of counsel without the defendant having received a full warning on the record about the risks of self-representation.[139]

B. Loss of Counsel Not Requiring a Hearing

Not all of the cases in which certiorari was sought and denied were cases in which a hearing was held, or later held to be required. Although the defendant in *Jones v. Walker* repeatedly asserted his wish for representation (as he requested new counsel), the Eleventh Circuit found the "functional equivalent" of a valid waiver.[140] The dispositive fact in *Jones*—in seeming direct contradiction to that Eleventh Circuit's holding in *United States v.*

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[135] State v. Jones, 772 N.W.2d 496 (Minn. 2009), *cert. denied*, 130 S. Ct. 3275 (2010).

[136] *Id.* at 502.

[137] *Id.* at 506.

[138] *Id.*

[139] Wilkerson v. Klem, 412 F.3d 449, 454 (3d Cir. 2005), *cert. denied*, 547 U.S. 1051 (2005). The Third Circuit noted that "[w]hile the Superior Court quoted this passage from *Wentz* cast in terms of 'waiver,' it made clear that this was a case in which the defendant had forfeited his right to counsel by his conduct and not one involving a voluntary waiver of that right." *Id.* at 452.

[140] Jones v. Walker, 540 F.3d 1277, 1286 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1670 (2009). "So long as a defendant knows the risks associated with self-representation, it is irrelevant for constitutional purposes whether his understanding comes from a colloquy with the trial court, a conversation with his counsel, or his own research or experience." *Id.* at 1293.

Garey (discussed *supra*)—was a finding of the defendant's understanding of the risks of self–representation, regardless of the source of that understanding.[141] *United States v. Hughes*, for one, acknowledged that a colloquy would have been "preferable" but held that when the defendant delayed retaining counsel, "[t]he facts and circumstances in this case support a valid waiver by conduct." [142] *Sullivan v. Pitcher* likewise upheld a waiver despite explicit warnings.[143] Under those circumstances, the Sixth Circuit announced that "a formal inquiry is not a sine qua non of constitutional waiver"[144] and that "Sullivan was acutely aware of his right to counsel and the risks of proceeding pro se, and his waiver of that right and his decision to proceed in the face of such risks was undeniably 'knowingly and intelligently' made."[145]

Several cases focused on the level of the defendant's understanding and perceived manipulation of the system. In two such cases, certiorari was denied after an appellate court upheld a finding of waiver/forfeiture without a full warning or hearings. In *State v. Carruthers*, the Supreme Court of Tennessee similarly held that "an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings."[146] Finding that Carruthers' conduct and dilatory behavior had escalated with the successive appointments of new counsel, and that he understood the dangers of proceeding without counsel, the court explained "in situations such as this one, a trial court has no other choice but to find that a defendant has forfeited the right to counsel; otherwise, an

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[141] *Id.*; *cf.* United States v. Garey, 540 F.3d 1253, 1267 (11th Cir. 2008).

[142] United States v. Hughes, 191 F.3d 1317, 1324 (10th Cir. 1999), *cert. denied*, 529 U.S. 1022 (2000).

[143] Sullivan v. Pitcher, 82 F. App'x 162, 165 (6th Cir. 2003), *cert. denied*, 541 U.S. 991 (2004).

[144] *Id.*

[145] *Id.* "In circumstances such as the instant one—when all the evidence supports the conclusion that the Sixth Amendment is being used not as a shield but as a sword—other courts have not hesitated to find waiver through conduct." *Id.* at 165-66 (citing United States v. Irorere, 228 F.3d 816, 826 (7th Cir. 2000)) (noting that "a defendant may waive his right to counsel through his own contumacious conduct"); United States v. Goldberg, 67 F.3d 1092, 1110 (3d Cir. 1995) (describing waiver by conduct as a "hybrid" situation that combines elements of waiver and forfeiture).

[146] State v. Carruthers, 35 S.W.3d 516, 549 (Tenn. 2000). On the other hand, that court opined that "the distinction between these two concepts is slight" and found both forfeiture and waiver in that case. *Id.*

intelligent defendant 'could theoretically go through tens of court-appointed attorneys and delay his trial for years.'"[147] The court in *State v. Pride* similarly upheld a finding of waiver of counsel after the defendant failed to work with his public defender, failed to officially hire private counsel, and failed to appear for trial.[148] The fact that the court viewed Pride as having "knowingly attempted to manipulate the court system" was dispositive.[149] The court also found the lack of a *Faretta*-type warning or waiver irrelevant, since Pride had never indicated a wish to represent himself.[150]

Most denials of certiorari involving forfeiture were in cases holding that no warning or hearing was required under those extreme circumstances existing in each case: death threats against counsel, kicking, punching, and the like.[151] In its own consideration of the issue, the Third Circuit discussed the absence of Supreme Court precedent. This was particularly relevant under the circumstances of federal habeas review regarding whether there was a prior decision of the Supreme Court involving facts "materially indistinguishable" from those presented in this case and whether the lower court's opinion was "contrary to . . . clearly established Supreme Court law."[152] "It remains true," the court explained, "that there are no Supreme Court decisions involving forfeiture of the right to counsel and *a fortiori* no decisions providing any clear guidance as to the 'standard to be applied

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147 *Id.* at 550.

