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Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution

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FORFEITURE OF THE RIGHT TO COUNSEL: A DOCTRINE UNHINGED FROM THE CONSTITUTION

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I. INTRODUCTION

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹

The Sixth Amendment right to the assistance of counsel in criminal cases received little attention from the United States Supreme Court until the 1930s.² In a

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¹ U.S. CONST. amend. VI.

² Only five earlier cases offer any discussion of the right to assistance of counsel: *Cooke v. United States*, 267 U.S. 517, 534-35 (1925) (court may impose punishment for offense committed in open court without hearing evidence or according offender assistance of counsel); *Andersen v. Treat*, 172 U.S. 24, 30-31 (1898) (record showed that assistance of counsel was not denied); *Kipley v. Illinois ex rel. Akin*, 170 U.S. 182, 184, 187-88 (1898) (no federal question); *McKnight v. James*, 155 U.S. 685, 686-87 (1895) (error lies only to the highest court of a state); *Jugiro v. Brush*, 140 U.S. 291, 292, 296-98 (1891) (federal *habeas corpus* is not a remedy for failure of state court to provide counsel).

series of cases beginning in 1932,³ however, the Supreme Court held that the constitutional right to counsel is a fundamental right that extends to the states through the Fourteenth Amendment, entitling every indigent defendant to a court-appointed attorney in any criminal case where there is a possibility of a deprivation of freedom as punishment. The right to an attorney is so fundamental that the Supreme Court has carefully developed a set of requirements to ensure that an indigent defendant does not go to trial without an attorney unless there is an affirmative waiver of the right to counsel on the record, showing a knowing, voluntary, and intelligent relinquishment of the right to the assistance of court-appointed counsel.

Although the Supreme Court has provided detailed guidance to federal and state courts on what the record must show to support a finding that a defendant has voluntarily waived or relinquished his right to appointed counsel in his defense, the Supreme Court has not addressed what the record must show for a finding that a defendant has lost his right to assistance of appointed counsel as a result of the defendant's own misconduct toward the court or the defendant's attorney. Both federal and state courts have recognized the authority of a court to terminate a defendant's right to appointed counsel where he has been previously warned on the record of the nature of misconduct that could result in a termination of his right to appointed counsel.⁴ Starting in 1995, however, state courts began imposing the sanction of forfeiture of the right to appointed counsel after the doctrine was approved that year in the *dicta* of two federal circuit court opinions.⁵ The doctrine of forfeiture of counsel required no prior warnings where the misconduct was found to be "extremely serious."⁶

The author contends that the doctrine of forfeiture of the right to assistance of counsel as a sanction for misconduct by a defendant towards the court or his counsel has no constitutional support in the principles that have defined the Sixth Amendment, is arbitrary in its application within the judicial system, and has become a refuge for courts, which have inadequately complied with established principles to protect fundamental rights.

Part II of this Article reviews the development of Supreme Court case law as it has interpreted the right to assistance of counsel under the Sixth Amendment. Part III traces the origin of using forfeiture of the right to appointed counsel as a sanction for misbehavior⁷ to two federal circuit court cases in 1995 and the subsequent adoption of the sanction of forfeiture in numerous state court decisions since that year. Part IV discusses the impact of federal legislation designed to limit *habeas corpus* review of state court decisions by federal courts. Part V sets forth the reasons

³ See *infra* Part II: Summary of Supreme Court Cases Interpreting the Sixth Amendment Right to the Assistance of Counsel.

⁴ See, e.g., *United States v. Moore*, 706 F.2d 538, 539-40 (5th Cir. 1983); *Jones v. State*, 449 So. 2d 253, 257 (Fla. 1984).

⁵ See *infra* Part III: The Doctrines of Waiver by Conduct and Forfeiture of the Right to Counsel.

⁶ See, e.g., *United States v. Goldberg*, 67 F.3d 1092 (3d Cir. 1995).

⁷ For purposes of this Article, references to the "sanction of forfeiture" or the "doctrine of forfeiture" are used interchangeably and should be construed as meaning the same thing.

for the author's contention that the forfeiture sanction violates established constitutional principles applicable to the Sixth Amendment right to assistance of counsel. Part VI offers suggestions on procedures courts can adopt to protect fundamental rights and still ensure a court's ability to effectively address misconduct.

II. SUMMARY OF SUPREME COURT CASES INTERPRETING THE SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL

"If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."⁸

In 1932, the Supreme Court in *Powell v. Alabama*⁹ set aside the convictions of eight black youths sentenced to death without the benefit of counsel. The Court acknowledged that the circumstances these defendants were in prevented them from having any opportunity to have obtained counsel on their own¹⁰ and precluded them from adequately representing themselves. The factors cited by the Court included their youth, public hostility, illiteracy, imprisonment, and friends and family who were in other states.¹¹ Under these circumstances the court held that:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . .¹²

The holding was narrow. It wasn't until 1961 in *Hamilton v. Alabama*¹³ that the Supreme Court held that a defendant in a capital case did not have to make a showing of particularized need or of prejudice resulting from the absence of counsel. Thereafter, assistance of counsel was considered a fundamental constitutional right essential to a fair trial in a capital case.

In *Johnson v. Zerbst*,¹⁴ the Supreme Court held that any defendant in a federal criminal case involving a felony offense who could not afford to retain a lawyer was entitled to the appointment of counsel. Justice Black, writing for the Court, stated, "The Sixth Amendment withholds from federal courts, in all criminal proceedings,

⁸ *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

⁹ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁰ Prior to *Powell*, indigent defendants were provided counsel only when it was "desired and provided by the party asserting the right." *Id.* at 68.

¹¹ *Id.* at 71.

¹² *Id.*

¹³ *Hamilton v. Alabama*, 368 U.S. 52 (1961).

