Under the Sixth Amendment, a criminal defendant has both the right to counsel and the right to represent himself. These rights are mutually exclusive, and the default right is the right to counsel; to exercise the right to self-represent, a defendant must “knowingly and intelligently” waive the right to counsel and its attendant benefits. Typically, a defendant who self-represents does so after expressly invoking that right and affirmatively rejecting the right to counsel.

But trial courts frequently confront defendants whose conduct seems to abuse the right to counsel and confuses the exercise of their Sixth Amendment rights. This conduct ranges from delayed proceedings because of repeated requests to substitute counsel without good cause to threats and physical violence against counsel. Faced with such conduct, courts ask whether the right to counsel can be relinquished by means other than express waiver. In finding that it can be, courts apply existing doctrines of waiver by conduct and forfeiture to this new context. However, the courts largely fail to engage with the underlying theoretical justifications for those doctrines and offer little guidance for trial courts to determine when and how they should (and should not) be applied.

This Comment surveys state courts’ current approaches to waiver by conduct and forfeiture in the context of indigent defendants’ right to counsel, looking at both judicial practices and justifications as well as scholarly criticism and proposed alternatives. After reexamining the caselaw to demonstrate the theoretical
justifications for the doctrines and noting how waiver is used in other criminal law contexts, this Comment offers guidelines for applying waiver by conduct and forfeiture to the right to counsel. These guidelines include general principles for analyzing factors that require case-by-case analysis as well as specific best practices concerning the substantive and procedural requirements of each doctrine.

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INTRODUCTION

Mark Means, facing trial in Massachusetts on assault and battery charges, repeatedly expressed dissatisfaction with his appointed counsel, alleging a complete breakdown in communications had occurred between them.\(^1\) Although he seemed to briefly reconcile with counsel, Means again moved to substitute counsel two months before trial. His motion disclosed to the court that he had sent counsel a bloodstained letter threatening to harm him if he did not withdraw.\(^2\) Despite the serious nature of this conduct, a hearing on the motion was not held until five months later.\(^3\) When confronted about the letter, Means admitted he sent it. He explained that he had been upset with counsel’s lack of engagement on his case and disavowed any intent to act on his threats.\(^4\) The hearing ended with the court finding Means had forfeited his right to counsel, requiring him to proceed to trial representing himself.\(^5\) Means had not been given notice that the judge was considering sanctions, let alone forfeiture of counsel.\(^6\) Without such notice, Means was unable to present evidence opposing this severe sanction, including evidence of his history of mental illness—which he had disclosed in affidavits and which the court later acknowledged at trial—and of counsel’s willingness to proceed with him in spite of the letter.\(^7\) At trial the following month, the court reiterated its forfeiture decision, and Means again apologized for sending the

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2 Id. at 653.
3 Id. at 662.
4 Id. at 654.
5 Id.
6 Id. at 662.
7 Id. at 662-63. As the state supreme court noted, the attorney himself did not disclose the letter to the court, despite the fact that he could have, and in the period between sending the letter and the hearing, Means apologized to counsel and engaged in no further misconduct. Id. at 663 n.24.
letter.\textsuperscript{8} Means was convicted on the assault and battery charges, and sentenced to ten years’ imprisonment.\textsuperscript{9}

In Arizona, Mikal Rasul, facing several charges stemming from falsified court documents, was also found to have lost the right to counsel.\textsuperscript{10} Rasul repeatedly demanded new counsel, accused counsel of poor representation and collusion with the state, filed state bar complaints, and threatened counsel’s physical safety.\textsuperscript{11} In spite of this repeated misconduct and warnings from the trial court, Rasul was represented by eighteen court-appointed attorneys before the court finally found his conduct justified the loss of appointed representation.\textsuperscript{12}

Both Rasul’s and Means’s cases are troubling. The \textit{Means} court forced a defendant with a history of mental illness to represent himself without an opportunity to demonstrate that the conduct for which he was sanctioned was impaired by his condition. The \textit{Rasul} court allowed a defendant to harass a dozen different attorneys into withdrawing before it acted. Both cases suggest something is wrong with how courts address misconduct related to exercise of the Sixth Amendment right to counsel. Though courts often find waiver of the right to counsel by conduct or forfeiture of the right to counsel, this caselaw has attracted little scholarly attention.\textsuperscript{13} And the caselaw itself often offers little in the way of doctrinal explanation or comprehensive practical guidelines. This Comment aims to provide clarity and context to this issue, scrutinizing its doctrinal justifications and context in criminal law before offering principles to reframe and guide trial courts’ application of the doctrines to the wide variety of cases they encounter.\textsuperscript{14}

This Comment proceeds in six parts. Part I outlines the basic Sixth Amendment rights to counsel and to self-representation, and introduces the various means of relinquishing the right to counsel. The next part surveys

\textsuperscript{8} Id. at 655.
\textsuperscript{9} Id. The sentence was imposed following a trial on charges for being a habitual criminal, which was held immediately after the assault and battery trial, and for which the judge again refused to reinstate counsel. Id.
\textsuperscript{11} Id. at 1290.
\textsuperscript{12} Id. at 1288, 1290. Some of the eighteen appointed attorneys seem to have withdrawn for unrelated reasons, but Rasul admitted to having had problems with at least twelve of them, and the court found he had directly threatened two. Id. at 1290.
\textsuperscript{13} This lack of commentary was noticed a decade ago, see Sarah Gerwig-Moore, Gideon’s \textit{Vuvuzela}: Reconciling the Sixth Amendment’s Promises with the Doctrines of Forfeiture and Implicit Waiver of Counsel, 81 MISS. L.J. 439, 442 (2012), and the volume of commentary has not increased by much since.
\textsuperscript{14} While waiver by conduct and forfeiture can apply to both indigent and nonindigent defendants, most caselaw, and most of the difficult questions, address indigent defendants who have received a court-appointed attorney. As such, this Comment focuses on and discusses only the issues that arise with indigent defendants represented by appointed counsel.
state courts’ current approaches to waiver by conduct and forfeiture in the context of the right to counsel. It also highlights points of disagreement on the nature and application of each doctrine. Part III details the reasoning state courts offer to justify the application of the doctrines, as well as some of the scholarly criticism of that reasoning, and Part IV explores several proposed alternatives to the doctrines. Part V revisits both the caselaw and its critics, as well as the idea of waiver, arguing that both doctrines are supported by Supreme Court caselaw and that waiver by conduct should be informed by the use of waiver in other criminal law contexts.

Finally, Part VI provides guidelines for applying both doctrines. Loss of counsel is a severe sanction, and whether the right must be restored is unclear. Courts should thus carefully consider the misconduct at issue, including its underlying cause and timing. Courts should be especially solicitous where a defendant’s behavior might be driven by mental illness or a remediable problem with counsel. Even after enforcing this sanction, courts should consider whether to renew the right at a later stage, regardless of whether black letter law requires that renewal. In waiver by conduct cases, courts must be careful to follow clear procedures that make the defendant aware of his rights, including an express, detailed, on-the-record warning of what he stands to lose by further misconduct. And forfeiture should be a vanishingly rare occurrence. Only where a defendant engages in violent or threatening conduct should this sanction be imposed, and then only after a hearing with significant due process protections.

I. MUTUALLY EXCLUSIVE SIXTH AMENDMENT RIGHTS

The Sixth Amendment protects criminal defendants in a number of ways, guaranteeing various rights “[i]n all criminal prosecutions.” Among these rights is a defendant’s right “to have the Assistance of Counsel for his defence.” This provision contains two mutually exclusive rights: the right to be represented by counsel, and the right to represent oneself. The right to counsel is the “default” right, but it can be expressly waived by a defendant who knowingly and voluntarily chooses to instead represent himself. This Part sketches the basic contours of each right and introduces two controversial means by which the right to counsel can be relinquished.

A. The Right to Counsel

In 1963, the Supreme Court held that assistance of counsel, as a fundamental right essential to receiving a fair trial, is “made obligatory upon

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15 U.S. CONST. amend. VI.  
16 Id.
the States by the Fourteenth Amendment." So when an indigent defendant in a state criminal trial cannot afford counsel, the state itself must provide the defendant with an attorney. Because of the complexity of criminal law and trial, lawyers are "necessities, not luxuries," and the "noble ideal" that all defendants are equal before the law "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." The Court expounded upon this right in later decisions. The government must provide counsel at every "critical stage" of criminal proceedings, including preliminary hearings, negotiation and entry of guilty pleas, trial, and sentencing. The right to counsel also extends—under the Fourteenth Amendment, not the Sixth—to direct appeals as of right. Counsel must meet a minimum level of competence; where the defendant is denied effective assistance of counsel, a conviction can be reversed. Wholly denying a defendant counsel is a structural error, and a reviewing court must reverse the conviction, even absent a showing of prejudice.

There are a few limits on the right to counsel found in Gideon and its progeny. The government must appoint counsel where conviction on a charge results in imprisonment, however brief, but not where conviction does not result in "actual imprisonment." Where a proceeding is not "critical," counsel need not be present, though states can choose to provide or require counsel as a matter of state law. And although nonindigent defendants have

18. Id. at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").
19. Id.
23. Gideon, 372 U.S. at 342. But see infra note 29 and accompanying text for qualifications of this right.
30. Probation revocation, for instance, does not require counsel under the Sixth Amendment. See Gagnon v. Scarpelli, 411 U.S. 776, 782, 790 (1973). However, some states provide it. See, e.g., State v. Flemming, 976 A.2d 72, 44 (Conn. App. Ct. 2009) (noting state law extends the right to counsel to all defendants in probation revocation hearings).
the right to counsel of their own choosing, a trial court may deny a motion to substitute counsel where the motion is made so close to trial that proceedings would be delayed if the court granted the motion.

In contrast, indigent defendants are not entitled to counsel of their choosing. While the court can substitute appointed counsel for good cause, such as a conflict of interest or complete breakdown in communication, a defendant represented by appointed counsel is not entitled to change counsel simply because he dislikes or disagrees with his attorney. Both indigent and nonindigent defendants do, however, have the right to choose not to be represented by counsel at all, instead invoking their right to self-representation.

B. The Right to Represent Oneself and Express Waiver of the Right to Counsel

The Supreme Court clarified this Sixth Amendment right to self-representation roughly a decade after Gideon. In Faretta v. California, the Court addressed “whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.” Although this was “not an easy question,” the Court found support for the right to self-representation in the structure of the amendment as well as English and colonial history. The rights expressed in the Sixth Amendment are personal, “given directly to the accused[,] for it is he who suffers the consequences if the defense fails.” The right to counsel “supplements this design” by speaking of counsel’s “assistance.” Counsel is “an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.” Where counsel is forced upon the defendant against his will, “counsel is not an assistant, but a master[,] and the right to make a defense is stripped of [its] personal character.” Unwanted counsel “represents’ the defendant only through a tenuous and unacceptable legal fiction” and means “the defense

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32 Cf. Martel v. Clair, 565 U.S. 648, 663 (2012) (noting timeliness of the motion is one factor the appellate courts point to as relevant for deciding whether to substitute counsel).
34 See Martel, 565 U.S. at 663.
35 See Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (“[W]e reject the claim that the Sixth Amendment guarantees a ‘meaningful relationship’ between an accused and his counsel.”).
37 Id. at 807.
38 Id. at 807, 818.
39 Id. at 819-20.
40 Id. at 820.
41 Id.
42 Id.
presented is not the defense guaranteed [the defendant] by the Constitution, for, in a very real sense, it is not *his* defense."

The Court acknowledged that the right to represent oneself “seems to cut against the grain” of its decisions requiring that defendants, before being convicted and imprisoned, be “accorded the right to the assistance of counsel.”44 Those decisions are based on the idea that counsel “is essential to assure the defendant a fair trial,” and there is a “strong argument” that they allow a state to “impose a lawyer upon even an unwilling defendant.”45 But the Court rejected this extension of the doctrine, distinguishing between the right to assistance and state-compelled counsel.46 Although most defendants would “undeniably[ly]” be better off with an attorney, “where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him.”47 Thus, the defendant “must be free personally to decide whether in his particular case counsel is to his advantage.”48

But because the defendant who chooses to represent himself thereby loses “many of the traditional benefits associated with the right to counsel,”49 the Court imposed a high bar to finding such a choice. The defendant must “knowingly and intelligently” waive the right to counsel and its attendant benefits.50 Indeed, the defendant must “be made aware of the dangers and disadvantages of self-representation,” such that the record reflects that “his choice is made with eyes wide open.”51 The usual presumption against waiving fundamental rights applies.52 But the risk of erroneously denying a request to proceed pro se is also high: as with the denial of counsel, denial of the right to self-representation is structural error.53

43 Id. at 821.
44 Id. at 832.
45 Id. at 832-33.
46 See id. at 833-34 (“The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them.” (footnote omitted)).
47 Id. at 834.
48 Id. (“[A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970))).
49 Id. at 835.
50 Id. (citing Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)).
51 Id. (quoting Adams v. United States ex rel. McCann, 317 U.S. 220, 279 (1993)).
52 See Johnson, 304 U.S. at 464 (“[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights . . . .” (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937))).
53 See Weaver v. Massachusetts, 582 U.S. 286, 295 (2017) (noting denial of the right to represent oneself is a structural error).
While the Sixth Amendment protects the right to represent oneself, the right to counsel is the default. Despite this fact, and the high Faretta standard for express waiver of the right to counsel, most states have found that defendants can lose the right to counsel in other ways.

C. Alternative Ways to Lose the Right to Counsel: Waiver by Conduct and Forfeiture

While Gideon and Faretta offer a relatively clean picture of criminal proceedings and the exercise of Sixth Amendment rights, the reality in trial courts is less clear-cut. Courts are split on issues stemming from Faretta, such as whether the court must hold a hearing to expressly warn the defendant about the dangers of exercising the right or can instead determine his knowledge of the danger from the record. And courts are also confronted with defendants whose conduct seems to abuse the right to counsel and confuses the exercise of their Sixth Amendment rights. Some such defendants delay the orderly progression of their cases by pushing back the dates of court proceedings. Some of these dilatory defendants try to fire their appointed lawyer and ask for substitute counsel, either throughout the representation or on the eve of trial. Others, while protesting the current counsel the court has declined to replace, refuse to clearly indicate whether they want to be represented by counsel or represent themselves. And a few defendants are violent towards their lawyers, or threaten to harm them or their families. Faced with these types of misconduct, courts developed two other ways of addressing defendants’ right to counsel: forfeiture and waiver by conduct.

The Third Circuit’s decision in United States v. Goldberg was the first to clearly distinguish between and offer a typology of the ways in which the right to counsel could be relinquished. As that case explains, forfeiture is

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54 See McDowell v. United States, 484 U.S. 980, 981 (1987) (White, J., dissenting from denial of certiorari) (noting circuit court disagreement over whether detailed inquiries, specific hearings, or neither is required, and observing that state courts disagree on this issue as well).

55 See, e.g., State v. Clay, 11 S.W.3d 706, 713 (Mo. Ct. App. 1999) (finding defendant engaged in “a pattern of refusing to cooperate with assigned counsel and, at the same time, maintaining that he wanted to be represented by counsel”).

