Gideon's Vuvuzela: Reconciling the Sixth Amendment's Promises with the Doctrines of Forfeiture and Implicit Waiver of Counsel

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GIDEON’S VUVUZELA¹: RECONCILING THE SIXTH AMENDMENT’S PROMISES WITH THE DOCTRINES OF FORFEITURE AND IMPLICIT WAIVER OF COUNSEL

Sarah Gerwig-Moore²

I. INTRODUCTION

Dating back to the early decades of the last century, the United States Supreme Court has articulated clear, venerable standards for the waiver of constitutional rights.³ There is fertile ground here in 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 rights.”⁴ A defendant must proceed with “eyes wide open” before waiving any constitutional right,⁵ and a waiver of a constitutional right will not be presumed from a “silent record.”⁶ 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, there has developed a significant corpus of cases that allows, under certain circumstances, the “forfeiture,” “implicit waiver,” or a “waiver by conduct” of the right to

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

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⁴ Johnson, 304 U.S. at 464;


⁶ See e.g., Johnson, 304 U.S. 458 (knowing and voluntary waiver of Sixth Amendment right to counsel); Miranda v. Arizona, 384 U.S. 436 (1966) (knowing and voluntary waiver of Fifth Amendment right not to be compelled to incriminate himself); Faretta, 422 U.S. 806 (knowing and voluntary waiver of Sixth Amendment right to counsel).
counsel. Given the scrutiny courts have given to “knowing and voluntary” constitutional waivers, some of these cases explore puzzling, contradictory definitions of both the terms and application of the doctrines. These seem, on their face, 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. This newer “implicit waiver” bypasses that inquiry for a defendant who later finds himself without a protection—or an attorney, for example—without having expressly decided to forego counsel’s representation.

There is very little literature on this topic; a survey of journals, law reviews and other secondary literature reveals little explanation or insight. Further, 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 find them.

This project began with an attempt to define, describe, and disambiguate forfeiture from implicit waiver/waiver by conduct and to discuss the rationale and policy reasons why these doctrines have emerged (yet highlighting the reasons why criminal defendants might reasonably attempt to disrupt the process). But as the survey produced more and more shades of gray,

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7 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 unintelligently and understandingly rejected the offer.”).
8 Gilchrist v. O’Keefe, 260 F.3d 87, 95 (2d Cir. 2001); Johnson, 304 U.S. at 464.
defining the doctrines and approaches became less interesting than looking beneath those doctrines for the variety courts seemed to depend on but which is difficult to perceive.

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 and federal appellate courts. Take Davis v. Frazier,\(^\text{10}\) 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 2000 conviction for rape, child molestation, and kidnapping, Mr. Davis was appointed counsel to assist him in prosecuting an appeal, which included an allegation of ineffective assistance of counsel.\(^\text{11}\) His ensuing list of appellate attorneys endured a somewhat contentious relationship with Mr. Davis—who 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.\(^\text{12}\) 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.\(^\text{13}\) 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.

\(^\text{10}\) 285 Ga. 16 (2009); Davis v. State, 273 Ga.App. 397 (2005); Davis v. State, 280 Ga. 352 (2006). 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.

\(^\text{11}\) Davis, 285 Ga. at 17.

\(^\text{12}\) Davis, 273 Ga.App. at 399.

\(^\text{13}\) Id. at 17.
Over strenuous objections, Mr. Davis conducted his own Motion for New Trial hearing pro se, which was subsequently overruled.\textsuperscript{14} He appealed pro se, lost, and then filed a pro se petition 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 of Mr. Davis being allowed to continue in his appeal—this time with counsel.\textsuperscript{15}

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.\textsuperscript{16} 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 be 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 to catalogue jurisdictional approaches to this problem but 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

\textsuperscript{14} Id. at 17.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
here to warrant a little study, some organized thinking, and perhaps even modification of existing approaches.
II. 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 cornerstone of the U.S. judicial system. The assistance of counsel has always been understood to be “of fundamental character” and after *Gideon v. Wainwright* and *Alabama v. Shelton*, 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.” And, consistently, the law is clear than in order to find or uphold 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.”

Put a little differently, “[t]he 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.”

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17 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 defense.”


20 *Carnley*, 369 U.S. at 516.

21 *Johnson* at 463 (emphasis supplied).
In fact, most waivers of constitutional rights follow the same line of inquiry: Was the defendant informed that the right existed in the first place?\textsuperscript{22} Did he waive that right understanding what he was losing?\textsuperscript{23} Doe court records reflect both the information and the intelligent, voluntary waiver?\textsuperscript{24} If the answers to these questions are “no,” then most US Supreme Court precedent—at least as related to the waiver of the right to counsel—prohibits a later finding of the loss of that right.

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.\textsuperscript{25} \textit{Faretta v. California} explained the right, co-existent with the right to representation, to dispense with counsel and navigate the process \textit{pro se}. 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

\textsuperscript{22} Shafer v. Bowersox, 329 F.3d 637 (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.”)\textsuperscript{23} \textit{U.S. v. Woodard}, 291 F.3d 95 (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. In determining whether there is a competent waiver of the right to counsel, the judge ‘must investigate as long and as thoroughly as the circumstances of the case before him demand.’”)\textsuperscript{24} Johnson 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. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.”)\textsuperscript{25} \textit{Faretta}, 422 U.S. at 819-20.
to counsel.”26 As with a general waiver of the right to counsel, before a defendant is permitted to proceed pro se, 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 with eyes open.’”27 Some jurisdictions have added further factors to the general Faretta test; for example, United States v. Welty demands that the defendant be warned about: (1) the technical problems he may face, and (2) the risks he takes if his pro se efforts are unsuccessful.28 This must all take place in open court and on the record, as “the right to assistance of counsel and the correlative right to dispense with a lawyer’s help are not ‘legal formalisms’ but protected by the Sixth Amendment.”29

Standby/ Shadow Counsel

Here, a brief discussion of “shadow” or “standby counsel” is useful. The beginnings of use of shadow counsel—more usual in federal court than in state courts—may reach back to dicta in the Faretta decision. 30 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.