148 State v. Pride, No. 2007-UP-544, 2007 S.C. App. LEXIS 48, at *12-13 (S.C. Ct. App. Aug. 24, 2007), *cert. denied*, 130 S. Ct. 3468 (2010).

149 *Id.*

150 *Id.* at *13-15 ("Additionally, we reject Pride's contention that his convictions should be reversed because the trial judge failed to admonish him regarding the dangers and disadvantages of self-representation pursuant to [*Faretta*]. . . . At no point did Pride indicate that he wanted to represent himself. Instead, he consistently communicated to the court and his court-appointed attorney that he wanted to retain a private attorney.").

151 Gilchrist v. O'Keefe, 260 F.3d 87, 89-90 (2d Cir. 2001). "Here, however, given 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." *Id.* at 97; *see also* United States v. Thompson, 335 F.3d 782, 785 (8th Cir. 2003) ("A criminal defendant may, however, by virtue of his actions forfeit his constitutional rights."); United States v. Leggett, 162 F.3d 237, 240, 250 (3d Cir. 1998).

152 Wilkerson v. Klem, 412 F.3d 449, 454 (3d Cir. 2005), *cert. denied* 547 U.S. 1051 (2006).

before [it can be concluded that] a defendant's misconduct warrants a forfeiture.'"[153]

Scholars, then, can make little of the meaning of these repeated denials of certiorari, as denials are equally as likely to be returned in cases requiring a more traditional waiver of counsel as cases that allow forfeiture without offering the defendant a warning or opportunity to adapt his behavior to an understanding of potential consequences. Why is it, then, that such important constitutional questions remain unaddressed by the Supreme Court? These questions are now being raised often enough—and on rather fundamental constitutional law issues—that it is difficult to imagine the Court to be disinterested in the issue.

As state and federal appellate courts blunder on their own, cases and circumstances raising significant constitutional concerns persist. While many crave the attention of our High Court, these questions cry out for guidance and clarity.

IV. MAKING SENSE OF THE PROBLEM: DOES THE RIGHT TO COUNSEL REALLY DEPEND ON GEOGRAPHY?

Evidently, court opinions on this topic range considerably (which is not unusual, considering most jurisdictions approach many criminal law matters with local flavor), with no forthcoming magic bullet from the Supreme Court. The unique issue here is that there is such variety in defining and approaching a constitutional criminal law matter on which there exists otherwise clear jurisprudence. Does conduct really create a set of problems that justify deviation from precedent on waiver of counsel? Or are these sets of cases aberrations crying out for a new set of legal responses (if not a Supreme Court opinion)? Depending on the location of an alleged crime, a defendant may be at risk for losing his right to counsel with no prior information about potential landmines, a warning and opportunity to modify behavior, or a hearing.

Variety is one thing. Variety on a fundamental constitutional question—particularly when definitions of the doctrines, triggering behavior, and appropriate responses are so vague—is troublesome.

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[153] *Id*. at 454-55 (citing Fischetti v. Johnson, 384 F.3d 140, 152 (3d Cir. 2004)).

Consider these scenarios as examples of the disparity of approaches:

Scenario 1: Defendant does not want to waive counsel but is not happy with counsel's performance. The court refers to the dangers of proceeding pro se, but the defendant nevertheless fires counsel on the eve of trial. Without further warning or a hearing, he is forced to proceed pro se.

Scenario 2: Defendant—perhaps with untreated mental health limitations—becomes frustrated with his attorney's failure to file motions on his behalf or to visit him in jail. The attorney-client relationship deteriorates. In a moment of desperation, amidst the stress of a court hearing, he physically assaults his counsel. He loses his right to counsel without warning from the trial court or a recorded evidentiary hearing.

Scenario 3: Defendant is convinced he would present his case better pro se than any attorney could. He is brought into court for a hearing, and the trial court explains the benefits of counsel, the pitfalls of proceeding without representation, and requires him to assure the court of his understanding of the attendant risks and to voluntarily relinquish his right to counsel. He then proceeds into trial pro se.

Before a defendant can be required to navigate the criminal process without counsel—either through delaying the process or through more extreme misconduct—do these doctrines and procedures ensure consistency with Supreme Court precedent and our fundamental respect for a defendant's right to counsel?