¹⁴ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”¹⁵ He also wrote:

This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.¹⁶

In the landmark case of *Gideon v. Wainwright*,¹⁷ the Supreme Court extended the right of an indigent defendant to the appointment of counsel in non-capital cases to the states by finding that the right to assistance of counsel in such cases was a “fundamental right” essential to a fair trial and, therefore, applicable to the states through the Fourteenth Amendment.¹⁸ The Court’s opinion left unanswered, however, whether the right to the assistance of counsel extended to non-felony trials.

In *Argersinger v. Hamlin*,¹⁹ the Supreme Court extended the right of an indigent defendant to the appointment of counsel in all criminal trials, regardless of whether the offense was a felony or a misdemeanor.²⁰ The *Argersinger* Court found that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”²¹ The Court also clarified its position that the right to the appointment of counsel for an indigent defendant exists without requiring an affirmative demand of that right.²²

In *Faretta v. California*,²³ the Supreme Court held that an indigent defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he elects to represent himself.²⁴ In so holding, however, the Court recognized that “[w]hen an accused manages his own defense, he relinquishes . . . many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must ‘knowingly and intelligently’ forgo

¹⁵ *Id.* at 463.

¹⁶ *Id.* at 465.

¹⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁸ *Gideon* overruled *Betts v. Brady*, 316 U.S. 455 (1942), which had held the appointment of counsel was not a fundamental right essential to a fair trial.

¹⁹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

²⁰ *Id.* In so holding, the Supreme Court overruled its opinion in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held the right to appointment of counsel applied only to trials for “non-petty” offenses that were punishable by more than six months of imprisonment.

²¹ *Argersinger*, 407 U.S. at 37.

²² *Id.* at 37-38.

²³ *Faretta v. California*, 422 U.S. 806 (1975).

²⁴ *Id.* at 807.

those relinquished benefits.”²⁵ The Court directed that a defendant choosing to represent himself should be “made aware of the dangers and disadvantages of self-representation, so the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”²⁶

These cases, over a span of almost fifty years, establish the primary body of law developed by the Supreme Court on the Sixth Amendment right to assistance of counsel. They raise the right to the assistance of counsel under the Sixth Amendment to a fundamental right essential to a fair trial and extend that right to state court criminal proceedings. They establish procedures to protect against the loss of this fundamental right by requiring courts to establish on the record that a defendant who chooses to relinquish the right to counsel does so knowingly and voluntarily. In short, these cases place the burden of establishing a basis for the denial or termination of a right to the assistance of counsel on the court, and not on a criminal defendant, in order to ensure that the right to assistance of counsel at trial is treated as a fundamental right in fact and not just in theory.²⁷ It is against this backdrop that this Article will examine the case law that has developed in the state and federal courts on the effect of a defendant’s misconduct on his right to appointed counsel and the circumstances that permit a court to find a defendant has lost his right to the assistance of counsel in his defense.

III. THE DOCTRINES OF WAIVER BY CONDUCT AND FORFEITURE OF THE RIGHT TO COUNSEL

“At the other end of the spectrum is the concept of ‘forfeiture.’ Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant’s knowledge thereof and irrespective of whether the defendant intended to relinquish the right.”²⁸

The focus of this Article is on those cases in which a defendant has been held to have lost his right to the assistance of appointed counsel as a result of behaviors that have been disruptive to the trial process or threatening toward appointed counsel.²⁹

²⁵ *Id.* at 835.

²⁶ *Id.* at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

²⁷ See *Chapman v. California*, 386 U.S. 18 (1967) (holding that before a fundamental constitutional error can be held harmless, a trial court must be able to find it harmless beyond a reasonable doubt).

²⁸ *Goldberg*, 67 F.3d 1092, 1100 (3d Cir.1995).

²⁹ There is another category of cases where a defendant who is not constitutionally entitled to the appointment of counsel because of a finding that he has the ability to retain an attorney has been held to have waived his right to the assistance of counsel as a result of his failure or refusal to do so. In these cases, the Sixth Amendment right to the assistance of appointed counsel is not implicated unless there are factual issues regarding an ability of a particular defendant to afford an attorney or to have a fair opportunity to retain counsel in the criminal matter. See, e.g., *United States v. Bauer*, 956 F.2d 693, 694-95 (7th Cir. 1992) (where a defendant demanding court-appointed counsel despite his having \$544,000 in assets was deemed to have waived his right to counsel); *United States v. Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987) (where the defendant’s failure to timely retain counsel after claiming that he would

As noted in the introduction, the Supreme Court has not directly addressed these types of cases. One would surmise, however, that a Supreme Court, which was so careful in crafting minimum requirements that a court must follow in determining whether a defendant voluntarily relinquishes the right to appointed counsel and chooses to represent himself, would be equally careful to ensure due process protections where a defendant has lost the right to assistance of counsel due to behaviors found to be disruptive to the trial process or threatening to his attorney. At a minimum, it would appear there should be a requirement that a defendant be warned on the record that certain conduct could result in the loss of his right to appointed counsel.

*Illinois v. Allen*³⁰ may be instructive of how the Supreme Court would rule in the event that a defendant's misconduct could cause a loss of a Sixth Amendment right. In *Allen*, the Court considered whether it could remove an unruly defendant from the courtroom without violating his Sixth Amendment right to be present at his trial. The Court held:

A defendant can lose his [Sixth Amendment] 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 the trial cannot be carried on with him in the courtroom.³¹

The Court punctuated its intent by stating that “no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior.”³²

This, however, has not been the general rule in the state and federal courts that have found a defendant has either “waived” or “forfeited” his right to appointed counsel as a result of misconduct. Courts that have addressed the issue have paid little attention to procedural safeguards and have focused, instead, on the type of conduct and its seriousness.³³

do so on his own was held as waiver); *United States v. Silva*, 611 F.2d 78, 79 (5th Cir. 1980) (where the court's having denied a motion to substitute retained counsel for appointed counsel was not a violation of Sixth Amendment rights); *United States v. Fowler*, 605 F.2d 181, 183 (5th Cir. 1979) (where the non-indigent defendant's failure to timely retain counsel was deemed a waiver); *United States v. Terry*, 449 F.2d 727, 728 (5th Cir. 1971) (where the defendant did not retain counsel despite the court's finding that he was financially capable of doing so).