26 Id. at 835; U.S. v. Frechette, 456 F.3d 1, 12 (1st Cir. 2006); U.S. v. Schmidt, 105 F.3d 82, 88 (2d Cir. 1997); U.S. v. Welty, 674 F.2d 185, 191 (3d Cir. 1982); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986).
27 Faretta, 422 U.S. at 835 (internal citations omitted).
28 Welty, 674 F.2d 185.
30 Faretta, 422 U.S. 806 (1975)( 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).
A court may appoint standby or shadow counsel to a defendant’s—even over his objection—if the court believes that said defendant “lacks the ability or vacillates in his or her resolve to continue without representation, the judge can appoint standby counsel to assist in the self-representation. 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.” 31

C. Analogous Waivers

Beyond the right to counsel or to self-representation, waivers of other constitutional rights must also be made knowingly and voluntarily—after first receiving information about the rights being given up. For example, jurisprudence on the waiver of the right to trial is similarly clear and iron-clad. 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.32 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.33

Along with the waiver of the right to trial, the right to remain silent may only be waived voluntarily, knowingly and intelligently as seen in Jackson v. Denno.34 There the court stated, “it is now inescapably clear that the Fourteenth Amendment forbids use of involuntary

31 21A Am. Jur. 2d Criminal Law § 1160
32 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.”).
33 Id.
34 378 U.S. 368 (1964).
confessions...because of the ‘strongly felt attitude of our society that important human values are
sacrificed where an agency of the government...wrings a confession out of an accused against
his will.’”35 Additionally, *Miranda v. Arizona*36 the court held that a defendant must be read
these rights so that they can fully understand what they might be waiving in the future. 37

Many of the commonalities between these different types of waivers is that they cannot
be inferred from a silent record and must be voluntary, intelligent, and usually in a court of law
before a judge.38 The primary difference between the right to remain silent and the right to a trial
and counsel is that the right to remain silent maybe waived at any time, regardless of whether it
is in a courtroom and on the record. However, if a defendant does waive the right to remain
silent, there must be sufficient evidence establishing that the statement was voluntary. 39

D. 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 topic of this full paper. 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 threads of cases: cases related to a delaying defendant; cases relating to a disruptive or

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35 Id. at 385-86 (quoting Blackburn v. Alabama, 361 U.S. 199 (1960)).
36 384 U.S. 436, 444(1966) “...our holding is not an innovation in our jurisprudence, but is an
application of principles long recognized and applied in other settings.” Id. at 442
37 Id. at 444.
38 Boykin, 395 U.S. at 243-44.
39 Id. at 461-62.
potentially violent defendant⁴⁰; 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 1940’s reflected courts’ frustrations with clients perceived to be
delaying the process by delaying hiring counsel. ⁴¹ 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 cases 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 US Supreme Court decisions addressed this problem in the early 1970’s and concluded
that a defendant could lose his constitutional right to presence through his conduct. ⁴²

So while it is difficult to fully trace the origins of the doctrines of implied/constructive
waiver or forfeiture of counsel—the US Supreme Court has never addressed this issue-- 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. The McLeod, Goldberg and Bultron opinions are the earliest ones that offer

⁴⁰ See United States v. Leavitt, 608 F.2d 1290, 1292 (9th Cir.1979) (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)
⁴¹ Spevak v. U.S. 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.”)
more than a passing discussion of the issues and potential responses, but even those cases represent a range of legal analysis, terminology, and recommended responses. 43

Only a handful of appellate opinions on the subject pre-date the early 1970’s, but beginning in the 1980’s—perhaps as courts began to smooth out any wrinkles in procedure after *Gideon v. Wainwright*, 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 covers a broad range of defendants’ behavior and various responses to it.

43 Bultron, 897 A.2d at 766 (“Intentional misconduct for the purpose of forcing counsel to withdraw so that the trial cannot proceed is plainly obstructive to the administration of justice.”)
III Surveying the Landscape of Waiver and Forfeiture by Conduct

This survey is the first national treatment on the issue of forfeiture and implicit waiver of attorney. The only other scholarly material available on this area of law consists of state law review articles and case notes which only focus on one circuit or state and leave untouched the national. This article will lay out for advocates, scholars, and practitioners the variety of practices and conditions the circuit courts and state courts have been dealing with. It’s a topic that has been lightly touched on and thus might lend itself to a useful overview of the current state (or lack thereof) of the law concerning the waiver to the right to counsel.

Most jurisdictions have dealt with the issues described in the Introduction in one way or another. In handling them, courts have gone to great lengths to discuss a defendant’s offending behavior (ranging from complaints to threats to physical violence) and the required procedural approaches.

Still, there has been no comprehensive survey of courts’ ranges of approaches to forfeiture and constructive waiver and it is useful to become aware of the range of approaches and court reasoning—even if analytically there’s little to gain from naming approaches differently.45

A. The Loss of Counsel through Forfeiture

Whether it is called by the more common term of “waiver” or whether, as here, it is referred to as “forfeiture,” the outcome is the same: a defendant’s loss of representation. A

45 Id.
number of jurisdictions recognize a forfeiture of counsel through conduct, a number do not\textsuperscript{46}, and there is variety of procedures along this spectrum. This section describes the jurisdictional practices and reasoning behind them.

1. Forfeiture Possible after a Hearing

At least when considering such constitutional precedent as \textit{Faretta}, the procedure most consistent with other waiver jurisprudence requires a hearing in open court before a defendant may “forfeit” his right to appointed counsel. Of those allowing forfeiture through conduct, three states follow this approach.\textsuperscript{47} Although courts applying this logic reserve forfeiture for “extreme” misconduct, they avoid imposing other jurisdictions’ troubling penalty: the loss of counsel without a hearing.

One of the most recent—and more comprehensive—explorations of this appears in \textit{Commonwealth v. Means}.\textsuperscript{48} Forfeiture, it explains, should be a “last resort” response to only the “gravest and most deliberate misconduct.”\textsuperscript{49} \textit{Means} emphasizes 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

\textsuperscript{46} Using search terms [op("forfeit!" /10 "right to counsel")] the following states do not recognize a forfeiture through conduct: These are the First, Fourth, Fifth, Seventh, and Tenth Circuit Courts of Appeals, as well as the state courts in Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Vermont, Virginia, West Virginia, and Wyoming.