A. What Are the Justifications, After All?

1. Courtroom Control

As many courts have explained, it is universally accepted—axiomatic even—that defendants should not be able to assault their attorneys or indefinitely delay a trial, and neither can state nor federal budgets afford serial and indefinite appointment of defense counsel to the indigent.[154] Appellate courts in nearly every

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[154] *See, e.g.*, Commonwealth v. Lucarelli, 971 A.2d 1173, 1179-80 (Pa. 2009); William Glaberson, *Suit Over Legal Aid Advances in New York*, N.Y. TIMES, May 6, 2010, at A20, *available at* http://www.nytimes.com/2010/05/07/nyregion/07court.html;

state and circuit are sympathetic and supportive of trial courts' assertions of control when a defendant has attempted to hijack the timetable of his case[155] or meddle with a court's authority. Despite a range of opinions about the propriety of a doctrine of forfeiture or waiver by conduct, it is clear that defendants cannot be permitted to play a "cat and mouse" game with a trial court.[156]

But in their "analysis" of the issue—in the early cases that first allowed these practices and in the later cases that have adopted them—courts have confused a universal acknowledgment of the problem with identifying the appropriate solution.

Consider, for example, the *Bultron* opinion, a fundamental one on the subject: "Intentional misconduct for the purpose of forcing counsel to withdraw so that the trial cannot proceed is plainly obstructive to the administration of justice. The record supports the legal conclusion that Bultron forfeited his right to counsel by his conduct."[157] That the defendant's behavior is unacceptable is clear. It should not necessarily follow that the *only* appropriate legal response—or even the primary one—is the loss of that defendant's right to representation. And yet many appellate courts in both the state and federal court systems accept the loss of the right to counsel as a mechanism by which courts may assert authority over an unruly defendant.[158] To the limited extent that forfeiture cases discuss the justification of the doctrine, courts describe the duty to uphold and maintain order in the court. The *Means* court emphasized the importance of ensuring that the defendant receives his due process, but the opinion also stressed that doctrine is used as a way of ensuring safety and control in the courtroom. Looking more broadly at forfeiture, the Supreme Court in *Allen* fell squarely on the side of

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Adam Liptak, *Defendants Squeezed by Georgia's Tight Budget*, N.Y. TIMES, July 5, 2010, at A13, *available at* http://www.nytimes.com/2010/07/06/us/06bar.html.

[155] United States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir. 1995) ("[A] court has discretion to deny a request for a continuance if made in bad faith, for purposes of delay or to subvert the judicial proceedings.").

[156] State v. Slattery, 571 A.2d 1314, 1318 (N.J. Super. Ct. App. Div. 1990).

[157] Bultron v. State, 897 A.2d 758, 766 (Del. 2006).

[158] Commonwealth v. Means, 907 N.E.2d 646, 659 (Mass. 2009) ("Forfeiture is a method of court room management in extraordinary circumstances"). "[F]orfeiture or waiver by conduct of that right is justified by the judge's powers to ensure safety and control throughout the proceedings." *Id.* at 658 n.18 (quoting Faretta v. California, 422 U.S. 806, 834-835 n. 46 (1975)).

court's ability to control "disruptive, contumacious, stubbornly defiant defendants."[159] The view from that opinion is more in line with the suppression of disorder rather than the protection of the defendant's procedural rights.[160]

An additional problem is that this doctrine reaches back to a conduct-driven waiver of the right to a defendant's *presence* in a trial rather than to his right to counsel.[161] The Second Circuit's *Gilchrist*[162] opinion read the analogy into the Supreme Court's opinions in *Illinois v. Allen* and *Taylor v. United States*, neither of which mentions forfeiture (of counsel) by name.[163] The *Gilchrist* opinion read (or rather, extends) *Allen* to mean that the Supreme Court did not indicate whether a warning was required in every circumstance, leaving open the question of forfeiture of the right to presence (i.e., a defendant's giving up the right to presence even though the judge has not given the defendant a warning).[164]

In doing so, *Gilchrist* seems to ignore the differences between the right to counsel and the right to presence at a trial; while both are significant rights for criminal defendants, each connects to an entirely different body of authority.[165] Furthermore, there are court opinions on the subject of a defendant's right to presence requiring that before a court may conduct a trial in the defendant's absence, it must ensure that the defendant had

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159 Illinois v. Allen, 397 U.S. 337, 343 (1970) ("It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges . . . must be given sufficient discretion to meet the circumstances of each case.").

160 *Id.*

161 *See id.*

162 Gilchrist v. O'Keefe, 260 F.3d 87 (2d Cir. 2001).

163 *See* Taylor v. United States, 414 U.S. 17 (1973); *Allen*, 397 U.S. 337.

164 Incidentally, *Gilchrist* also appears to read *Taylor*—in which the Supreme Court effectively held that Taylor's voluntary absence was the equivalent of a waiver of his right to be present—to mean that the Supreme Court recognizes forfeiture of the right to be present.

