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Constitutional Law - United States v. Goldberg: The Third Circuit's Nontraditional Approach to Waiver of the Sixth Amendment Right to Counsel

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CONSTITUTIONAL LAW— *UNITED STATES V. GOLDBERG*: THE THIRD CIRCUIT'S NONTRADITIONAL APPROACH TO WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

I. INTRODUCTION

The Sixth Amendment right to counsel is fundamental to a fair trial.[1] Indeed, the right to counsel is "an essential barrier against . . . deprivation of human rights."[2] While the Sixth Amendment is the source of the right

1. *See* United States v. Fulton, 5 F.3d 605, 611 (2d Cir. 1993) (citing Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("[T]he Sixth Amendment right to counsel is necessary to insure fundamental human rights of life and liberty.").

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Sixth Amendment provides procedural safeguards in order to ensure a just resolution of criminal matters. Randall B. Bateman, *Federal and State Perspectives on Criminal Defendant's Right to Self-Representation*, 20 J. CONTEMP. L. 77, 81 (1994). For example, the Sixth Amendment is the source of the right to a speedy trial, the right to be informed of accusations, a compulsory process for obtaining witnesses and the right to the assistance of counsel. *Id.* The Sixth Amendment rights are fundamental to our criminal justice process. *See* Faretta v. California, 422 U.S. 806, 818 (1975) (discussing history of Sixth Amendment). Because they are fundamental, they are part of the "due process of law" guaranteed by the Fourteenth Amendment to the defendants in the state criminal courts. *Id.; see* Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (declaring Sixth Amendment right to counsel applicable to states).

The United States Constitution has two separate provisions for the right to assistance of counsel. C. Allen Parker, Jr., *Proposed Requirements for Waiver of Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 363 (1982). The Fifth Amendment right to counsel provides protection during custodial interrogation. *Id.*; Miranda v. Arizona, 384 U.S. 436, 440 (1966). This protects a defendant from compulsory self-incrimination. Howard M. Kaufer, *Constitutional Law: Right to Counsel*, 49 GEO. WASH. L. REV. 399, 400 (1981). *Miranda* warnings originate in the Fifth Amendment, requiring that the government inform the accused of the right to remain silent, to talk to a lawyer and to have counsel present during interrogation. *Id.* These warnings must be given to anyone in custody. *Id.* The Sixth Amendment right to counsel does not attach until criminal proceedings against a defendant begin. *Id.* at 401. Although the Fifth and Sixth Amendments provide protection at different times during the criminal justice process, they are basically the same in function. Parker, *supra*, at 365. They both grant the accused the right to counsel. *Id.*

2. *Zerbst*, 304 U.S. at 462-63. The right to counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Id.* at 462. Courts have consistently recognized the importance of the Sixth Amendment right to counsel. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) ("The right of an accused to counsel is beyond question a fundamental right . . . . Without counsel the right to a fair trial itself would be of little consequence, . . . for it is through counsel that the accused secures his other rights."); United States v. Cronic, 466 U.S. 648, 654 (1984) ("Of all the rights that an accused has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."); Bland v. California Dep't of Corrections, 20 F.3d 1469, 1478 (9th Cir.), *cert. denied*, 115 S. Ct. 357

to assistance of counsel, it also includes the right to waive counsel.[3] Attempting to balance the Sixth Amendment's inherent tension, the United States Supreme Court provided general guidelines to determine a valid waiver in *Faretta v. California*.[4] The Court left the task of determining the

(1994) ("[D]eprivation of counsel is a structural defect requiring automatic reversal.").

3. *See* Bateman, *supra* note 1, at 79 (stating Sixth Amendment includes right to counsel and right to waive counsel); *see also* United States v. Purnett, 910 F.2d 51, 54 (2d Cir. 1990) ("The right to self-representation and the right to assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin."). The Sixth Amendment has an inherent tension. Bateman, *supra* note 1, at 81. It supports the values of justice with the right to counsel. *Id.* In addition, it supports the right of self-determination with the right to waive counsel and proceed pro se. *Id.*; *see Faretta*, 422 U.S. at 819 (recognizing right of defendant to waive counsel and proceed pro se). This tension did not become apparent, however, until courts began to appoint counsel. Bateman, *supra* note 1, at 81. Courts at first focused solely on reaching the most just result. *Id.* After the right to self-representation was recognized in *Faretta v. California*, the focus changed to the defendant's right to choose whether or not to have representation. United States v. McDowell, 814 F.2d 245, 248 (6th Cir. 1987); Bateman, *supra* note 1, at 81 n.9. The *McDowell* court explained that "[b]efore 1975, constitutional determinations of the voluntariness of a waiver of counsel were motivated primarily by the need to protect accused persons from the dire consequences of rash gestures. In that year, however, the Supreme Court decided *Faretta v. California*, and accorded constitutional significance to the right to self-representation." *Id.* (citations omitted).

Sixth Amendment waiver arises in three contexts. Parker, *supra* note 1, at 381. One instance is when an accused requests before a trial judge to represent him or herself. *Id.* Another instance where Sixth Amendment waiver arises is during interrogation when an accused confesses or otherwise makes incriminating statements during face-to-face "deliberate elicitation" by state officers. *Id.* A third instance is when a defendant voluntarily confesses or makes incriminating statements to a state officer. *Id.* This Casebrief only discusses waiver before a judge. For a detailed discussion of the other instances where Sixth Amendment waiver issues arise, see *id.*

The procedural requirements for waiver of the Fifth and Sixth Amendments right to counsel are different. Parker, *supra* note 1, at 364. The Fifth Amendment right to counsel is protected by clear standards as set out in the *Miranda* warning. *Id.* Waiver is impossible unless these warnings are first given. *Id.* In contrast, the Sixth Amendment waiver of the right to counsel does not have any prophylactic warnings. *Id.* Instead, there are only general guidelines, making the standards for Sixth Amendment waiver much less clear. *Id.*

4. 422 U.S. 806, 835 (1975). The United States Supreme Court held that only knowing and intelligent waiver of right to counsel is valid. *Id.*; *see also* United States v. McCaskill, 585 F.2d 189, 190 (6th Cir. 1978) (per curiam) ("There was thus no occasion in *Faretta* to lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct in order to determine whether a defendant has 'knowingly and intelligently' chosen to forgo the benefits of counsel."). For a discussion of the Supreme Court's holding in *Faretta*, see *infra* notes 66-73 and accompanying text.

Correlative to the right to waive counsel is the right to proceed pro se. JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 7.13, at 303 (2d ed. 1986). The right to self-representation is unique because it forces a defendant to waive one constitutional right, the Sixth Amendment right to counsel, for another. *Id.* at 379. Furthermore, the defendant would almost always be better off if he or she agreed to assistance of counsel. *Id.* The defendant must make a timely request to

specific requirements for a valid waiver to the lower courts.[5] Unfortunately, the *Faretta* guidelines have proven too vague and a split among the circuits currently exists over the requirements for a valid waiver of the right to counsel.[6]

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proceed pro se. *Id.* at 380. Once the trial has begun, the right to represent oneself may be denied. *Id.* at 381. Also, a defendant that chooses initially to proceed pro se is prohibited from changing his or her mind during the trial. *Id.* at 385.

The right to represent oneself, like the right to waive counsel, must be balanced against society's interest in an orderly and efficient criminal justice system. Stacey A. Giulianti, Comment, *The Right to Proceed* Pro Se *at Competency Hearings: Practical Solutions to a Constitutional Catch-22*, 47 U. MIAMI L. REV. 883, 890 (1993). Thus, the right to proceed pro se is limited in several ways. *Id.* First, when defendants proceed pro se, they give up the benefits of the right to counsel. *Id.* Also, the court may terminate the right to proceed pro se if the defendant engages in "serious or obstructionist" misconduct. *Id.* (quoting *Faretta*, 422 U.S. at 835 n.46). Furthermore, a defendant who proceeds pro se also gives up the right to claim ineffective assistance of counsel. *Id.* As one author noted, "[i]t would be a strange system indeed that allowed a defendant to freely select self-representation and thereby create a safety net for reversal based on her legal ineptitude." *Id.* at 892.

Despite the advantages of assistance of counsel, courts recognize that the defendant's right to choose whether or not to have a lawyer is fundamental. *Id.* at 893. A trial court cannot force counsel upon an unwilling defendant. *Id.* For a detailed discussion of the right to self-representation, see COOK, *supra*, at 377-97.

5. *See* Parker, *supra*, note 1, at 364 (noting failure of Supreme Court to provide waiver requirements, leaving for lower courts to determine). Inconsistent application of waiver requirements among the courts are one result of the Supreme Court's broad guidelines. *Id.* An associated problem created by the lack of clear standards for waiver is that courts are not able to recognize when a waiver is valid or invalid. *Id.* Thus, a time-consuming hearing must be held in order to determine whether waiver is appropriate. *Id.* Furthermore, this lack of clear requirements has resulted in confusion over proper investigatory techniques once in police custody. *Id.*

6. *See* United States v. McDowell, 484 U.S. 980, 980 (1987) (White, J., dissenting) (discussing split among circuit courts over requirements for valid waiver). Justice White, joined by Justice Brennan, dissented from a denial of a writ of certiorari, citing the confusion in the circuit courts and the state courts over the proper application of the *Faretta* requirements. *Id.*

With all of the advantages of having assistance of counsel, it is difficult to understand why a defendant would waive the right to counsel and choose to proceed pro se. GILBERT B. STUCKEY, PROCEDURES IN THE JUSTICE SYSTEM 141, 148-49 (3d ed. 1986); Giulianti, *supra* note 4, at 887. A common warning of a judge to a defendant seeking waiver is that "when a person seeks to represent himself he has a fool for a lawyer and a fool for a client." August K. Anderson, Note, People v. Longwith: *The Requirements of Court Advisement in Assuring a Knowing and Intelligent Waiver of Right to Counsel*, 5 CRIM. JUST. J. 379, 379 (1982). Nevertheless, defendants frequently choose to forgo the right to counsel and represent themselves. *Id.* There are a variety of reasons that a defendant may choose to waive the right to counsel. Giulianti, *supra* note 4, at 887. One common reason is that defendants believe that jurors will sympathize with the "lone defendant" standing up against the "Goliath" state. *Id.* Another reason is that defendants believe that they are innocent and that the criminal justice system will inevitably find the truth. *Id.* These defendants are surprised when they realize that there is a rigid courtroom procedure to follow, prohibiting much of the evidence and questioning that they planned. *Id.* Some defendants seek to waive counsel because they simply distrust attorneys or doubt their capabilities. STUCKEY, *supra*, at 149. This often stems from an attorney failing to keep in touch with a defendant or an overwhelming caseload

Traditional waiver analysis recognizes only one form of waiver—it is a blanket term, applied in the same manner, despite the wide variety of circumstances that lead to waiver.[7] The United States Court of Appeals for the Third Circuit, however, recently added a new dimension to the concept of waiver when it held that waiver of the right to counsel analytically is divided into three categories: "waiver," "waiver by conduct" and "forfeiture."[8] In *United States v. Goldberg*,[9] the Third Circuit determined that the appropriate category depends upon the circumstances of the case, including the severity of a defendant's conduct and the scope and extent of judicial advisement about the consequences of waiver.[10] In *Goldberg*, the court found that the defendant's abusive conduct toward his attorney did not fall under the rubric of traditional waiver analysis.[11] The court held that waiver of the right to counsel due to the defendant's misconduct may occur either by waiver by conduct or forfeiture.[12] The court found that the requirements for a waiver by conduct were not satisfied, and further declined to adopt a forfeiture analysis.[13] Thus, the court concluded that the defendant's misconduct had not waived his right to counsel.[14]

The analytical categories of waiver discussed in *Goldberg* have significant consequences on both a defendant's constitutional right to counsel and the right to waive counsel.[15] In order to comprehend the importance

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of the attorney. Giulianti, *supra* note 4, at 887. In addition, some defendants believe that their counsel does not have their best interests at stake. STUCKEY, *supra*, at 149. Furthermore, defendants may disagree with an attorney's trial strategy. *Id.*; Giulianti, *supra* note 4, at 888. Finally, some defendants take advantage of the fact that by representing themselves, they are permitted to consult with co-defendants and witnesses out of the courtroom, thus permitting them to conspire against the government. STUCKEY, *supra*, at 149.