³⁰ *Illinois v. Allen*, 397 U.S. 337 (1970).

³¹ *Id.* at 343 (emphasis added).

³² *Id.* at 350 (Brennan, J., concurring).

³³ See *United States v. Leggett*, 162 F.3d 237, 240 (3d Cir. 1998) (where the defendant was deemed to have forfeited his right to counsel after he punched his counsel, knocked him to the ground, straddled him, and began to choke, scratch, and spit on him); *United States v. Jennings*, 855 F. Supp. 1427, 1440 (M.D. Pa. 1994), *aff'd*, 61 F.3d 897 (3d Cir. 1995) (where the district court found that the defendant had waived his right to counsel by punching his court-appointed attorney). See also *United States v. Moore*, 706 F.2d 538, 539 (5th Cir. 1983). In *Moore*, the defendant's repeated rejection of attorneys appointed for him by the court was held to constitute a waiver of the right to assistance of appointed counsel. When the

This is not to say that courts never warn a defendant of conduct that may result in the loss of the right to appointed counsel. Although not a requirement, it appears to be a factor in many cases where the courts have taken such action. For example, in *Richardson v. Lucas*,³⁴ the defendant refused to allow appointed counsel to represent him and demanded the court appoint a different specific attorney of his choice—a request which the court denied.³⁵ The court explained to the defendant that he had a clear choice: accept the representation of the attorney appointed for him or represent himself.³⁶ The record also shows the trial court repeatedly encouraged the defendant to accept his appointed attorney and discussed the advantages of having a trained attorney.³⁷

For the first time, in 1995, two federal court of appeals opinions made a distinction between a waiver of counsel by conduct and forfeiture of counsel by conduct. In *United States v. McLeod*,³⁸ the defendant was appointed new counsel to represent him in connection with a motion for new trial following his conviction on a charge of retaliating against a witness.³⁹ The defendant's new attorney submitted his briefs on the motion for new trial and then moved to withdraw as defendant's counsel. At a hearing on the motion to withdraw, the defense counsel testified that defendant was abusive towards him, had repeatedly threatened to sue him, and had asked him to engage in unethical conduct.⁴⁰ The court granted the motion to withdraw but declined to appoint new counsel for the defendant despite defendant's

defendant filed his *pro se* motion seeking dismissal of his third appointed counsel four days before trial, the court granted the motion and appointed his fourth appointed attorney and, in doing so, advised the defendant that “[i]t is highly likely that failure of [the defendant] to cooperate with [his attorney] in preparation of his case will be construed by this court as a waiver of his right to counsel.” *Id.* at 539. *See also* *United States v. Thomas*, 357 F.3d 357 (3d Cir. 2004). The trial court judge found that the defendant had been verbally abusive to his attorney, tore up his correspondence, refused to cooperate in producing a witness list, hung up on him, attempted to force his attorney to file frivolous claims, and engaged in the same conduct with three previous attorneys. *Id.* at 363. The court had a “warning colloquy” with the defendant in which, among other things, he was advised of the possibility that continued misconduct could annul his right to counsel. *Id.* In upholding a finding of waiver by conduct, the appellate court stated that a “colloquy between the defendant and trial judge is the preferred method of ascertaining that a waiver is voluntary, knowing, and intelligent,” but that there is no rote script that must be followed “such as that mandated for guilty plea proceedings conducted pursuant to *Rule 11 of the Federal Rules of Criminal Procedure*.” *Id.* at 364 (quoting *Gov't of Virgin Islands v. James*, 934 F.2d 468, 473-4 (3d Cir. 1991)).

³⁴ *Richardson v. Lucas*, 741 F.2d 753 (5th Cir. 1984).

³⁵ *Id.* at 756.

³⁶ *Id.*

³⁷ *Id.* at 756-57.

³⁸ *United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995).

³⁹ *Id.* at 323. The charge of retaliating against a witness arose from the following circumstances: The defendant had previously filed a civil suit action against a deputy sheriff claiming his civil rights had been violated. After the district court judge granted a directed verdict on the civil action in favor of the deputy sheriff, the defendant threatened to kill the deputy sheriff upon his release from prison. *Id.*

⁴⁰ *Id.*

request for appointment of new counsel.⁴¹ The trial court found the defendant's treatment of his lawyer constituted a waiver of his right to have counsel represent him at the hearing on the motion for new trial.⁴² Although the court of appeals stated, "we are troubled by the fact that [the defendant] was not warned that his misbehavior might lead to *pro se* representation," it found that the defendant was given the opportunity to testify at the hearing held on his attorney's motion to withdraw, which the court found he declined when he refused to take the oath.⁴³ The court of appeals affirmed the trial court's order finding the defendant had waived his right to counsel by his misconduct, but in doing so, acknowledged that the concept of "waiver" implies an intentional relinquishment of a known right.⁴⁴ It recognized that it was inconsistent with the accepted definition of "waiver" to find a defendant had lost his right to the assistance of appointed counsel when there had been no prior warning or evidence of the defendant's intention to relinquish his right. The court therefore concluded that "under certain circumstances, a defendant who is abusive toward his attorney may forfeit his right to counsel."⁴⁵

The problem was that there was no precedent for the finding of a forfeiture of the right to counsel. As support for its creation of the new sanction of forfeiture, the *McLeod* court cites only one Supreme Court case and several court of appeals cases where courts have purportedly found defendants to have "forfeited" various constitutional rights by conduct, such as being removed from the courtroom due to disruption,⁴⁶ escaping from custody,⁴⁷ and causing a witness to be unavailable.⁴⁸ The Supreme Court case cited in *McLeod* was *Illinois v. Allen*⁴⁹ which, in fact, was not a case involving "forfeiture" of a fundamental right, but rather a case where the defendant was specifically warned that further disruptive behaviors would result in his removal from the courtroom.