165 The criminal defendant's right to be present during his trial derives from the Confrontation Clause of the Sixth Amendment and is considered a constitutional right. Although a defendant does not have to be warned that he will lose the right to be present during trial by voluntarily absenting himself from trial (meaning that the right may be waived even in the absence of a warning), there has not been a finding that the right may be totally forfeited. *See* United States v. Barnwell, 477 F.3d 844 (6th Cir. 2007).

adequate notice of his right to be present, the nature of the proceedings, and the consequences of the defendant's failure to appear.[166] Unfortunately, many of the cases related to forfeiture or waiver, which do not demand on-record warnings or hearings, ignore this fact. Instead, many announce that the solution is the loss of the right to counsel and unceremoniously reiterate the same line of cases used to justify the doctrine from its inception.[167] The *Gilchrist* opinion has seemingly formed the basis of the doctrine of forfeiture with more than seventy-five cases citing to that opinion and relying on its authority.[168]

2. Fundamental Rights

It seems evident that many of these courts should have undertaken a more thorough and searching analysis of this problem and proposed a solution in light of the Supreme Court's precedent in *Johnson*, *Faretta*, and the like. Those cases do not cease to control questions of the loss of fundamental rights simply because a defendant's conduct—rather than his verbal waiver—is at issue.

In addition to being generally useful in a criminal trial process, the right to counsel is a fundamental right.[169] Its denial through a court ruling—or through counsel's ineffectiveness[170]—is a structural error of such significant proportions that the extreme solution of a new trial is the required corrective measure.[171]

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[166] *See, e.g.*, United States. v. Tortora, 464 F.2d 1202 (2d Cir. 1972); Barnett v. State, 512 A.2d 1071 (Md. 1986); People v. Smith, 497 N.E.2d 685 (N.Y. 1986); State v. Jackson, 341 S.E.2d 375 (S.C. 1986).

[167] *See* King v. Bobby, 433 F.3d 483 (6th Cir. 2006); United States v. Bauer, 956 F.2d 693 (7th Cir. 1992); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Jones v. State, 536 S.E.2d 511 (Ga. 2000).

[168] Figure based on citing references to *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001), further narrowed to the terms "right to counsel."

[169] *Cf.* Erica J. Hashimoto, *Defending The Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

[170] *See* Alabama v. Shelton, 535 U.S. 654, 658 (2002) (extending the right to counsel to those who receive a "suspended sentence that may 'end up in the actual deprivation of a person's liberty'"); Strickland v. Washington, 466 U.S. 668, 686 (1984) (criminal defendant not only has the right to assistance of counsel, he has the right to *effective* assistance of counsel); Wood v. Georgia, 450 U.S. 261, 271 (1981) (right to conflict-free counsel).

[171] *See* Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 60-61 (2003) ("The right to counsel is deemed

Under the circumstances—balancing the harm of the loss of counsel (no matter what label courts might have given it) against the "burden" of warnings and acknowledgements on the record—it is difficult to justify not requiring some sort of hearing. After all, a hearing as envisioned in *Johnson* and *Faretta* are more than a simple five-minute court session, wherein an official must recite constitutional rights and warnings. Rather, it is the court's opportunity to inform and educate a defendant about his rights and to ascertain whether any waiver was made "understandingly."[172]

Considering, too, that delays, disruptions, and dismissals of attorneys are all ways to express concern about the validity of the process, it is worth introducing here that courts should have in place a mechanism through which to evaluate legitimate pre-trial (or at least pre-conviction) concerns about a counsel's effectiveness. As one case expressed, "While a defendant may not be forced to proceed to trial with incompetent or unprepared counsel . . . a refusal without good cause to proceed with able appointed counsel is a 'voluntary' waiver."[173] But if no hearing is required in so many jurisdictions before a defendant loses his right to counsel for inappropriately delaying, complaining about, or railing at the process, courts may not intervene—pre-trial, when intervention could make a difference[174]—in the case of the "unprepared" attorney. What, then, can be done if a defendant has legitimate concerns about his counsel or the process? Surely there is a way to better protect a court's power to control its courtroom docket and procedures while effectively (and more consistently) safeguarding the right to counsel (whether appointed or retained)? Most courts are practiced at moving a case along or reminding a defendant that, while he has the right to counsel's appointment,

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'fundamental' . . . In fact, the United States Supreme Court has opined that it is as essential as any right conferred on criminal defendants."); *see also* Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial.").

[172] Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[173] Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (internal citations omitted).

[174] *See* United States v. Cronic, 466 U.S. 648, 656-57 (1984).

he is not entitled to the counsel of his choosing.[175] Allowing courts flexibility in how that warning is afforded, yet requiring that it is done when a defendant is at risk of entering a criminal process without an advocate, addresses each of these considerations.

There may be a number of reasons why across-the-board warnings about the consequences of dilatory, threatening, or difficult conduct might seem unwarranted. First, hearings are expensive: courts across the nation are busy enough already with dockets overflowing and security and facilities being underfunded or in disrepair. They are extra trouble. This may also be seen as an over-reaction to a relatively rare problem—coddling a defendant whose only goal is to rage against the machinery of the judicial process.

In comparison to the number of total criminal defendants processed by the courts each year, the most extreme stories recounted here represent a relatively uncommon problem. However, any national trend related to the loss of counsel without a valid waiver is troublesome enough to warrant a decisive solution. The United States Supreme Court has failed to offer one, and so too have legislative bodies.