7. *See* United States v. Goldberg, 67 F.3d 1092, 1100 (3d Cir. 1995) (explaining that no court has made distinction among different types of waiver). The circumstances of waiver vary—some defendants may affirmatively choose to waive the right to counsel, while others may imply waiver of the right to counsel by their own conduct. *See, e.g.*, United States v. Arlt, 41 F.3d 516, 521 (9th Cir. 1994) (recognizing defendants may voluntarily seek to represent themselves); United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (holding defendant's failure to retain counsel implied waiver); McQueen v. Blackburn, 755 F.2d 1174, 1178 (5th Cir. 1985) (finding defendant's request to remove counsel during trial was valid waiver). For a further discussion of the various circumstances in which waiver is found, see *infra* notes 74-117 and accompanying text.

8. *Goldberg*, 67 F.3d at 1101.

9. 67 F.3d 1092, 1101 (3d Cir. 1995).

10. *Id.* at 1100-02. For a complete discussion of the Third Circuit's analytical categories of waiver analysis in *Goldberg*, see *infra* notes 141-73 and accompanying text.

11. *Goldberg*, 67 F.3d at 1103. For a full discussion of the court's reasoning in *Goldberg*, see *infra* notes 141-73 and accompanying text.

12. *Goldberg*, 67 F.3d at 1101.

13. *Id.* at 1102.

14. *Id.* at 1103. For a complete discussion of the Third Circuit's analysis of the defendant's conduct in *Goldberg*, see *infra* notes 141-73 and accompanying text.

15. *See Goldberg*, 67 F.3d at 1101 (emphasizing administrative and substantive impact of these waiver categories on Sixth Amendment). Without waiver require-

of an appropriate analysis of the waiver of the right to counsel, an overview of the history of the right to counsel is necessary. Part II of this Casebrief traces the development of the right to counsel from the early colonies to the present.[16] Part II also examines the right to waive counsel, including the Supreme Court's guidelines.[17] Further, Part II examines the split among the circuits over the elements of a valid waiver.[18] This includes a discussion of the various circumstances where waiver of the right to counsel may be found.[19] Moreover, Part II explores the Third Circuit's approach to waiver of the right to counsel prior to the *Goldberg* decision.[20] Parts III and IV of this Casebrief discuss the facts and analyze the *Goldberg* decision.[21] Finally, Part V asserts that although the Third Circuit took an important step in establishing three categories of waiver, courts need to properly balance the right to counsel and the right to waive counsel in order to prevent defendants' manipulation of the criminal justice system through egregious behavior towards his or her attorney.[22]

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ments, there is no clear guidance for judges, and inconsistent application of the right to waive the Sixth Amendment right to counsel occurs. Parker, *supra* note 1, at 365-66. Because the courts do not know whether or not a waiver should be implied, time-consuming hearings are conducted. *Id.* This affects the administrative efficiency of the court system. *Id.* Furthermore, clear standards are necessary to aid the trial judge in making the difficult decision whether to allow waiver of the right to counsel. Michael C. Krikava & Charlann E. Winking, *The Right of an Indigent Criminal Defendant to Proceed* Pro Se *On Appeal: By Statute or Constitution, A Necessary Evil*, 15 WM. MITCHELL L. REV. 103, 107 (1989). The court must resolve the tension between the defendant's right to choose to represent him or herself and the court's knowledge that this choice will lead to the defendant's conviction. *Id.* The court must also consider society's interests in preventing wrongful convictions and the efficient administration of the courts. Bateman, *supra* note 1, at 104-05. One court summed up the difficult position of the trial court when faced with a waiver of the right to counsel as follows:

> An overprotective judge who refuses to allow a defendant to jeopardize his own defense may be reversed, and a judge who does not make a copious inquiry into the thought process of the accused (which may themselves be characterized as trial strategy) is subject to an appeal such as that presently before this court.

United States v. McDowell, 814 F.2d 245, 248-49 (6th Cir. 1987).

16. For a discussion of the development of the Sixth Amendment right to counsel, see *infra* notes 23-47 and accompanying text.

17. For a discussion of the development of the right to waive the Sixth Amendment right to counsel, see *infra* notes 48-73 and accompanying text.

18. For a further discussion of the split among the circuits over the requirements for a valid waiver, see *infra* notes 74-92 and accompanying text.

19. For a further discussion of the various circumstances where waiver is found, see *infra* notes 83-93 and accompanying text.

20. For a further discussion of the Third Circuit's approach to waiver analysis, see *infra* notes 118-27 and accompanying text.

21. For a discussion of the facts and reasoning of the *Goldberg* court, see *infra* notes 128-73 and accompanying text.

22. For a discussion of the impact of the opinion in *Goldberg*, see *infra* notes 199-205 and accompanying text.

II. BACKGROUND

A. *Historical Development of the Sixth Amendment Right to Counsel*

The common law of England did not recognize a general right to counsel.[23] The American colonists, however, adopted the right to counsel as part of their due process of law.[24] The right to counsel was subsequently incorporated in the Sixth Amendment to the United States Constitution.[25] This right to assistance of counsel was qualified, though, applying only to federal prosecutions and only to defendants who could afford to retain their own counsel.[26]

The Supreme Court did not affirmatively recognize the right to appointed counsel in federal cases for indigent defendants until *Powell v.*

23. STUCKEY, *supra* note 6, at 141. Under the common law of England, a criminal defendant was entitled only to counsel for a misdemeanor charge. *Id.* There was no right to assistance of counsel for a felony charge. *Id.* Numerous theories exist to explain this paradoxical rule. *Id.* One reason suggested is that it was thought that the judge would be more sympathetic in felony cases than for minor charges because of the potentially severe consequences. *Id.* Another reason suggested is that the king wanted to deny defendants accused of a felony the right to counsel because the chances for conviction increased, thus also increasing the chances for the confiscation of the felon's property. *Id.* This common law existed in England until 1836, when Parliament finally recognized the right to assistance of counsel in felony proceedings. Powell v. Alabama, 287 U.S. 45, 60 (1932).

24. *Powell*, 287 U.S. at 60. Almost all of the Colonies adopted the right to counsel as part of their due process of law. *Id.* at 61. Twelve of the thirteen original Colonies adopted the right to counsel prior to the signing of the Constitution. FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 109 (1961). Maryland's colonial constitution reflected a typical declaration of this right: "'That, in all criminal prosecutions, every man hath a right . . . to be allowed counsel . . . .'" *Powell*, 287 U.S. at 61 (quoting MD. CONST. of 1776, art. XIX). The purpose of these provisions in state constitutions was to provide the privilege of counsel that English rules prohibited. HELLER, *supra*, at 109-10.

25. STUCKEY, *supra* note 6, at 141. For the relevant text of the Sixth Amendment, see *supra* note 1.

26. STUCKEY, *supra* note 6, at 141. The states included similar provisions for the right to counsel in their state constitutions or statutes. *Id.* These provisions reflected the Sixth Amendment's wording, usually providing that "[i]n criminal prosecutions the accused shall have the right to appear and defend, and in person and with counsel." *Id.*; *see also Powell*, 287 U.S. at 61-64 (discussing early states' constitutional and statutory provisions for right to counsel). The purpose of the provision for the right to counsel was to change the prior common law of England. HELLER, *supra* note 24, at 110. The right to appointed counsel was not recognized. STUCKEY, *supra* note 6, at 141. Early interpretations of the right to counsel defined this right to mean that if an accused appeared in court with counsel, the accused could not be denied the assistance of counsel. *Id.* The Judiciary Act of 1789 reflected this intent to merely allow the representation by counsel: "That in all the courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel . . . as by the rules of the said courts . . . ." HELLER, *supra* note 24, at 110 (quoting Act of April 30, 1970, 1 Stat. 112, 119 (codified as amended at 18 U.S.C. § 503 (1940))). The limited nature of the early Sixth Amendment was illustrated in the Federal Crimes Act of 1790, in which Congress required courts to assign counsel for defendants in capital cases. *Id.* Congress would not have enacted such a law if the right to appointed counsel was recognized to exist within the Sixth Amendment. *Id.*

Alabama.[27] In *Powell*, the defendants were illiterate and unable to afford counsel, and they were rushed to trial and convicted with the token assistance of the "entire bar."[28] The Supreme Court held that the failure to provide for the assistance of counsel violated the defendants' due process rights.[29] The Court held that in any capital case, the trial

27. 287 U.S. 45 (1932). Notably, this was not a Sixth Amendment case, but instead involved a claim decided under the "fundamental fairness" doctrine of the Fourteenth Amendment. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.1, at 519 (2d ed. 1992). Later, when the Court discarded the fundamental fairness interpretation in favor of selective incorporation analysis, it rendered the Sixth Amendment applicable to the states through the Fourteenth Amendment. *Id.*

28. *Powell*, 287 U.S. at 49. This case involved six African American defendants accused of raping two Caucasian girls in Alabama, a capital offense. *Id.* The case was tried in a racially charged atmosphere. *Id.* at 51. Although the court's record did not report the defendants' ages, they were clearly "youthful." *Id.* at 51-52. They were also "ignorant," "illiterate" and far from their homes. *Id.* at 52.

The Supreme Court addressed the precise issue whether the defendants were substantively denied their right to counsel. *Id.* At their arraignment, the defendants were never asked if they had or intended to retain counsel. *Id.* The trial court never even asked if they had friends or families who might help them. *Id.* The trial began six days after their indictment. *Id.* at 53. The court "appointed all the members of the bar" to represent the defendants. *Id.* A few attorneys agreed to help the defendants, but the extent to which they would represent the defendants' cause was far from clear. *Id.* at 56. Thus, the defendants were denied their right to counsel "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important . . . ." *Id.* at 57.

29. *Id.* at 58. Specifically, the Supreme Court found that "[i]n the light of the facts . . . we think the failure of the trial court to give [the defendants] reasonable time and opportunity to secure counsel was a clear denial of due process." *Id.* at 71. The Court emphasized that the counsel which agreed to help the defendants did not do so until the morning of the trial. *Id.* at 57. Counsel, therefore, had no time to prepare the case. *Id.* The Court explained that these "young, ignorant, illiterate" defendants were "thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." *Id.* at 57-58. Relying on precedent, the Court declared that it was useless to give a defendant his or her day in court without an opportunity to prepare for it. *Id.* (citations omitted). Finding that the right to counsel was a fundamental right, the Court explained the significance of counsel:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable . . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 69.

judge must appoint counsel if the defendant cannot afford an attorney.[30]

The Supreme Court extended the right to assistance of counsel to all federal criminal defendants in *Johnson v. Zerbst*.[31] The defendants in *Zerbst*, charged with a felony, were tried and convicted without counsel because the forum state only provided counsel for defendants charged with a capital crime.[32] In a habeas corpus petition, the defendants claimed that the trial court denied them their Sixth Amendment right to counsel.[33] The Supreme Court agreed, concluding that the Sixth Amendment prohibits the federal courts, in *all criminal* proceedings, from depriving an accused of life or liberty unless the defendant has assistance of counsel at trial.[34] The Court emphasized the importance of representation, stating that the Sixth Amendment right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the . . . skill to protect himself . . . before a tribunal with power to take his life or liberty."[35] The Court concluded: if the right to counsel is not provided, justice will not be done.[36]

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30. *Id.* at 71. The Court declined to determine whether this right to counsel attaches in other criminal proceedings. *Id.* The Court limited its holding, stating that "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." *Id.* The right to have counsel appointed, the Court reasoned, was "a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72.