56 See, e.g., People v. Kammeraad, 858 N.W.2d 490, 507 (Mich. Ct. App. 2014) (concerning a defendant who would not choose to represent himself but also would not accept his appointed counsel).


58 67 F.3d 1092 (3d Cir. 1995). Goldberg cites United States v. McLeod, 53 F.3d 322 (11th Cir. 1995) as the only prior case to distinguish between waiver and forfeiture, but McLeod itself did not provide a detailed explanation of the analytical distinctions or discuss waiver by conduct.
the opposite of the express waiver Faretta envisioned. Waiver requires “an intentional and voluntary relinquishment of a known right,” typically resulting from “an affirmative, verbal request.”59 By contrast, when a defendant forfeits a right, he relinquishes it regardless of whether he knows of that right or means to give it up.60

Waiver by conduct is a “hybrid situation,” combining pieces of waiver and forfeiture.61 If a defendant, after being “warned that he will lose his attorney if he engages in dilatory tactics,” later engages in misconduct, that conduct is “treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel.”62 Unlike defendants who forfeited the right, but like those who expressly chose to waive it, these defendants “[knew] what they [stood] to lose.”63 And unlike defendants who expressly chose to waive the right, but like those who forfeited it, they often “vehemently object to being forced to proceed pro se” and never “affirmatively request[]” self-representation.64

The nature of the misconduct required to invoke these doctrines is contested. Dilatory conduct, threats, and acts of violence are all relevant considerations, but courts disagree about what kind of act forfeits counsel.65 They do agree that, given “the drastic nature” of forfeiture, the misconduct in such cases must be greater than misconduct that supports waiver by conduct.66

Many state courts that have addressed these scenarios refer to and rely on Goldberg’s definitions and analytical distinctions.67 Nonetheless, confusion remains. Some courts use other terms for waiver by conduct.68 Some find the loss of counsel without an express waiver but do not clearly label or

59 Goldberg, 67 F.3d at 1099.
60 Id. at 1100.
61 Id.
62 Id.
63 Id. at 1101.
64 Id.
65 See infra notes 86–88 and accompanying text.
66 Goldberg, 67 F.3d at 1101; cf. Commonwealth v. Means, 907 N.E.2d 646, 658 (Mass. 2009) (describing acts resulting in waiver by conduct as “highly disruptive” but describing acts resulting in forfeiture as “extreme conduct that imperils the integrity or safety of court proceedings”).
67 See, e.g., State v. Nisbet, 134 A.3d 840, 851-54 (Me. 2016) (using the Goldberg framework); Bultron v. State, 897 A.2d 758, 763-66 (Del. 2006) (same). But see State v. Suriano, 893 N.W.2d 543, 553 (Wis. 2017) (“This court could have adopted the three-tiered Goldberg approach but it did not do so . . . . [W]e remain unconvinced that a switch to Goldberg’s three-tiered approach is warranted.”).
distinguish this finding from a typical scenario. Still others confuse the two concepts, using the terms interchangeably or failing to clearly distinguish between them.

II. CURRENT STATE LAW ON WAIVER BY CONDUCT AND FORFEITURE

Adoption of waiver by conduct and forfeiture as means of relinquishing the right to counsel is not uniform across the states. Some have adopted one means, others both, and a few have not yet addressed the issue. Even among states that have adopted the same means, the exact nature of the doctrine varies. Each form of relinquishment has its own unique problems. But both face the questions of (1) whether the critical stage itself matters for determining if conduct rose to the appropriate level, and (2) whether relinquishment at one stage carries over to later stages.

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69 For courts that accept the underlying concept of waiver by conduct, but without using a label that distinguishes this situation from express waiver or confronting the differences between these scenarios, see, for example, State v. Thornton, 800 A.2d 1016 (R.I. 2002) and State v. Buckland, 777 P.2d 745 (Kan. 1989).

70 See, e.g., People v. Arguello, 772 P.2d 87, 93 (Colo. 1989) (“An implied waiver of counsel resulting from a defendant’s misconduct is more accurately described as a forfeiture of the right rather than a deliberate and informed decision to waive the right.”); Jackson v. State, 2 So.3d 1036, 1037 (Fla. Dist. Ct. App. 2009) (finding that defendant’s conduct “amounted to a binding forfeiture or waiver of” his right to counsel); Strozier v. State, 821 S.E.2d 39, 43 (Ga. Ct. App. 2018) (“[U]nder several Georgia cases, the concepts of forfeiture and waiver of the right to counsel are not distinguished.”); Walker v. Commonwealth, 839 S.E.2d 123, 129 (Va. Ct. App. 2020) (using forfeiture and waiver interchangeably).

71 The categorization of states as having adopted or not adopted these doctrines is based on published appellate court decisions analyzing these doctrines in the context of a Supreme Court-recognized critical stage of criminal proceedings. Cases in which the court considered whether to apply the doctrines to defendants’ Fourteenth Amendment right to counsel on direct appeal were included if used by later lower court decisions considering a critical stage. The terminological confusion discussed above can make it difficult to tell what a state has recognized, and sometimes it is unclear whether the court adopted or simply discussed the doctrines; some cases cited in the Appendices below are unclear in this respect but are cited by later state courts as if the doctrine had been adopted.

72 See, e.g., State v. Allgier, 353 P.3d 50, 53-54 (Utah 2015) (finding the procedural stage relevant to forfeiture, with trial requiring more severe misconduct than other stages).

73 Compare Gladden v. State, 153 P.3d 1028, 1032 (Alaska Ct. App. 2007) (finding no plain error where the trial court did not reopen the waiver inquiry at sentencing after the defendant, at trial, waived the right to counsel by conduct), with Watson v. State, 718 So.2d 253, 253 (Fla. Dist. Ct. App. 1998) (finding the defendant, who lost the right to counsel at trial due to misconduct, should have been asked whether he wanted counsel for sentencing). Cf. State v. Moussa, 53 A.3d 630, 644 (N.H. 2012) (finding defendant’s waiver at trial could continue at sentencing because of his inability to work with counsel at trial).
A. Waiver by Conduct

Nearly three-quarters of the states recognize waiver by conduct as a constitutionally valid means of relinquishing the right to counsel.\(^74\) And a handful of states have decisions indicating its courts might accept waiver by conduct if the issue is ever squarely presented.\(^75\) At most, three states reject the idea,\(^76\) and a few have never addressed the issue.

Accepting the validity of waiver by conduct is not a simple matter. The concept invites several questions, some directly related to issues \textit{Faretta} left unanswered with respect to the proper standard for express waiver. Procedurally, post-\textit{Faretta} courts split on whether courts must hold a specific

\(^74\) For a list of the thirty-six states recognizing waiver by conduct, see Appendix A. It is worth noting that inclusion of states in this list does not mean the state court follows the procedure and analysis outlined in \textit{Goldberg}. It simply means the court, in conducting a waiver analysis for cases that fall outside the typical \textit{Faretta} scenario, treats the defendant’s conduct as a key consideration in the waiver inquiry. However, the list does not include states wherein the only indication that waiver by conduct is accepted occurred in cases that narrowly addressed nonindigent defendants’ failure to retain counsel without speaking more broadly to the doctrine’s application in other circumstances. See, e.g., State v. Slattery 571 A.2d 1314, 1317-22 (N.J. Super. Ct. App. Div. 1990) (holding that a nonindigent defendant who fails to obtain counsel can be required to proceed pro se because he waived the right to counsel by “his actions, or more accurately his omissions,” and providing guidance for cases in which nonindigent defendants appear without counsel).

\(^75\) See \textit{Grindling} v. State, 445 P.3d 25 (Haw. 2019) (discussing, in a case concerning the loss of counsel for direct appeal, the requirements of waiver by conduct); State v. Lindsay, 864 P.2d 663, 667 (Idaho Ct. App. 1993) (suggesting in a probation revocation hearing, which state law treats as carrying a right to counsel under the Sixth Amendment, that dilatory conduct could result in waiver by conduct); People v. Ames, 978 N.E.2d 1119 (Ill. App. Ct. 2012) (applying waiver by conduct analysis, and mentioning forfeiture, in an opinion concerning an unrepresented probation revocation hearing); State v. Moussa, 53 A.3d 630, 643-44 (N.H. 2012) (citing federal appellate court cases on waiver by conduct in holding that a defendant’s express waiver at trial could continue at sentencing where he had refused to cooperate with multiple attorneys at trial); State v. Tribble, 892 A.2d 232, 241-42 (Vt. 2005) (distinguishing the case before it, in which there was no colloquy regarding defendant’s conduct, with federal cases in which defendants were required to proceed pro se after rejecting multiple attorneys yet insisting on new counsel); State v. McCraine, 588 S.E.2d 177, 185 (W. Va. 2003), overruled by State v. Herbert, 588 S.E.2d 177 (W. Va. 2003) (citing a pre-\textit{Faretta} case concerning plea negotiations for the proposition that waiver by conduct is possible, but not discussing it in the instant case, which concerned use of unencounseled prior convictions to enhance a current charge).

\(^76\) See State v. Atwell, 881 S.E.2d 124, 131-32 (N.C. 2022) (”[T]here is no ‘effective’ waiver of this constitutional right . . . . We encourage . . . . courts to begin any waiver analysis by carefully considering whether the defendant in question has expressed a clear desire to forgo the constitutional right to counsel . . . . ‘”); Tutt v. State, 339 S.W.3d 166, 173 (Tex. App. 2011) (noting that under state precedent, a defendant whose request for substitute appointed counsel is denied must proceed with appointed counsel, even if he does not want to, unless he asserts his rights under \textit{Faretta}); State v. Suriano, 893 N.W.2d 543, 553 (Wis. 2017) (”[W]e remain unconvinced that a switch to \textit{Goldberg}’s three-tiered approach is warranted.”). However, \textit{Atwell} does not squarely address waiver by conduct or cite the state appellate courts’ discussion of the doctrine, which has continued post-\textit{Atwell} to assume it is possible. See, e.g., State v. Moore, 893 S.E.2d 231 (N.C. Ct. App. 2023). And because \textit{Suriano} recommends courts give warnings before finding forfeiture, \textit{see} 893 N.W. 2d at 556, the court is essentially willing to find waiver by conduct, just not by that term.
hearing or whether it is instead sufficient to infer a defendant's knowledge of the consequences of his waiver from the record. Courts have likewise split on whether the defendant's knowledge in a waiver-by-conduct case must be clearly demonstrated in a colloquy with the court or can instead be gleaned from the record. Most courts prefer, but do not require, a colloquy. A few require them. Substantively, Faretta said a defendant should be aware of the risks of self-representation, but the necessary content and depth of defendant's knowledge and court-provided warnings varies by jurisdiction. Likewise, the knowledge and warnings required in waiver-by-conduct cases is state-dependent, with some courts offering virtually no guidance and others imposing lengthy requirements or factors.

The primary reason for finding waiver by conduct—namely, defendant-initiated conduct that delays proceedings, often for weeks or months—raises another question. To hold that a defendant waived the right to counsel by his conduct, must a court find that he intended to delay court proceedings? Some courts might require this intent, but most do not expressly mention an intent requirement.

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77 See supra note 54.
78 See, e.g., Gladden v. State, 110 P.3d 1006, 1010 (Alaska Ct. App. 2005) ("We will excuse an on-record inquiry only if the record as a whole unequivocally demonstrate[s] a full awareness . . . of the benefits of counsel and the dangers of self-representation." (quoting Evans v. State, 822 P.2d 1370, 1375 (Alaska Ct. App. 1991))); Osbey v. State, 825 S.E.2d 48, 51 (S.C. 2019) ("In this case, the plea court did not mention to Osbey the dangers of self-representation. When this happens, we look to the record to determine if it shows the factual basis for the waiver."); People v. Arguello, 772 P.2d 87, 96 (Colo. 1989) ("On appeal, a reviewing court will look for the on-the-record advisement, but also will consider the totality of the circumstances in the whole record in ascertaining the validity of the waiver.").
79 See, e.g., State v. Hampton, 92 P.3d 871, 874 n.3 (Ariz. 2004) ("[T]he Third Circuit has suggested that, in accordance with Faretta, courts should require an on-the-record colloquy with the defendant that includes 'an explanation by the [trial] court of the risks of self-representation.' We agree." (citation omitted)).
80 See supra note 54.
81 See, e.g., Walker v. Commonwealth, 839 S.E.2d 123, 128-29 (Va. Ct. App. 2020) (finding waiver by conduct where the defendant was warned that misconduct would result in the loss of counsel, but not saying whether more detailed warnings or knowledge are required for waiver); State v. Barr, 806 So.2d 137, 145 (La. Ct. App. 2001) (noting the state courts have "no particular formula" for determining waiver of counsel and instead look to the totality of circumstances, including the defendant's background and experience).
82 See, e.g., People v. Arguello, 772 P.2d 87, 94-95 (Colo. 1989) (holding the record must show the defendant understood, inter alia, the charges, possible punishments, defenses, and mitigating factors, and requiring the court to assess factors such as the defendant's background, experience, and conduct); Bultron v. State, 897 A.2d 758, 763-66 (Del. 2006) (requiring the inquiry to match a Faretta inquiry and providing a list of factors to consider).
83 See, e.g., Allen v. Daker, 858 S.E.2d 731, 744 (Ga. 2021) (describing a form of “functional waiver” that can be found when the trial court determines the defendant is engaging in dilatory tactics).
B. Forfeiture

Forfeiture of the right to counsel is recognized by nearly half of the states. Forfeiture doctrine, like waiver by conduct, is not uniform across the adopting states. Courts address the doctrine with varying levels of detail, and there are open questions about the concept and its implementation. One crucial question is how broadly forfeiture can be applied. Some courts, while acknowledging that violent conduct can justify forfeiture, strongly suggest that dilatory conduct never can. Other courts expressly accept egregiously dilatory or disruptive conduct as grounds for forfeiture. And still others find abusive but non-violent conduct can be sufficient. Courts rarely address the related question of whether forfeiture requires intent, even where forfeiture occurred. Procedurally, some courts require that forfeiture be a measure of

84 For a list of the twenty-one states that recognize forfeiture, see Appendix B.
85 See Gladden v. State, 110 P.3d 1006, 1012 (Alaska Ct. App. 2005) (declining to reach the question of whether to adopt forfeiture of counsel); State v. Stanton, 511 P.3d 1, 7 n.2 (Or. 2022) (observing, in a decision based solely on state law, that some jurisdictions distinguish between forfeiture and waiver by conduct, but not addressing forfeiture because neither party raised the issue).
86 See, e.g., Commonwealth v. Means, 907 N.E.2d 646, 660 n.21 (Mass. 2009) (“Because dilatory tactics, even when extreme, can readily be addressed by a waiver by conduct warning, we are not so persuaded [that dilatory conduct alone can justify forfeiture].”); cf. People v. Shanks, 176 N.E.3d 682, 689 (N.Y. 2021) (stating the right to counsel “would be almost meaningless” if every defendant who attempted to delay proceedings forfeited it, but acknowledging that a defendant who refused to cooperate with a series of attorneys might forfeit the right to assigned counsel).
87 See, e.g., State v. Simpkins, 838 S.E.2d 439, 447 (N.C. 2020) (finding that “obstructionist” conduct, such as continually firing counsel and delaying proceedings, refusing to choose to proceed with counsel, and refusing to participate in proceedings, can constitute grounds for forfeiture); Commonwealth v. Lucarelli, 971 A.2d 1173, 1180 (Pa. 2009) (finding that the defendant’s “extremely dilatory conduct” was sufficient for forfeiture); People v. Kammeraad, 858 N.W.2d 490, 510 (Mich. Ct. App. 2014) (“[W]e conclude that defendant also forfeited his constitutional right to counsel, considering his refusal to accept, recognize, or communicate with appointed counsel, his refusal of self-representation, and his refusal to otherwise participate in the proceedings.”).
88 See, e.g., Means, 907 N.E.2d at 660 (“[F]orfeiture may be an appropriate response to the defendant’s threats of violence . . . .”); Bultron v. State, 897 A.2d 758, 766 (Del. 2006) (finding no abuse of discretion where the trial court found forfeiture as a result of conduct that “fell just short of violence and was intended to force [counsel] to withdraw”); State v. Rasul, 167 P.3d 1286, 1290 (Ariz. Ct. App. 2007) (finding that the defendant forfeited the right where he violently threatened counsel and repeatedly demanded new counsel to delay proceedings).
89 Compare State v. Rasul, 167 P.3d 1286, 1290 (Ariz. Ct. App. 2007) (finding that defendant’s intentionally dilatory conduct sufficient for forfeiture, but not indicating whether intent was required) and Bultron v. State, 897 A.2d 758, 766 (Del. 2006) (same), with King v. Superior Ct., 132 Cal. Rptr. 2d 585, 596 (Cal. Ct. App. 2003) (holding that forfeiture is permissible when defendants engage in misconduct “intended to cause counsel to withdraw and to delay or disrupt proceedings” but finding forfeiture inapplicable in the instant case), and State v. Holmes, 302 S.W.3d 831, 847-48
last resort, imposed only where no other means to check the defendant’s behavior would suffice. And while some courts impose significant procedural safeguards before a trial court may find forfeiture, most do not address the question.