Although the issue demands more than a cost-benefit analysis, what is the burden of a short hearing when the risk is the violation of a fundamental right? Conduct is not so different from words that courts are justified—without better guidance from the High Court—in generating an entirely new set of tests to examine the waiver of counsel.

A minimal time investment in a warning and acknowledgment of risk may save decades of expensive litigation down the road (as in the Georgia case described in the Introduction). Once problems present themselves—a delay, perhaps, or conflict with an attorney's advice—the judge could sua sponte call the parties for a brief hearing during which she hears reasons for the defendant's behavior (including, perhaps, legitimate concerns about counsel's performance), warns the defendant of the consequences of continuing the behavior, and

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[175] *Maynard*, 545 F.2d at 278 ("The right to counsel of one's choice is not absolute. A court need not tolerate unwarranted delays, and may at some point require the defendant to go to trial even if he is not entirely satisfied with his attorney.").

accepts the defendant's knowing and intelligent consent to the warning about dilatory tactics or potential threats or violence. A brief hearing the length of a *Faretta* warning or a *Boykin* colloquy is a small burden—especially when compared with the potential loss of a fundamental constitutional right.[176]

B. Are Not These Fundamentally "Contemptuous" Defendants?

In many ways, both doctrines of implicit waiver and forfeiture appear punitive—especially because in some cases defendants lose not only their rights to counsel but their rights to a preceding warning or hearing. Our legal system, however, has a mechanism for dealing with unacceptable courtroom behavior by lawyer or client: contempt. A thorough search for an intersection of these doctrines has proven fruitless, which raises questions about why forfeiture and implicit waiver doctrines stuck while contempt sanctions in these cases seem to have been unexplored (at least by appellate courts).

Traditionally, contempt proceedings have been the primary "stick" available to trial and appellate courts overseeing difficult parties or counsel.[177] Contempt actions are common, and though procedures vary greatly across jurisdictions, they are meant to afford judges the power necessary to address misconduct, delay, or other roadblocks to an efficient judicial process.[178] A trial judge, of course, "may impose civil or criminal sanctions on both witnesses and parties at trial" and have "broad discretion" to fashion "narrowly tailored" remedies appropriate to the circumstances.[179]

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[176] *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[177] *Authority of the Trial Judge*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 597, 606 (2010).

[178] Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power—Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 480-81 (1990) ("Probably no more than a few minutes go by in this country without an attorney being charged or threatened by a judge with contempt. In Los Angeles County alone, one public defender is held in contempt or threatened with contempt every week.").

[179] *Id.* at 606-07; *see also* Eric Fleisig-Greene, *Why Contempt is Different: Agency Costs and "Petty Crime" in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1246 (2003) ("[C]ontempt power could be maintained . . . where the contemnor posed an immediate threat of endangering those present or disrupting the court's functions.").

This is particularly relevant in criminal cases, which generate the highest number of contempt actions.[180]

Clients' physical assaults upon an attorney have been held to be contempt of court—even when occurring in a courthouse hallway.[181] If "calculated to impede, embarrass or obstruct the [trial] court in the administration of justice," even violent behavior occurring outside the presence of the court can fall into this category of cases.[182] If contempt can be used to assert control over litigants' behavior even out of court, then its extension to cover unrepresented defendants' behavior is not radical. If counsel may be sanctioned for missing deadlines or failure to respond to other direction from the court,[183] then an unrepresented defendant's delays can be adequately addressed by contempt powers as well.

The various doctrines all address the same behavior and support improved courtroom control, but one makes much more sense. Contempt actions still reprimand defendants for their actions, but the right to counsel remains intact.

Not only is contempt the more traditional way of dealing with misconduct that disrupts the judicial process, its application in the implicit waiver/forfeiture context may be more analytically consistent as well. Many courts impute to criminal defendants an understanding of the consequences of violence or continued disruptive conduct; however, this presupposes that defendants

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[180] Raveson, *supra* note 178, at 480-81 ("Although no one seems to maintain statistics on the frequency of contempt citations, anecdotal data suggests that the threat and use of contempt against attorneys, particularly those representing criminal defendants, is at an all time high and increasing.").

[181] *See* People v. Clancy, 239 Ill. App. 369 (Ill. App. Ct. 1926).

[182] *See id.* at 373; *Assault on Attorney as Contempt*, 61 A.L.R.3d 500 (1975); *cf.* State *ex rel.* Browning v. Jarrell, 192 S.E.2d 493 (W. Va. 1972).

> The trial court's adjudging the defendant to be in *contempt* for assaulting an attorney in the court clerk's office was held erroneous . . . because the evidence was insufficient to show beyond a reasonable doubt that the attorney was going to or coming from court for, or in respect to, a proceeding had, or to be had, in that court, as required by the statute under which the defendant had been convicted, since, said the court, the evidence did not show what business, if any, the attorney had with the court at the time that the assault occurred.

Assault on Attorney as Contempt, 61 A.L.R.3d 500 (1975) (emphasis added).