31. 304 U.S. 458 (1938).

32. *Id.* at 460. This case involved two marines on leave who were indicted for "uttering," passing and possessing counterfeit money. *Id.* at 459. The trial was held immediately after their indictment. *Id.* at 460. The defendants requested that the District Attorney appoint counsel for them. *Id.* The District Attorney later denied that the defendants ever asked him for help. *Id.* at 460-61.

Although they had counsel for the Grand Jury proceeding two months prior to the trial, they were unable to retain counsel for the trial itself. *Id.* at 460. The defendants were tried, convicted and sentenced to four and one-half years imprisonment. *Id.* The defendants attempted to represent themselves. *Id.* Commenting on one of the defendant's defense, the prosecution conceded that he "conducted his defence about as well as the average layman usually does in cases of a similar nature." *Id.* at 461.

33. *Id.* The District Court denied the defendants' habeas corpus petition because the defendants did not attempt to get a message to the judge indicating that they needed appointed counsel. *Id.* Although the district court agreed that the defendants' right to counsel was violated, the judge did not believe that was sufficient to "make the trial void and justify its annulment in a habeas corpus proceeding." *Id.* at 459. The court of appeals affirmed the district court's opinion. *Id.*

34. *Id.* at 463. The Court noted that the defendants had little education, no money and were far from any friends or family. *Id.* at 460. The Court relied on its earlier opinion in *Powell v. Alabama* to illustrate the fundamental nature of the right to counsel in any proceeding. *Id.* at 463 n.10.

35. *Id.* at 462-63.

36. *Id.* at 462. Furthermore, counsel is necessary because "[t]hat which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Id.* at 463. The Court explained that the Sixth

The obligation to provide assistance of counsel for defendants in criminal proceedings was extended to the states in *Gideon v. Wainright.*[37] Charged with a felony and unable to afford retained counsel, the defendant in *Gideon* requested court appointed counsel.[38] His request was denied, and after attempting to represent himself, he was convicted.[39] The Supreme Court granted habeas corpus relief and held that the trial court denied the defendant his Sixth Amendment right to assistance of counsel.[40] Citing the fundamental nature of the right to counsel, the Court concluded that counsel must be provided for any defendant brought to trial, regardless of the charge.[41]

Amendment guarantees fundamental human rights of life and liberty. *Id.* These fundamental rights, the Court noted, include the "humane policy" that an indigent defendant be provided with counsel. *Id.* (citing Patton v. United States, 281 U.S. 276, 308 (1934)).

37. 372 U.S. 335 (1963). In *Gideon*, the Court rendered the Sixth Amendment directly applicable to the states through the Fourteenth Amendment, consistent with the selective incorporation doctrine. *See id.* at 342 (concluding that Sixth Amendment right to counsel is fundamental right); LAFAVE & ISRAEL, *supra* note 27, at 522 (stating that right to counsel is fundamental).

38. *Gideon*, 372 U.S. at 337. The defendant was charged with breaking and entering with intent to commit a misdemeanor, a felony under Florida law. *Id.* at 336. The defendant, lacking money or counsel, pleaded to the trial court that "[t]he United States Supreme Court says I am entitled to be represented by Counsel." *Id.* at 337. The trial court informed the defendant that in Florida, counsel is only appointed in capital cases. *Id.*

39. *Id.* The defendant attempted to conduct his own defense. *Id.* Despite his efforts, making an opening statement, cross-examining witnesses and presenting his own witnesses, the jury returned a guilty verdict. *Id.* The defendant was sentenced to five years in prison. *Id.* The defendant then filed a habeas corpus petition, claiming that the trial court denied his "Fourth, Fifth and Fourteenth Amendment rights." *Id.* at 337 n.1.

40. *Id.* at 345. The Court rejected the precedent of *Betts v. Brady*, 316 U.S. 455 (1942). In *Betts*, the Court concluded that the right to counsel in state court was not a fundamental right implicated in the Due Process Clause of the Fourteenth Amendment. *Betts*, 316 U.S. at 461-62. Overruling *Betts*, the Court concluded that *Betts* was an anomaly—"an abrupt break with its own well-considered precedents." *Gideon*, 372 U.S. at 344. The *Gideon* Court instead embraced the older precedents, which recognized the fundamental nature of the right to counsel. *Id.* Such recognition "restore[s] constitutional principles established to achieve a fair system of justice." *Id.*

41. *Gideon*, 372 U.S. at 344. The Court explained: "[R]eason and reflection require us to recognize that in 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. This seems to us to be an obvious truth." *Id.* Furthermore, the Court pointed to the necessity of representation by counsel in court proceedings:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours . . . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id.

While *Gideon* established the right of an indigent defendant to court appointed counsel, it remained unclear whether this right attached only in felony proceedings.[42] The scope of the right to counsel was settled in *Argersinger v. Hamlin*.[43] The defendant was charged with a misdemeanor punishable by either a fine or six months imprisonment, a petty offense.[44] The trial court refused to appoint counsel for the defendant and he was convicted.[45] Rejecting the defendant's claim that he was denied his right to counsel, the Supreme Court of Florida stated that the right to counsel only extended to trials "for non-petty offenses punishable by more than six months imprisonment."[46] The United States Supreme Court reversed, declaring that the right to court appointed counsel extends to any criminal prosecution with a potential of depriving a defendant of liberty, regardless of the classification of the offense.[47]

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42. *See* STUCKEY, *supra* note 6, at 143 (stating question remained after *Gideon* whether counsel must be appointed for petty offenses).

43. 407 U.S. 25 (1972); *see* Bateman, *supra* note 1, at 89 (discussing present day status of right to counsel). The Sixth Amendment right to counsel only attaches to "critical stages" in a criminal prosecution. LAFAVE & ISRAEL, *supra* note 27, at 535. The "critical stages" include all interrogation subsequent to the commencement of formal judicial proceedings, pre-trial hearings in which a defendant requires assistance of counsel and trial court proceedings. Kaufer, *supra* note 1, at 401. The rationale is that assistance of counsel is unnecessary unless "the substantial rights of the accused may be affected." *Id.* The greater importance that the right to counsel assumes after formal proceedings have begun is reflected in the significant burden states have in establishing waiver. Parker, *supra* note 1, at 373. The counsel's role shifts from that of merely protecting the accused from self-incrimination, as the Fifth Amendment requires, to that of advocating the defendant's case, as the Sixth Amendment requires. *Id. See generally* Karen Akst Schecter, Comment, *The Right to Counsel: Attachment Before Criminal Judicial Proceedings?*, 47 FORDHAM L. REV. 810 (1979). For a discussion of the differences between the Fifth and Sixth Amendment right to counsel, see *supra* note 1.

44. *Argersinger*, 407 U.S. at 26. The defendant was charged with carrying a concealed weapon. *Id.* This offense carried a potential punishment of a $1,000 fine or six months imprisonment. *Id.*

45. *Id.* Following trial, the defendant was sentenced to 90 days in jail. *Id.* In a subsequent habeas corpus petition, the defendant claimed that "he was unable as an indigent layman properly to raise and present to the trial court good and sufficient defenses to the charge for which he stands convicted." *Id.*

46. *Id.* at 27.

47. *Id.* at 37. The Supreme Court reasoned that the legal problems in misdemeanor cases are often just as complex as those in felony cases. *Id.* at 33. The Court also pointed to a long tradition of providing counsel to misdemeanor defendants. *Id.* at 30. While the common law of England did not include the right to counsel in felony cases, it did provide the right to counsel in petty offense cases. *Id.* Furthermore, the Court noted that the volume of misdemeanor cases often results in "speedy dispositions, regardless of the fairness of the result." *Id.* at 34. The Court also emphasized the fundamental nature of the right to counsel and asserted that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." *Id.* at 31. Thus, the Court concluded that presence of counsel is required to insure a fair trial. *Id.* at 37. Significantly, however, this right was conditioned on the *actual* punishment, not the potential punishment. COOK, *supra* note 4, § 7:2, at 271 (emphasis added). Thus, it is immaterial whether there is a potential for imprisonment if a less severe sanction is ultimately imposed. *Id.* The Court

B. *The Sixth Amendment Right to Waive Counsel*

Argersinger and *Gideon* indisputably established the right of an indigent defendant to the assistance of counsel under the Sixth Amendment.[48] Supreme Court jurisprudence, however, had also declared that the Sixth Amendment includes the right to waive the assistance of counsel.[49] This inherent tension within the Sixth Amendment raised the issue of whether a defendant who was constitutionally entitled to the assistance of counsel could nevertheless waive this right or whether assistance must be provided to ensure a fair trial.[50] In an attempt to alleviate this tension,

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stated that "every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." *Argersinger*, 407 U.S. at 40. Although the distinction was only implicit in *Argersinger*, the Court made this distinction explicit in *Scott v. Illinois*, 440 U.S. 367 (1979). *See id.* (clarifying present scope of right to counsel).

48. Krikava & Winking, *supra* note 15, at 109-10.

49. Augustine Gerard Yee, *The Right to Competent Counsel: Extending the* Faretta *Waiver*, 18 PEPP. L. REV. 909, 916 (1991); *see also* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942) (recognizing right to counsel implicitly embodies "correlative right to dispense with a lawyer's help"); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (discussing standards to apply to determine proper waiver).

50. *Zerbst*, 304 U.S. at 464; *see also* Krikava & Winking, *supra* note 15, at 110 (finding that after *Gideon*, question arose whether defendant who was constitutionally entitled to representation could choose to give up that representation and proceed pro se). The issue of waiver of the Sixth Amendment right to counsel is particularly difficult because the court must balance the individual's freedom of choice and societal concern with a just outcome. *See* Yee, *supra* note 49, at 916-18 (examining conflict between individual freedom of choice to proceed pro se and right to assistance of counsel). The court must decide whether to allow a waiver of counsel knowing that such a decision will probably harm the individual. *Id.* at 918. While the decision to waive counsel is usually not a wise one, the court must defer to the fundamental principle of individual autonomy. *Id.* This balancing of societal and individual interests suggests that the right to counsel and the right to waive counsel conflict. Bateman, *supra* note 1, at 104. The defendant must choose either the right to counsel or the right to waive counsel, not both. *Id.*

Whatever the choice that the defendant ultimately makes, the trial court must weigh societal concerns when determining whether to allow a defendant to waive counsel. *Id.* One societal concern is preventing wrongful convictions. *Id.* The decision of criminal defendants to represent themselves increases the risk of an unjust result. *Id.* The Supreme Court has continuously recognized the important role of counsel in criminal proceedings. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Without [counsel's help] . . . [the defendant] faces the danger of conviction because he does not know how to establish his innocence."). Another societal concern is the efficient administration of justice. Bateman, *supra* note 1, at 105. Criminal defendants will most likely not be familiar with criminal procedure, thus causing delays. *Id.* at 106. The judge must delay trial to overcome the defendant's ignorance. *Id.* This undoubtedly creates a ripple effect on the rest of the court's docket. *Id.* An additional concern is the effect on the appellate courts. *Id.* With the almost certain conviction of defendants who waive counsel and proceed pro se comes a flood of appeals asserting that there was an improper waiver of the right to counsel. *Id.* In light of these societal concerns, the trial judge must find a way to protect the interests of society without denying a defendant's constitutional right to waive counsel. *Id.*

courts require certain elements to establish a valid waiver.[51]

The Supreme Court first commented on the requirements for a valid waiver of the Sixth Amendment right to counsel in *Johnson v. Zerbst*.[52] The *Zerbst* Court, balancing the right to waive counsel and the right to assistance of counsel, stated that a defendant has a right to counsel "unless he . . . waives the assistance of counsel."[53] The Court warned that a valid waiver requires an intelligent relinquishment of a known right.[54] The validity of a waiver, the Court stated, must be determined on a case-by-case basis.[55] Furthermore, the Court explained that the Sixth Amendment right to counsel imposes a heavy burden on the trial judge to ensure a proper waiver, and the Court recommended that such waiver appear in the record.[56] Thus, the Supreme Court established the general "knowing

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The Supreme Court noted the Sixth Amendment's inherent tension in *Faretta v. California*:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel.