\textsuperscript{47} Tennessee falls into this category, requiring a hearing (at which the defendant is present and permitted to testify) before forfeiture can be found. 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.” \textit{State v. Holmes}, 302 S.W.3d 831 (Tenn. 2010).

\textsuperscript{48} 454 Mass. 81 (2009).

\textsuperscript{49} \textit{Id.} at 93-95.
evidence as to the totality of the circumstances that may bear on the question whether the sanction of forfeiture is both warranted and appropriate.”

Another intriguing approach is a hybrid forfeiture procedure, requiring a hearing in the “gray area” sorts of cases and conduct. In California’s *King v. Superior Court*, for example, readers learn that a warning is not always required before forfeiture of counsel, but “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 forestall future misconduct.” In that case, 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. **States Allowing a Forfeiture Which Do Not First Require a Hearing**

Some jurisdictions—three federal circuits and ten states, to be precise—do not require a hearing before a defendant forfeits his right to representation. The theory, perhaps, is that the behavior justifying forfeiture is so egregious and extreme as to make a hearing inappropriate, or that some behavior is automatically understood to justify waiver. And 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.

From the Third Circuit’s *U.S. v. Goldberg* case, a fundamental opinion on the subject, readers gain no more insight to the doctrine despite lengthy discussion and attempted

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50 *Id.* at 83.
51 132 Cal. Rptr. 2d 585 (Cal. App. 3 Dist. 2003).
52 *Id.* at 589-590.
differentiation between forfeiture and traditional or implicit waiver.\footnote{U.S. v. Goldberg, 67 F.3d 1092 (3d Cir. 1995) “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.} Forfeiture is used when not referring to an intentional waiver of rights, and \textit{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.\footnote{Id. at 1101. \textit{See also} U.S. v. Leggett, 162 F.3d 237 (3d Cir. 1998) (forfeiture upheld here a defendant physically threatened and assaulted his court appointed attorney).} Here, forfeiture is defined in the lack of intentionality of a waiver (triggered by extreme conduct), but some 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.

Just as one begins to believe that physical violence might always be the sort of “egregious conduct” leading to an immediate forfeiture, there is a twist in the authority. Take the Delaware Supreme Court’s explanation, “Violence is not the \textit{sine qua non} of extremely serious misconduct… so long as the conduct is ‘egregious,’ it can constitute a forfeiture.”\footnote{Bultron v. State, 897 A.2d 758, 766 (Del.Supr. 2006). \textit{Id.} at 765 (quoting \textit{U.S. v. Thomas}, 357 F.3d 357, 363 (3d Cir. 2004)).} This can happen 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 \textit{pro se} litigant.

The variety in opinions is not surprising given the lack of guidance from the U.S. High Court. In a Second Circuit Court of Appeal’s opinion—\textit{Gilchrist v. O’Keefe}—the court held (quite correctly), “there is no Supreme Court holding either that an indigent defendant may not forfeit (as opposed to waive) his right to counsel through misconduct nor a general Supreme Court holding that a defendant may not forfeit a constitutional right.”\footnote{Id. at 97.} But perhaps this creates...
more questions than it answers. On one hand, the Circuit Court reasoned, “we 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.” On the other hand, the court also held, “…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.”

One explanation for finding forfeiture without a hearing is that any other procedure might offer the defendant undue power over the trial process. One Pennsylvania court explained that the colloquy requirements are not needed in situations of forfeiture due to the unwanted result of clogging up the courts and slowing down the system of justice. Such fears about defendants refusing to engage in a colloquy, however, do not appear in that case’s record or in other cases.

Regardless of the rationale, however, the majority of states or jurisdictions that recognize the doctrine of forfeiture do not require that the defendant be warned first of the dangers of self-representation. In fact, it seems that a hearingless waiver is the hallmark of this doctrine: that

57 Id. at 100.
58 Id.
60 Id. at 195.
61 Those recognizing the doctrine and not requiring a hearing but not discussed above are: North Carolina -- State v. Montgomery, 530 S.E.2d 66 (N.C.App. 2000) (citing Goldberg for the proposition that forfeiture, unlike waiver, results in the loss of a right regardless of the defendant’s knowledge); South Carolina -- State v. Thompson, 583 S.E.2d 131 (S.C.App. 2003); Minnesota -- State v. Jones, 772 N.W.2d 496 (Minn. 2009); New York- People v. Smith, 92 N.Y.2d 516, 521 (1998) (“Egregious conduct by defendants can lead to a deemed forfeiture of the fundamental right to counsel.”); See also People v. Best, 856 N.Y.S.2d 457, 464-65 (N.Y. City Crim.Ct. 2008); Arizona -- State v. Rasul, 167 P.3d 1286 (Ariz.App.Div. 2 2007); Washington -- City of Tacoma v. Bishop, 920 P.2d 214 (Wash.App. Div. 2 1996); Wisconsin -- State v. McMorris, 742 N.W.2d 322 (Wis.App. 2007) (“the Klessig colloquy is not required; rather, the court should determine that the defendant, by his or her conduct, has forfeited the right to counsel.”); Utah -- State v. Pedockie, 137 P.3d 716 (Utah 2006); 11th Circuit -- U.S. v. McLeod, 53 F.3d 322 (11th Cir. 1995).
the defendant has engaged in conduct so outrageous as to not only waive his right to counsel but to a warning about the dangers of continued misbehavior. Here, it seems, a number of jurisdictions have carved a significant exception to Faretta and to Gideon, but without the explicit approval of the United States Supreme Court.—this is the heart of the piece.