[183] *See* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 373 (2000) ("Contempt is intended as a remedial mechanism as well as a punishment for an offense against the state"—through injunctions, fines, or terms of imprisonment.).

could reasonably expect punishment for their behavior that would extend beyond the typical sanctions of contempt.[184] That is, a defendant may understand that a punch may constitute a tort or crime, or potential exposure to contempt sanctions, but assuming that criminal defendants understand these doctrines which elude both scholars and courts is too great a logical assumption.

C. Recommended Procedures

Of course, the circumstances described in this Article present complicated decisions for the courts considering them—particularly for the trial courts actually facing a difficult defendant (as well as other parties, the substantive case before it, and all other litigants demanding time and attention). This does not, unfortunately, relieve courts of the responsibility to hold the line requiring a knowing, *intelligent*, and voluntary relinquishment of the right to counsel in criminal proceedings.

The most intellectually and doctrinally consistent response to these situations is to keep misconduct in the realm where they belong: contempt actions. Disruptive conduct—including in and out of court violence or threatened violence against an attorney—is frequently sanctioned by trial courts through contempt actions, which can be specially tailored to a defendant's circumstances, the severity of the misconduct, and the stage of the proceedings. Contempt proceedings, unlike the right to counsel, do not require extensive colloquies, warnings, or special procedures: if a defendant shows disrespect to the court's order and authority, he can immediately be subjected to an additional contempt charge. This solution to the real problems addressed in the doctrines of implicit waiver of counsel and forfeiture is both more appropriate and better-reasoned and gets to the heart of the underlying concerns: courtroom control.

If, however, courts choose not to abandon the doctrines of forfeiture or implicit waiver in favor of contempt proceedings, a rather familiar hearing procedure would help ensure that courts maintain control over their parties and their docket, while at the

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[184] Criminal contempt is traditionally imposed as a punishment for disobedience of a legal commandment. It can result in lengthy imprisonment and substantial fines. *Id.*

same time ensuring that a defendant's counsel is not lost without necessary due process. That procedure is an on-record hearing, which includes a colloquy about the defendant, the risks of his continued behavior, the risks of continuing pro se, and a clear warning about the doctrine of forfeiture or implicit waiver (and the fact that continued misbehavior will lead to the loss of the right to counsel). In those circumstances, a defendant must be competent[185] and demonstrate an understanding of the warnings and the rights he stands to waive.

An additional but somewhat less desirable response may involve adding simple warnings to a standard preliminary or first appearance hearing colloquy. In those hearings, defendants are typically explained that they hold important constitutional rights, most of which are easily waived.[186] To add a few simple sentences explaining that dilatory behavior or violence toward counsel may result in the loss of the right to counsel would neither incur special expenses nor waste valuable time, but would still serve to educate defendants about their rights and the possibility for waiving them.[187]

1. A Warning and Hearing Disruptive or Dilatory Behavior

Short of failing to recognize a doctrine of forfeiture or implicit waiver (as many jurisdictions have done), the only approach consistent with existing Supreme Court precedent on the right to counsel requires both warnings about the risks of proceeding pro se and the risks of continued disruptive behavior. Of course, many states that do allow for a waiver by conduct do follow this

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[185] Competence may be more of an issue in these cases than has manifested in the appellate opinions. Of course, as with any constitutional right, a defendant must be competent to understand and comply with the warnings he receives from the court, and a competence inquiry may be both appropriate and pragmatic in the sorts of cases described here. *See* Westbrook v. Arizona, 384 U.S. 150 (1966).

[186] For example, in the *Miranda* warning itself, defendants are told of their right to remain silent and of the consequences of their failure to remain so. This oversimplifies the warnings somewhat, but the analogy is nonetheless apt; if a defendant is able to waive his counsel through conduct, a warning that this can occur through a method other than a verbal waiver could be appropriate.

[187] On the other hand, while it might theoretically prevent the behavior discussed in this Article, the power of suggestion is strong. For this reason, a hearing, once signs of difficulty manifest, is both most practical and what is required under *Faretta* and *Johnson*.

procedure. Colorado offers an excellent example of how to address this somewhat complicated situation while remaining true to constitutional authority.

The Colorado Supreme Court has articulated so elegantly what seems to be the best approach to the circumstance—and has resolved a tension while considering interests of both trial courts and defendants. The jurisdiction recognizes a waiver by conduct, but makes clear:

> A defendant may waive assistance of counsel either expressly or impliedly through his or her conduct . . . . [however,] [b]ecause there exists a strong presumption against the waiver of a fundamental constitutional right, the trial court has the duty to make a careful inquiry about the defendant's right to counsel and his or her desires regarding legal representation.[188]

Most jurisdictions have resisted, for some reason, mandating a particular colloquy. Perhaps if courts cannot agree about whether a hearing is required in the first place, then mandatory questions must be too much to ask. But, of course, *Faretta* and *Boykin*—fundamental cases on waiver—do outline questions for waiver colloquies that ensure at least a constitutional minimum.