422 U.S. 806, 832 (1975).

51. *See* Anderson, *supra* note 6, at 380 (stating that after courts established right to counsel, they found it necessary to determine under what circumstances this right could be waived). For a discussion of the Supreme Court's approach to waiver analysis, see *supra* notes 48-50 and *infra* notes 52-73 and accompanying text.

52. 304 U.S. 458 (1938). For a discussion of the facts of *Zerbst*, see *supra* notes 31-36 and accompanying text.

53. *Zerbst*, 304 U.S. at 463.

54. *Id.* at 464. The Court said specifically that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* The Court explained that if the right to counsel is properly waived, then the "assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence." *Id.* at 468. If, however, the trial court does not provide counsel for a defendant unable to retain counsel, and the defendant has not "intelligently waived" this constitutional right, the court loses jurisdiction. *Id.* The judgment is thus rendered void, and a defendant imprisoned may be released on habeas corpus. *Id.*

55. *Id.* at 464. Specifically, the Court stated: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.*

56. *Id.* at 465. The Court explained:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Id. The burden is on the Government to prove a valid waiver. COOK, *supra* note 4, § 7:13, at 306.

and intelligent" standard for a valid waiver.[57] The Court, however, declined to announce any specific requirements to provide guidance to lower courts in determining when a "knowing and intelligent" waiver exists.[58]

The Court expanded on the "knowing and intelligent" standard required for a valid waiver in *von Moltke v. Gillies*.[59] In *von Moltke*, the defendant signed a waiver of her right to counsel, pleaded guilty and was sentenced to prison.[60] In a subsequent habeas corpus proceeding, a plurality of the Court held that the defendant did not have the understanding and comprehension required for a valid waiver.[61] Noting that there is a

57. *See Zerbst*, 304 U.S. at 469 (stating that defendant must have "competently and intelligently" waived his or her right to counsel). More recently, the Supreme Court established the standard of a "knowing and intelligent" waiver. Faretta v. California, 422 U.S. 806, 835 (1975). The difference, if any, between the "competent and intelligent" waiver standard and the "knowing and intelligent" waiver standard is unclear. Bateman, *supra* note 1, at 90 n.61.

The Court reaffirmed the concept of waiver in *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). A defendant who had studied law in the past demanded to present his case without counsel. *Id.* at 278. The court permitted the defendant to defend himself, stating that "the Constitution does not force a lawyer upon" anyone. *Id.* at 279.

58. Anderson, *supra* note 6, at 381-82. The author explained that after the "knowing and intelligent" standard was established for waiver, it became clear that there was a need for states to establish some guidelines to determine what constituted a "knowing and intelligent" waiver. *Id.*

59. 332 U.S. 708 (1948) (plurality opinion).

60. *Id.* at 709. The defendant, along with many others, was charged with conspiracy to violate the Espionage Act. *Id.* The defendant, a former German countess, allegedly conspired to collect and deliver vital military information to German agents. *Id.* The defendant had no money to hire a lawyer. *Id.* At the arraignment, when the trial judge was informed that the defendant had neither counsel nor the ability to hire one, the trial judge said that he would appoint an attorney. *Id.* at 712. The judge immediately brought the defendant into the courtroom, picked a lawyer in the courtroom and told him to "help" the defendant out. *Id.* The attorney at first resisted, but then agreed to help just for the arraignment. *Id.* at 712-13. The lawyer did not even see the indictment, or inform the defendant of the nature of the charges against her. *Id.* at 713. After the defendant entered a plea of not guilty, the trial judge said he would appoint another attorney. *Id.* Without any legal advice, except that of government FBI agents, the defendant later changed her plea to guilty. *Id.* at 715. Before the judge, the defendant stated that she understood the charges and was voluntarily changing her plea to guilty. *Id.* at 717. She then signed a written waiver. *Id.* The Supreme Court noted that the entire proceeding took no more than five minutes. *Id.* The record did not indicate whether the judge advised the defendant of the implications of the charges or the consequences of her plea. *Id.* The judge did not ask whether the defendant was able to hire a lawyer or why she did not want one. *Id.* at 718. The judge sentenced the defendant to imprisonment for four years. *Id.* at 709. In a habeas corpus petition, the defendant claimed that her sentence was invalid because she "neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the Sixth Amendment." *Id.* at 710.

61. *Id.* at 720. The Supreme Court concluded that the defendant did not comprehend her legal rights despite the fact that the Court found that she was "an intelligent, mentally acute woman." *Id.* The Court pointed to *Powell v. Alabama* to illustrate that the right to counsel deserves close scrutiny when a defendant is sub-

strong presumption against waiver, the Court declared that a judge "must investigate as long and as thoroughly as the circumstances of the case before him demand" in order to ensure a valid waiver.[62] This duty is not satisfied by mere "token" or "hollow" compliance.[63] The Court listed several requirements for a valid waiver: the defendant must apprehend the nature of the charges, the statutory offenses included within them, the range of potential punishments, the possible defenses to the charges and the "circumstances in mitigation thereof."[64] Despite the Court's declaration of specific factors to apply in waiver analysis, most of the lower courts did not interpret these factors as essential for a valid waiver.[65]

The Court attempted to clarify the standards for waiver in *Faretta v. California*.[66] Addressing the correlative Sixth Amendment right of defendants to represent themselves, the Court reaffirmed the "knowing and intel-

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ject to widespread public hostility. *Id.* The Court found such widespread hostility in *von Moltke*, emphasizing that the United States was at war with Germany at the time, that the defendant was German, that the United States was deeply suspicious of all Germans and that the defendant was charged with espionage. *Id.* at 720-21. Indeed, the Court stated that "[a]nyone charged with espionage in wartime under the statute in question would have sorely needed a lawyer; [the defendant], in particular, desperately needed the best she could get." *Id.* at 721. The Court also commented on the confusing nature of conspiracy charges under the Espionage Act. *Id.*

62. *Id.* at 723-24. The Court further explained: "It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings." *Id.* at 722. It is not enough that a defendant states that he or she is informed of the right to counsel and desires to waive it. *Id.* at 724.

63. *Id.* at 723. The "momentary" appointment of counsel, the Court declared, was a mere "hollow compliance" with the right to counsel. *Id.* The trial judge never even appointed another attorney until it was too late—after the defendant plead guilty. *Id.* The signing of a waiver is far from enough to satisfy the waiver requirement. *Id.* at 724. Indeed, in this case, it left the judge "entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel." *Id.* In addition, the advice that the FBI agents gave to the defendant did not imply that the waiver of the right to counsel was understood. *Id.* at 726. The Court explained that the Constitution contemplates the "[u]ndivided allegiance and faithful, devoted service" of lawyers, not government agents, to provide prisoners with legal counsel and aid. *Id.* at 725-26.

64. *Id.* at 724. Furthermore, the Court asserted that a judge can determine a valid waiver only "from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *Id.* The Court noted that even "the slightest deviation from the court's routine procedure would have revealed" the defendant's uncertainty about her waiver. *Id.* at 725. The precise meaning of the Court's requirement that the defendant must understand the possible defenses to the charges and the "circumstances in mitigation thereof" is unclear. LAFAVE & ISRAEL, *supra* note 27, at 545 n.3.

65. LAFAVE & ISRAEL, *supra* note 27, at 546. The courts are in agreement, though, that this is the preferred method to determine a valid waiver. *Id.* For a discussion of the various approaches of the circuits in determining a valid waiver of the right to counsel, see *infra* notes 74-117 and accompanying text.

66. 422 U.S. 806 (1975).

ligent" standard necessary for a valid waiver.[67] In *Faretta*, the trial judge appointed counsel over the defendant's objections, concluding that there was no "intelligent and knowing" waiver of the right to counsel.[68] On appeal, the Supreme Court held that the trial court violated the defendant's constitutional right to self-representation by appointing counsel over his objections.[69] Discussing the concept of waiver, the Court declared that a defendant does not need to have the skill of a lawyer to waive the right to counsel.[70] Thus, the Court concluded that the defendant's waiver was valid.[71] The Court stressed, however, that the defendant should be aware

67. *Id.* at 835 (citing Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)).

68. *Id.* at 809-10. The defendant was charged with grand theft. *Id.* at 807. The trial court appointed counsel at the defendant's arraignment. *Id.* Well before trial, the defendant requested permission to represent himself. *Id.* The judge's inquiries revealed that the defendant had a high school education and that he did not want to be represented by the public defender because the defendant thought that his caseload was too heavy. *Id.* The judge accepted the defendant's waiver, but declared that it was subject to reversal. *Id.* at 808. Prior to the trial, the judge held another hearing to determine the defendant's ability to represent himself. *Id.* After inquiring into the defendant's knowledge of various rules of trial procedure, the judge ruled that the defendant had not made a "knowing and intelligent" waiver. *Id.* at 808-10. After a trial where court-appointed counsel represented the defendant, the defendant was judged guilty and sentenced to prison. *Id.* at 811. The California Court of Appeals agreed that the defendant had no constitutional right to defend himself and affirmed his conviction. *Id.* at 811-12. The Supreme Court granted certiorari. *Id.* The precise issue on appeal was "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Id.* at 807.

69. *Id.* at 836. The Supreme Court affirmatively recognized the right of a defendant to proceed pro se. *Id.* The Court highlighted the fact that circuit courts consistently held that the Bill of Rights protected the right to self-representation. *Id.* at 816. The right to counsel, the Court asserted, was intended to supplement the basic right to represent oneself. *Id.* The Court conducted a review of the history of the Sixth Amendment and concluded that its structure implies the right to self-representation. *Id.* at 819. The Court noted that the only period in history that counsel was forced upon an accused was the notorious English Star Chamber. *Id.* at 821. Furthermore, the colonies included the right to self-representation in their colonial charters. *Id.* at 830. For a general discussion of the right to self-representation and the Star Chamber, see HELLER, *supra* note 24, at 5-14.

The Court attempted to strike a balance between the right to counsel and the right to self-representation. *Faretta*, 422 U.S. at 832. Noting the significance of the right to assistance of counsel for any accused, the Court found that it did not justify "impos[ing] a lawyer upon . . . an unwilling defendant." *Id.* at 833.

70. *Faretta*, 422 U.S. at 835. The Court stated that a defendant "need not . . . have the skill and experience of a lawyer in order [to] competently and intelligently . . . choose self-representation." *Id.*

71. *Id.* The Court pointed to several factors in determining that the defendant's waiver was valid. *Id.* First, the defendant clearly made his request to proceed pro se. *Id.* Second, the record affirmatively showed that the defendant was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.* Third, the trial judge warned the defendant that he thought it was a mistake to waive his right to counsel. *Id.* at 835-36.

of the "dangers and disadvantages of self-representation."[72] Accordingly, the Court advised that the record should establish that the decision to waive the right to counsel was made "'with [defendant's] eyes open.'"[73]

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72. *Id.* at 835.