3. **Jurisdictions Discussing Forfeiture but Declining to Apply the Doctrine**

What can we learn from these jurisdictions? Is there an explicit rejection of the doctrine at hand? Three federal circuit courts of appeal and two state high courts have discussed the doctrine in appellate opinions, but have declined to extend the doctrine into that jurisdiction. It is impossible to tell whether these states and circuits might accept or apply the notion of forfeiture under the right circumstances.62 But given the tone and fact-oriented discussion of a number of these states and circuits it is conceivable that, in a certain particular instance, forfeiture might be allowed. There is also a continued attempt among these cases to differentiate between the doctrines of implied waiver of counsel and forfeiture of counsel.63

Though the Eighth and Ninth Circuit Courts of Appeal also recognize that other federal jurisdictions apply a doctrine of forfeiture, they decline to do so---but for somewhat different reasons. The Ninth Circuit in *United States v. Thompson*64 discussed the Eleventh Circuit’s approach allowing forfeiture in some detail but stopped short of applying it (in part because of factual circumstances of the case before it), and the Eighth Circuit in *Chandler v. Blackletter*65 examined the forfeiture doctrine but failed to apply it because of the defendant’s failure to

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62 Not explicitly discussed here but included in this category is Alaska. *Gladden v. State*, 110 P.3d 1006 (Alaska App. 2005) (declining to apply forfeiture doctrine because defendant’s actions were not egregious enough to merit forfeiture of the right to counsel).
63 See *Com. v. Terry*, 295 S.W.3d 819, 823 (Ky. 2009).
64 335 F.3d 782 (8th Cir. 2003).
identify any clearly established federal law on the matter. Though these cases, much like cert
denials, may be difficult to make broad inferences from, it’s worth noting that the courts were
aware of these approaches and specifically chose to not apply them. On the other hand, neither
rises to the level explicit condemnation that has been shown in other circuits that have dealt with
and applied the forfeiture doctrine.

4. Jurisdictions Discussing a “Forfeiture” Doctrine but Which Seem
to Intend to Establish or Espouse a “Constructive Waiver”
Doctrine

As described previously, the terminology describing forfeiture, implicit waiver and
waiver by conduct is somewhat intertwined and ambiguous. Rather than discuss these
jurisdictions’ approaches according to what the courts seem to accept or describe, it seems useful
here to highlight the anomalies by the terms as defined by various courts. The cases discussed
here seem to intend to describe an implicit or constructive waiver even though the term
“forfeiture” is used. Nine states fall into this category.

Take, for example, State v. Lindsay, an Idaho case from the mid-1990’s. The opinion in
that case reflects the difficulties in terminology. Here, “Lindsay, [the State] contends, did not
expressly waive his right to counsel, but rather impliedly waived or ‘forfeited’ that right by
appearing at the…hearing without an attorney after having been given the opportunity to retain
one.” The court ostensibly discusses waiver by conduct – not forfeiture as established in
Goldberg, which was decided and became so 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.

66 State v. Lindsay, 864 P.2d 663 (Idaho App. 1993).
67 Id. at 667.
Likewise, although forfeiture is recognized in the North Dakota case of *City of Grand Forks v. Corman*, the circumstance there is more accurately described, in light of the way other courts deal with waiver of the right to counsel, as implicit waiver or waiver by conduct. The court explains, “[t]his 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.” The court further acknowledges that if after warned the defendant fails to secure counsel it can lead to a constructive waiver or a forfeiture, depending on the court.

**B. IMPLICIT OR CONSTRUCTIVE WAIVER AND “WAIVER BY CONDUCT”: APPROACHES AND PROCEDURES**

As with forfeiture, 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. And also, as with forfeiture, definitions and classifications vary but with little reasoning underpinning the differentiations. While some courts require that trial courts thoroughly warn defendants of the possible repercussions (including being forced against their will to proceed *pro se*), others ensure that defendants receive and assent to this warning (in the form of a colloquy or dialogue), while

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68 767 N.W.2d 847 (N.D. 2009).
69 *Id.*
others have not encountered this problem at the appellate level\textsuperscript{71}. Still others require no warning at all.

This section explores the range of courts’ approaches to these predicaments, highlighting particularly examples of conflicting language and factual scenarios.

1. Jurisdictions Requiring a Hearing before a Defendant Can Implicitly or Constructively Waive his Right to Counsel

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.

a. Jurisdictions Requiring a Hearing but not requiring particularized language or procedures.

A number of jurisdictions—four federal circuits and twelve states—follow this approach, though most give little guidance about the substance of such a hearing or a “magic words” inquiry.

Of course, waiver by conduct is often defined in only in relation to forfeiture—and when those definitions vary the terminology becomes a moving target. For example, \textit{Commonwealth v. Means}, as discussed above, focuses on forfeiture but recognizes the doctrine of “waiver of counsel by conduct (abandonment).” The court stated that the acts do not have to be violent to

\textsuperscript{71} Using searches [OP("waiver by conduct" & "right to counsel")], [OP("impli! waiv!" & "right to counsel")], and OP("construct! waiv!" & "right to counsel")] the following states have no required warning: First Circuit; Second Circuit; Fourth Circuit; Fifth Circuit; Eighth Circuit; Arkansas; Connecticut; Idaho; Illinois; Iowa; Kansas; Kentucky; Louisiana; Michigan; Mississippi; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Dakota; Texas; Vermont; Virginia; and West Virginia.
constitute a waiver but rather disruptive.\textsuperscript{72} In Massachusetts, a court “must first conduct a hearing at which the defendant has a full and fair opportunity to offer evidence.”\textsuperscript{73}

In Delaware’s key forfeiture case \textit{Bultron} case, the court makes clear in \textit{Bultron} 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 \textit{pro se}.”\textsuperscript{74} The Court further clarified, citing to both \textit{Faretta} and \textit{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 \textit{Faretta} warnings.”\textsuperscript{75}