III. THE ADOPTION OF THE DOCTRINES: RATIONALES IN STATE COURT

Courts adopting the doctrines of forfeiture and waiver by conduct often provide minimal legal justification for doing so. Generally, state court opinions cite other appellate cases—from sister-states or federal circuits—to recognize and define waiver by conduct and forfeiture, then analogize to the fact patterns and findings of those courts. Few cases explain the competing interests at issue, or the legal foundations for waiver by conduct and forfeiture. But some state courts do offer more grounding for the doctrines. Their arguments take two main forms: First, analogy to the loss of other Sixth Amendment rights, and second, balancing the individual right to counsel against judicial interests in economy, dignity, and administration of justice. A few courts offer a third justification: misconduct that undermines the purpose of the right to counsel justifies its loss.

(Tenn. 2010) (listing dilatory intent as one factor in the determination of whether forfeiture should result but finding no forfeiture in the case before the court).

90 See, e.g., King, 132 Cal. Rptr. at 588-89 (“Forfeiture of counsel should be a court’s last resort and generally forfeiture should occur only after lesser measures to control defendant, including but not limited to a warning and physical restraints or protections, have failed.”); State v. Nisbet, 134 A.3d 840, 854 (Me. 2016) (“[F]orfeiture requires a determination by the court that there are no lesser judicial responses that can reasonably be expected to prevent or ameliorate the ongoing effects of the defendant’s misconduct.” (citing Means, 907 N.E.2d at 660-61)).

91 See, e.g., King, 132 Cal. Rptr. 2d at 600 (“Before a finding of forfeiture is made, the court must conduct a hearing and give defendant notice of the hearing. At the hearing defendant is entitled to be present, to have the assistance of counsel, to present evidence, and to cross-examine witnesses. The court must find the facts supporting forfeiture by clear and convincing evidence, and set forth its factual findings in the record.”); State v. Krause, 817 N.W.2d 136, 146 (Minn. 2012) (“[I]n a forfeiture-of-counsel evidentiary hearing, the defendant is entitled to appropriate due process protections, including adequate notice, the assistance of counsel, the ability to present evidence and to confront and cross-examine witnesses, an impartial decision maker, a decision on the record, and a full explanation for the decision.”); Means, 907 N.E.2d at 662 (relying on King, 132 Cal. Rptr. 2d at 600).

92 Earlier commentators also observed this hole in the caselaw. See, e.g., Stephen A. Gerst, Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution, 58 CLEV. ST. L. REV. 97, 102 (2010) (“Courts . . . have paid little attention to procedural safeguards and have focused, instead, on the type of conduct and its seriousness.”). The state of the caselaw has only marginally improved since then.

93 See Gerwig-Moore, supra note 13, at 476 (observing that many cases do no more than “unceremoniously reiterate” a line of cases).
A. Analogy to Other Sixth Amendment Rights

The state courts primarily rely on Illinois v. Allen,94 and Taylor v. United States,95 both of which concern the right to be present at trial.96 The defendant in Allen, after repeatedly interrupting trial proceedings, was warned that continued misconduct would result in his removal from the courtroom; when he persisted, the trial court removed him.97 The appellate court reversed, finding the right to presence “so ‘absolute’ that . . . [defendant] could never be held to have lost that right so long as he continued to insist upon it.”98 The Supreme Court disagreed with the appellate court and affirmed the trial court. The Court explained that “a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed” for disorderly conduct, he continues to act “in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.”99 In Taylor, the defendant absconded from trial during a recess, and the Supreme Court affirmed the trial court’s decision to proceed with trial in his absence.100 The defendant argued his “voluntary absence” could not be “construed as an effective waiver” under Johnson “unless it is demonstrated that he knew or had been expressly warned by the trial court . . . that the trial would continue in his absence.”101 But the Court emphatically rejected this argument, finding it “incredible” that the defendant would not know trial could continue in his absence.102

State courts read these decisions to mean that Sixth Amendment rights are subject to waiver by conduct or forfeiture when they are manipulated or abused.103 One court, confronted with a defendant who “engaged in a pattern of serious misconduct, violence and threats of violence” towards a series of appointed attorneys,104 rejected defendant’s attempts to cast Allen and Taylor in his favor. The court read them instead “to permit loss of a constitutional

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95 414 U.S. 17 (1973) (per curiam).
96 See, e.g., King, 132 Cal. Rptr. at 594-96 (citing and explaining both cases); Bultron v. State, 897 A.2d 758, 766 n.21 (Del. 2006) (citing both cases as support for the conclusion that “obstructive conduct” can result in forfeiture, but without further explanation); State v. Nisbet, 134 A.3d 840, 853-54 (Me. 2016) (citing the result in Allen as evidence that “the magnitude of the constitutional right to counsel does not by itself insulate it from forfeiture”).
97 Allen, 397 U.S. at 339-41.
98 Id. at 342.
99 Id. at 343.
100 Taylor, 414 U.S. at 17-18, 20.
101 Id. at 19.
102 Id. at 20.
103 See supra note 96.
right . . . based on misconduct, even without a prior warning.” The court pointed out that the Taylor Court, concerned that defendant’s conduct was intended to delay proceedings, quoted Justice Brennan’s Allen concurrence, which asserted that “‘the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused.’” To the court, the loss of counsel through misconduct flowed from the idea that wrongdoers should not profit from their wrongdoing.

Outside the courts, this reading is contested. Although relinquishment of the right to counsel through waiver by conduct or forfeiture has drawn little academic attention, the scholars who have addressed the doctrines are skeptical of its theoretical justification. They question whether the doctrine is actually well-grounded in other Sixth Amendment caselaw and the concept of purposeful wrongdoing.

One commentator, taking issue with the analogy to the right to presence, objects to reading Allen to “leav[e] open the question of forfeiture” by not indicating whether a warning was required. This extension of Allen “ignore[s] the differences between the right to counsel and the right to presence,” each of which “connects to an entirely different body of authority.” Moreover, with respect to the right to presence, courts often expressly require that a defendant be warned of the possibility that trial will be conducted in his absence, but “many of the cases related to forfeiture or waiver, which do not demand on-record warnings or hearings, ignore this fact.”

Other commentators suggest that current forfeiture of counsel caselaw fails to reflect the Court’s profit-by-wrongdoing doctrine. While the

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105 Id. at 595.
106 Id. at 595 (citing Taylor, 414 U.S. at 20).
107 See id. ("Justice Brennan believed a disruptive defendant should not be allowed to profit from his wrong and constitutional rights can be surrendered if abused for the purpose of frustrating trial."); see also State v. Fualaau, 228 P.3d 771, 778 (Wash. Ct. App. 2010) ("Forfeiture by misconduct is grounded in equity—the notion that people cannot complain of the natural and generally intended consequences of their actions." (quoting State v. Mason, 162 P.3d 396, 404 (Wash. 2007))).
108 See supra note 13.
109 For a response to the criticisms summarized in this section, see Section V.A.
110 Gerwig-Moore, supra note 13, at 475-76; Gerst, supra note 92, at 110-12.
112 Gerwig-Moore, supra note 13, at 475.
113 Id. The author does not further explain this statement. Perhaps it is a reference to the rights stemming from different provisions within the Sixth Amendment.
114 Id. at 475-76.
115 See McAllister, supra note 111, at 1232, 1266-68; Carlson, supra note 111, at 829-29, 837.
Supreme Court “has consistently held that the defendant’s wrongdoing in procuring a witness’s absence can constitute a forfeiture of the fundamental right of confrontation,” the Court has since “clarified and narrowed this rule” by specifying that “the defendant’s wrongdoing must be directly related to procuring the witness’s absence from trial for the purpose of preventing the witness from testifying.”¹¹⁶ In other words, on this argument, forfeiture has a specific intent requirement.¹¹⁷

B. Interest Balancing

Some decisions emphasize the need to grant trial courts discretion to administer justice and manage their courtroom. These opinions echo Allen’s concern that courts “confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.”¹¹８ Several courts expressly frame this analysis in terms of balancing,¹¹⁹ though others discuss the interests of both defendants and courts without engaging in explicit balancing.¹²⁰ When discussing the competing interests at stake, courts typically do not explain why the courts’ needs outweigh the individual right to counsel, but a few do offer a rationale for such discretion. As those courts observe, the “power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court” is a power “absolutely necessary for a court to function effectively and do its job of administering justice.”¹²¹ The state courts emphasize that the practical reality of permitting dilatory tactics is an inability to set the time at which trial or other proceedings occur.¹²² Courts maintain that the right to counsel has limitations

¹¹⁶ Carlson, supra note 111, at 828 (relying on Giles v. California, 554 U.S. 333 (2008)).
¹¹⁷ See id. at 837 (arguing forfeiture should not have applied to a dilatory defendant where the record did not reflect whether his conduct was intended to delay proceedings because Giles demonstrated that “[t]he forfeiture cases decided by the Supreme Court have all involved purposeful wrongdoing or misconduct that is directly responsible for the loss of the constitutional right”); McAllister, supra note 111, at 1267–68 (“The same combination of wrongful act and specific intent mandated by Giles is required under this Article’s [forfeiture] proposal, which rests on the same underlying principles.”).
¹²² See, e.g., State v. Carruthers, 35 S.W.3d 516, 550 (Tenn. 2000) (warning that, without forfeiture, “an intelligent defendant ‘could theoretically go through tens of court-appointed
“derive[d] from the important and valid state interest in proceeding with prosecutions in an orderly and expeditious manner.”

That state interest encompasses “the practical difficulties” of coordinating “witnesses, lawyers, and jurors” as well as the more abstract “concerns and interests of the victims, witnesses and general public, and the appropriate use of judicial resources.”

On the other side of the scales, courts emphasize “the inherent importance of the right to counsel and its interrelationship with other fundamental rights such as the right to a fair trial.”

When courts find that the interests of the judiciary and the state outweigh defendants’ interests, they adopt and apply the doctrines. There are two main criticisms of this balancing. The first rejects the outcome of the analysis. The second argues that even where defendants’ interests could be outweighed in theory, the courts undervalue those interests and thus impose insufficiently protective procedures. By adopting waiver by conduct and forfeiture, the first set of critics explain, the courts have “confused . . . acknowledgment of the problem with identifying the appropriate solution.”

Even where defendants’ conduct is “unacceptable,” it “should not necessarily follow that the only appropriate legal response—or even the primary one—is the loss” of right to counsel.

While “the duty to uphold and maintain order in the court” echoes the concerns in *Allen*, the fact that a consequential, fundamental right is at stake—one that is intended to protect the fairness of the criminal process—should give courts greater pause.

_attorneys and delay his trial for years”) quoting State v. Cummings, 546 N.W.2d 406, 419 (Wis. 1996)); Commonwealth v. Lucarelli, 971 A.2d 1173, 1179 (Pa. 2009) (“Should an unrepresented defendant choose not to engage in the colloquy process with the trial court, were there no provision for forfeiture of counsel, that defendant could impermissibly clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice.”).


124 Id.; see also State v. Souto, 210 A.3d 409, 420 (R.I. 2019) (deferring to the trial court’s “finding that defendant intentionally manipulated the proceedings by ‘stalling trial perhaps indefinitely or at least until [defendant] totally succeeded in wearing down the resolve of the State and its witnesses’”).

125 State v. Nisbet, 134 A.3d 840, 854 & n.4 (Me. 2016) (“[W]e do not sanction the loss of a fundamental constitutional right merely to create a means for the court to function effectively. Rather, it is a recognized doctrine that is based upon the principle that the right to counsel is not absolute and is subject to forfeiture as a result of egregious misconduct . . . .”); see also State v. Holmes, 302 S.W.3d 831, 838 (Tenn. 2010) (noting the right to counsel is a fundamental safeguard of liberty, the erroneous deprivation of which constitutes structural error).

126 For responses to these criticisms, see Section V.C (rejecting the first criticism) and Sections VI.A, VI.C (incorporating the second criticism into recommended guidelines for applying the doctrines).

127 Gerwig-Moore, supra note 13, at 474.

128 Id.

129 Id. at 474-75 (“The view from [Allen] is more in line with the suppression of disorder rather than the protection of the defendant’s procedural rights.”); Gerst, supra note 92, at 110-11 (emphasizing the presumption against loss of fundamental rights).
assuming that the result of this interest analysis is the loss of the right to counsel, rather than loss of the right to represent oneself. In other words, maybe a different individual right—to self-represent, not to counsel—is outweighed by judicial interests.

Alternatively, even if waiver by conduct and forfeiture could theoretically be applied in light of the interests at stake, critics suggest that courts have failed to appropriately weigh those interests when determining the processes by which the doctrines are applied. Courts have not engaged in a “thorough and searching analysis of this problem and proposed a solution in light of” Johnson and Faretta, which “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.” Given that the court is “balancing the harm of the loss of counsel . . . against the ‘burden’ of warnings and acknowledgements on the record[,] it is difficult to justify not requiring some sort of hearing” to ensure a defendant knows his rights. Such a hearing would also enable courts to evaluate “legitimate pre-trial (or at least pre-conviction) concerns about a counsel’s effectiveness,” which defendants often express through “delays, disruptions, and dismissals of attorneys.” Since that conduct often drives the finding of relinquishment of counsel, a trial court should hold a hearing once a defendant’s behavior and problems with counsel become known, at which time the court can determine the reasons for defendant’s conduct and, as applicable, substitute counsel or warn the defendant of the consequences of his conduct.