73. *Id.* (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)). The Court concluded that the defendant made his decision knowingly. *Id.* at 836. Thus, the trial judge's decision to appoint counsel violated the defendant's right to defend himself. *Id.*

Although the Court clarified the prerequisites for a valid waiver of the right to counsel, the Court declined to give any specified standards. *See* LAFAVE & ISRAEL, *supra* note 27, at 554-55 (noting *Faretta* Court did not view factors listed in *von Moltke* as essential). The Court most recently addressed the issue of waiver of the right to counsel in *Patterson v. Illinois*, 487 U.S. 285 (1988). In *Patterson*, the Court affirmed the requirement that a judge must make a "searching [and] formal inquiry" of the defendant to determine a valid waiver. *Id.* at 299. *Patterson* involved the Sixth Amendment right to counsel at postindictment questioning of an accused. *Id.* at 290. The defendant in *Patterson* was indicted for murder. *Id.* at 288. During subsequent interviews with the police, he was read his *Miranda* rights, and the defendant signed a waiver form. *Id.* The defendant then confessed involvement in the murder. *Id.* The jury convicted the defendant. *Id.* at 289. On appeal, the defendant argued that he had not "knowingly and intelligently" waived his Sixth Amendment right to counsel before he gave his uncounseled postindictment confessions. *Id.* He argued that while the *Miranda* warnings were enough for a valid Fifth Amendment waiver of the right to counsel, it was not enough for a waiver of the Sixth Amendment right to counsel. *Id.* The Supreme Court rejected the defendant's claim, concluding that the *Miranda* waiver was adequate to make the defendant aware of his Sixth Amendment right to counsel in the context of postindictment questioning. *Id.* at 298. Thus, the Court held that the defendant's waiver was "knowing and intelligent." *Id.* at 296. The Court explained that the Sixth Amendment is not necessarily superior to the Fifth Amendment right to counsel. *Id.* at 297. Instead, the Court reasoned that a practical approach to the waiver issue is utilized to determine the scope of the Sixth Amendment right to counsel, examining the importance of the attorney's function in the particular stage of the criminal proceedings in question and the dangers to the accused of proceeding without counsel. *Id.* at 298. The Court explained that at one end of the spectrum, there are certain pre-trial proceedings where counsel is not required under the Sixth Amendment, such as postindictment photographic identification, in which the accused does not require legal counsel to cope with meeting his or her adversary. *Id.* In contrast, the Court pointed to the "enormous importance and role that an attorney plays at a criminal trial . . . ." *Id.* The Court explained that the full "dangers and disadvantages of self-representation" are more obvious at trial than during postindictment questioning. *Id.* Because of the heightened dangers to the defendant of proceeding without counsel, the Court explained that a defendant's waiver of the right to counsel at trial is subject to the "most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Id.*

C. *The Analysis of Waiver of the Right to Counsel in the Circuit Courts*

1. *General Waiver Standards—The Defendant's Decision to Waive Counsel and Proceed Pro Se*

Courts have generally looked to *Faretta* for the applicable standards to determine a valid waiver of the right to counsel.[74] Since *Faretta*, lower courts have attempted to find the proper balance between allowing a defendant to exercise the right to self-representation and ensuring that a "knowing and intelligent" waiver was made.[75] Although the *Faretta* opinion clarified that the record should establish that the defendant made a "knowing and intelligent" waiver, the circuit courts interpreted this standard in several different ways.[76]

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74. *See, e.g.*, United States v. Swinney, 970 F.2d 494, 498 (8th Cir. 1992) (relying on *Faretta* for the applicable waiver standard); United States v. Allen, 895 F.2d 1577, 1579 (10th Cir. 1990) (same); United States v. McDowell, 814 F.2d 245, 248 (6th Cir.) (same) *cert. denied*, 484 U.S. 980 (1987); United States v. Mitchell, 788 F.2d 1232, 1235 (7th Cir. 1986) (same); United States v. McFadden, 630 F.2d 963, 970 (3d Cir. 1980) (same).

75. *McDowell*, 484 U.S. at 980 (White, J., dissenting). Justice White, in his dissenting opinion from the denial of the writ of certiorari, discussed the split among the lower courts on the matter of waiver of the right to counsel. *Id.* (White, J., dissenting). According to Justice White:

> Since *Faretta*, lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant's right to counsel is only made when "knowing and intelligent" and "with eyes open."

Id. (White, J., dissenting). Justice White pointed to the case in point to illustrate the confusion. *Id.* (White, J., dissenting). The district court concluded that a short colloquy between judge and defendant was enough. *McDowell*, 814 F.2d at 249. While the Sixth Circuit affirmed, it recommended a new standard for future cases. *Id.* at 249-50. Following the lead of the D.C. Circuit, the court invoked its supervisory powers to require district judges in the future to follow the model inquiry set forth in 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES 1.02-2 (3d ed. 1986), or one covering the same substantive points. *McDowell*, 814 F.2d at 250.

Another court stated that "[w]hen the Supreme Court in *Faretta* announced the right to self-representation it placed trial judges between a rock and a hard place." United States v. Berkowitz, 927 F.2d 1376, 1383 (7th Cir. 1991). It further explained the trial court's dilemma:

> Whether the district court honors or denies the defendant's request to represent himself, the defendant is likely to appeal if he loses at trial. The appeal will almost inevitably revolve around whether or not the defendant was fully aware of his right to counsel, the benefits he receives because of that right, and the pitfalls of going alone.

Id.

76. *See also* Anderson, *supra* note 6, at 381-82 (explaining that after Supreme Court determined that waiver of right to counsel is valid if made with "knowledge and intelligence," courts needed to establish guidelines as to just what constituted "knowledge and intelligence"); *McDowell*, 484 U.S at 980-81 (noting the variety of interpretations of *Faretta* among lower courts) (White, J., dissenting). The Sixth Circuit noted the questions left unanswered after *Faretta*: "Since *Faretta*, a great many courts have addressed the question of the type of record necessary to establish that a defendant's waiver of counsel is knowing and intelligent." *McDowell*, 814

Circuit courts agree that the trial court should follow a certain procedure to determine the validity of the waiver of the right to counsel.[77] Once the defendant requests to proceed pro se, the trial court must make a careful evaluation of the accused's ability to make a waiver of the right to counsel.[78] It is usually necessary for the trial judge to hold a hearing to warn of the dangers of self-representation and to ascertain whether the defendant understands these disadvantages and their consequences.[79] Some of the dangers of self-representation of which the trial judge should inform the defendant include: (1) that defending oneself requires following technical rules that govern the conduct of a trial; (2) that the prosecutor has extensive experience and training in trial procedure and that the defendant, unfamiliar with legal procedures, will probably make technical and tactical mistakes that a lawyer would not; (3) that the defendant comprehends the nature of the charges and potential punishment; and (4) that the choice to proceed pro se precludes an appeal about the competency of the defendant's representation.[80] If the defendant persists in the

F.2d at 249. For a discussion of the various interpretations of *Faretta* among the lower courts, see *supra* notes 74-75 and *infra* notes 77-93 and accompanying text.

77. LAFAVE & ISRAEL, *supra* note 27, at 554. For a discussion of the standards for waiver of the right to counsel that circuits consistently require, see *supra* notes 74-76 and *infra* notes 78-117 and accompanying text.

78. STUCKEY, *supra* note 6, at 146; Grace Chung & Alan Sege, Comment, *Trial-Criminal Procedure Project*, 81 GEO. L.J. 1267, 1276 (1983); *see also* Government of Virgin Islands v. James, 934 F.2d 468, 470 (3d Cir. 1991) (detailing judicial inquiry essential for waiver of right to counsel); *Berkowitz*, 927 F.2d at 1383 (declaring before waiver may be valid, "the trial judge must ensure that the defendant has knowingly and voluntarily waived his Sixth Amendment right to counsel"); *Allen*, 895 F.2d at 1578 (emphasizing importance of judicial inquiry to determine "voluntary, knowing, and intelligent" waiver).

79. LAFAVE & ISRAEL, *supra* note 27, at 554-55; *see also Berkowitz*, 927 F.2d at 1383 ("[T]he judge should advise the defendant about and try to ensure he understands the benefits associated with the right to counsel, the pitfalls of self-representation, and the fact that it is unwise for one not trained in the law to try to represent himself."); United States v. Welty, 674 F.2d 185, 188 (3d Cir. 1982) (stating district court should advise defendant of "dangers and disadvantages" of proceeding pro se) (citing Faretta v. California, 422 U.S. 806, 835 (1975)). This is commonly referred to as a "Faretta" hearing. STUCKEY, *supra* note 6, at 147.

80. LAFAVE & ISRAEL, *supra* note 27, at 554; *see also* United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994) ("In particular, we require proof that the defendant understood his or her 'constitutional right to have [a] lawyer perform certain core functions,' and that he or she 'appreciate[d] the possible consequences of mishandling these core functions and the lawyer's superior ability to handle them.'" (quoting United States v. Kimmel, 672 F.2d 720, 721 (9th Cir. 1982))); *James*, 934 F.2d at 471 (citing *von Moltke* factors as essential for valid waiver); United States v. Mitchell, 788 F.2d 1232, 1236 n.3 (7th Cir. 1986) (advising trial court to engage in "a much more thorough and extensive inquiry" by asking defendant's age; informing of charges and possible sentence; ensuring defendant's comprehension of charges; instructing defendant to follow Federal Rules of Evidence and Federal Rules of Criminal Procedure; and informing defendant to conduct himself according to rules of court); United States v. McFadden, 630 F.2d 963, 972 (3d Cir. 1980) (pointing to significance of defendant's understanding of charges against him and range of punishment).

desire to proceed pro se, the trial judge should inquire into factors relevant to the defendant's ability to understand the waiver of counsel.[81] Such factors include the defendant's age, history, prior experience or familiarity with criminal trials, and prior consultation with counsel in deciding to represent oneself.[82]

While the above procedure is the preferred method for determining whether a valid waiver of the right to counsel has been made, it is not necessarily a constitutional requirement.[83] The majority of federal appellate courts, including the United States Courts of Appeals for the First, Second, Fifth, Seventh, Eighth and Ninth Circuits, only require that the defendant is aware of the disadvantages of proceeding pro se.[84] This may be established from the record as a whole, rather than a formal searching

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81. LAFAVE & ISRAEL, *supra* note 27, at 554.

82. *Id.*; *see also Berkowitz*, 927 F.2d at 1384 (highlighting defendant's college degree in determination of valid waiver); Meyer v. Sargent, 854 F.2d 1110, 1114-15 (8th Cir. 1988) (pointing to defendant's previous contacts with criminal courts to infer "general knowledge of the dangers and disadvantages of self-representation"); Richardson v. Lucas, 741 F.2d 753, 757 (5th Cir. 1984) (listing factors such as defendant's familiarity with criminal justice system and schooling in law). A "Faretta" hearing not only enables a judge to properly determine the validity of a waiver of the right to counsel, but also provides the appellate court with a basis for review for the probable appeal of the pro se defendant after conviction. LAFAVE & ISRAEL, *supra* note 27, at 554. The requirement that courts discuss waiver of counsel in open court with the defendant is well-established. *Berkowitz*, 927 F.2d at 1383 (advocating formal court inquiry of defendant); United States v. Charrgia, 919 F.2d 842, 847 (2d Cir. 1990) (same); United States v. Ant, 882 F.2d 1389, 1394 (9th Cir. 1989) (same).

83. LAFAVE & ISRAEL, *supra* note 27, at 555; *see* Chung & Sage, *supra* note 78, at 1276 (noting failure of court to hold waiver hearing may not be enough to warrant reversal, especially if trial record otherwise reflects "knowing and intelligent" waiver); *see also Mitchell*, 788 F.2d at 1235 (finding failure of trial court to inform defendant of dangers of waiving counsel was not reversible error). *But see* United States v. Martin-Trigona, 684 F.2d 485, 491-92 (7th Cir. 1982) (finding waiver of counsel may not be presumed from silent record).