Similarly, the Third Circuit Court of Appeals recognizes the doctrine of constructive waiver – so long as appropriate procedures are followed. “Although waiver most commonly is effected by an “affirmative, verbal request” to proceed \textit{pro se}, waiver also may be effected by conduct.”\textsuperscript{76} In those circumstances, however, the court must engage in a colloquy, on the record, with the defendant to explain to the defendant the possibility of waiver and give the defendant “an awareness of the dangers and disadvantages inherent in defending oneself.”\textsuperscript{77} The Sixth and Seventh Circuits federal circuits and Tennessee\textsuperscript{78} follow this approach but also require “no more” than the standard \textit{Faretta} warnings that continued delay or failure to retain counsel (when

\begin{flushleft}
\textsuperscript{72} Id. at 658. \\
\textsuperscript{73} Id. at 652. \\
\textsuperscript{74} \textit{Bultron} at 764. \\
\textsuperscript{75} Id. \\
\textsuperscript{76} \textit{Thomas}, 357 F.3d 357, 362 (3d Cir. 2004). \\
\textsuperscript{77} Id. (citing \textit{Welty}, 674 F.2d at 188). \\
\textsuperscript{78} \textit{Carruthers}, 35 S.W.3d 516 (Tenn. 2000) (“We decline to hold that a trial court must provide extensive…warnings when a defendant's conduct illustrates that he or she understands the right to counsel and is able to use it to manipulate the system…an implicit waiver may appropriately be found, where… the record reflects that the trial court advises the defendant the right to counsel will be lost if the misconduct persists and generally explains the risks associated with self-representation.”).
\end{flushleft}
financially able to do so) will result in a waiver.\textsuperscript{79} Other states retain varying approaches.\textsuperscript{80} More specifically, Arizona\textsuperscript{81} and Washington\textsuperscript{82} have spoken on the issue with different outcomes.

**b. Jurisdictions Requiring a Hearing with Specific Procedures**

Only two states require “magic words” that must be asked of a defendant or offer more guidance about special factors a court must consider before it finds that a defendant has constructively waived his right to counsel.

One jurisdiction in particular treats both implicit and explicit waivers no differently. \textit{Broadwater v. State}\textsuperscript{83}, a Maryland case, requires that courts engage defendants in the “necessary litany of advisements” codified as Maryland Rule 4-215 before counsel may be expressly or

\textsuperscript{79} \textit{King v. Bobby}, 433 F.3d 483 (6th Cir. 2006); \textit{Bauer}, 956 F.2d 693 (7th Cir. 1992) (“the catechism in the \textit{Benchbook for United States District Court Judges} § 1.02(3) (1989 ed.) is not part of the sixth amendment. . . . \textit{Faretta} and decisions such as \textit{United States v. Allen}, 895 F.2d 1577 (10th Cir.1990), require nothing more.”) \textit{Id.} at 695.

\textsuperscript{80} Other cases espousing similar tenets but not discussed here in detail: \textit{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); \textit{King v. Superior Court}, 132 Cal. Rptr. 2d 585 (Cal. App. 3 Dist. 2003); \textit{State v. Char}, 93 P.3d 679 (table), 2004 WL 1618502 (Hawaii 2004) (establishing that before a defendant may waive his right to counsel, he must be given a specific waiver inquiry as established in \textit{State v. Dickson}, 673 P.2d 1036 (Hawaii App. 1983); \textit{State v. Constable}, 2005 WL 637792 (Ohio App. 12 Dist. 2005) (finding no meaningful exchange between defendant and court, negating the defendant’s “constructive waiver” of the right to counsel); \textit{State v. Morrison}, 559 N.W.2d 924 (table), 1996 WL 688805 (Wis. App. 1996) (finding that trial court needed to engage in some colloquy before finding the defendant waived his right to counsel); \textit{State v. Jones}, 772 N.W.2d 496, 505 (Minn. 2009) (“The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct.”); \textit{People v. Alengi}, 148 P.3d 154 (Colo. 2006); \textit{State v. Wilkerson}, 948 S.W.2d 440 (Mo. App. W. Dist. 1997).

\textsuperscript{81} \textit{Hampton v. State}, 92 P.3d 871 (Ariz. 2004) (“When trial courts are confronted with misconduct directed toward counsel, they should apprise the defendant, on the record, of the risks and consequences of waiving the right to counsel.”).

\textsuperscript{82} \textit{City of Seattle v. Klein}, 166 P.3d 1149 (Wash. 2007) (“[r]elinquishment by conduct is only constitutional once a defendant has been warned that he or she will waive this right if he or she engages in dilatory tactics. Any misconduct thereafter may be held to include an implied request to proceed pro se and a waiver of counsel.”).

\textsuperscript{83} \textit{Broadwater v. State}, 931 A.2d 1098 (Md. 2007).
implicitly waived.\textsuperscript{84} Upon the defendant’s first showing in court without counsel the judge must inform the defendant of their right to counsel, inform them about the importance of counsel, as well as advise the defendant about the charges and penalties that are present in their case.\textsuperscript{85} The advisements to the defendant, from a judge, concerning the possibility of losing or forfeiting counsel are required only when a defendant would like to waive counsel or a subsequent trial date is set.\textsuperscript{86}

Also, a Missouri case, \textit{State v. Wilkerson},\textsuperscript{87} 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. In recommending the written waiver of counsel “out of an abundance of caution,” the court urges trial court judges to present the waiver to the defendant to sign so that his refusal to sign the waiver is on the record.\textsuperscript{88}

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.

\section*{2. When a Hearing is Not Required}

\subsection*{a. Jurisdictions Not Requiring a Hearing Before Finding a Waiver}

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 if the

\textsuperscript{84} \textit{Id.} at 1100.
\textsuperscript{85} \textit{Md. Code Ann.}, Waiver of Counsel § 4-215 (West 2011).
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} 948 S.W.2d 440 (Mo. App. W. Dist. 1997).
\textsuperscript{88} \textit{Id.} at 445.
defendant understands the risks of continued dilatory or obstructionist behavior. Four states\textsuperscript{89} do not require a hearing before a trial court is empowered to find an implicit waiver or waiver by conduct. As discussed above, most 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].”\textsuperscript{90}

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]… \textit{Faretta} inapplicable to the instant case.”\textsuperscript{91} Formalistically finding that since the defendant had not indicated that he wished to proceed \textit{pro se}, the Court found that \textit{Faretta} did not apply. This is true, of course, but the jurisprudence of waiver leading to \textit{Faretta} went unexamined.\textsuperscript{92} Likewise, the defendant’s absence seems to be a dispositive factor in Indiana’s consideration of the implicit waiver issue.\textsuperscript{93}