As the Eighth Circuit eloquently writes, "the right to counsel is a shield, not a sword," and "[a] defendant has no right to manipulate his right for the purpose of delaying and disrupting the trial," or any other proceeding.[189] Still, if the right to counsel—and Supreme Court jurisprudence interpreting and explaining that right—is to be appropriately protected, a warning, on the record, should be required before any waiver of that right can be found. Eyes must still be "wide open."[190]

If an in-person hearing is too expensive, burdensome, or otherwise impractical, the Massachusetts courts have solved this

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[188] People v. Alengi, 148 P.3d 154, 159 (Colo. 2006).

[189] United States v. Stewart, 20 F.3d 911, 917 (8th Cir. 1994) (internal quotations omitted) (a defendant attempting to delay the proceedings received warnings about his behavior and was found to have waived his right to counsel).

[190] *See id.*

problem by warning defendants via videoconference.[191] With improved technology becoming less complicated and expensive, this may offer a solution, making compliance with *Faretta* somewhat simpler.

Many courts, as described *infra*, do hold a hearing at the first sign of delay or difficulty, though the outcomes of these proceedings are mixed. Many jurisdictions, however, stop short of offering a hearing or warning in the case of physical violence or a threat of violence against an attorney, and a skeptic might assume this is because of the sudden and unpredictable nature of these cases or the defendants described therein. This mistakes the issue. First, until there is Supreme Court precedent to the contrary, this sidesteps the existing law requiring a *knowing* and intelligent waiver of counsel. Second, many (if not most) of the cases that culminated in violence began with lower-level delay or disruption of the process and offered earlier opportunities for warning or intervention.[192] There were opportunities, in these cases, for a court to offer warnings—both about the risks of the continued misconduct and the risks of continuing pro se—as described above. Finally, at least one jurisdiction has offered a very workable model for responding to a defendant who has attacked his lawyer and preventing waiver without warning. In its *Holmes* case, Tennessee offered a rational, practical solution in these circumstances; the solution suggested is both consistent with protection of the defendants' constitutional rights and a rational response to a heated, emotional situation.[193] Again, there may not be "magic

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[191] *See* Commonwealth v. Means, 907 N.E.2d 646, 651-52 (Mass. 2009) (finding forfeiture of the right to counsel but affording a videoconferencing hearing for a defendant).

[192] *See, e.g.*, United States. v. Thomas, 357 F.3d 357 (3d Cir. 2004); State v. Rasul, 167 P.3d 1286 (Ariz. Ct. App. 2007); King v. Superior Court, 132 Cal. Rptr. 2d 585 (Cal. Ct. App. 2003); State v. Montgomery, 530 S.E.2d 66 (N.C. Ct. App. 2000).

[193] The Tennessee Supreme Court gives another recommended procedure for dealing with potential forfeiture in future cases. So long as the query on whether the defendant has been appropriately warned is a dispositive concern in this procedure, this is an excellent method for addressing such circumstances.

> For the benefit of trial courts in future cases where 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

words" or a set colloquy that must be followed in every case. However, to suggest that a defendant's violent conduct makes compliance with the constitution impossible ignores a trial court's range of optional responses and ability to craft a solution appropriate to a defendant's unique concerns (and methods of manifesting them).

2. A General Warning at First Appearance

Additionally (not *alternatively*), if a warning could be added to an already-existing court appearance—say, a first appearance hearing, when defendants typically receive information about the right to remain silent, their right to appointed counsel, and the like—the only additional expense involved is twenty extra seconds of the judge's breath.

If protection of defense attorneys from potential harm is a factor (in part) driving a policy allowing the forfeiture of the right to counsel, would not a warning at the beginning of the process do more to prevent this? Forfeiture is almost by definition a reactionary response—and if a defendant does not understand the consequences of his actions, then forfeiture or waiver is no deterrent. The addition of a brief warning that "egregious conduct" can form the basis of a waiver of counsel could help prevent the

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> 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.

State v. Holmes, 302 S.W.3d 831, 848 (Tenn. 2010).

problematic behavior in the first place. After all, courts must be careful not to make too many assumptions about a defendant's understanding. On the other hand, any warning must be clear enough to put a defendant on notice, while stopping short of suggesting violence in the first place or inhibiting a defendant from complaints about his attorney's performance (in a more appropriate form).

Practices differ among the state or federal jurisdictions, but in Georgia, all defendants receive information about their constitutional rights in a hearing to be held not later than seventy-two hours after an arrest.[194] At this first appearance, the judicial officer is required to inform the defendant about the charges against him and about his *Miranda* rights.[195] In addition to offering further information about bail (if applicable) and making cursory decisions about the existence of probable cause, defendants are given information about their right to counsel and the procedures through which counsel may be appointed.[196] This could be an appropriate opportunity to explain that, although accused of a crime and entitled to the assistance of counsel, the right to counsel can be "waived" or "forfeited" under circumstances of a defendant's delay or as a result of a defendant's threatening behavior. It would add no perceptible length to such a hearing and—coupled with a later warning if appropriate—could prevent unconstitutional, involuntary loss of the right to counsel (if not the offending behavior itself).