84. *See* United States v. McDowell, 814 F.2d 245, 249 (6th Cir. 1987) (discussing split among circuits); *accord* Gilbert v. Lockhart, 930 F.2d 1356, 1359 (8th Cir. 1991) (finding no valid waiver despite defendant's eight prior convictions). *See generally* United States v. Meeks, 987 F.2d 575, 579 (9th Cir. 1993) (noting defendant "must be aware of the . . . charges against him, the possible penalties and the dangers of self-representation"); United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (stating that defendant "should be well warned of the dangers before he sets out to represent himself"); *Meyer*, 854 F.2d at 1114 (noting that "key inquiry" made by trial court is whether defendant knows consequences of self-representation); *Lucas*, 741 F.2d at 757 (noting that trial judge fully disclosed to defendant advantages of proceeding with counsel); United States v. Hafen, 726 F.2d 21, 24 (1st Cir. 1984) (holding that trial court may consider defendant's background experience in determining defendant's knowledge of disadvantages of self-representation). The Eighth Circuit, like all of the circuits, is not entirely consistent in their analysis of waiver. *Compare Lockhart*, 930 F.2d at 1359 (requiring formal inquiry), *with* United States v. Pilla, 550 F.2d 1085, 1093 (8th Cir. 1977) (determining sufficiency of waiver from record as whole, not formal inquiry).

inquiry.[85] Many of the courts adopting this nonformalistic approach, however, prefer a formal inquiry on the record.[86]

In contrast, the United States Courts of Appeals for the Third, Tenth and Eleventh Circuits require a "searching inquiry," even if the surrounding circumstances suggest a "knowing and intelligent" waiver.[87] While this does not require a rote dialogue, the district court judge must conduct a special hearing on the record.[88] Specifically, the trial judge must warn the defendant of the dangers of self-representation and establish that the defendant comprehends the consequences of waiver.[89] Only the Third Circuit, however, has actually reversed a conviction for lack of such an inquiry.[90]

The United States Courts of Appeals for the Sixth and District of Columbia Circuits have rejected both formalistic and nonformalistic approaches.[91] Invoking their supervisory powers, these courts require judges

85. *McDowell*, 814 F.2d at 249. *See, e.g., Meeks*, 987 F.2d at 579 (noting that valid waiver may be found by examining record as whole); *Meyer*, 854 F.2d at 1114 (finding effective waiver of counsel despite lack of court advisement, emphasizing defendant's prior experience in criminal justice system); Wilks v. Israel, 627 F.2d 32, 34-36 (7th Cir. 1980) (finding valid waiver despite lack of extensive inquiry).

86. *McDowell*, 814 F.2d at 249. *See, e.g., Berkowitz*, 927 F.2d at 1383 (finding valid waiver despite lack of proper court inquiry, but advising "the few minutes a proper *Faretta* inquiry normally would take is a worthwhile alternative to a new trial"); *Mitchell*, 788 F.2d at 1236 n.3 (holding that although lack of thorough inquiry did not render waiver invalid, it is preferable for district court to have conducted "a much more thorough and extensive inquiry").

87. *See* United States v. Allen, 895 F.2d 1577, 1578 (10th Cir. 1990) (asserting that searching inquiry by trial judge must appear on record); Greene v. United States, 880 F.2d 1299, 1304 (11th Cir. 1989) (finding invalid waiver due to lack of inquiry on record); United States v. Welty, 674 F.2d 185, 189 (3d Cir. 1982) (finding invalid waiver due to lack of inquiry on record).

88. *Allen*, 895 F.2d at 1578; *Greene*, 880 F.2d at 1304; *Welty*, 674 F.2d at 189.

89. *Allen*, 895 F.2d at 1578 (declaring that trial judge's inquiry must appear on record); *Welty*, 674 F.2d at 189 (declaring that waiver is valid only when trial judge, on record, "has made a searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary").

90. United States v. Goldberg, 67 F.3d 1092, 1103 (3d Cir. 1995) (reversing conviction due to trial judge's insufficient inquiry of defendant); *Welty*, 674 F.2d at 194 (same). Even the Third Circuit, however, has rejected a "rote dialogue" requirement for a valid waiver. *See* Government of Virgin Islands v. James, 934 F.2d 468, 473 (3d Cir. 1991) (declining to require detailed list of requirements for valid waiver of right to counsel). Instead, the proper standard is whether the district court judge has made "a searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary." *Id.* at 473-74 (citing *Welty*, 674 F.2d at 189). Similar to other circuits, the Third Circuit looks to the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 474 (quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981)). An extensive colloquy of some kind, however, is still required. *See id.* (finding valid waiver by looking to facts and circumstances of case in addition to extensive colloquy of trial judge).

91. *See* McDowell v. United States, 484 U.S. 980, 980 (1987) (White, J., dissenting) (noting rejection by Sixth and D.C. Circuits of Third Circuit's formalistic approach).

to conduct a detailed inquiry based upon the *Bench Book* model instruction for district court judges.[92] Thus, in these circuits, whenever a district court judge is faced with a defendant who wishes to represent him or herself in criminal proceedings, the proper procedure to follow is either that defined in the model instruction or one covering the same substantive points.[93]

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92. *See* United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) (requiring courts in future to conduct inquiry as recommended in 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES (3d ed. 1986)); United States v. Bailey, 675 F.2d 1292, 1297 (D.C. Cir. 1982) (same). The guidelines provide a list of 16 different questions to ask defendants when they state that they want to represent themselves. 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES §§ 1.02-2. Some examples of the recommended questions include:

> (1) Have you ever studied law? (2) Have you ever represented yourself or any other defendant in a criminal proceeding? (3) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case. (4) Are you familiar with the Federal Rules of Evidence? (5) Are you familiar with the Federal Rules of Criminal Procedure? (6) I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try and represent yourself. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to represent yourself. (7) Is your decision entirely voluntary on your part?

Id. Furthermore, if the questions are answered appropriately, the judge should say something to the effect that "I find that the defendant has knowingly and voluntarily waived his right to counsel." *Id.*

93. *See McDowell*, 814 F.2d at 250 (citing BENCH BOOK, *supra* note 92) (mandating substantial but not literal compliance with *Bench Book for United States District Judges*). Moreover, the Seventh Circuit has recommended the use of the *Bench Book* model, although it is not a requirement. *See* United States v. Berkowitz, 927 F.2d 1376, 1383 (7th Cir. 1991) (citing BENCH BOOK, *supra* note 92) (stating that appropriate inquiry for waiver purposes is found in *Bench Book for United States District Judges*). The *Berkowitz* court explained that "[b]y conducting a formal inquiry such as the one set out in the District Judge's Bench Book, the judge will insulate the judgment from . . . attack . . . . We realize that such inquiries take time. But the few minutes a proper *Faretta* inquiry normally would take is a worthwhile alternative to a new trial." *Id.*

Another option for district courts is to appoint standby counsel when a defendant requests to proceed pro se. *See* United States v. Torres, 793 F.2d 436, 441 (1st Cir. 1986) (recognizing that district court may appoint standby counsel). The Supreme Court has held that approval of appointing standby counsel over the objections of the defendant does not violate the defendant's constitutional rights. *See* McKaskle v. Wiggins, 465 U.S. 168, 184 (1984) ("A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles . . . ."); Faretta v. California, 422 U.S. 806, 835 n.46 (1975) (recognizing that court may appoint "assistance" of counsel over defendant's objection). The defendant, however, must maintain actual control over the case. *McKaskle*, 465 U.S. at 178. The standby counsel merely assists in routine decisions. *Id.* Nevertheless, appointing standby counsel is not a viable solution to the problem of balancing the interests of the defendant and the judicial system. STUCKEY, *supra* note 6, at 148. Appointing standby counsel takes up the valuable time of the attorney and increases court costs. *Id.*

2. *Implying Waiver From Defendant's Conduct—Limiting the Defendant's Choice*

While the right to counsel is a fundamental and cherished right, it "may not be put to service as a means of delaying or trifling with the court."[94] Thus, courts have recognized a waiver of the right to counsel by virtue of a criminal defendant's actions.[95] Courts are hesitant to validate an implied waiver because of the possibility of depriving a defendant of his or her right to counsel.[96] Nevertheless, courts may infer a "knowing and intelligent" waiver when the defendant engages in "deleterious or manipulative" conduct after repeated warnings from the court.[97]

One instance where courts may find an implied waiver due to "deleterious or manipulative" conduct is where a defendant fails to cooperate with counsel.[98] A defendant's refusal of representation or firing of coun-

94. United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979).

95. *See, e.g.*, United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995) (holding that defendant's abusive conduct forfeited his right to counsel); United States v. Meeks, 987 F.2d 575, 579 (9th Cir. 1993) (recognizing that in limited circumstances defendant may be forced to proceed pro se). Valid waiver need not be express in most circuits, but instead may be implied from the surrounding circumstances. Chung & Sege, *supra* note 78, at 1276. For a discussion of the requirements for a valid waiver that apply in a majority of circuits, see *supra* notes 84-86 and accompanying text.

96. Chung & Sege, *supra* note 78, at 1277-78. There is a presumption against an implied waiver of the right to counsel. *Faretta*, 422 U.S. at 835; Yee, *supra* note 49, at 918. Another reason courts are reluctant to find an implied waiver is the administrative problems that result from an inexperienced defendant attempting to represent him or herself. STUCKEY, *supra* note 6, at 147. Such problems include a longer trial, improper objections and arguments with the judge over rulings. *Id.* In addition, courts are reluctant to find implied waiver where the competence or voluntariness of the waiver is in question. Carnley v. Cochran, 369 U.S. 506, 516 (1962) (stating that waiver of counsel could not be presumed from silent record); Chung & Sege, *supra* note 78, at 1278.

97. *See* United States v. Jennings, 855 F. Supp. 1427, 1443 (M.D. Pa. 1994) (explaining that "[d]eleterious or manipulative conduct" of accused may waive "by implication" the right to be represented by counsel), *aff'd*, 61 F.3d 897 (3d Cir. 1995). Cases suggest that court warnings are necessary before a waiver will be inferred. *See* United States v. Allen, 895 F.2d 1577, 1578-79 (10th Cir. 1990) (finding that defendant's Sixth Amendment right to counsel was violated when trial judge deemed waiver valid due to defendant's refusal of appointed counsel and failure to retain counsel). The court explained that "[a] court is under no less obligation to ensure that waiver is knowing and intelligent when voluntariness is deduced from conduct than when it is asserted expressly." *Id.* at 1579; *see also* United States v. Welty, 674 F.2d 185, 189 (3d Cir. 1982) (requiring inquiry into waiver even if defendant engages in manipulative tactics). The *Welty* court reasoned: "While we can understand, and perhaps even sympathize, with the frustration and exasperation of the district court judge, even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." *Id.*

98. *See, e.g.*, United States v. Fazzini, 871 F.2d 635 (7th Cir. 1989) (holding that defendant's failure to cooperate with four different attorneys constituted waiver of right to counsel); United States v. McFadden, 630 F.2d 963 (3d Cir. 1980) (holding that defendant's refusal to cooperate with counsel and eventual firing of counsel waived right to counsel).

sel may also render the right to counsel waived.[99] Furthermore, an implied waiver may exist if a defendant fails to retain counsel within a reasonable time.[100]

An extreme instance of conduct that a court may infer as a "knowing and intelligent" waiver occurs when a defendant is abusive or physically threatening to his or her lawyer.[101] Violence in the court threatens the criminal proceedings, and courts recognize this behavior as particularly "egregious."[102] Physical force or threats impair a court's ability to function and, therefore, such "extreme and outrageous" conduct calls for an "extreme sanction"—waiver by conduct of the right to counsel.[103]

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99. *See* United States v. Kelm, 827 F.2d 1319, 1322 (9th Cir. 1987) (holding defendant's refusal to retain counsel or accept appointed counsel constituted waiver); Richardson v. Lucas, 741 F.2d 753, 757 (5th Cir. 1984) (finding waiver when defendant refused any representation of counsel); United States v. Weninger, 624 F.2d 163, 167 (10th Cir. 1980) (finding defendant's refusal to hire attorney waiver of right to counsel).