C. The Purpose of the Right to Counsel

Several courts highlight the purpose of the right of counsel to demonstrate that waiver by conduct and forfeiture are valid. Where conduct undermines that purpose, it undermines the exercise of the right and justifies waiver by conduct or forfeiture. The purpose of the right, as one court

130 Cf. McAllister, supra note 111, at 1256-63 (suggesting this result in one particular circumstance); Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (allowing courts to revoke self-representation where a defendant “engages in serious and obstructionist misconduct”).

131 Gerwig-Moore, supra note 13, at 476.

132 Id. at 477; see also Gerst, supra note 92, at 112-13 (recommending that courts abandon forfeiture and adopt a practice of always holding a hearing with warnings when counsel is first appointed).

133 Gerwig-Moore, supra note 13, at 477.

134 Id. at 478-79.

135 See State v. Simpkins, 838 S.E.2d 439, 446-48 (N.C. 2020); State v. Nisbet, 134 A.3d 840, 854 (Me. 2016) (holding forfeiture occurs where the defendant “has engaged in extremely serious misconduct that directly undermines the integrity and effectiveness of” the right to counsel); cf. State v. Langley, 273 P.3d 901, 913 (Or. 2012) (suggesting, in a decision based on state law, that “a
explained, is to ensure the defendant is not “left to his own devices in facing the prosecutorial forces of organized society,” such that the defendant and society can rely on the fairness and integrity of the outcome.\textsuperscript{136} But “[i]f one purpose of the right to counsel is to ‘justify reliance on the outcome of the proceeding,’ then totally frustrating the ability of the trial court to reach an outcome thwarts the purpose of the right to counsel.”\textsuperscript{137} Thus, although “[j]ustice . . . requires honoring the right to the effective assistance of counsel,” sometimes the defendant precludes realization of that right, making forfeiture a necessary “additional avenue” for trial courts to “ensure the orderly administration of justice.”\textsuperscript{138}

IV. COMMENTATORS’ PROPOSED ALTERNATIVES

Scholars’ concerns about the theoretical soundness and practical difficulties of the doctrines have led them to propose alternatives to current practices. One of these alternatives purports to address all scenarios in which waiver by conduct or forfeiture might otherwise have been applied. The other addresses a specific type of defendant conduct that poses unique difficulties for courts. While both proposals provide helpful alternatives courts could apply in some scenarios, neither is practically or analytically sound enough to resolve all of the circumstances it is meant to address.\textsuperscript{139}

A. Contempt as a Complete Replacement for Waiver by Conduct and Forfeiture

One commentator proposes using contempt proceedings, rather than loss of counsel, to sanction defendants who delay, are violent, or refuse to choose between the representation rights.\textsuperscript{140} Contempt proceedings are already commonly used to “deal[] with unacceptable courtroom behavior,” and they give judges “the power necessary to address misconduct, delay, or other roadblocks to an efficient judicial process.”\textsuperscript{141} Such misconduct includes a

\begin{itemize}
  \item defendant’s recalcitrant behavior toward counsel can move beyond noncooperation and become misconduct that defeats the ability of counsel to carry out the representation function.”\textsuperscript{136} Simpkins, 838 S.E.2d at 446 (quoting Moran v. Burbine, 475 U.S. 412, 430 (1986)).
  \item Id. (citation omitted) (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)). Conduct that prevents proceedings from taking place, and thereby undermines the right, includes “refus[ing] to obtain counsel after multiple opportunities to do so, refus[ing] to say whether he or she wishes to proceed with counsel, refus[ing] to participate in the proceedings, or continually hir[ing] and fir[ing] counsel.” Id. at 447.
  \item Id. at 445 & n.5.
  \item Another commentator rejects forfeiture entirely and proposes only waiver by conduct be used. See Gerst, supra note 92, at 112-13. Responses to this proposal are offered infra notes 214, 275, 287.
  \item Gerwig-Moore, supra note 13, at 479-81.
  \item Id. at 479.
\end{itemize}
client's violent conduct towards his attorney, even if that conduct has not occurred in the courtroom.\textsuperscript{142} Currently, courts often “impute to criminal defendants an understanding of the consequences of violence or continued disruptive conduct,” presuming they “could reasonably expect punishment for their behavior that would extend beyond the typical sanctions of contempt.”\textsuperscript{143} But while a defendant may understand that an action “constitute[s] a tort or crime, or potential exposure to contempt sanctions,” he is unlikely to understand the more complex doctrines of waiver by conduct and forfeiture.\textsuperscript{144} Contempt is thus “more analytically consistent” than current practices.\textsuperscript{145}

Contempt actions might be sufficient to handle some misconduct. But as the \textit{Allen} Court recognized, they do not obviate stronger measures.\textsuperscript{146} If a defendant simply does not want to proceed, contempt actions cannot force him to stop abusing or harassing counsel, or prevent him from assaulting counsel, in order to slow proceedings.\textsuperscript{147} Contempt sanctions are particularly impotent where a defendant faces a heavy sentence, giving him an incentive to delay in hopes of bringing about a more favorable outcome, perhaps by stalling long enough “that adverse witnesses might be unavailable.”\textsuperscript{148} In such a case, contempt sanctions would, perversely, reward the defendant’s behavior.\textsuperscript{149} Moreover, criminal cases occur in a world of scarcity; courts have only so much time, and only so many attorneys are available to take cases. Delays and rounds of hearings in one case negatively affect courts’ ability to hear cases against other defendants within a reasonable timeframe, and negatively affect attorneys’ ability to effectively represent their clients. Contempt alone is simply unable to handle the practical realities and possibilities of criminal proceedings.

Nor is contempt more analytically coherent than waiver by conduct or forfeiture. The very point of waiver by conduct is alerting the defendant to the consequences of his conduct. A defendant who is warned cannot complain

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\textsuperscript{142} \textit{Id.} at 480.
\textsuperscript{143} \textit{Id.} at 480-81.
\textsuperscript{144} \textit{Id.} at 481.
\textsuperscript{145} \textit{Id.} at 480.
\textsuperscript{146} \textit{See} Illinois v. Allen, 397 U.S. 337, 344-45 (1970) (observing that some defendants might stop interrupting, but “if the defendant is determined to prevent any trial, then a court in attempting to try the defendant for contempt is still confronted with the identical dilemma”).
\textsuperscript{147} The court could shackle or otherwise restrain a violent defendant, but doing so carries its own problems. \textit{See id.} at 344 (“Not only is it possible that the sight of shackles and gags might have a significant effect on the jury’s feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.”).
\textsuperscript{148} \textit{Id.} at 345.
\textsuperscript{149} \textit{See id.} (“A court must guard against allowing a defendant to profit from his own wrong in this way.”).
\end{flushleft}
that he did not expect the consequence to follow, so contempt has no advantage over waiver by conduct in terms of defendants’ knowledge. And the very point of forfeiture is that knowledge is unnecessary; the defendant’s conduct was sufficiently egregious that his knowledge and expectations are irrelevant to the consequence of his behavior.\textsuperscript{150} Furthermore, the doctrines fit comfortably within Sixth Amendment jurisprudence, which hesitates to let a defendant benefit from his own wrongdoing\textsuperscript{151}—a benefit that contempt would permit in many cases.\textsuperscript{152}

**B. Loss of the Right to Represent Oneself as the Means of Addressing Defendants Who Refuse to Choose Between Their Rights**

Another commentator’s proposal pertains to one particular group of defendants: those who refuse to choose between the Sixth Amendment rights, affirmatively selecting neither counsel nor self-representation.\textsuperscript{153} This defendant might request to partially represent himself in order to make arguments his attorneys will not, insisting on a form of hybrid representation that is not one of the constitutional options.\textsuperscript{154} Or the defendant might insist—without good cause—that his current court-appointed attorney be replaced, while also insisting that he wants to proceed with counsel, not pro se.\textsuperscript{155} Even when the court declines to allow hybrid representation or to substitute appointed counsel, requiring the defendant to choose between proceeding with current appointed counsel or self-representing, the defendant refuses to cooperate with the court by refusing to make a choice.\textsuperscript{156} In these cases, courts often determine that the defendant has waived the right to counsel by conduct, and require him to proceed pro se.\textsuperscript{157} While a court in this position “would arguably be justified in refusing to appoint substitute counsel,” it should, under the proposed alternative, require the defendant to proceed with his original counsel.\textsuperscript{158} On this view, an obstructive defendant—one whom the court has found acted with intent to delay proceedings—has not waived his right to counsel by conduct but forfeited his right to self-

\textsuperscript{150} Supra notes 60, 66 and accompanying text.
\textsuperscript{151} See infra Section V.A.
\textsuperscript{152} See supra notes 147–149 and accompanying text.
\textsuperscript{153} McAllister, supra note 111, at 1227-30.
\textsuperscript{154} Id. at 1227-28.
\textsuperscript{155} Id. at 1229.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 1248-51; cf. People v. Kammeraad, 858 N.W.2d 490, 510 (Mich. Ct. App. 2014) (finding forfeiture based on defendant’s repeated “refusal to accept, recognize, or communicate with appointed counsel, his refusal of self-representation, and his refusal to otherwise participate in the proceedings”).
\textsuperscript{158} McAllister, supra note 111, at 1251, 1256.
This approach thus aligns with the Court’s cases on profiting from wrongdoing, requiring the trial court to find specific intent. And the result better respects the judicial and individual interests at stake. For the individual, proceeding with counsel acknowledges that self-representation is, in terms of likely outcome, inferior to representation by counsel. For the courts, this proposal prevents manipulation by the defendant, promotes judicial economy and prompt administration of justice by preventing the defendant from changing his mind, and upholds the dignity and integrity of the judicial system by preventing misconduct.

The immediate result of this approach may be doctrinally and practically preferable to the loss of counsel in certain cases. For example, where the defendant is obstructive on the eve of trial, requiring him to proceed pro se would either require an extension—thus rewarding the misconduct—or require him to not only proceed pro se but do so without any time to prepare.

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159 Id. at 1256. It is clear this proposal does not apply to all waiver by conduct cases. For instance, some defendants engage in dilatory conduct following a warning to not do so and yet still insist on the right to counsel. See, e.g., Walker v. Commonwealth, 839 S.E.2d 123 (Va. Ct. App. 2020). But it also seems that courts can duck the dilemma of deciding which right was waived or forfeited by a defendant who refused to choose by finding that no right is relinquished, in any manner, in the proceeding in which a defendant refuses to choose. The defendant will proceed, under a warning, with counsel—the Sixth Amendment default—but could still invoke the right to self-represent or choose to actively cooperate with appointed counsel. Should further dilatory conduct occur, the court does not need to risk another refusal to choose and can immediately conduct the knowledge inquiry to find waiver.

160 McAllister, supra note 111, at 1267-68. Given this proffered justification, it is curious that the author does not clearly explain whether his violence exception has an intent requirement. For acts of violence and verbal threats of violence, the author proposes that substitute counsel be appointed after the first incident, and the counsel right lost after a second. Id. at 1263. If intent were always necessary for forfeiture, presumably only violence for the purpose of delay would qualify for forfeiture of counsel. But not all violence is for that purpose, and it is not clear why violence that is not intentionally dilatory should not also result in forfeiture, given the interests the author cites. See id. at 1265 (recognizing violence and verbal abuse create an “obvious rift” between counsel and defendant, and that forfeiture would be the most effective deterrent to such behavior).

161 Id. at 1260-61. It is worth noting that the superiority of representation by counsel, an intuitive assumption often repeated by courts, has rarely been empirically tested. See Erica J. Hashimoto, Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant, 85 N.C. L. REV. 423, 437-38 (2007). Defendants who choose to proceed pro se might actually obtain outcomes equally as good as those obtained for defendants represented by counsel. See id. at 427-28, 447-50 (finding the results for pro se felony defendants in state court “at least as good as, and perhaps even better than, the outcomes for their represented counterparts”); id. at 451-54 (finding pro se felony defendants in federal court “do not appear to have done significantly worse than” those represented by counsel). Defendants who elect self-representation often do so because of concerns over the quality of their counsel. Id. at 428-29, 460-73. While this study casts doubt on the general assumption that counsel is clearly superior to self-representation, defendants who lose counsel via waiver by conduct or forfeiture have not self-selected in the same manner—though their misconduct might express underlying dissatisfaction with counsel’s adequacy—which may mean they would have different success rates.

162 McAllister, supra note 111, at 1259-62.
likely making his odds at trial even worse. So long as counsel—whose time preparing for trial will have been wasted by requiring the defendant to proceed pro se—is willing to proceed, a last-minute act of dilatory conduct via refusal to choose between rights is thus perhaps best met by proceeding with counsel. This result may also be preferable where the defendant, while not opposing representation by his current appointed counsel, requests some kind of hybrid-counsel procedure, so long as the request has not undermined the purpose of the right or generated an acrimonious relationship with counsel. By proceeding with counsel in such cases, both the court’s and defendant’s interests are satisfied: judicial economy, the administration of justice, and the purpose of counsel—ensuring a fair trial—are not in tension.

But requiring a defendant to proceed with counsel is not always the better alternative. And forfeiture of self-representation—the legal framework the proposal uses to achieve that result—does not fit comfortably with concerns underlying the rights to counsel and self-representation. As with contempt, a defendant intent on delaying proceedings or believing he has nothing to lose could continue to cause trouble for the court or his counsel. This misconduct threatens the judicial interests allegedly protected by the proposal. Insofar as this proposal risks discouraging defendants from raising legitimate grievances with appointed counsel, the risk of misconduct and its attendant courtroom difficulties increases. A defendant who raises a grievance and is, upon its rejection, warned that raising a further ungrounded complaint will result in loss of counsel at least knows the court will consider a further complaint should another issue arise (and ideally, at the hearing, was given an idea of what distinguishes a legitimate grievance). There, whether to raise a future complaint or request to proceed pro se is entirely in his hands and he can evaluate the risks. But a defendant who is told outright that he will proceed with counsel and the matter is closed has little reason to believe

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163 Given that counsel is preferred to self-representation because of both the appearance of fairness and the assumption that an attorney is better able to present the defense, self-representation that is not chosen and is imposed without time to prepare is more troubling than self-representation that is imposed, but with time to prepare.

164 Requiring the defendant to proceed with counsel in these circumstances finds a parallel in most courts’ Faretta caselaw, where the timeliness of the request to proceed pro se bears on whether the request will be granted. See McAllister, supra note 111, at 1254–55.

165 As detailed in notes 202–214 and accompanying text, alignment with Giles’s intent requirement for forfeiture is unnecessary, so that proposed doctrinal justification does not save the proposal outside of the narrow possibilities mentioned above.