Thus, the sanction of forfeiture in dealing with cases involving the Sixth Amendment right to the assistance of counsel was born as a result of *dicta*, analogy with other court of appeals cases that did not involve the right to assistance of counsel, and a misunderstanding of the holding in *Illinois v. Allen*,⁵⁰ the only Supreme Court case relied on as authority.

⁴¹ *Id.*

⁴² *Id.* at 324-26. Although there was an issue before the court of appeals as to whether a motion for new trial was a "critical stage" of prosecution for which the right to counsel attaches, the court found it unnecessary to decide the issue because of its conclusion "that [the defendant] forfeited any right that he may have had by virtue of his pervasive misconduct." *Id.* at 325.

⁴³ *Id.* at 326.

⁴⁴ *Id.* at 325 n.6 (quoting WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, §11.3, at 546 n.4 (2d Hornbook ed. 1992)).

⁴⁵ *Id.* at 325.

⁴⁶ *Allen*, 397 U.S. at 343.

⁴⁷ *Golden v. Newsome*, 755 F.2d 1478, 1481 (11th Cir. 1985).

⁴⁸ *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982).

⁴⁹ *Allen*, 397 U.S. 337.

⁵⁰ *Id.* at 343.

In October 1995, a mere four months after *McLeod*, the Third Circuit adopted with approval *McLeod*'s distinction between a waiver of the right to counsel by conduct and a forfeiture of the right to counsel by conduct in *United States v. Goldberg*.⁵¹ As in *McLeod*, the issue of forfeiture of the right to counsel had not been raised by either party. The district court found the defendant had waived his right to counsel by his conduct in "manipulating his right to counsel in order to delay his trial."⁵²

Goldberg had been charged with forgery while serving a sentence in a federal penitentiary. An attorney had been appointed for the trial, but shortly before trial the attorney moved for the appointment of new counsel. The trial judge conducted a hearing into the defendant's allegations against his court-appointed attorney immediately prior to the commencement of jury selection. After hearing from both the defendant and court-appointed counsel, the court concluded that the attorney was providing adequate representation. The defendant was then given the choice of either continuing to be represented by his court-appointed attorney or proceeding *pro se*. At this point, for the first time, the defendant revealed that he had the financial resources to retain private counsel. The court advised the defendant that it would only consider a continuance of the trial if the defendant actually retained an attorney prior to the commencement of the trial. The court-appointed attorney then requested permission to withdraw from the representation of the defendant, asserting that the defendant was threatening him and asking the attorney to do things he did not feel were prudent. The trial judge denied the request to withdraw and proceeded with the jury selection process.⁵³

Prior to taking testimony, in a telephonic conference with only the judge and prosecutor, the court-appointed attorney once again requested permission to withdraw, alleging that the defendant had threatened his life by telling him that he had ample means to carry out the death threat as well as to hire a new attorney. The trial court judge this time granted the court-appointed attorney's request to withdraw without any hearing or opportunity for the defendant to answer the allegations made against him. The court informed the defendant that the case would proceed to trial with the defendant representing himself unless he retained an attorney who entered an appearance in the case.⁵⁴ When the defendant asked for another continuance to obtain the funds to retain private counsel, the court denied his request stating, "The Court finds that you have manipulated the judicial system for your own benefit, and the Court will not grant the continuance. The Court finds that by your conduct you have waived the right to proceed with counsel at this trial, and the Court simply will not tolerate that behavior."⁵⁵ The case proceeded to trial with the defendant representing himself *pro se* and insisting that he was not waiving his Sixth

⁵¹ *Goldberg*, 67 F.3d 1092, 1101.

⁵² *Id.* at 1094.

⁵³ *Id.* at 1094-95.

⁵⁴ *Id.* at 1095-96.

⁵⁵ *Id.* at 1096. The district court judge relied on its *Jennings* decision to justify his finding of a waiver of counsel by conduct. That case reasoned that "threatening one's attorney with physical violence like the actual use of force is tantamount to a 'waiver' of the right to counsel." *Id.* at 1097.

Amendment right to counsel. The defendant was convicted on the charges contained in the indictment and sentenced to prison terms to run consecutively with the prison sentence he was then serving.⁵⁶

The *Goldberg* court began its discussion of the defendant's contention that he did not waive his right to the assistance of counsel with recognition that there is a distinction between the concepts of "waiver" and "forfeiture," and a hybrid of those two concepts, "waiver by conduct."⁵⁷ The court noted that "[b]oth parties appear to have confused those issues, as have a number of courts that have addressed the effect of a defendant's dilatory tactics on the right to counsel."⁵⁸ The court distinguished "waiver" from "forfeiture" by stating:

Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right Finally, there is a hybrid situation ("waiver by conduct") that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel.⁵⁹

After setting forth the distinguishing characteristics among the concepts of "waiver," "forfeiture," and "waiver by conduct," the *Goldberg* court expressed its uncertainty regarding whether or not a warning was required as a matter of constitutional law or under the facts of a particular case.⁶⁰ The court acknowledged, however, that in the only United States Supreme Court case to address an issue of a court depriving a defendant of a fundamental constitutional right,⁶¹ the defendant was repeatedly warned and made aware of the consequences of his actions should he repeat them again. In recognizing the drastic nature of the sanction of forfeiture, the *Goldberg* court declared that the forfeiture sanction should only be applied where the facts established "extremely dilatory conduct," while "waiver by conduct" could be based on conduct less severe than that sufficient to warrant a forfeiture."⁶²

After expounding on the newly created sanction of forfeiture of counsel, the *Goldberg* court found it was not applicable to the case before it. It noted that the defendant's alleged death threats to his attorney were not established at a hearing at which the defendant was present or represented and, therefore, could not be used to justify forfeiture. In the absence of any evidence of a death threat other than the

⁵⁶ *Id.* at 1096.