\textsuperscript{89} Included in this tally but not otherwise discussed here is Ex parte State, 27 So.3d 582 (Ala. 2008).
\textsuperscript{90} \textit{Jones v. State}, 536 S.E.2d 511, 513 (2000).
\textsuperscript{91} \textit{Roberson}, 675 S.E.2d 732 (S.C. 2009).
\textsuperscript{92} \textit{Id.} at 733-734.
\textsuperscript{93} \textit{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.”)
b. 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 but have recommended an on-record hearing as the preferred mechanism to determine the validity of a defendant’s waiver of the right to counsel. Three states and two federal circuits follow this approach.\(^{94}\)

With a footnote to the *Benchbook*, in *U.S. v. Garey*,\(^{95}\) the Eleventh Circuit Court of Appeals 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.”\(^{96}\) 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.\(^{97}\)

In Maine, a defendant may waive his right to counsel without having first been warned, but only in the unusual circumstance.\(^{98}\) 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 defendant fully understood the right to counsel and the dangers of self-representation* apart

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\(^{94}\) Not fully discussed but also in this category fall *United States v. Hughes*, 191 F.3d 1317 (10th Cir. 1999) (in the absence of an on-the-record colloquy, that the defendant waived his right to counsel by his conduct) and *Gladden v. State*, 110 P.3d 1006 (Alaska App. 2005) (urging courts to use on-record inquiry).

\(^{95}\) 540 F.3d 1253 (2008).

\(^{96}\) *Id.* at 1267 “[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.”

\(^{97}\) *Id.* at 1268.

\(^{98}\) *State v. Watson*, 900 A.2d 702 (Me. 2006).
from the court's Faretta warnings."99 Utah has a similar approach.100 The court notes, however, that the case presented, “is 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.”101

Some of the confusion and inconsistency stemming from forfeiture and implied waiver is the language being used by the different courts and circuits. While some use forfeiture to describe a defendant who is losing their right to an attorney another circuit is using implied waiver to illustrate this series of events. The language, in the grand scheme of things, does not matter. They both mean the same thing and the ultimate end game is the fact that a defendant is left to navigate the justice system without counsel and without the proper guidance.

99 Id. at 712.
100 Pedockie v. State, 137 P.3d 716 (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.”
101 Id. at 725.
IV. The US 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 knowing, intelligent, voluntary relinquishment.

If we hold Boykin and Faretta and the “knowing, intelligent, and voluntary” jurisprudence on the one hand, and this body of forfeiture and implicit waivers on the other, something seems not quite to 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”102—seem on the sturdiest ground constitutionally and allow trial courts the flexibility of finding a forfeiture or waiver while still protecting a defendants’ 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 very 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.”103

True. Denial of certiorari, however, is difficult to decipher. Traditionally, students of law learn not to view a denial of certiorari as a hint about how the Court would decide a case on the merits. The “orthodox view” is that the denial of certiorari is not an indication of the Court's view on the merits of a case.104 Some have been so glib as to suggest the process as the product

102 Bultron at 764 (citing Goldberg at 1101).
103 Chandler v. Blackletter, 366 Fed.Appx. 830 (9th Cir. 2010).
of a “‘a fit of absentmindedness’”—or a matter of “serendipity.” 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 taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.”

In at least some instances, a denial of certiorari is a simple way of affirming a lower court decision. A lengthy study of certiorari practice is provided by Peter Linzer in *The Meaning of Certiorari Denials.* His major conclusion explains that that although it remains wise to honor traditional rules by avoiding any express citation that attributes a decision on the merits to a denial of certiorari, denials often may reflect 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 decision below 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.

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.


107 1979, 79 Col.L.Rev. 1228.
Waiver 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. U.S. 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. Applying similar reasoning, United States v. Meeks determined that the defendant’s right to counsel had been violated by the trial court’s finding of a waiver by conduct. The Appellate Court that decided 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.

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. That Court also acknowledged the lack of guidance from the U.S. Supreme Court. Seemingly contradictorily, however, the opinion gave lip service to the importance of protecting defendants’ right to counsel.

108 United States v. Bauer, 956 F.2d 693 (7th Cir. 1992), cert. denied, 506 U.S. 882, 113 S.Ct. 234, 121 L.Ed.2d 169 (1992) (Under Faretta, the court was required to give the Defendant warning about pro se representation, which it did, but nothing more).
109 United States v. Meeks, 987 F.2d 575 (9th Cir. 1993), cert. denied, 510 U.S. 919, 114 S.Ct. 314, 126 L.Ed.2d 261 (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.”)
111 United States v. Garey, 540 F.3d 1253, 1267-68 (11th Cir. 2009), cert. denied, 129 S.Ct. 1016, 173 L.Ed.2d 306 (2009). (“[A] Faretta-like monologue will suffice…. 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.”)
112 “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
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. 113

2 Waiver of counsel not requiring a hearing:

Not all of the cases, however, 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. Walker114 repeatedly asserted his wish for representation (as he requested new counsel), the Eleventh Circuit Court of Appeals found the “functional equivalent” of a valid waiver. The dispositive fact in Jones was a finding of the defendant’s understanding of risks of self-representation—regardless of the source of that understanding.115 United States v. Hughes,116 for one, acknowledged that a colloquy would have been “preferable” but held that when the defendant delayed retaining counsel, “the facts and circumstances in this case support a valid waiver by conduct.” Sullivan v. Pitcher likewise upheld a waiver despite explicit warnings.117

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113 Id. at 1267.
114 Jones v. Walker, 540 F.3d 1277, 1293 (11th Cir. 2008), cert. denied, 129 S.Ct. 1670, 173 L.Ed.2d 1039 (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.”)

115 Id.
Under those circumstances, the Sixth Circuit Court of Appeals announced that “a formal inquiry is not a sine qua non of constitutional waiver”\textsuperscript{118} 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.”\textsuperscript{119}

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. The level of a defendant’s understanding in \textit{State v. Carruthers},\textsuperscript{120} the Supreme Court of Tennessee held similarly 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.”\textsuperscript{121} 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 theoretically go through tens of court-appointed attorneys and delay his trial for years.’” \textsuperscript{122} \textit{State v. Carruthers}, 35 S.W.3d 516 (2000), cert denied, 533 U.S. 953, 121 S. Ct. 2600

\textsuperscript{118} \textit{Sullivan} at 165.