100. *See* United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (finding that defendant's failure to retain counsel when financially able to do so waived right to counsel); United States v. Mitchell, 777 F.2d 248, 258 (5th Cir. 1985) (holding valid waiver existed when defendant hired counsel known to have conflict of interest and failed to retain new counsel); United States v. Fowler, 605 F.2d 181 (5th Cir. 1979) (citing United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976) (holding that failure to retain counsel in as little as 20 days may imply waiver)); United States v. Terry, 449 F.2d 727 (5th Cir. 1971) (holding that where defendant was given reasonable time to secure counsel and was financially able to retain counsel, failure to retain counsel was properly treated as waiver).

The *Mitchell* court explained the effects of a defendant's manipulation of the right to counsel:

> [The defendant] had the fundamental right to a reasonable opportunity to obtain a particular counsel of his choice. That reasonable opportunity was afforded [the defendant] in this case. [The defendant] did not have the right to continue to insist on a particular lawyer and postpone the trial indefinitely, at the expense of the court, its schedule, the government, the other parties, and the orderly administration of justice.

Mitchell, 777 F.2d at 258.

101. *See, e.g.*, United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995) (holding that defendant's threats to counsel forfeited his right to counsel); *Jennings*, 855 F. Supp. at 1443 (finding that defendant's assault on his counsel in courtroom waived right to counsel). *But see* United States v. Goldberg, 67 F.3d 1092, 1103 (3d Cir. 1995) (finding no valid waiver despite defendant's alleged threats on counsel's life).

102. *See Jennings*, 855 F. Supp. at 1445 (finding defendant's act of physically striking his counsel to be more "egregious" than conduct in other cases where waiver by conduct was implied).

103. *Id.* at 1444-45. The *Jennings* court discussed numerous problems that may arise due to the threat of violence. *Id.* at 1443-44. The defendant here who assaulted his attorney in court, "figuratively . . . struck a blow at the orderly and efficient administration of justice, and at the heart of justice itself." *Id.* at 1443. The court asserted that "[n]o court can carry on its business in an atmosphere of violence, fear and intimidation." *Id.* In addition, the threat of violence would affect the prosecuting attorney, witnesses, jurors and even the bench itself. *Id.* Furthermore, the court added, "the public perception of the courts would be irrevocably altered, no longer as a place where fairness and justice govern and individual liberties are protected, but to a place where might makes right." *Id.* at

3. *Voluntary Relinquishment v. Involuntary Relinquishment*

Courts have recognized waiver of the right to counsel in numerous and varied circumstances, ranging from a defendant's voluntary request to waive counsel to a defendant assaulting his counsel in court.[104] Traditional waiver analysis, however, is applicable only in instances of a defendant's voluntary waiver of the right to counsel.[105] Courts have failed to make a distinction between the concept of voluntary waiver—in which a defendant verbally requests to waive counsel—and involuntary forfeiture of the right to counsel—in which a waiver is inferred from a defendant's conduct.[106] Thus, it is not clear which standard to apply to non-traditional types of waiver.[107] Unfortunately, the Supreme Court has also failed to recognize more than one category of waiver.[108] Indeed, the only recent case to recognize any distinction was *United States v. McLeod*.[109] In *McLeod*, the defendant dismissed his court appointed counsel following a guilty verdict, and new counsel was appointed for appeal.[110] Citing defendant's abusive and threatening behavior, the new counsel eventually

1444. Invoking the separation of powers, the court explained that just as courts must be free from "political might," they must also be free from "physical might." The court concluded that "[n]o civilized society can accept the threatened or actual use of force within its courts and expect those courts to operate effectively or fairly for all parties involved." *Id.*

The right to waive counsel and the right to proceed pro se thus appear to be similarly limited with respect to the termination of the right if the defendant engages in obstructionist misconduct. *See* Giulianti, *supra* note 4, at 891-92 (explaining court may terminate right to proceed pro se if defendant engages in serious misconduct which destroys the courtroom's traditional dignity).

104. For a discussion of cases that implicated waiver of the right to counsel, see *supra* notes 94-103 and accompanying text.

105. *Goldberg*, 67 F.3d at 1099. The court explained that "[t]he most commonly understood method of 'waiving' a constitutional right is by an affirmative, verbal request. Typical of such waivers under the Sixth Amendment are requests to proceed pro se . . . ." *Id.*

106. *See id.* at 1100 (explaining that only Eleventh Circuit, has made distinction between waiver and forfeiture). Despite the lack of recognition, courts have utilized different standards in determining whether there is a valid waiver depending upon the circumstances of the case. For a discussion of the different approaches courts use to analyze waiver, see *supra* notes 74-117 and accompanying text.

107. *See Goldberg*, 67 F.3d at 1099 (noting that many courts that have addressed issue of effect of defendant's dilatory tactics on right to counsel are confused about waiver analysis).

108. *Id.* at 1100.

109. 53 F.3d 322 (11th Cir. 1995).

110. *Id.* at 323. The defendant, while in jail, filed a civil rights action against the county deputy sheriff. *Id.* The deputy testified at the resulting trial. *Id.* The court granted a directed verdict in favor of the deputy, and after the verdict, the defendant threatened the deputy that he was going to kill him as soon as he got out of jail. *Id.* The defendant was charged with retaliating against a witness, in violation of 18 U.S.C. § 1513(a)(1). *McLeod*, 53 F.3d at 323. At the ensuing trial, the jury found the defendant guilty. *Id.* Court appointed counsel represented the defendant. *Id.* After the verdict, defendant's counsel filed a motion for a new trial. *Id.* The defendant then filed a motion to dismiss his counsel, and requested

withdrew.[111] The district court found that the defendant's treatment of his lawyer constituted a waiver of his right to counsel.[112] Thus, the defendant proceeded pro se in the hearing on his motion for a new trial and the motion was denied.[113] On appeal, the Eleventh Circuit asserted that the defendant *forfeited* his right to counsel due to his repeated abusive, threatening and coercive behavior toward his counsel.[114] Significantly, the court noted that this case involved forfeiture and not waiver because this was not "an intentional relinquishment of a known right."[115] The court found that the defendant's misbehavior resulted in the loss of his right to counsel, regardless of the fact that no warnings were given to the defendant that his behavior may lead to loss of this right.[116] Noting other

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appointment of new counsel. *Id.* The district court granted the defendant's motion and appointed new counsel. *Id.*

111. *McLeod*, 53 F.3d at 323. The new counsel submitted briefs on the motion for a new trial. *Id.* The basis of the new motion was ineffective assistance of trial counsel. *Id.* After these were submitted, though, the attorney moved to withdraw as counsel. *Id.* At a hearing on the attorney's motion to withdraw as counsel for a new trial, the counsel testified that the defendant was abusive and had repeatedly threatened to sue the attorney. *Id.* In addition, the defendant asked the attorney to engage in conduct which the attorney considered to be unethical. *Id.* The defendant declined the opportunity to testify at the hearing. *Id.*

112. *Id.* The district court noted that all the papers, including extensive briefs, had been filed and in addition, there was a legal assistant who remained with the defendant to help him find the documents. *Id.*

113. *Id.*

114. *Id.* at 326. The defendant's second attorney testified at the hearing on his motion to withdraw as counsel that the defendant had verbally abused and threatened to harm him over the phone. *Id.* at 325. Specifically, according to the counsel's testimony, the defendant declared: "Don't you f*** with me. I am going to sue all of [you]. I am going to sue you and all them other lawyers in the firm." *Id.* at 325 n.10. In addition, the defendant claimed that counsel was "setting [him] up." *Id.* Counsel also testified that the defendant had threatened to sue him on at least four other occasions. *Id.* at 325. He also had attempted to persuade counsel to engage in unethical conduct, such as having "girls" who worked for the defendant testify on his behalf because they would testify to whatever he wanted. *Id.* at 325 n.11.

The United States Court of Appeals for the Eleventh Circuit rejected the claim that the district court denied the defendant his Sixth Amendment right to counsel. *Id.* at 324-25. Counsel was appointed to represent the defendant for sentencing and appeal after the motion for a new trial was denied. *Id.* at 326 n.12. The first attorney appointed to represent the defendant requested to withdraw nine days later. *Id.* The second court-appointed attorney represented the defendant through the sentencing, but was dismissed after sentencing on the defendant's motion to dismiss counsel. *Id.* The court then appointed another attorney to handle the defendant's appeal. *Id.*

115. *Id.* at 325. The court explained that "[w]e discuss 'forfeiture' rather than 'waiver' because waiver implies an 'intentional relinquishment of a known right.'" *Id.* at 325 n.6 (quoting LAFAVE & ISRAEL, *supra* note 27, at 546 n.4).

116. *Id.* at 326. The court was concerned about the lack of any warning. *Id.* The court noted, however, that the defendant had refused his opportunity to testify on his own behalf at the hearing on the motion to withdraw counsel. *Id.* The defendant refused to take an oath, and thus was not allowed to testify. *Id.* After granting the second counsel's motion to withdraw, the judge again asked the de-

circumstances where a defendant may forfeit constitutional rights due to his or her conduct, the court concluded that "a defendant who is abusive toward his attorney may forfeit his right to counsel."[117]

D. *The Third Circuit's Approach to Waiver of the Sixth Amendment Right to Counsel*

The Third Circuit has adopted a formalistic approach for determining whether there was a valid waiver of the Sixth Amendment right to counsel.[118] Unlike the majority of circuits, the Third Circuit is rigid in its requirement that the record reveal a "searching inquiry" of the defendant to satisfy the trial judge that the waiver was "knowing and voluntary."[119] The district courts have the responsibility of establishing, on the record, that the defendant knows the dangers and disadvantages of waiving the right to counsel, although a particular list of inquiries or advice are not mandated.[120] The Third Circuit has recommended that the trial judge advise the defendant, inter alia, of the nature of the charges, the range of potential punishments and possible defenses to the charges.[121] In addi-

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fendant if he objected to counsel's withdrawal. *Id.* The defendant requested that the court appoint another attorney. *Id.* Despite defendant's third request for court-appointed counsel, the court concluded that "[i]n light of [the defendant's] behavior . . . we cannot say that the district judge erred by concluding that [defendant] had forfeited this right to counsel." *Id.*

117. *Id.* at 325. The court cited examples where a defendant's conduct may result in the forfeiture of constitutional rights. *Id.* For instance, a defendant's misbehavior in the courtroom may forfeit the right to be present at trial. *Id.* (citing Illinois v. Allen, 397 U.S. 337, 345-46 (1970); Foster v. Wainwright, 686 F.2d 1382, 1388-89 (11th Cir. 1983)). The right to confrontation may be forfeited if a defendant causes a witness to be unavailable for trial. *Id.* (citing United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982)). An escape from custody also forfeits defendant's right to be present and to confront witnesses during the trial. *Id.* (citing Golden v. Newsome, 755 F.2d 1478, 1481 (11th Cir. 1985)). Furthermore, the Eleventh Circuit had recognized that the right to counsel may be forfeited when a defendant fails to retain counsel within a reasonable time, even if this forfeiture forces the defendant to proceed pro se. *Id.* (citing United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979)). Thus, the court concluded by analogy that a defendant's abusive behavior may result in the forfeiture of the right to counsel. *Id.*

118. *See* Government of Virgin Islands v. James, 934 F.2d 468, 471 (3d Cir. 1991) (requiring searching inquiry on record to determine proper waiver); *see also* United States v. McDowell, 814 F.2d 245, 249 (6th Cir. 1987) (discussing circuits' approach to determining whether record establishes "knowing and intelligent" waiver of counsel).