⁵⁷ *Id.* at 1099.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1100.

⁶⁰ *Id.* at 1101.

⁶¹ *Allen*, 397 U.S. at 337.

⁶² *Goldberg*, 67 F.3d at 1101. At this point in the opinion, the court uses the words "extremely dilatory conduct." *Id.* Later in the opinion it uses the words, "extremely serious misconduct." *Id.* at 1102.

attorney's own statement at the telephonic side-bar conference, the *Goldberg* court found there was insufficient evidence of "abusive conduct" from which to conclude that the defendant forfeited his right to counsel. The judgment of conviction was reversed and the case was remanded for a new trial.⁶³

Following the *dicta* approving the concept of forfeiture of counsel in *Goldberg* and *McLeod*, and without any guidance from the United States Supreme Court, federal courts and state courts began to adopt the concept that a defendant may forfeit his right to the assistance of counsel without prior warning on the record. The forfeiture sanction has most commonly been used in cases where defendants caused unnecessary delay, orally abused their counsel or the court, or physically assaulted their counsel.

Federal cases involving forfeiture of right to counsel can be classified into two categories: cases involving review of federal trial court decisions to forfeit right to counsel and cases involving a review of state trial court forfeiture decisions. There are very few appellate-level reviews of federal trial court findings.⁶⁴ Despite the relative scarcity of this type of case, there may be additional guidance as to what constitutes or does not constitute a justifiable forfeiture in the *dicta* of federal *habeas corpus* reviews of state decisions.⁶⁵

State cases are far more prevalent and generally fall into three classifications: physical assaults on counsel, oral abuse towards counsel, and, rarely, cases where the defendant causes unnecessary delay. Cases involving physical violence against counsel usually result in a finding of forfeiture.⁶⁶ Forfeiture is also readily found when a defendant exhibits a pattern of oral abuse or threats towards counsel. Often this includes death threats, profanity, or a complete refusal to cooperate with appointed attorneys.⁶⁷ In cases where oral abuse towards counsel is limited to only a

⁶³ *Id.* at 1102.

⁶⁴ *See, e.g.*, United States v. Legget, 162 F.3d 237 (3d Cir. 1998) (forfeiture justified when the defendant physically attacked his attorney during sentencing).

⁶⁵ *See, e.g.*, Fischetti v. Johnson, 384 F.3d 140, 147-49 (3d Cir. 2004) (defendant's having fired three appointed counsel would have been insufficient to justify forfeiture in a federal setting); Gilchrist v. O'Keefe, 260 F.3d 87, 99-100 (2d Cir. 2001) (defendant's having punched his attorney in the head probably would have been insufficient to justify forfeiture in a federal court).

⁶⁶ *See* State v. Lehman, 749 N.W.2d 76, 79 (Minn. Ct. App. 2008) (affirming forfeiture where defendant, in open court, grabbed and repeatedly punched his public defender in the face); State v. Montgomery, 530 S.E.2d 66, 68 (2000) (affirming forfeiture where defendant threw water in his counsel's face); People v. Gilchrist, 239 A.D.2d 306, 307 (N.Y. App. Div. 1997) (affirming forfeiture where defendant brutally assaulted his attorney). *But see* King v. Super. Ct., 132 Cal. Rptr. 2d 585, 588-89 (Cal. Ct. App. 2003) (reversing forfeiture where defendant head-butted his attorney).

⁶⁷ *See* State v. Rasul, 167 P.3d 1286, 1288, 1290 (Ariz. Ct. App. 2007) (affirming forfeiture where defendant used profanity towards and threatened eighteen different appointed attorneys); Bultron v. State, 897 A.2d 758, 766 (Del. 2006) (affirming forfeiture because of defendant's profanity and insults towards his attorney); People v. Sloan, 262 A.D.2d 431, 432 (N.Y. App. Div. 1999) (affirming forfeiture where defendant showed a pattern of threatening, abusive, and uncooperative behavior towards three appointed attorneys); Commonwealth v. Thomas, 879 A.2d 246, 259 (Pa. Super. Ct. 2005) (affirming forfeiture where defendant was

few outbursts as distinct from a pattern of misconduct, or the abuse seems limited to behavior against one attorney, courts have generally declined to uphold forfeiture.⁶⁸ Forfeiture of the right to counsel is, on rare occasion, found in cases where the defendant delays a case, generally through failure to make an affirmative act to procure counsel. In such cases, courts typically engage in a series of continuances so that the defendant can find an attorney, but the defendant fails to do so.⁶⁹ Fact patterns conforming to a scenario involving a defendant's failure to procure counsel more commonly fall under the waiver by conduct analysis.⁷⁰

On only two occasions have state courts ruled on the issue of forfeiture where the defendant was facing the death penalty. In *State v. Hampton*,⁷¹ the defendant's appointed counsel requested withdrawal during an appeal on grounds that the defendant had issued his attorneys written death threats. The threats were taken seriously because of the defendant's strong gang ties. Counsel was permitted to withdraw. The Public Defender was then appointed but soon requested withdrawal because the defendant had sent written death threats to his attorneys demanding that they, too, withdraw. The Arizona Supreme Court declined to find a forfeiture and remanded for appointment of new counsel.⁷²

In *State v. Carruthers*,⁷³ the defendant was appointed two attorneys, who were subsequently permitted to withdraw. The trial court was adamant that Carruthers use his third counsel through trial and that this attorney would not be dismissed. The third appointed counsel requested that he be permitted to withdraw because of abuse and threats from the defendant. This attorney's secretary was reportedly having nightmares because of the defendant's conduct. The trial court refused to permit the withdrawal. The attorney later moved again to withdraw, indicating that the defendant had sent threatening letters to his home, which described the kind of vehicle that his daughter was driving. In court, the defendant glared at his counsel

abusive towards and threatened five appointed attorneys); *State v. Carruthers*, 35 S.W.3d 516, 550 (Tenn. 2000) (affirming forfeiture where defendant threatened and was abusive towards three appointed counsel).