\textsuperscript{119} 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.” \textit{Sullivan} at 165-55 citing \textit{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”); \textit{United States v. Goldberg}, 67 F.3d 1092, 1100 (3d Cir. 1995)(describing waiver by conduct as a “hybrid” situation that combines elements of waiver and forfeiture)).

\textsuperscript{120} \textit{State v. Carruthers}, 35 S.W.3d 516 (2000), cert denied, 533 U.S. 953, 121 S. Ct. 2600

\textsuperscript{121} \textit{Carruthers} at 549. 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.

\textsuperscript{122} \textit{Carruthers} at 550.
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 did not appear for trial. The fact that the court viewed Pride as having “knowingly attempted to manipulate the court system” was dispositive. The appellate court also found the lack of a Faretta-type warning or waiver irrelevant, since Pride had never indicated a wish to represent himself.

3 Forfeiture:

Most of the cert denials involving forfeiture were in cases holding that no warning or hearing was required under those extreme circumstances existing in each case. In Gilchrest, the Second Circuit acknowledges the doctrine and analyzes 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 a forfeiture circumstances. Similarly, United States v. Leggett found a valid forfeiture of counsel when the defendant punched, attacked, and spat upon his attorney. When the defendant in United

124 Pride at 12-13.
125 Pride at 13-14 (“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 v. California...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.”)
126 Gilchrist v. O'Keefe, 260 F.3d 87 (2nd Cir.2001), cert. denied, 535 U.S. 1064, 122 S.Ct. 1933, 152 L.Ed.2d 839 (2002) (“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.”)
127 United States v. Leggett, 162 F.3d 237 (3rd Cir.1998), cert. denied, 528 U.S. 868, 120 S.Ct. 167, 145 L.Ed.2d 141 (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.)
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.128

Similarly, the US Supreme Court has denied certiorari from State v. Jones,129 In that case, the trial court had 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. 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. 130 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. 131 Wilkerson v. Klem,132 reached a similar conclusion. That Court upheld a finding of forfeiture of counsel without the defendant having received a full warning on the record about the risks of self-representation.133

In considering this issue, the Third Circuit discussed in detail the absence of United Supreme Court precedent dealing with the forfeiture of counsel (this was particularly relevant under the circumstances of federal habeas review regarding whether there was a no prior decision of the Supreme Court involved facts “materially indistinguishable” from those presented in this case and whether the lower court’s opinion was “contrary to . . . clearly

128 United States v. Thompson, 335 F.3d 782, 785 (8th Cir. 2003), cert. denied, 540 U.S. 1134, 124 S.Ct. 1111, 157 L.Ed.2d 940 (2004) (“A criminal defendant may, however, by virtue of his actions forfeit his constitutional rights.”)
129 State v. Jones, 772 N.W.2d 496 (2009), cert denied 130 S. Ct. 3275; 176 L. Ed. 2d 1188 (2010).
130 Jones at 506.
131 Id.
132 Wilkerson v. Klem, 412 F.3d 449 (3d Cir. 2005), cert denied, 547 U.S. 1051, 126 S.Ct. 1616,
133 The Third Circuit noted that “While 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.” Klem at 451.
established” Supreme Court law.”) 134 “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 before [it can be concluded that] a defendant's misconduct warrants a forfeiture.’” 135

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. But 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. There is always the possibility that the denials of certiorari have nothing whatever to do with the merits of the case or the questions presented and more to do with mechanics, such as the development of the record below, the size of the docket for a particular term, or concern over ripeness of the issue.

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

134 Klem at 454.
135 Klem at 454 (Citing Fischetti at 152).
V Making Sense of the Problem?

Evidently, court opinions on this topic range considerably (which is not unusual, considering most states and federal jurisdictions approach many criminal law matters with local flavor) with no forthcoming magic bullet from the Supreme Court. The unique question 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 High Court opinion)?

1 Does the Right to Counsel Depend upon Geography?

Depending on the location of a(n alleged) crime, a defendant may be at risk for losing his right to counsel with no prior information about potential landmines, a warning, or a hearing.

In the realm of forfeiture, for example, there are twenty seven states and four federal circuits that do not recognize the doctrine at all. Of the states and circuits that do, a number of these adopt the method explained in United States 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.” 136

136 Means at 83.
On the other hand is Delaware’s rule\(^{137}\), which unapologetically allows for forfeiture of counsel “[i]f a defendant’s behavior is sufficiently egregious” (whatever that may mean) and requiring no “Faretta warnings or a warning to discontinue bad conduct”\(^{138}\).

Similarly, on the question of implicit waiver, five circuits and twenty eight states do not allow or recognize the doctrine. And of those that do, there are jurisdictions, such as the Eleventh Circuit, holding “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 “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.”\(^{139}\)

Others, such as Colorado and Delaware, have a vastly different practice. 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.”\(^{140}\) 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.”\(^{141}\)

And in Delaware, too, a “‘waiver by conduct’ requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se.”\(^{142}\) This stands in contrast to Delaware’s rule on forfeiture (articulated in the very same case) that forfeiture may be

\(^{137}\) Bultron v. State, 897 A.2d 758 (Del.Supr. 2006).

\(^{138}\) Id. at 765 (quoting U.S. v. Thomas, 357 F.3d 357, 363 (3d Cir. 2004).

\(^{139}\) Jones v. Walker, 540 F.3d 1277, 1289, 1293 (11th Cir. 2008).

\(^{140}\) Alengi, 148 P.3d 154, 159 (Colo. 2006).

\(^{141}\) Id.

\(^{142}\) Bultron at 764 (citing Goldberg at 1101).
imposed for violent or especially outrageous behavior (without warnings, colloquy or a hearing).\textsuperscript{143}

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.

Consider these scenarios as examples of the disparity of approaches:

Scenario 1: Man doesn’t want to waive counsel but isn’t happy with counsel’s performance. His attorney tries to warn him of the dangers of proceeding pro se, but he nevertheless fires counsel on the eve of trial. Without further warning or a hearing, he is forced to proceed pro se.