166 See supra notes 146–149 and accompanying text.

167 See supra text accompanying note 161. The defendant is free to keep delaying and disrupting the court, thereby manipulating it. Although he cannot change his mind because counsel is locked in, defendant’s conduct hinders judicial economy and the prompt administration of justice, as it requires the court to attend to this misconduct rather than another matter. The cumulative effect is to degrade the dignity and integrity of the system.
a future complaint, even if legitimate, would be heard. Nor can he request to proceed pro se, should he have made up his mind to do so. With no judicial outlet, the only channels for defendant’s frustration are the sort of “delays, disruptions, and dismissals” courts try to avoid with a forfeiture decision. Should that frustration turn to violence or attempted violence, the court has even more serious problems to address, ranging from whether the act created a conflict with counsel, which could require a mistrial if the violence occurred in court, to whether the defendant should be shackled in or removed from the courtroom if new or currently appointed counsel is retained.

Crucially, the proposal does not consider all of the defendant’s interests. While counsel may give defendant a better chance at trial, requiring him to proceed with counsel he has expressly stated he does not want, or with counsel that will not make the argument (however improper) he wants to offer, ignores the fact that the defense presented is thus “not his defense.” Insofar as “respect for the individual” is the “lifeblood of the law,” requiring a defendant to proceed with unwanted counsel or an unpreferred theory threatens to violate this commitment. True, the defendant has not expressly chosen to represent himself. But he has definitively made one choice—to reject the default state of affairs—and given that Sixth Amendment rights are held and exercised personally by the defendant, that is the only choice available for the court to respect and uphold.

Where a defendant does not actually want to have new counsel appointed, or a specific argument presented. They might want only to delay proceedings, and contesting counsel or the right to make an argument is a means to that end. In such cases, requiring appointed counsel and finding self-representation forfeit would not violate defendants’ preferences, contradict defendants’ choices, or infringe Faretta’s caution against imposing unwanted counsel. See McAllister, supra note 111, at 1259, 1262 (arguing such defendants have made a positive choice “not to elect either Sixth Amendment right but to instead obstruct the judicial process”). Even assuming intent and complaint can be disentangled, and that a defendant clearly wants to retain his counsel or does not care about making a specific argument (despite his own protests to the contrary and refusal to choose to proceed otherwise), it is not clear why he should be allowed to profit from this wrongdoing by keeping counsel. Indeed, he is intentionally wasting the court’s time and resources and undermining his own relationship with, and the purpose of, counsel.

Requiring defendants to proceed with counsel arguably respects defendants’ freedom in the long run. See id. at 1263 (“[A]ppointed counsel . . . reduce[s] the potential for erroneous convictions, and there is no better way to curtail a defendant’s freedom than to place him behind bars.”). But see supra note 161. And perhaps cases with especially high stakes justify the proposal and an attempt to
not want counsel, the advantage of having counsel “can be realized, if at all, only imperfectly.” Ensuring that criminal proceedings are conducted fairly is of societal concern, but it is ultimately the defendant who will “bear the personal consequences of a conviction.” Requiring an unwilling defendant to proceed with a state-appointed attorney “can only lead him to believe that the law contrives against him.” The result of respecting the defendant’s refusal to accept the default—that is, appointment of counsel—necessarily results in self-representation. Refusing to choose is a voluntary action. Where the defendant knew of the consequences of that action, it is a sufficient basis for finding waiver by conduct of the right to counsel rather than forfeiture of the right to self-represent.

Moreover, forfeiture, in the context of representation rights, occurs where behavior is egregious, on the assumption that relinquishing a right without warning requires a high bar for misconduct. The right to self-represent is just as fundamental as the right to counsel. There is thus no reason the former should be subject to a lower bar for forfeiture than the latter. And yet, there is no reason to believe that the defendant this proposal acts upon has committed an act that rises to the level of egregious misconduct necessary for finding forfeiture of the right to counsel.

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look out for defendants’ long-term interests. But if a defendant is warned of the stakes and the risks of his conduct, he can take responsibility for his long-term interests.

176 Faretta, 422 U.S. at 834.
177 Id.
178 Id. A defendant who already distrusts his lawyer can hardly be said to believe he will receive a fair trial or that the state is protecting his best interests, especially if he is then convicted. However much greater the defendant’s odds with counsel, to a defendant who distrusts the state, requiring him to proceed with counsel he does not want might look like it ensures his conviction. Cf. People v. Arguello, 772 P.2d 87, 89, 96 (Colo. 1989) (finding the defendant, who did not want to self-represent but refused several appointed attorneys because he distrusted the entire public defender’s office, did not have sufficient knowledge for waiver by conduct); Hashimoto, supra note 161, at 460-76 (finding felony defendants who elect self-representation often make this choice due to legitimate concerns about the quality of appointed counsel or ideological concerns about having a state agent present their defense).

179 Supra notes 66, 86–88 and accompanying text.
180 See Faretta, 422 U.S. at 832 (finding no evidence the Framers thought the right to self-representation was inferior to the right to counsel).
181 This is especially true in light of the author’s agreement that violence can trigger forfeiture of that right. McAllister, supra note 111, at 1265.

Ultimately, no right should be forfeited because of the refusal to choose. Instead, the defendant should be given warnings about future misconduct and required to proceed, for the time being, with counsel. See supra note 159. Note that the proposal cannot be saved by recasting it as waiver by conduct of the right to self-represent. First, that right was not being exercised, so waiving it by conduct is conceptually hard to accept. Second, where the solution is meant to address intentionally dilatory conduct, loss of the right to self-represent poses no deterrent function. However, the practical result of the proposal may sometimes be doctrinally or practically preferable, see supra notes 163–164 and accompanying text.
V. REVISING THE THEORETICAL UNDERPINNINGS OF WAIVER BY CONDUCT AND FORFEITURE

Despite their widespread usage, waiver by conduct and forfeiture are under-theorized in state court opinions. Most courts do little more than “unceremoniously reiterate the same line of cases,”\(^\text{182}\) while even the more detailed opinions lack sufficiently deep explanations. And critics properly highlight the need to bring clarity and consistency to the application of these measures.\(^\text{183}\) Prior caselaw is not as supportive as the state court cases suggest, but it provides more support than critics acknowledge. Waiver by conduct, in particular, has significant support in the Court’s caselaw, as well as in the concerns raised by non-majority opinions, while waiver in other criminal law contexts provides guidance for ensuring this waiver meets the “knowing and voluntary” standard. Forfeiture has less direct support, but its roots in a common law maxim that the Court still cites suggest that it cannot be quickly dismissed as doctrinally impermissible.

A. Caselaw on the Loss of Sixth Amendment Rights: Allen, Taylor, and Giles

Courts and commentators alike draw on caselaw regarding other Sixth Amendment rights in considering whether the right to counsel can be waived by conduct or forfeited. These rights are, as Faretta noted, personally held by the defendant, and work together to ensure a fair trial.\(^\text{184}\) As such, it is worth looking to other Sixth Amendment provisions and caselaw for insight on the right to counsel. This caselaw shows that misconduct can result in the loss of some Sixth Amendment rights, through waiver by conduct and even forfeiture. But a unified theory of Sixth Amendment rights, or perfect identity in their application and loss, is not guaranteed.\(^\text{185}\)

Allen and Taylor, the right to presence cases often cited as justification for loss of counsel,\(^\text{186}\) primarily support waiver by conduct as a practice, with only Taylor providing implicit support for forfeiture.\(^\text{187}\) Allen’s holding clearly

\(^{182}\) Gerwig-Moore, supra note 13, at 476.

\(^{183}\) Id. at 472-73, 489; McAllister, supra note 111, at 1230-31, 1263; Gerst, supra note 92, at 111.

\(^{184}\) 422 U.S. at 818-20.

\(^{185}\) For instance, while the standard that waivers be voluntary and knowing, see Johnson v. Zerbst, 304 U.S. 458, 464 (1938), applies to all constitutional rights, this unity is at a high level of generality, and the specific contours of waiving a right can look very different in context. Compare, e.g., Faretta v. California, 422 U.S. 806, 835-36 (1975) (discussing waiver of the right to counsel), with Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (discussing waiver of the right to remain silent).

\(^{186}\) Supra notes 94–96 and accompanying text.

\(^{187}\) For a brief summary of Allen, see supra notes 97–99 and accompanying text. For a brief summary of Taylor, see supra notes 100–102 and accompanying text.
references a warning made by the trial court.\textsuperscript{188} Although it is not clear that the warning was constitutionally required,\textsuperscript{189} the case does suggest, at least, that waiver by conduct is possible in other contexts.\textsuperscript{190} This reading is supported by \textit{Faretta}, which cited \textit{Allen} for support in allowing courts to revoke self-representation where a defendant “engages in serious and obstructionist misconduct,” observing that the right “is not a license to abuse the dignity of the courtroom.”\textsuperscript{191}

\textit{Taylor} is more complicated, insofar as the opinion contains some suggestion that it supports forfeiture, not merely waiver by conduct, though evidence for the latter is ultimately stronger. Unlike the trial court in \textit{Allen}, the trial court in \textit{Taylor} gave the defendant no express warning of the consequences of misconduct before finding his right to presence was lost. The Court clearly rejected the argument that a warning was required where the defendant obviously knew of his right to be present, even though it also never indicated that the trial court had made him aware of the right.\textsuperscript{192} Implicitly invoking the maxim against allowing profit by wrongdoing,\textsuperscript{193} the Court went on to quote Justice Brennan’s concurrence in \textit{Allen}: “[T]here can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward.”\textsuperscript{194} The lack of judicial involvement and implicit invocation of the maxim might mean the Court was imprecise in labeling the outcome of the case. Perhaps in “effectively waiv[ing]” his right,\textsuperscript{195} the defendant actually forfeited it. But the Court’s emphasis on the defendant’s knowledge of not just his right but the consequences of his action cuts the other direction, and

\begin{itemize}
\item \textsuperscript{188} Illinois v. Allen, 397 U.S. 337, 343 (1970) (holding that a defendant can lose his constitutional right to be present at trial “if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom”).
\item \textsuperscript{189} Cf. United States v. Goldberg, 67 F.3d 1092, 1101 (3d Cir. 1995) (“Whether or not the warning was required as a matter of constitutional law or under the particular facts is somewhat unclear.”).
\item \textsuperscript{190} Id. (“Suffice it to say that the [Allen] Court has approved a trial court’s decision to deprive a defendant of a fundamental constitutional right at least where the defendant is aware of the consequences of his actions, but regardless of whether the defendant affirmatively wishes to part with that right.”).
\item \textsuperscript{191} \textit{Faretta} v. California, 422 U.S. 806, 834 n.46 (1975).
\item \textsuperscript{192} The defendant in \textit{Taylor} argued he should have been “expressly warned” of the consequences of his absence; in rejecting this claim, the Court found his voluntary act “effectively waived” the right to presence where it was “wholly incredible to suggest” that he “entertained any doubts” about his right or the consequence of his act. \textit{Taylor} v. United States, 414 U.S. 17, 19-20 (1973) (per curiam).
\item \textsuperscript{193} See Giles v. California, 554 U.S. 353, 357, 365-68 (2008) (noting the historical pedigree of the common law maxim “that a defendant should not be permitted to benefit from his own wrong”).
\item \textsuperscript{194} \textit{Taylor}, 414 U.S. at 20 (quoting \textit{Allen}, 397 U.S. at 349 (Brennan, J., concurring)).
\item \textsuperscript{195} Id.
\end{itemize}
suggests the case is truly about waiver. Although forfeiture can occur where a defendant has this knowledge, the Court need not have considered the question; unlike in the waiver by conduct inquiry, which emphasizes the defendant’s knowledge of his right and its consequences, knowledge is not a necessary part of the forfeiture inquiry.\textsuperscript{196} And crucially, the Court expressly referenced the waiver standard from \textit{Johnson}.\textsuperscript{197} Thus, \textit{Taylor} is in the same waiver-by-conduct line as \textit{Allen}.\textsuperscript{198}

\textit{Taylor} goes further than \textit{Allen}, however, by supporting waiver by conduct even without an express warning or specific intent on the defendant’s part.\textsuperscript{199} It also suggests a low bar for the knowledge requirement.\textsuperscript{200} And \textit{Taylor}’s reference to the maxim suggests that forfeiture by wrongdoing is a relevant consideration in circumstances that also concern waiver by conduct. At the least, given that forfeiture by wrongdoing is a long-established concept, courts and commentators should not read the lack of express approval for such a measure as foreclosing that possibility.

\textit{Giles}, a recent case about forfeiture and a Sixth Amendment right, is a tempting place to look for answers regarding the nature of forfeiture in the context of the right to counsel.\textsuperscript{201} At defendant’s trial for murdering his ex-girlfriend, the trial court in \textit{Giles} admitted into evidence statements she had made to the police about a domestic violence incident several weeks before her murder.\textsuperscript{202} The issue before the Court was whether a defendant who prevents a witness from testifying against him at trial has thereby forfeited

\begin{footnotes}
\footnotetext{196}{The question of knowledge could be relevant in some forfeiture cases today, wherein the court considers whether the defendant’s behavior is sufficiently egregious to give rise to this sanction and decides that his knowledge elevates the severity of his conduct. But there is no indication the \textit{Taylor} Court was evaluating degrees of behavior.}
\footnotetext{197}{\textit{Taylor}, 441 U.S. at 19-20. \textit{Cf. Goldberg}, 67 F.3d at 1100 (arguing that where a court did not discuss \textit{Faretta} or \textit{Johnson}, its decision was based on forfeiture, not waiver, despite using only the latter term).}
\footnotetext{198}{\textit{But see Gilchrist} v. O’\textit{Keefe}, 260 F.3d 87, 95-97 (2d Cir. 2001) (characterizing \textit{Allen} and \textit{Taylor} as forfeiture cases and not discussing waiver by conduct). A number of state courts cite \textit{Gilchrist}, and at least one does so in arguing that there are only two means of relinquishing counsel, not three. See \textit{State} v. \textit{Suriano}, 893 N.W.2d 543, 553-54 (Wis. 2017).}
\footnotetext{199}{\textit{See Taylor}, 441 U.S. at 19-20.}
\footnotetext{200}{\textit{See id.} at 20 (rejecting the argument that waiver requires express warning or knowledge). For how these features should relate to waiver by conduct in the context of counsel, see infra Section VI.B.}
\footnotetext{201}{\textit{See McAllister}, supra note 111, at 1267 (discussing \textit{Giles}); \textit{Carlson}, supra note 111, at 826-28, 837 (same). \textit{Faretta} also drew a connection between the right to counsel and the right to presence rooted in the Sixth Amendment’s Confrontation Clause. \textit{See Faretta} v. \textit{California}, 422 U.S. 806, 816 (1975) (observing that the right to presence was based on the idea that a defense may be better presented if the defendant is present because he can then “give advice or suggestion or even . . . supersede his lawyers altogether and conduct the trial himself”) (emphasis omitted). That clause is also the source of the right to directly confront witnesses—the right at issue in \textit{Giles}.}
\end{footnotes}
his Sixth Amendment right to confront witnesses against him. Pre-Giles, some courts found defendants could forfeit this right through any conduct that prevented a witness from testifying, a holding that might support forfeiture of the right to counsel, regardless of intent, as well. Giles, however, overruled those decisions and held that a defendant whose conduct prevents a witness from testifying against him forfeits his confrontation rights only if he acted with the intent of preventing the witness from testifying. In light of this holding, it is tempting to argue that forfeiture of counsel needs to be modified to reflect a more specific intent. But given the specificity of Giles’s reasoning and holding, that case alone is an insufficient basis for imposing an intent requirement in other Sixth Amendment contexts.