⁶⁸ See *Brooks v. State*, 819 S.W.2d 288, 289-90 (Ark. Ct. App. 1991) (reversing forfeiture where defendant accused counsel of lying and demanded her withdrawal); *Commonwealth v. Lucarelli*, 914 A.2d 924, 930 (Pa. Super. Ct. 2006) (reversing forfeiture where defendant refused to take counsel's advice in favor of the advice of laypersons and insisted that the public defender did not "want him").

⁶⁹ See *Siniard v. State*, 491 So.2d 1062, 1064 (Ala. Crim. App. 1986) (affirming forfeiture where the defendant was given eight months and several continuances to obtain counsel and failed to do so). *But see* *City of Tacoma v. Bishop*, 920 P.2d 214, 216, 219 (Wash. Ct. App. 1996) (reversing forfeiture where defendant failed to obtain counsel for six months and was given several continuances).

⁷⁰ See *Brickert v. State*, 673 N.E.2d 493, 495-96 (Ind. Ct. App. 1996) (affirming waiver where defendant delayed over a year to obtain counsel); *Painter v. State*, 762 P.2d 990, 992 (Okla. Crim. App. 1988) (affirming waiver where defendant failed to procure counsel after two months and two continuances).

⁷¹ *State v. Hampton*, 92 P.3d 871 (2004).

⁷² *Id.* at 875.

⁷³ *Carruthers*, 35 S.W.3d at 516.

and gritted his jaw. After being denied again, the attorney filed an application for extraordinary appeal with the appellate court and was granted relief. The defendant proceeded in *pro per*, was convicted, and was sentenced to death. The appellate court held that although the defendant's conduct satisfied the requirements of a waiver by conduct it was also "sufficiently egregious to support a finding that he forfeited his right to counsel."⁷⁴

IV. THE LACK OF FEDERAL APPELLATE REVIEW

"[B]ecause [the Anti-Terrorism and Effective Death Penalty Act] severely restricts our scope of review, we have no occasion to pass on the question of whether the denial of counsel in this case violates the Sixth Amendment"⁷⁵

The sanction of forfeiture of the right to assistance of counsel as a result of a defendant's misconduct has not yet drawn the attention of the Supreme Court or of any federal court of appeals in substantive habeas review of a state court decision despite the fact that the sanction fails to incorporate any of the constitutional safeguards mandated by the Supreme Court to protect the fundamental right of an indigent defendant to the assistance of counsel.⁷⁶ This lack of meaningful Sixth Amendment review of state court decisions by federal courts on *habeas* review is due primarily to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).⁷⁷

The AEDPA places jurisdictional limitations on habeas review of state court decisions. For a defendant to receive a review in federal court of a habeas petition on the merits, the defendant must establish either of the following:

- (1) That the state court action "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"⁷⁸ or
- (2) That the state court action "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence."⁷⁹

As a defendant must first have "exhausted the remedies available in the courts of the State,"⁸⁰ it is highly unlikely that an unreasonable determination of the facts

⁷⁴ *Id.* at 550.

⁷⁵ *Gilchrist*, 260 F.3d at 100.

⁷⁶ Although a significant number of state court cases have been reviewed by federal courts of appeals on habeas petitions, the author could find no case where a court of appeals addressed the substantive issues of whether a defendant's fundamental constitutional Sixth Amendment right to the assistance of counsel was violated.

⁷⁷ 28 U.S.C. § 2242-2256 (2006).

⁷⁸ *Id.* § 2254(d)(1).

⁷⁹ *Id.* § 2254(d)(2).

⁸⁰ *Id.* § 2254(b)(1)(A).

would filter through the appellate courts of any given state. Additionally, the AEDPA provides that factual issues determined by state courts are presumed to be correct during habeas review, further elevating the burden a state defendant requesting federal habeas review must meet.⁸¹

As a direct result of the procedural requirements of the AEDPA, no federal court has reviewed the merits of a state court action that resulted in the forfeiture of the right to the assistance of counsel due to a defendant's conduct. The combination of a lack of Supreme Court guidance on the issue of when and under what circumstances a defendant loses his right to appointed counsel due to his own conduct and the lack of federal court guidance to state courts has resulted in there being no meaningful review of state court actions finding a defendant has forfeited his constitutional right to the assistance of counsel as a result of misconduct.⁸²

V. CONSTITUTIONALITY OF THE FORFEITURE DOCTRINE

“[W]e explicitly hold today 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 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.”⁸³

When one considers the careful framework constructed by the Supreme Court to ensure the protection of the fundamental right to appointed counsel in criminal cases, it is difficult to presume that the Supreme Court would countenance the forfeiture of that right without a minimum requirement of an on-the-record warning to the defendant that the right to assistance of counsel may be lost as a result of disruptive, threatening, or abusive behaviors toward the court or counsel, and the defendant's acknowledgment on the record of an understanding of that warning.

The Supreme Court has neither recognized nor approved the concept of a forfeiture of the right to counsel. To the contrary, the Supreme Court has stated that we “‘indulge every reasonable presumption against waiver’ of fundamental constitutional rights and that we ‘do not presume acquiescence in the loss of

⁸¹ *Id.* § 2254(e)(1).