Scenario 2: Man threatens his court appointed attorney and ultimately strikes him. He loses his right to counsel without a hearing or warning from the trial court.

Scenario 3: A man 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 is required to assure the court of his understanding and voluntary relinquishment of the 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 constructive waiver or forfeiture—do these doctrines and procedures ensure that he has been given at least some warning about the consequences of his actions?\textsuperscript{144}

\textsuperscript{143} Id.
\textsuperscript{144} Means, 454 Mass at 83 (“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.”).
B. What are the Justifications, After All?

Courtroom control and greased wheels of justice are essential, important policy considerations. Criminal defendants should not be able to indefinitely delay a trial for the sole purpose of delay, and neither can state or federal budgets afford serial and indefinite appointment of defense counsel to the indigent.\textsuperscript{145}

Appellate courts in nearly every state and circuit are sympathetic to and supportive of trial courts’ assertions of control when a defendant has attempted to hijack the timetable of his case\textsuperscript{146} or meddle with a court’s authority. Despite a range of opinions about the appropriateness 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.\textsuperscript{147}

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. Take, for example, the \textit{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

\textsuperscript{146} “[T]he court has the discretion to deny a request for continuance if made in bad faith, for purposes of delay, or to subvert the judicial proceedings.” \textit{Goldberg} at 1098.
\textsuperscript{147} \textit{State v. Slatter} at 1318.
to counsel by his conduct.” 148 That the defendant’s behavior is unacceptable, it should not necessarily follow that the only appropriate legal response is the loss of counsel’s representation.

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, Faretta, and others more than just a scheduled five-minute court session to 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 made “understandingly.” 149

Considering, too, that delays, disruptions, 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 counsel’s effectiveness. What, then, if a defendant has legitimate concerns about his counsel and the process? (Or even illegitimate concerns when the penalties for expressing them are so severe and often without warning?) 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, he is not entitled to the counsel of his choosing. 150 Allowing courts flexibility in

148 Bultron, 897 A.2d at 766.
149 Carnley at 516.
150 Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) (“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.”)
how that warning is afforded, and 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.

Though the issue demands more than a cost-benefit analysis, a brief hearing the length of a *Faretta* warning or a *Boykin* colloquy is no burden. It is especially not burdensome when compared with the potential loss of a fundamental constitutional right. ¹⁵¹

¹⁵¹ *Johnson* at 464.
VI  RECOMMENDATIONS

A  Why a warning and colloquy should be given in all criminal cases.

There may be a number of reasons why across-the-board warnings about the effects of dilatory, threatening, or difficult conduct might raise eyebrows. First, hearings are expensive: courts across the nation are busy enough already, with dockets overflowing and security and facilities underfunded or in disrepair. They are extra trouble. This may also be seen as an over-reaction to a relatively rare problem. How many defendants, after all, have been forced to proceed pro se after threatening their attorneys?

In comparison to the number of total criminal defendants processed by the courts each year, it is true that the most extreme stories told 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 have legislative bodies.

The truth is, however, that 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). A twenty-minute hearing early in the process might prevent the possibility of expensive litigation over a much longer stretch of time (recall, for example the example of Davis v Frazier/ Davis v. State offered in the Introduction). Once problems presented 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 heard reasons for the defendant’s behavior (including, perhaps, legitimate concerns about counsel’s performance), warned the defendant of the consequences of continuing the behavior, and accepted the defendant’s knowing and intelligent consent to the warning about dilatory tactics or potential threats or violence.
A Warning After Disruptive or Dilatory Behavior

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, “because 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.”

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. What, then, is so different about conduct that an entirely new set of tests should be triggered? Is there a principled reason to distinguish between waivers expressed in words and waivers expressed in conduct? And what is the burden of a short hearing when the risk is the violation of a fundamental right?

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152 People v. Alengi, 148 P.3d 154 (Colo. 2006).
153 Id. at 159.
154 In Tennessee, such a waiver occurs only after the trial judge advises a defendant of the dangers and disadvantages of self-representation and determines that the defendant “knows what he is doing and his choice is made with eyes open.” State v. Carruthers 35 S.W.3d 516, 546. See also Hampton v. State, 92 P.3d 871 (Ariz. 2004) (“When trial courts are confronted with misconduct directed toward counsel, they should apprise the defendant, on the record, of the risks and consequences of waiving the right to counsel.”)
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. 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.”

C  General Warning at First Appearance

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.

Further, 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 about dilatory or threatening (or even violent behavior) could help prevent the problematic behavior in the first place. After all, courts must be careful not to make too many assumptions about a defendant’s understanding.

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 72

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155 United States v. Stewart, 20 F.3d 911, 917 (8th Cir.1994) (where a defendant attempting to delay the proceedings received warnings about his behavior and was found to have waived his right to counsel), quoting Meyer v. Sargent, 854 F.2d 1110, 1113 (8th Cir.1988), quoting, in turn, United States v. White, 529 F.2d 1390, 1393 (8th Cir.1976).
hours after an arrest. At this first appearance, the judicial officer shall is required to inform the defendant about the charges against him and about his Miranda rights. 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. This could be an appropriate opportunity to explain that, although accused of a crime and entitled to the assistance of counsel, that 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 could prevent unconstitutional, involuntary loss of the right to counsel—if not the offending behavior itself.

D. Alternative Remedies Not Constitutionally Sufficient

The appointment of standby representation does not fully address the discrepancy that exists between a defendant’s right to be represented by an attorney at trial and said trial court’s determination that the defendant has validly waived or forfeited his or her right to an attorney. Some authority proposes that defendant’s 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.

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

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156 Georgia Uniform Superior Court Rule 26.1. Bonds and First Appearances
157 Id.
158 Id.
standby counsel may be appointed even if the court is not certain that there has been a valid waiver,” 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 yields “a presentation to the jury that directly contradicts the approach undertaken by the defendant.” 160 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.” 161

VII CONCLUSION

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 Zerbst, 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-- wishes 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,

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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” other otherwise disruptive to the process, that defendant could find himself facing a trial or other court proceedings on his own and without an advocate.

The truth is that very little related to protections or procedures for those charged with crimes change 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.