Giles was not about forfeiture broadly speaking. Instead, it addressed the narrow question of how forfeiture by wrongdoing affected the right to confrontation during the Founding era. The Court recognized that forfeiture principles are themselves broad, sounding in the maxim that “a defendant should not be permitted to benefit from his own wrong.” But the case turned on whether application of this ancient maxim to confrontation was, as a matter of historical, Founding-era practice, limited to wrongdoing with the specific intent of preventing a witness from testifying. The opinion focused on historical cases and treatises to determine the common law rule within this context, and found that confrontation rights are indeed forfeit only when the defendant prevented the witness from testifying with the specific intent of preventing his testimony. The particularity of the Court’s inquiry and holding make it unlikely this narrow forfeiture rule regarding confrontation is applicable to other rights, even Sixth Amendment rights, absent independent evidence of their common law development.

Giles suggests that courts need to rein in forfeiture of counsel as currently practiced if the common law at the time of the Founding indicated a narrower form of forfeiture applied to that right. But because indigent defendants did not have the right to state-appointed counsel at the time, Founding-era evidence as to the scope of the right to counsel may not map neatly onto the cases confronting courts today. Without historical evidence regarding the

203 Id. at 355.
204 Id. at 357, 366-67.
205 Id. at 359-68.
206 Id. at 358.
207 Id. at 365-68.
208 Id. at 359-65.
209 Id.
210 Cf. id. at 365 (discussing why common law authorities narrowly applied the broad maxim in the confrontation context).
211 If, for instance, courts had a particular view of motions to withdraw because of client-created problems, such as requiring defendants to proceed pro se or granting a continuance to hire
application of the ancient maxim to the right to counsel, there is no support for a unified theory of forfeiture, applicable across rights, that is more specific than the maxim itself supplies.

The logic underlying the tailored application of the maxim to the confrontation right supports the unlikelihood of a unified theory of Sixth Amendment forfeiture at this level of specificity. The purpose of forfeiture by wrongdoing is preventing abuse of a right. Although a narrow form of forfeiture is necessary in the context of confrontation rights for the sake of protecting a defendant’s other rights, there is no reason for a similarly narrow form of forfeiture to apply to counsel. The absence of an intent requirement for forfeiture of confrontation rights would “strip the defendant of a right that the Constitution deems essential to a fair trial” because the judge thought the defendant was guilty of the charged offense, which conflicts with the right to trial by jury.

In the context of the right to counsel, however, absence of an intent requirement does not turn a forfeiture decision into an inference about guilt, conflict with the right to jury trial, or infringe any other right. So long as the bar required for conduct to constitute forfeiture is high in practice, not just in theory, minor infractions will not serve as grounds for loss of a consequential right. Forfeiture of counsel thus comfortably sits within the broader incentive framework of forfeiture by wrongdoing.

B. Faretta: State Compulsion, Individual Choice, and the Purpose of Counsel

As discussed above, the Faretta Court was concerned with respecting not only a defendant’s interest in a fair trial but his choices and interest in presenting his own defense. The Court emphasized the concepts of choice and state-compelled counsel. This language suggests that requiring a defendant to proceed pro se is antithetical to Faretta, at least where the defendant actually does insist that he wants counsel—not self-representation—in spite of his conduct. But the doctrine is clear that defendants have no right to choose their appointed counsel, and courts need

new counsel, this might shed light on whether counsel could be forfeited. Even if permissible, however, the application would not necessarily be advisable in today’s complex trial context.

212 See Giles, 554 U.S. at 365 (“The absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them.”).

213 Id.

214 In wholly rejecting forfeiture of counsel, Gerst insists there is no basis in the Court’s caselaw for the doctrine but fails to discuss the maxim or Giles. See Gerst, supra note 92, at 110–11. Rejecting forfeiture as imprudent or impractical is defensible, but saying it has no basis in caselaw goes too far.

215 See supra notes 40–48, 171–178 and accompanying text.
not substitute counsel on a defendant’s whim. Where a defendant thus insists that he wants counsel, but not this counsel, and that he does not want to represent himself, a court is justified in deciding that he must proceed pro se where his discontent with counsel and the defense they will present is so strong that he repeatedly causes significant difficulties for his counsel and the court.

A defendant who first protests his counsel, but then acquiesces and raises no further complaint and engages in no further misconduct, may view this outcome—proceeding with appointed counsel he disagrees with or dislikes—as second-best. But he has definitively accepted it—not without some feeling of compulsion, perhaps, but not involuntarily, either. By contrast, a defendant who consistently resists appointed counsel is, if not required to self-represent, going to trial with a defense that is clearly not his and counsel that is wholly compelled. Where a defendant insists on an option that is not available to him, the best the court can do is proceed with the least coercive option. Because the defense ultimately belongs to the defendant, this means proceeding, in at least some cases, with self-representation. The defendant is not (or at least, should not be) penalized for complaining about counsel, per se. That alone cannot rise to the level of forfeiture, and no wrongdoing is involved. But once the defendant is informed of his rights, namely that he will proceed with this counsel or no counsel at all, his conduct is in his hands. Courts are not required to find waiver by conduct or forfeiture, but where, in the court’s judgment—with the benefit of its knowledge of the case, the defendant, counsel, and local resources—doing so would be proper, the court has solid theoretical justification for its decision.

Faretta noted that defendants have no right to abuse the criminal process and can therefore lose the right they wanted to exercise by their misconduct. This admonition applies equally strongly to the right to counsel, especially in light of the other interests at stake. Abuse of this right

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216 See supra notes 33–35 and accompanying text.
217 The fact that a court is doctrinally justified in adopting or applying the doctrines does not necessarily mean it should do so in a given case. See infra text accompanying note 219; Part VI.
218 Reluctance, miscalculation, and pressure do not necessarily make a choice involuntary or unconstitutionally coerced. Cf. infra notes 243, 246 and accompanying text.
219 Cf. Commonwealth v. Means, 907 N.E.2d 646, 659 (Mass. 2009) (“Mindful that violence by defendants can and does occur in the court room, and taking into account considerations of the fair, efficient, and orderly administration of justice, we are not prepared to deprive judges of what may be a necessary response to exigent circumstances.”).
220 Faretta v. California, 422 U.S. 806, 834 n.46 (1975). Faretta is not clear, however, on whether this misconduct must be intentionally abusive. The concern that defendants “may use the courtroom for deliberate disruption of their trials,” id., suggests an intent requirement. Yet allowing judges to “terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct,” id., could mean that conduct that is voluntary and by its nature obstructionist can be enough to terminate the right, even absent intent.
not only delays resolution of the defendant’s case and impedes the court’s dignity and the administration of justice, but also wastes the resources available to other defendants who did not fail to conduct themselves appropriately and are harmed by the misconduct of other defendants.

C. Considering State Interests: Brennan’s Allen Concurrence, the Faretta Dissenters, and Resource Scarcity

Critiques of the interest analysis supporting the doctrines take two forms. First, critics point to the outcome of the balancing itself, and instead favor the right to counsel. Second, commentators criticize the application of waiver by conduct and forfeiture of counsel. The first set of criticisms undervalues the interests of other actors in the criminal justice system, including courts, witnesses, victims, and other defendants. The second set raises legitimate concerns about the process of forfeiture. But these concerns should not be mistaken for reasons to end the doctrine, only to narrow and improve it. The first set of criticisms is addressed here, and the second is addressed below.

The societal interests at stake in waiver by conduct and forfeiture cases are perhaps best phrased in Justice Brennan’s short concurrence in Allen. Courts should look to his opinion when considering whether to adopt and how to implement these practices. Justice Brennan first offers a stark reminder of the historical context in which the criminal justice system is situated. He observes that the “[c]onstitutional power to bring an accused to trial is fundamental to a scheme of ‘ordered liberty’ and prerequisite to social justice and peace.” Justice Brennan condemned the notion that trial could be prevented by a defendant’s own voluntary misconduct, arguing that to allow a disruptive defendant to delay his trial “is to allow him to profit from his own wrong.” Despite this strong language, and clear invocation of the maxim of forfeiture by wrongdoing, he backed away from forfeiture, and toward waiver by conduct, in the next paragraph. It is notable, then, that Taylor—which rejected the argument that a defendant should have been given an express warning—quoted Brennan’s concurrence only for the absolute proposition that “there can be no doubt whatever that the governmental

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221 See supra Section III.B.
222 See infra Sections VI.A, VI.C.
224 Id. at 350.
225 See id. (“[N]o 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.”).
prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward.”

Surprisingly, the concerns of the Faretta dissenters provide strong support for waiver by conduct and forfeiture. The dissenters worried about the complexity of navigating criminal proceedings and the individual and societal need for fair trials. These concerns for defendants’ rights and interests must factor into whatever course of action the trial court takes. But insofar as Chief Justice Burger’s dissent strongly emphasized society’s interest in “seeing that justice is achieved,” requiring self-representation under waiver by conduct or forfeiture can be necessary for realizing this interest. A clever defendant, incentivized to delay his criminal proceedings and facing no counter-incentive to respect the court or his counsel, could drag out his case for months or years. Even a defendant who did not intend to cause a delay, but refused to heed the court’s warnings about his behavior, could have this effect. This delay not only fails to advance society’s interests, but actively undermines them; it is impossible to see justice achieved when the defendant refuses to allow it to take place. Concern for societal interests was further reflected in the dissenters’ worry that self-representation would burden the resources of the criminal justice system. But well-reasoned, consistently-followed guidelines for waiver by conduct and forfeiture would mitigate the concern about appellate overruling while easing the burden of resource constraints at the trial level. Delays due to defendant misconduct cost the time of courts and attorneys, at the expense of defendants to whom those resources could be otherwise directed. In a system often defined by scarcity, repeatedly rewarding the misconduct of some defendants—even a small number—has significant negative effects on defendants who have done nothing to warrant such consequences.

226 Taylor v. United States, 414 U.S. 17, 20 (1973) (per curiam) (quoting Allen, 397 U.S. at 349 (Brennan, J., concurring)).
227 Faretta v. California, 422 U.S. 806, 838-40 (1975) (Burger, C.J., dissenting); id. at 849 (Blackmun, J., dissenting).
228 Id. at 840 (Burger, C.J., dissenting).
229 See, e.g., State v. Rasul, 167 P.3d 1286, 1290 (Ariz. Ct. App. 2007) (finding defendant, who had been represented by eighteen different attorneys, at least twelve of whom he expressed problems with or threatened, had engaged in a “ploy to delay trial” and forfeited the right) (internal quotation marks and citation omitted); Walker v. Commonwealth, 839 S.E.2d 123, 127-28 (Va. Ct. App. 2020) (finding defendant’s creation of conflicts with all eight appointed counsel, resulting in nearly thirty continuances, a strategy to delay trial).
230 See supra notes 137–138, 223 and accompanying text.
231 Faretta, 422 U.S. at 845 (Burger, C.J., dissenting) (“It hardly needs repeating that courts at all levels are already handicapped by the unsupplied demand for competent advocates . . . ”).
D. Waiver in Other Criminal Contexts

Much of the difficulty in analyzing and applying waiver by conduct stems from confusing this means of losing counsel with the express waiver of the right to counsel and affirmative selection of the right to self-represent. Faretta and the right to represent oneself assume the defendant affirmatively and deliberately chose between two rights, intending to exercise one and not the other: The defendant unequivocally invokes the right to self-represent, knowing what he risks in doing so. This waiver process is built on the general requirement that waivers be knowing and voluntary. Openly acknowledging and confronting the fact that waiver by conduct results in self-representation but is not the same as asserting that right via express, intentional waiver of the right to counsel would allow courts to focus on the underlying waiver standard. That standard guides the application of waivers in other criminal contexts which also might appear questionably voluntary or knowing, and drawing on judicial experience within these contexts should help courts reflect on waiver by conduct with respect to counsel.

For instance, in the Fifth Amendment context, so long as a Mirandized defendant understands the warning he received and is not coerced by the police, the choice to speak constitutes a waiver of the right to remain silent. Although custodial interrogation is inherently coercive, “full comprehension” of the rights at issue dispels that coercion. While the government must demonstrate that the Miranda warning was understood, and the statements uncoerced, there is no “formalistic waiver procedure.” If a defendant undertakes an action “inconsistent” with the exercise of his known rights, his act constitutes a “deliberate choice to relinquish” the rights. The mere act of speaking to answer a question is sufficient to waive the right, even without an express statement of the defendant’s intent to do so. While this waiver is thus “less formal than a typical waiver on the record in a courtroom,” it satisfies the Johnson standard. The lower formality is justified by the “practical constraints and necessities of interrogation,” as well as the advisory purpose of Miranda warnings.

Plea bargaining also involves difficult questions about waiver. The constitutionality of waiving rights via a guilty plea is well established, so long
as the defendant does so voluntarily and with knowledge of the consequences. The possibility of external pressure to plead guilty has long raised questions about the voluntariness of plea bargains. But even where the defendant is motivated by the hope of lesser punishment and influenced by government actions, the plea is not rendered involuntary. So long as the defendant is aware of the consequences of a plea, and absent improper pressure such as threats or misrepresentation, the plea is deemed voluntary. The voluntariness of the plea does depend, in part, on the defendant’s knowledge. And a plea is intelligently made if, among other things, the defendant knows the nature of the charge and is competent. Even if pleading guilty was, in retrospect, not in the defendant’s best interests, the waiver is still valid. Given the high stakes of a guilty plea, the Court has emphasized the importance of thorough engagement by the trial court, ensuring the defendant understood and voluntarily waived his rights. While guilty plea waivers are express, the concerns here bear on all forms of waiver because of the underlying Johnson standard, even if the specific context ultimately calls for a different implementation of that standard.

These imperfect but well-established forms of waiver demonstrate that waiver is a context-specific doctrine and inquiry. This inquiry should account for the practical realities of the situation and the rights at stake for defendants. Its touchstone is a voluntary act concerning known rights. In the context of counsel, courts should draw on judicial experience with Miranda and its connection to the practical needs and purpose of the situation, which justify waiver by conduct and a less formal standard than express waiver. The guilty plea context highlights the importance of judicial engagement,
considering the significance of the right to counsel\textsuperscript{250} and the importance of ensuring a defendant is competent to waive that right. And both contexts emphasize knowledge, which should strengthen courts’ reliance on the validity of a thorough warning to appropriately put the defendant on notice that further misconduct will result in waiver of counsel.

VI. GUIDELINES FOR DEVELOPING AND APPLYING THE DOCTRINES

Closely re-reading the cases and considering other waiver contexts reveals some theoretical difficulties with the loss of counsel, but also suggests guidelines and best practices. One of the key principles derived from these cases and contexts is the need to adapt waiver by conduct and forfeiture to the specific scenario confronting the court. This scenario is unique at both a high level—loss of counsel, rather than another right—and at a more particularized level, with respect to each individual defendant. Both the nature and timing of an individual defendant’s conduct are important factors. Careful consideration of the former can allow the court to address possible underlying concerns early on in the criminal process, accruing benefits for the court, defendant, and counsel that can last throughout the proceedings. And while timing is a complex consideration that cuts in different directions, once the court determines the loss of counsel is justified, it should also consider whether the right should be restored at the next stage of proceedings, even if it does not have to be renewed as a matter of law. Before finding waiver by conduct, the court should follow clearly established procedures to inform the defendant of the rights at stake, advantages of counsel, and consequence of future misconduct. To ensure the defendant’s knowledge and understanding, the court should engage in an express, detailed, on-the-record colloquy with the defendant. Forfeiture should be reserved for defendants who engage in violent or seriously threatening conduct, and only be imposed after a hearing in which the defendant receives significant due process protections.