⁸² See Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231 (2008). This Article points out that, as a matter of history, many fundamental criminal procedural rights were discovered and announced on federal habeas corpus review and that, as a practical matter, habeas corpus review as a matter of right has been effectively curtailed by the AEDPA. This leaves only discretionary certiorari jurisdiction in the Supreme Court, which it will rarely exercise over state criminal convictions. Accordingly, by curtailing substantive federal review of claims asserting federal constitutional rights in the habeas context, the federal rights themselves are, for all intents and purposes, no longer under the guardianship of the federal system, and instead are largely left to the discretion of state courts. In short, no longer are federal courts the primary and authoritative voice as to the scope and meaning of constitutional rights in the field of criminal law. Instead, state courts are provided with the discretion to define or vary from the mandates of federal constitutional law.

⁸³ *Illinois v. Allen*, 397 U.S. 337 (1970) (emphasis added).

fundamental rights.”⁸⁴ When a defendant misbehaves, but through a lack of judicial warning, does not realize that his behavior will result in loss of his rights, a forfeiture of those rights violates the presumption against acquiescence. As pointed out in the quotation heading this Section, from the Supreme Court’s only case dealing with the loss of a Sixth Amendment right due to a defendant’s misconduct, the Court emphasized that the trial court repeatedly warned the defendant that his continued disruptive behavior in open court would result in his removal from the courtroom. Such a minimal basic requirement is fair and consistent with prior Supreme Court rulings on fundamental constitutional rights.

In addition, the forfeiture sanction as defined in the *Goldberg* decision purports to apply only in cases where the misconduct is “extremely serious.”⁸⁵ Note that “extremely serious” is not defined. The lack of definition has resulted in disparate decision-making by state and federal trial courts. Disparate and arbitrary decisions may be sufficient reasons to find the doctrine constitutionally flawed on the basis that it violates the Due Process clause of the Fourteenth Amendment which, as interpreted, requires that laws that deprive a person of rights not be so vague and ambiguous that a reasonable person would have to guess as to their meaning.⁸⁶ This means that for extremely serious misconduct in the eyes of the beholder court,⁸⁷ a defendant is not constitutionally entitled to a warning that his future conduct may put at risk his right to the assistance of counsel, but that for conduct that is not considered extremely serious he is constitutionally entitled to a warning. Even the worst conduct imaginable does not dilute a criminal defendant’s constitutional right to a trial and the rights attendant thereto. On what constitutional basis then can there be a distinction between a right to a warning and no right to a warning based solely on the nature and seriousness of the misconduct?

As a further example of how senseless the doctrine of forfeiture is in its application, consider a defendant who has been found to have lost his right to counsel for assaulting his attorney. The defendant would then be required to represent himself *pro se*, and yet be entitled to appointment of new counsel in connection with the criminal charge of assaulting his attorney. This is more than hypothetical. In *State v. Montgomery*,⁸⁸ the defendant threw water in his counsel’s face. Consequently the court found that he had forfeited his right to counsel. A separate action was initiated charging the defendant with simple assault against his attorney. The defendant was appointed counsel in the simple assault case. The

⁸⁴ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted).

⁸⁵ *Goldberg*, 67 F.3d at 1102.

⁸⁶ See, e.g., *Kolender v. Lawson*, 461 U.S. 352 (1983) (holding unconstitutionally vague a California statute requiring loiterers to provide police with “credible and reliable” identification or face criminal charges); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding a vagrancy ordinance void for vagueness because it failed to give a person of ordinary intelligence fair notice that the contemplated conduct was forbidden).

⁸⁷ Compare *State v. Montgomery*, 530 S.E.2d 66 (Ct. App. N.C. 2000) (upholding forfeiture where a defendant threw water in his attorney’s face) with *King v. Superior Court*, 132 Cal. Rptr. 2d 585 (Ct. App. 2003) (reversing forfeiture where a defendant head-butted his attorney).

⁸⁸ *Montgomery*, 530 S.E.2d at 68.

appointed counsel appeared and requested that he be permitted to represent the defendant in the case in which the right to counsel had been forfeited. The trial court denied the request.⁸⁹ This is the consequence of a doctrine that is based only on the seriousness of the conduct rather than recognizing conduct as a factor along with procedural safeguards, such as a warning on the record.

The forfeiture sanction ignores half a century of development of the law protecting defendants' fundamental rights under the Sixth Amendment, including how those rights can be waived. The forfeiture sanction is a doctrine born out of the *dicta* statements contained in two federal appellate opinions in 1995. It has never been imposed by any federal court. It is inconsistent with prior rulings of the Supreme Court. It makes meaningless the presumption against judicial termination of fundamental rights.

VI. SUGGESTED POLICIES AND PROCEDURES TO PROTECT FUNDAMENTAL RIGHTS AND ENSURE A COURT'S ABILITY TO ADDRESS MISCONDUCT EFFECTIVELY

"[T]he right to counsel is a shield, not a sword. A defendant has no right to manipulate his right for the purpose of delaying and disrupting the trial."⁹⁰

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. The court must address the defendant on the record and warn the defendant of the type of conduct that could result in the loss of the right to the assistance of a court-appointed attorney in his defense. The record must disclose an acknowledgment from the defendant that he understands the conditions that could result in the loss of this right. This should be sufficient to establish a knowing and voluntary waiver by conduct if the defendant then commits the acts of misconduct about which he was warned.

As the overwhelming number of instances in which a defendant has lost the right to the assistance of counsel have involved acts falling into certain categories (such as threats to his attorney or being physically assaultive), a warning should include these types of conduct. Other types of conduct that seriously disrupt a court or that a court would find abusive toward appointed counsel should also be included. Such preemptive actions by the court, either at the time counsel is appointed or at any later time before loss of the right to counsel based on such conduct, would be consistent with the principles developed by the United States Supreme Court to protect and ensure a defendant's fundamental rights under the Constitution.