3. Standby Counsel is Not Constitutionally Sufficient

A number of courts—perhaps out of discomfort with a blanket loss of counsel after a defendant disrupts the trial process but yet unwilling to offer a full hearing under the circumstances—have adopted alternatives. Some "recommend" but do not require a hearing before a defendant can lose his right to counsel.[197] Others require an examination of the entire record (as a whole) to determine whether there is evidence that the defendant

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194 GA. UNIF. SUPER. CT. R. 26.1.

195 *Id.*

196 *Id.*

197 *See* State v. Watson, 900 A.2d 702, 714-15 (Me. 2006).

independently understood the rights he stood to lose.[198] A third approach, which is relatively common in the federal courts, even when a defendant has expressly waived his right to counsel, offers standby or "shadow" counsel to the defendant to assist him during his trial. Each of these is constitutionally insufficient—and may in fact cause more confusion in the long run.

The appointment of standby representation does not fully address the disconnect that exists between a defendant's right to be represented by an attorney at trial and a trial court's determination that the defendant has validly waived or forfeited his or her right to an attorney. Some authority proposes that defendants may be appointed standby counsel before acquiring a valid waiver, thus violating the defendant's right of self-representation if he or she does not expressly affirm that right.[199]

The use of standby counsel—as opposed to actual representation—is improper if a defendant has not validly waived his right to counsel. While some authority suggests that standby counsel should be appointed in circumstances of uncertainty,[200] it is possible that a defendant will not receive warnings regarding the dangers of self-representation because the court presumes that standby counsel eliminates the need for valid waivers. Further, appointing standby counsel may violate a pro se defendant's rights if appointment "yield[s] a presentation to the jury that directly contradicts the approach undertaken by the defendant."[201] The defendant has a right to retain actual control over his or her case; this is the core of the *Faretta* right. Finally, because "multiple voices for the defense could confuse the message the defendant wishes to convey . . . a standby attorney's participation would be barred when it would destroy the jury's perception that the defendant is representing himself."[202]

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[198] *See* Jones v. State, 536 S.E.2d 511, 514 (Ga. 2000).

[199] People v. Nieves, 442 N.E.2d 228, 235 (Ill. 1982); State v. Chavis, 644 P.2d 1202, 1207 (Wash. Ct. App. 1982).

[200] McKaskle v. Wiggins, 465 U.S. 168 (1984).

[201] United States v. Davis, 285 F.3d 378, 381 (5th Cir. 2002), *cert. denied*, 537 U.S. 1066 (2002).

[202] Indiana v. Edwards, 554 U.S. 164, 186 (2008) (Scalia, J., dissenting) (internal quotation marks and citations omitted).

CONCLUDING THOUGHTS

Few, perhaps, are particularly outraged that a defendant (by definition, of course, standing trial for criminal activity) might lose his right to counsel for belligerent, contrarian, or perhaps even violent behavior. But to lose counsel without warnings on the record should at least prove uncomfortable to those who recognize the rationale in *Johnson*, *Gideon*, *Faretta*, and others in that company.

And if not outrage or discomfort, then, perhaps even the most skeptical can perceive an irony here. A defendant facing a criminal trial attempts to proceed without counsel—wishing to conduct his trial pro se. In that circumstance, under guidance and directive from the United States Supreme Court, a trial court is required to give the defendant particularized warnings, including describing the usefulness of a lawyer's skill and counsel, the traps of courtroom and evidentiary procedure, and the penalties should he be found guilty.

On the other hand, consider the person facing those same charges but who never vacillates in his understanding of the importance of counsel. He accepts appointed counsel (or retains his own counsel, assuming he is financially able to do so). At some point, dissatisfied with his counsel—perhaps his attorney has mapped an unacceptable strategy for the case, has failed to meet with or identify witnesses, or has otherwise failed to prepare a defense in a satisfactory way—that defendant requests new representation. If the trial court finds that the defendant's actions are "dilatory" or otherwise disruptive to the process, that defendant could find himself facing a trial or other court proceedings on his own and without an advocate.

If the understood punishment here in the case above is contempt for punching the attorney, then why would implicit waiver and forfeiture, two notions not common to uneducated defendants, be understood as punishment as well? Most competent defendants may expect some consequences after threatening or carrying out violence against their counsel, but those punishments take different forms: contempt proceedings, civil suit, and criminal charges. And since they are by definition on trial for "bad behavior" and entitled to (appointed) counsel, why

would any such defendant presume that bad behavior could likewise lead to the loss of counsel?

The truth is that very little related to protections or procedures for those charged with crimes changes because of widespread public outrage. What should attract attention, though—and action—is this inconsistency among jurisdictional approaches and inconsistency with clearly established federal law on the loss of counsel. If criminal defendants can lose their guaranteed right to counsel because of unpopular or impolite behavior—without a hearing, without a warning, without a "knowing, intelligent, and voluntary" assent that continuation of disruptive behavior could lead to the loss of representation—then *Gideon* means little and *Faretta* makes no sense.