In light of the theoretical concerns, practical difficulties, and competing interests and rights at stake, a comprehensive one-size-fits-all policy is unlikely to emerge. But given the weight of the right at issue, and the possibility that it need never be renewed once lost, these best practices, general principles, and specific considerations should broadly shape how courts address waiver by conduct and forfeiture.

\textsuperscript{250} While loss of counsel is not equivalent to pleading guilty, the complexity of trial means that representation by counsel can significantly affect the outcome for the defendant. See supra text accompanying note 19.
A. Considerations and Principles Applicable to Both Waiver by Conduct and Forfeiture

Some considerations and principles apply to both doctrines. One of the most important considerations is the conduct of the specific defendant before the court. Understanding the nature of his conduct and what might be driving it is essential to forming the appropriate response. As such, guidelines for finding relinquishment of counsel should begin by considering the defendant’s individual behavior and position. Each doctrine also must consider when the misconduct occurs, and whether relinquishment is permanent.

1. Type of Conduct

The conduct that might justify a defendant’s loss of counsel falls into several categories. Although these categories are not always mutually exclusive, considering them separately can reveal different needs, expose different problems, and suggest different solutions. Even where the broad approach to defendants in different categories is similar, keeping the distinctions in mind should guide the court’s specific interaction with a defendant and provide a framework and language for considering cases. And where a broad approach is proposed for a given category, the proposal must build in flexibility to address defendants at different stages of a criminal case and in their own unique circumstances.

A defendant might be unintentionally dilatory, engaging in behavior that delays proceedings without intending that result. He may genuinely have problems with his counsel—albeit problems that do not rise to the legal standard for substitution—or with the criminal justice system more broadly. Quickly moving to sanction these defendants will improve neither their situation nor behavior and gains the court little. A greater degree of patience and flexibility with a defendant who is simply frustrated or ignorant of the legal process and standards that courts and lawyers take for granted is warranted. If engaging with the defendant answers his questions and makes it possible for him to better cooperate with his attorney, the situation improves for everyone. This possibility also warrants giving the benefit of the doubt to a defendant whose intent is difficult to discern. If he actually was intentionally dilatory or keeps engaging in dilatory conduct after the court addressed the concerns, he is now clearly on notice as to his legal rights and the consequences of his actions. As such, a future decision finding he has lost

251 Cf. Hashimoto, supra note 161, at 460-76 (finding felony defendants who elect self-representation often make this choice due to legitimate concerns about the quality of appointed counsel or because of ideological concerns about having a state agent present their defense).
the right to counsel is on more secure footing. Insofar as this degree of engagement with defendants reveals recurring problems, it also presents an opportunity for judges to address those issues and encourage communication between counsel and client before problems arise in a specific case.

But other defendants are tactically dilatory, engaging in conduct intended to delay trial or other proceedings. This may occur under the guise of feigned disagreement, complaints about the attention counsel gives the case, or other problems—even violence or threats. The element of wrongfulness in this behavior might justify forfeiture. But finding truly wrongful intent can be difficult, as the defendant's conduct can plausibly reflect something more innocent, like frustration or ignorance of court procedure and legal standards. Because of this difficulty, and because the court loses little by taking a complaint at face value (just as it would for the clearly unintentionally dilatory defendant), giving the benefit of the doubt is often advisable. Both court and defendant benefit if the conduct was wrapped up in a remediable problem with counsel: The defendant can cooperatively move forward with counsel to best advance his case, and the court is free to turn its attention to other issues, assured that this problem is resolved. And if the underlying issue was not easily remediable, the defendant is more clearly aware of his rights and the consequences of his actions than he was before, strengthening the court's ability to address future problems and the defendant's ability to make informed decisions.

Defendants who refuse to choose between their rights could be either unintentionally or tactically dilatory. The former might genuinely have a dispute with counsel (albeit one that does not rise to legal significance), and also know that he lacks the skills for trial. He will not choose counsel, but also will not choose to represent himself. And the tactically dilatory defendant might fabricate a problem with counsel to present this dilemma. Here the court needs significant flexibility to consider the defendant's prior encounters with the court on this issue, the stage of proceedings, and other case-specific factors. If this is the defendant's first encounter with the court on the issue, it may be that requiring him to proceed with counsel—now informed of his rights and the consequences of his future choices—is the best course. But the

252 See, e.g., cases cited supra notes 55, 229; State v. Carruthers, 35 S.W.3d 516, 533-53 (Tenn. 2000); State v. Cummings, 546 N.W.2d 406, 416-21 (Wis. 1996).

253 Giving the defendant the benefit of the doubt by taking him at his word and treating him with respect also helps build trust, which is particularly important for defendants who have had negative prior experiences with the judicial system.

254 See, e.g., People v. Kammeraad, 858 N.W.2d 490, 515 (Mich. Ct. App. 2014) (finding defendant's conduct, which included refusal to choose between rights, could reasonably be characterized as intentionally dilatory).

255 See supra notes 163–178 and accompanying text.
specificity of the situation may also give the court greater insight into the defendant’s intent, and so call for a different response.

Defendants who engage in violence or threats of violence present different problems than defendants who are merely dilatory.256 Violent or threatening conduct can sometimes be a tactical attempt to delay, but that is not a given. While intent can be part of determining whether counsel was forfeited or waived, the court should also keep in mind that alternative measures might be workable. These measures include shackling a defendant or removing him from the courtroom, though each has negative consequences the court should weigh against the harm from loss of counsel.257 And because violence or threats can strain the client-attorney relationship to a greater degree than disagreement, bar complaints, and other uncooperative conduct, the court must also consider whether counsel could effectively represent the defendant at all.258

Some defendants who engage in disruptive, dilatory, or violent conduct suffer from mental illness.259 Their mental states create questions about the voluntariness of the action at issue and their competency to represent themselves. These questions and possibilities should give the court pause before it conducts a forfeiture or waiver-by-conduct inquiry. Where mental illness is a possibility, the defendant ought to be evaluated before a decision regarding counsel is made.260 And because even defendants who are competent to stand trial and are not mentally ill may nonetheless not be competent to represent themselves, courts should consider the individual circumstances of the defendant before finding forfeiture or waiver by conduct.

2. Timing of Misconduct

Timing is relevant to relinquishment of counsel in two ways. First, what critical stage of the criminal case is the defendant preparing to face? Second, at what point within that stage is the defendant—at trial, for instance, is defendant months away, days away, or has it already begun? These questions

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256 See, e.g., cases cited supra notes 57, 169.
257 See supra note 147 (detailing negative consequences of restraining a defendant).
258 Cf. State v. Fualaau, 228 P.3d 771, 777-78 (Wash. Ct. App. 2010) (noting defendant’s violent outburst at trial could create a conflict of interest, which is typically grounds for substitution of counsel, but instead finding his conduct grounds for forfeiture of representation rights).
259 See, e.g., Commonwealth v. Means, 907 N.E.2d 646, 663-64 (Mass. 2009) (noting the defendant had a history of mental illness that may have contributed to his threatening conduct towards counsel and faulting the trial court for insufficiently inquiring into these facts).
260 See id. at 661 (noting courts have a duty to ensure a mentally ill defendant is not forced to proceed alone and therefore requiring a competency hearing before finding relinquishment of the right to counsel where there is indication of a mental disorder).
are rarely discussed. When they are, courts recognize that they matter to the
decision of whether to require the defendant to proceed without counsel.261

While counsel is required at every critical stage, it is possible that some
stages are “more” critical than others, and courts should be more hesitant to
require self-representation at those stages. Trial, for instance, is complex;
counsel may make a bigger difference there than at another stage.262 And
requiring the defendant to proceed pro se on the eve of trial limits his ability
to prepare while counsel’s sunk time goes to waste. This suggests that the
misconduct required to result in loss of counsel should be more severe, and
the defendant given more leeway, at this stage or with this timing. On the
other hand, the importance of the stage and the timing might suggest the
conduct is more culpable, and so the defendant should be held to account.
Given these countervailing considerations, the court should (1) consider any
evidence of wrongdoing or intent on the defendant’s part, wary of profiting
him by a decision, and (2) more heavily weigh the interests of other actors.
For example, is counsel willing and prepared to proceed, will the court’s time
be further wasted by a particular decision, and are there witnesses, victims, or
others with an interest at stake? Evaluating these and any other related
concerns helps account not only for the defendant’s interests but the broader
societal interest in fair and efficient administration of justice.

To some extent, arguing that courts sometimes should not find waiver by
conduct or forfeiture, and thus should require the defendant to proceed with
counsel, is at odds with Faretta and the notion of defendants’ choice.263 But
even in the pure Faretta-based express waiver context, most courts have taken
timing (in the second sense) into account.264 And where (as here) the premise
is defendant’s wrongdoing, or at least violation of an express warning,
accounting for other interests is not in irreconcilable tension with respecting
individual rights and choice, especially if the defendant might profit from his

261 See, e.g., State v. Allgier, 353 P.3d 50, 53-54 (Utah 2015) (acknowledging the procedural stage
is relevant to forfeiture, with trial requiring more severe misconduct, and finding defendant’s
dilatory conduct and threats were sufficient for forfeiture on direct appeal where he had pled guilty
and counsel had filed the opening brief, so consequences of the loss were limited to the reply brief
and oral argument); Fualaau, 228 P.3d at 777-78 (noting conduct at trial invites the possibility of
mistrial); Waterhouse v. State, 596 So. 2d 1008, 1014-15 (Fla. 1992) (finding sufficient knowledge for
waiver where dilatory, equivocating defendant was required to present closing argument, noting he
was only required to represent himself for the end of proceedings, but not stating how much weight
was given to that factor).

262 Cf. Means, 907 N.E.2d at 659 (noting forfeiture is usually invoked at a non-trial phase and
that losing counsel at those stages is less severe a result for the defendant than loss at trial).

263 See supra notes 171–178 and accompanying text (explaining that the right to proceed pro se
stems in part from the fact that the criminal justice system should not force unwanted counsel on a
defendant).

264 See McAllister, supra note 111, at 1254 (noting most courts require pro se requests be timely
made).
wrong. Severe effects on the court and other actors can justify a change in the usual position of requiring a defendant to proceed pro se.

3. Continuity of the Loss

The continuity of relinquishment of counsel via waiver by conduct or forfeiture is part of a larger discussion on the continuation of express waiver of counsel.\textsuperscript{265} If other Sixth Amendment rights are relevant guides to aspects of waiver by conduct and forfeiture of counsel, they could be brought to bear on this issue as well. The continuity of forfeiture of confrontation rights was not addressed in \textit{Giles} and might be wrapped up in the same historical considerations; bringing that context to bear on the forfeiture of counsel would thus be difficult. \textit{Allen}, however, specifies that the right to presence can be regained: “Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.”\textsuperscript{266}

The restoration in \textit{Allen} does not, however, translate perfectly to the context of counsel. Here, case-specific factors alter the analysis to a greater degree than they do in the context of the right to presence. On the one hand, the right to counsel could be restored in waiver-by-conduct cases where the defendant makes a credible commitment to not engage in further misconduct. Just as a defendant can be trusted to comport himself at trial even after misconduct, if a defendant can now be trusted to not undermine the purpose of counsel or the orderly administration of justice, then he should be allowed to be represented by counsel. On the other hand, while a defendant could be removed and returned to the courtroom more than once, flip-flopping between representation by counsel and self-representation is often impractical. For instance, while the change may be possible when trial is yet months away, the issue looks different when trial is only a few weeks, or days, from the defendant’s misconduct or promise of good behavior. The delays necessary to hold hearings and get counsel caught up (or give the defendant time to prepare) could be lengthy and would be a significant incentive for tactically dilatory defendants. Thus, even if relinquishment of counsel due to waiver by conduct could be undone within the same critical stage, its

\textsuperscript{265} See, e.g., Jona Goldschmidt, \textit{Has He “Made His Bed, and Now Must Lie in It”? Toward Recognition of the Pro Se Defendant’s Sixth Amendment Right to Post-Trial Readmonishment of the Right to Counsel}, 8 DEPAUL J. FOR SOC. JUST. 287, 290 (2015) (arguing that defendants have a continuing right to reappointment of counsel after express waiver). \textit{But see id.} at 352 (suggesting relinquishment due to misconduct may not require reappointment).

occurrence would be heavily dependent on the nature of defendant’s prior conduct and the timing of the case.  

Because there is a right to counsel at each critical stage, and on direct appeal,  

it is possible that the right renews or reattaches whenever a new critical stage (or direct appeal) is reached. If so, no Allen-like promise to not abuse the right to counsel would be necessary. Forfeiture cases would also result in restoration of the right. Regardless of whether the right renews as a doctrinal matter, courts should seriously consider adopting this practice. The right to counsel is significant, and a defendant who lost the right by misconduct once may be unwilling to repeat that loss in the future. Penalizing him for past misconduct, even intentional misconduct, would serve little purpose. And if the court is worried the misconduct will recur, waiver by conduct would be relatively easy for the court to set up; alongside the reappointment of counsel, it could provide the requisite warnings. The court would thus face reduced risk when dealing with a particularly difficult defendant.

B. Waiver-Specific Principles

Taylor sheds light on the constitutional requirements for waiver by conduct, but courts should, in some instances, go further in protecting the right to counsel than the case suggests would be necessary. For instance, Taylor suggests a hearing with a warning or colloquy is not required before finding waiver. In Taylor, the appellate court’s review of the record led it to conclude the defendant was aware of his right to be present. The Supreme Court accepted this conclusion even while it rejected the defendant’s argument that, absent an express warning, his waiver was invalid. But because of the nature and stakes of the right to counsel, and the difficulty or impossibility of regaining it once lost, courts should engage in such a colloquy and expressly warn defendants of the importance of counsel and consequences of misconduct. If courts proactively address defendants who engage in dilatory conduct, this exchange would be clearly in the record, so the court need not later splice together parts of the record to try to determine

267 These considerations may be applicable in forfeiture cases as well. But because of the nature of forfeiture, it is not immediately clear that a defendant’s promise to comport himself can restore the right. Forfeiture requires more egregious conduct and involves a more drastic break with counsel than waiver by conduct. And there is a more punitive aspect to forfeiture than to waiver by conduct; forfeiture is connected to the maxim about wrongdoing, and unlike waiver by conduct, there is no concern with explaining how the result was knowingly and voluntarily chosen.