It is suggested that courts adopt, either by court rule or policy, the practice of providing admonitions to a defendant, on the record, at the time counsel is first appointed. In most courts, the appointment of counsel is made at the initial appearance or arraignment. At that time, the defendant is present and proceedings are on the record. Generally, an inquiry is made of the defendant regarding his financial ability to retain a private attorney. The defendant signs a financial affidavit if he claims he cannot afford to retain counsel. It would be a simple matter for the

⁸⁹ *Id.* at 68.

⁹⁰ *United States v. White*, 529 F.2d 1390, 1393 (8th Cir. 1976).

court to include a colloquy with the defendant at that time regarding the conditions of his being appointed an attorney at the state's expense. This practice should include the warnings that provide a basis for waiver by conduct should the defendant engage in conduct that justifies the loss of his right to appointed counsel. It would be an even better practice to include written warnings signed by the defendant. Finally, the court should make a finding on the record that the defendant understands and voluntarily accepts the conditions upon which counsel is appointed and which could lead to the loss of the right to assistance of counsel if violated. It would also be prudent to remind or re-warn a defendant at any time there is any change in counsel for any reason, especially if the change is the result of alleged behavior involving the defendant that does not rise to the level of finding he has lost his right to the assistance of appointed counsel. Further, such a policy may act to deter a defendant from acting out against his attorney, as he then knows the right to appointment of counsel is not an unlimited right and is aware of the types of conduct that could put his right to counsel at risk.

There may remain issues regarding the seriousness of particular conduct and whether a court would be justified in finding a defendant has lost his right to the assistance of counsel under a particular set of circumstances. These, however, are factual issues that may be determined at an appropriate evidentiary hearing, which would then be reviewable by appellate courts. Such issues are not made less important by a standard that applies only to misconduct that is "extremely serious."

The doctrine of waiver is widely recognized as the appropriate and lawful means for a defendant to relinquish a constitutional right. In the following situations, courts generally make findings on the record that the defendant has chosen to waive or relinquish a constitutional right based on having been earlier warned or advised of the rights that will be lost if certain decisions are made, a course of conduct chosen, or a course of conduct continued:

- The defendant chooses to exercise the constitutional right not to be present at trial;⁹¹
- The defendant jumps bail and absconds or has escaped from custody and the trial proceeds without the defendant;⁹²
- The defendant gives up the right to a speedy trial;⁹³

⁹¹ See FED. R. CRIM. P. 43(c); Laurel M. Cohn, Annotation, *Sufficiency of Showing Defendant's "Voluntary Absence" From Trial for Purposes of Criminal Procedure Rule 43, Authorizing Continuances of Trial Notwithstanding Such Absence*, 141 A.L.R. FED 569 (1997).

⁹² See, e.g., *United States v. Muzevsky*, 760 F.2d 83 (4th Cir. 1985) (defendant deemed to have waived his right to be present at trial after fleeing and not being apprehended for seventeen months); *United States v. Powell*, 611 F.2d 41 (4th Cir. 1979) (defendant found to have voluntarily waived his right to be present at trial after being given permission to leave his district to gather evidence and he was not seen again until he was apprehended two years later); *Perez Goitia v. United States*, 409 F.2d 524 (1st Cir. 1969) (defendant deemed to have been voluntarily absent after jumping bail and absconding).

⁹³ *Barker v. Wingo*, 407 U.S. 514 (1972).

- The defendant is forcibly removed from the courtroom during trial due to unruly behavior;⁹⁴
- The defendant chooses to exercise the Fifth Amendment right not to take the witness stand and testify;⁹⁵
- The defendant gives up the Sixth Amendment right to be tried by a jury and, instead, elects a bench trial,⁹⁶ and, most commonly,
- The defendant chooses to plead guilty and give up the right to a trial and the right to appeal.

In the balancing of competing interests involving fundamental rights under the Constitution, a court should use the least restrictive means available.⁹⁷ A court should stop short of stripping a defendant of his right to assistance of counsel except in the most egregious of circumstances and where there are no other reasonable alternatives. A defendant who is guilty of misconduct that involves a crime, such as a threat of physical violence or an assault on his attorney, should be charged with any new criminal offense. Such conduct, however, may also be evidence of an underlying pathology that alerts a court to the need for a mental examination of the defendant that may mitigate the circumstances of a defendant's misbehavior.

VII. CONCLUSION

"The principle that law abhors a forfeiture is embedded in our jurisprudence"⁹⁸

Forfeiture of the right to assistance of counsel has no constitutional basis. It has become a refuge for courts that have failed to comply with the minimal warning requirements necessary to establish a waiver by conduct of the right to appointed counsel. Its continued use amounts to excusing and permitting constitutional laxity by trial and appellate courts. The doctrine of waiver by conduct, on the other hand, satisfies the minimal constitutional requirements that are reflected in Supreme Court decisions on other aspects of the Sixth Amendment right to the assistance of counsel. Any court which strips a defendant of his right to the assistance of counsel under circumstances that do not justify a finding of waiver by conduct should be held to have violated a defendant's fundamental right to counsel and due process. Such violation should result in a reversal of the court's order.⁹⁹ No defendant should lose the right to the assistance of counsel *without a warning on the record* of the conduct which may cause him to lose that right.

⁹⁴ *Allen*, 397 U.S. 337.

⁹⁵ *Raffel v. United States*, 271 U.S. 494 (1926).

⁹⁶ *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942).

⁹⁷ *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 520 (1984) (Marshall, J., concurring).

⁹⁸ *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 973 (Fed. Cir. 2007).

⁹⁹ *See, e.g., Chapman v. California*, 386 U.S. 18 (1967).