268 Supra notes 20–25 and accompanying text.


270 Id. at 19-20.

271 See supra note 250.
whether a defendant had sufficient knowledge. For instance, many dilatory defendants raise frivolous complaints about counsel and request substitute counsel. Hearings on this issue provide an ideal opportunity to warn the defendant that future misconduct could result in waiver, regardless of whether the currently-appointed counsel is retained or new counsel is appointed. Having this exchange on the record better protects the right to counsel and makes the notion of waiver by conduct—which is supposed to be a knowing relinquishment—less strained. Moreover, a clear record benefits judicial economy in the long run, simplifying appellate review of this issue and reducing the likelihood of reversal.

At this hearing, courts must be careful to not discourage defendants from raising legitimate concerns. Part of the warning should include an explanation of what does and does not count as a legitimate grievance against appointed counsel. Courts should also seriously consider substituting counsel at that hearing, regardless of the complaint’s legal validity, taking into consideration local resources, the sincerity of defendant’s complaint, and the possibility of unintentionally encouraging further misconduct. Giving the defendant a second chance to cooperate with new counsel where he had a legally invalid but sincerely held problem with current counsel might prevent further misconduct and ensure the defendant was not himself the problem. This would also promote a better relationship between defendant and counsel, thereby improving the defense and bolstering the defendant’s sense that he will be fairly represented.

But not all courts require on-the-record colloquies for express waivers under Faretta, meaning some will have to confront whether to implement the

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272 See supra notes 78–79 and accompanying text.
273 That courts often do this blunts the impact of Moore’s criticism, supra text accompanying note 114, but the point is well-taken that better upfront engagement, though it may seem like a resource drain at the time, will likely mitigate later and more serious drains on court resources.
274 Cf. McCarthy v. United States, 394 U.S. 459, 466 (1969) (noting clarity on appeal is one advantage to the inquiry conducted under FED. R. CRIM. P. 11 for guilty pleas); McAllister, supra note 111, at 1269 (noting one advantage of his proposal is the clarity it provides appellate courts).
275 The risk of chilling defendant’s exercise of his right to counsel by raising a legitimate grievance makes the recommendation to provide this warning alongside other standard warnings at an initial hearing, see Gerwig-Moore, supra note 13, at 485-86 and Gerst, supra note 92, at 112, a bad idea. It may be an unnecessary and confusing warning at that time, and a defendant with a legitimate grievance may not raise it for fear of the consequences of being incorrect. Moreover, if given alongside many other warnings, reliance on it as sufficient for the knowledge waiver requires is tenuous.
276 See Commonwealth v. Means, 907 N.E.2d 646, 659 n.19 (Mass. 2009) (“Where trouble in an attorney-client relationship extends through multiple counsel, it is less likely that the disquiet is due to the particular attorney-client relationship, and more likely that the difficulty is due to the client’s intransigence or misconduct.”).
277 Cf. Faretta v. California, 422 U.S. 866, 834 (1975) (“To force a lawyer on a defendant can only lead him to believe that the law contrivies against him.”).
two methods of waiver differently. Alignment between the two kinds of waiver contributes to a doctrinal consistency, and is perhaps easier to apply, as courts would not risk applying the wrong requirement for the type of waiver at issue. However, the two types of waiver are already significantly different. Waiver of counsel requires a clear invocation of the right to self-represent, and a knowing and voluntary waiver of counsel. Misconduct is, implicitly or explicitly, interpreted as that clear and express assertion of the right to self-represent, but that is a fiction by which the court is already departing from express waiver. Perhaps some inconsistency at the first step is further reason to want consistency at the second. But here, given the nature of the fiction at the first step, having a higher standard for the second step is preferable. The defendant is ultimately losing a right he has not intentionally chosen to waive, and the right at issue is a consequential one. His conduct is voluntary and knowing, but it was not intended to have this consequence, as opposed to the defendant who intends his expression to result in the loss of one right and exercise of another. A colloquy does not impose a heavy burden, and it carries other benefits. Courts should thus require an on-the-record colloquy for waiver by conduct, even where the jurisdiction does not require the same for express waiver.

Taylor also does not suggest that dilatory intent is necessary to waive a Sixth Amendment right. The Court never mentions the defendant’s intent, instead focusing on the voluntariness of his action and his knowledge. On this issue, because defendants have the requisite knowledge and given the practical concerns at stake, courts should follow Taylor and decline to impose an intent requirement. Disentangling dilatory intent from a genuine, if legally unfounded, problem with counsel is not easy. Unintentionally

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278 This risk cuts in both directions. Where the lower standard of in-the-record evidence applies to express waiver, mistakenly requiring an on-the-record colloquy inhibits the exercise of the right to self-represent, while applying the lower standard of in-the-record evidence to waiver by conduct where the state courts actually require the higher standard of an on-the-record colloquy inhibits the exercise of the right to counsel.

279 Faretta, 422 U.S. at 835.

280 Supra text accompanying notes 272–275.

281 Taylor v. United States, 414 U.S. 17, 19-20 (1973) (per curiam). Allen likewise never mentions intent, though Brennan’s concurrence might suggest intent is required, see Illinois v. Allen, 397 U.S. 337, 350 (1970) (Brennan, J., concurring) (stating the right can be surrendered “if it is abused for the purpose” of delaying), as might Faretta, see supra note 220.

282 Cf. note 249 and accompanying text.

283 Courts often find intent after defendants have cycled through numerous attorneys. See, e.g., Walker v. Commonwealth, 839 S.E.2d 123, 127-28 (Va. Ct. App. 2020) (finding defendant who had eight appointed attorneys engaged in delaying strategy); State v. Rasul, 167 P.3d 1286, 1290 (Ariz. Ct. App. 2007) (finding defendant who had eighteen appointed attorneys was intentionally delaying). The sheer number of attorneys makes intent easier to discern in such cases. Although it is possible some complaints were sincere, the cases should never have reached that point. Earlier
dilatory conduct can be warned against, and while waiver is not forfeiture by wrongdoing, unintentional but dilatory conduct that was warned against and yet nonetheless repeated can be sufficiently wrongful to both mitigate concerns about intent and justify finding waiver. Because the court is not required to find waiver by conduct, it has the flexibility to consider various factors, such as the nature of the defendant’s action, his conduct over time, and local resource scarcity, in deciding whether to re-warn the defendant instead.\footnote{Cf. Commonwealth v. Means, 907 N.E.2d 646, 659 (Mass. 2009) (“Mindful that violence by defendants can and does occur in the court room, and taking into account considerations of the fair, efficient, and orderly administration of justice, we are not prepared to deprive judges of what may be a necessary response to exigent circumstances.”).}

\section{C. Forfeiture-Specific Principles}

Forfeiture should be limited to cases of violence or serious threats of violence. Given that forfeiture should be reserved for the most extreme cases of misconduct,\footnote{Supra note 66 and accompanying text.} there is no reason for the court to allow dilatory conduct or delay tactics to ever reach the level required for forfeiture, and line-drawing with respect to the severity of that type of conduct is a difficult and unnecessary complication. Where the court has failed to exercise its ability to manage its cases by proactively engaging with dilatory defendants, it should not use its own failure to act earlier as reason to sanction the defendant.\footnote{Cf. Gerst, supra note 92, at 112 (“In every case in which forfeiture of the right to the assistance of counsel has been ordered, a simple process involving a judicial warning at any time prior to or during a defendant’s misconduct would have been sufficient to justify a waiver by conduct.”). While wholly abandoning forfeiture should not be done, as this unnecessarily ties courts’ hands when dealing with truly egregious behavior, it should be a rare occurrence, and never for dilatory conduct. Some courts permit forfeiture in cases of nonviolence out of a concern that defendants intent on obstruction will refuse to cooperate in a waiver colloquy or sign a waiver form. See, e.g., Commonwealth v. Lucarelli, 971 A.2d 1173, 1179 (Pa. 2009) (finding the state rule of criminal procedure concerning waiver colloquies inapplicable in cases of forfeiture and worrying that, absent use of forfeiture, defendants who refused to engage in the required colloquy would “clog the machinery of justice”). While rules of procedure might appear to complicate the analysis in some states, a defendant’s refusal to cooperate amounts to a refusal to choose between rights, and can be treated the same way. See supra notes 159, 171–181 and accompanying text.}

As some courts have expressly required, a hearing should be held, with robust due process protections, before the court finds forfeiture.\footnote{Supra note 91 and accompanying text.} Loss of counsel without warning is a severe sanction, and while there are instances that justify it, a defendant should have a chance to object and demonstrate that he understands the seriousness of his conduct. While the court does have to expend time and resources to hold a hearing, this harm to the court is warnings against frivolous complaints would prevent both dilatory defendants from reaching this point and serially frivolous (albeit sincere) defendants from exhausting court resources.
insufficient to justify imposition of the sanction without further inquiry. If forfeiture is not justified, the hearing can also be used as an opportunity to warn the defendant that future misconduct can result in the loss of counsel. Such a warning would set up a waiver by conduct scenario wherein any misconduct, not just violence or threats, could result in that loss. Moreover, the hearing allows the court to ask why the defendant acted as he did. The defendant may not have been culpable at the time, or he may have been expressing a grievance with his representation. While no grievance justifies violence against counsel, a legitimate grievance might be reason to offer the defendant a second chance. This is especially the case where other factors, including the severity of the act, its timing, counsel's willingness to proceed, and defendant's sincere apology indicate forfeiture is too strong a measure. A hearing might also prevent a defendant who engaged in violence with dilatory intent from benefitting from his wrongdoing by ending with the retention, not dismissal, of counsel.

Some courts impose last resort and intent requirements on forfeiture, but neither should be adopted. Because forfeiture could conceivably be preferable to other alternatives, or imposed at a point unlikely to have serious effect, the rigidity of a last resort requirement goes too far. This is true although the underlying ideas—that courts should consider a wide range of options and be cognizant of the severity of forfeiture—are sound. And intent is not typically an element of forfeiture by wrongdoing. Absent strong evidence that intent would have been required at the Founding, or good reason to adopt an intent requirement now, imposing one is overly restrictive. Conduct sufficient to result in forfeiture of counsel already must rise to the level of egregious conduct, and finding such forfeiture on the basis of severe

288 Supra notes 259–260 and accompanying text.
289 Cf. State v. Montes, 442 P.3d 1247, 1256–57 (Utah Ct. App. 2019) (finding defendant's threat to headbutt counsel did not rise to the level of forfeiture where the record suggested it was made out of frustration with no intent to follow through, and immediately followed by an apology); Commonwealth v. Means, 907 N.E.2d 646, 663 n.24 (Mass. 2009) (observing that the defendant, not the attorney, disclosed the threatening letter to the court, even though defense counsel ethically could have, and that in the months between sending and disclosing the letter the defendant had apologized to the attorney and engaged in no further misconduct).
290 Cf. State v. Fualaau, 228 P.3d 771, 777–78 (Wash. Ct. App. 2010) (holding that where a defendant's violent conduct towards counsel is intended to result in a mistrial, he can be found to have forfeited the right to counsel free of the newly created conflict).
291 See cases cited supra notes 89–90.
292 See supra note 147(detailing negative consequences of restraining a defendant).
293 See, e.g., State v. Alligier, 353 P.3d 50, 53–54 (Utah 2015) (finding forfeiture based on less severe misconduct where the consequences of the loss were limited to the reply brief and oral argument on appeal).
294 Cf. supra text accompanying notes201–209 (discussing Giles, in which the Supreme Court found that the specific intent requirement for forfeiture of the confrontation right derives from the common law at the Founding).
wrongdoing is squarely within the traditional concept of forfeiture by wrongdoing.

CONCLUSION

Defendant misconduct with respect to the right to counsel poses difficult questions, doctrinally and practically, for trial courts. But by drawing on other criminal law doctrines, including forfeiture and the nature of waiver in other contexts, courts can create a flexible yet clear and consistent framework for addressing both the rights of defendants and the interests of other actors in the criminal justice system. Where misconduct is so severe that immediate loss of the right to counsel might be justified, courts’ touchstone should be the specific situation the defendant faces and presents. That unique circumstance should be uncovered in a hearing wherein the defendant receives robust due process protections. And where the misconduct is of a less serious nature, courts’ touchstone should be a consideration of the defendant’s situation and knowledge, as the court itself is in the ideal position to inform and assist the defendant in understanding his rights and the consequences of his actions.

APPENDIX A

STATES RECOGNIZING WAIVER BY CONDUCT

1. Alabama, see Ex parte State, 27 So.3d 582 (Ala. 2008)
4. Arkansas, see Burns v. State, 780 S.W.2d 23 (Ark. 1989)
6. Colorado, see People v. Arguello, 772 P.2d 87 (Colo. 1989)
8. Delaware, see Bultron v. State, 897 A.2d 758 (Del. 2006)
9. Florida, see State v. Young, 626 So.2d 655 (Fla. 1993)
10. Georgia, see Allen v. Daker, 858 S.E.2d 731 (Ga. 2021)
11. Indiana, see Poynter v. State, 749 N.E.2d 1122 (Ind. 2001)

295 This list includes states whose doctrine accepts waiver by conduct of the Sixth Amendment right to counsel, even if the court labels it by another term (e.g., “implicit waiver”), conflates waiver and forfeiture, or says the state accepts only waiver and forfeiture, but applies the label “forfeiture” to what the majority of courts would consider waiver by conduct. For further explanation of the criteria for including states, see supra note 71.
15. Maryland, see Broadwater v. State, 931 A.2d 1098 (Md. 2007)
18. Minnesota, see State v. Jones, 772 N.W.2d 496 (Minn. 2009)
19. Mississippi, see McCollum v. State, 186 So.3d 948 (Miss. Ct. App. 2016)
21. Nebraska, see State v. Green, 471 N.W.2d 413 (Neb. 1991)
22. New Mexico, see State v. Stallings, 476 P.3d 905 (N.M. 2020)
23. New York, see People v. Smith, 705 N.E.2d 1205 (N.Y. 1998)
25. North Dakota, see State v. Benter, 974 N.W.2d 403 (N.D. 2022)
27. Oklahoma, see Burnham v. State, 535 P.3d 301 (Okla. Crim. App. 2023)
30. South Carolina, see Osbey v. State, 825 S.E.2d 48 (S.C. 2019)
31. Tennessee, see State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000)
32. Utah, see State v. Pedockie, 137 P.3d 716 (Utah 2006)
35. Wisconsin, see State v. Suriano, 893 N.W.2d 543 (Wis. 2017)

APPENDIX B
STATES RECOGNIZING FORFEITURE\textsuperscript{296}


\textsuperscript{296} This list includes states whose doctrine accepts forfeiture of the Sixth Amendment right to counsel, even if the court does not use that label. For further explanation of the criteria for including states, see \textit{supra} note 71.
4. Delaware, see Bultron v. State, 897 A.2d 758 (Del. 2006)
5. Georgia, see Allen v. Daker, 858 S.E.2d 731 (Ga. 2021)
7. Maine, see State v. Nisbet, 134 A.3d 840 (Me. 2016)
11. Minnesota, see State v. Jones, 772 N.W.2d 496 (Minn. 2009)
12. Mississippi, see McCollum v. State, 186 So.3d 948 (Miss. Ct. App. 2016)
17. South Carolina, see Osbey v. State, 825 S.E.2d 48 (S.C. 2019)
18. Tennessee, see State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000)
21. Wisconsin, see State v. Suriano, 893 N.W.2d 543 (Wis. 2017)