119. United States v. Welty, 674 F.2d 185, 189 (3d Cir. 1982).

120. *See James*, 934 F.2d at 471 (stating inquiry and determination of valid waiver must appear on record); *see also Welty*, 674 F.2d at 189 (stating that district court must establish on record defendant's valid waiver by "bringing home to the defendant the perils he faces in dispensing with legal representation"). Thus, the Third Circuit strictly construes the waiver requirements discussed in *Johnson v. Zerbst* and *Farretta v. California.* For a discussion of the *Johnson* and *Faretta* opinions, see *supra* notes 52-58, 66-73 and accompanying text.

121. *James*, 934 F.2d at 471 (citing von Moltke v. Gillies, 332 U.S. 708, 724 (1948)).

tion, the trial judge should advise that: (1) the defendant must follow the Federal Rules of Criminal Procedure and Evidence; (2) lack of knowledge will hurt the defendant's defense; and (3) the dual role of attorney and accused will hamper the defendant's defense.[122] Also, the Third Circuit, unlike other circuits, will not "infer a valid waiver of the right to counsel based upon the district court's subjective overall impression of [the] defendant."[123] Indeed, the Third Circuit is the only circuit to reverse a conviction because the district court did not conduct a searching inquiry on the record.[124]

Thus, the Third Circuit has firmly established that a valid waiver requires judicial warnings of the consequences of waiver of the right to counsel on the record.[125] The mandatory nature of judicial warnings in the Third Circuit suggests that waiver is invalid unless the trial judge appropriately warns the defendant.[126] The Third Circuit has applied a formalistic approach, regardless of whether the alleged waiver stems from a voluntary request or disruptive behavior.[127] Thus, the stage was set for the Third Circuit to reject a pure forfeiture analysis.

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122. *Welty*, 674 F.2d at 188.

123. United States v. Salemo, 61 F.3d 214, 221 (3d Cir.), *cert. denied*, 116 S. Ct. 456 (1995). The *Salemo* court explained that the appropriate method of determining a voluntary, knowing and intelligent waiver is a colloquy between the judge and the defendant which appears on the record. *Id.*

124. *See id.* (concluding district court's failure to conduct searching inquiry of defendant on record required remand); *Welty*, 674 F.2d at 192 (reversing defendant's conviction due to lack of any inquiry by district court into whether defendant understood implications of waiver); *cf.* United States v. McDowell, 814 F.2d 245, 249 (6th Cir. 1987) (holding district court failure to conduct particular inquiry did not require reversal of conviction).

125. *See* McMahon v. Fulcomer, 821 F.2d 934, 946 (3d Cir. 1987) (finding that despite judge's advice to defendant, he failed to ensure that defendant truly understood consequences of decision to waive counsel); *Welty*, 674 F.2d at 193-94 (concluding even when defendant is attempting to disrupt court procedure and manipulate right to counsel, record must still disclose effective waiver). The *Welty* court explained the Third Circuit's requirement for judicial advisement:

> Thus, while we do not require a detailed listing of advice similar to that mandated for guilty plea proceedings conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure, a defendant's waiver of counsel can be deemed effective only where the district court judge has made a searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary.

Welty, 674 F.2d at 189 (citations omitted).

126. *See* United States v. Jennings, 855 F. Supp. 1427, 1443-45 (M.D. Pa. 1994) (distinguishing extreme "egregious" behavior, such as punching counsel, as distinct from other implied waiver cases where judicial warnings are still required).

127. *See, e.g.*, Government of Virgin Islands v. James, 934 F.2d 468, 470-71 (3d Cir. 1991) (requiring formal inquiry on record for defendant's voluntary waiver of right to counsel); United States v. McFadden, 630 F.2d 963, 970 (3d Cir. 1980) (requiring formal judicial inquiry for defendant's waiver of right to counsel following irreconcilable differences with his attorneys).

III. FACTS OF *UNITED STATES V. GOLDBERG*

In *United States v. Goldberg*,[128] Goldberg was indicted for forging the signature of a judicial officer and was provided court appointed counsel.[129] Several days before jury selection was to begin, Goldberg filed a motion for continuance in order to obtain new counsel or in the alternative, to represent himself.[130] Finding lack of good cause, the district court denied Goldberg's motion for continuance.[131] Given the choice of proceeding pro se or continuing with the court appointed counsel, the defendant chose to remain with his counsel.[132] The counsel then requested to withdraw, asserting that Goldberg had threatened his life and also had requested him to engage in unethical conduct.[133] Granting the counsel's

128. 67 F.3d 1092 (3d Cir. 1995).

129. *Id.* at 1094. Goldberg was serving a sentence for a previous conviction when he forged the signature of a magistrate-judge on a pass that alleged to permit Goldberg unrestricted access to the prison's law library. *Id.* Prison officials discovered the forgery. *Id.* Goldberg was indicted for forging the signature of a judicial officer and for making a materially false statement to a federal agency. *Id.* Precisely how the defendant was appointed counsel was unclear. *Id.* Goldberg never finished a questionnaire to determine his financial ability to retain counsel. *Id.* Nevertheless, prior to his arraignment, a federal defender was appointed as defendant's counsel. *Id.*

130. *Id.* at 1095. Goldberg's counsel had already filed several motions on the defendant's behalf. *Id.* at 1094. In addition, Goldberg's counsel had attempted to visit the defendant in prison, but the defendant refused to meet with him, after making him wait over two hours. *Id.* at 1094-95. Therefore, Goldberg did not meet his counsel in person, but they did communicate by mail and telephone. *Id.* at 1095. Goldberg's motion to dismiss counsel rested on the grounds that his counsel: (1) disagreed with him on the strategy of the defense; (2) was not "well versed" in federal criminal procedure; (3) lacked any interest in his case; and (4) had not met with him and had declined to file motions that he had requested. *Id.* Goldberg also provided notice of his intent to pursue an insanity defense. *Id.* The district court immediately denied the request to pursue an insanity defense due to its untimeliness under Federal Rule of Criminal Procedure 12.2. *Goldberg*, 67 F.3d at 1095.

131. *Goldberg*, 67 F.3d at 1095. Immediately preceding jury selection, the district court held a hearing to scrutinize Goldberg's allegations that his counsel was inadequate. *Id.* After listening to both the defendant and counsel, the court found that the federal defender was providing adequate representation. *Id.*

132. *Id.* Although the district court stated that the defendant was not allowed to proceed pro se because there was no knowing and intelligent waiver, there is no indication that defendant clearly wanted to do so. *Id.* at 1095 n.1. Goldberg, instead, affirmatively chose to remain with his appointed counsel. *Id.* Unexpectedly, however, Goldberg then disclosed for the first time that he was financially capable of hiring a private attorney, and had already conferred with several attorneys. *Id.* at 1095. The district court informed Goldberg that if he were able to retain counsel by the start of the trial, the court may reconsider a motion for continuance. *Id.*

133. *Id.* The counsel's first request to withdraw was denied. *Id.* In his initial request, the counsel had asserted that there was a lack of a proper attorney-client relationship and that Goldberg was "threatening [him] and demanding that [he] do certain things that [he does not] feel are prudent." *Id.* The court denied this motion, and counsel proceeded to represent the defendant in jury selection. *Id.* Prior to the start of trial, counsel renewed his request to withdraw as counsel during a telephone conference. *Id.* Counsel pointed out that Goldberg had re-

motion, the district court warned Goldberg that because he had the financial ability to retain counsel, he must either retain an attorney or represent himself.[134] Goldberg did not retain counsel by the start of trial, and the court refused to grant a continuance.[135]

The United States District Court for the Middle District of Pennsylvania found a "knowing and intelligent" waiver despite Goldberg's objections and continuous assertions of his Sixth Amendment right to counsel.[136] The court concluded that the defendant's manipulative and threatening conduct waived his right to counsel.[137] Accordingly, the court

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quested this motion to withdraw as counsel. *Id.* When he refused to do so, Goldberg allegedly threatened counsel's life, declaring that he had the financial ability to both retain other counsel and carry out his threat. *Id.* Without even hearing Goldberg's position on the matter, the court granted the motion to withdraw as counsel. *Id.* at 1096.

134. *Id.*

135. *Id.* When Goldberg appeared before the court on the first day of testimony, one attorney who had visited the defendant at prison was present in court. *Id.* No private attorney, however, had made a formal appearance. *Id.* The district court asked Goldberg if he intended to represent himself. *Id.* In response, the defendant presented a letter indicating that an attorney would represent him, but only if a retainer was paid within 45 days. *Id.* Goldberg thus requested a continuance to allow him time to liquidate assets in order to pay the retainer. *Id.* When the Government opposed the motion, the defendant re-asserted his Sixth Amendment right to counsel. *Id.* Goldberg argued that he had done everything that he could to retain counsel in the time available. *Id.* Furthermore, Goldberg maintained that he was incapable of representing himself at trial. *Id.* The district court held that a continuance would only "delay and disrupt the efficient administration of justice . . . ." United States v. Goldberg, 855 F. Supp. 725, 730 (M.D. Pa. 1994), *rev'd*, 67 F.3d 1092 (3d Cir. 1995). Furthermore, the court held that there was lack of good cause for substitution of counsel. *Id.* at 730-32. There was an "obvious lack of merit" and Goldberg failed to substantiate any claim of ineffective assistance of counsel. *Id.* at 732.

136. *Goldberg*, 67 F.3d at 1096. The district court then advised Goldberg how to conduct himself before the jury and the correct procedure to follow in court. *Id.* The Government suggested that stand-by counsel be appointed, but Goldberg objected, arguing that stand-by counsel was not sufficient to satisfy his right to counsel. *Id.* Goldberg continued to assert that he was not making a valid waiver of his right to counsel. *Id.* The court, in response, clarified to Goldberg that the court was not engaging in a colloquy with respect to a waiver. *Id.* The judge stated to Goldberg: "I'm determining that your actions have waived counsel, and that was a knowing and voluntarily intentional act." *Id.* Goldberg reasserted his Sixth Amendment right to counsel and objected to the court's finding of a valid waiver. *Id.*

It was not until after the court had found a waiver of Goldberg's right to counsel that the court elicited sworn testimony from Goldberg's counsel concerning the defendant's alleged behavior that led to his motion to withdraw as counsel. *Id.* Notably, Goldberg was not a party at the first conference when the court granted the motion to withdraw as counsel and the court never heard Goldberg with respect to these events. *Id.*

137. *Id.* at 1096-97. The court noted that Goldberg had the financial ability to retain counsel since the beginning of the case, over two months before, and had failed to do so. *Id.* The court concluded that Goldberg "manipulated the judicial system" for his own benefit, and thus refused to grant the continuance. *Id.* The court stated that it would not tolerate the defendant's behavior and found that

then advised him of the correct procedure for representing himself at trial.[138] Goldberg was thus forced to stand trial without assistance of counsel and he was convicted.[139] On appeal, the Third Circuit found that there was no valid waiver and, therefore, held that Goldberg was denied his fundamental right to assistance of counsel.[140]

IV. ANALYSIS

A. *The Third Circuit's Rationale in* Goldberg

The Third Circuit initially noted the underlying tension in this case caused by the defendant's apparent manipulation of his right to counsel.[141] To begin its analysis of the defendant's claim that the district court denied his Sixth Amendment right to counsel, the Third Circuit emphasized that the district court had not engaged in any sort of inquiry as required by the Supreme Court in *Faretta*.[142] Noting that both parties as well

Goldberg's conduct implicitly waived the right to counsel at this trial. *Id.* The court emphasized the "clear and unequivocal threat to do serious bodily harm to his appointed counsel . . . [coupled] with the apparent present ability to accomplish [such] physical harm . . . ." *Goldberg*, 855 F. Supp. at 732. The court further noted that there are instances in which there is an implied waiver of the right to counsel. *Id.* at 730. The district court explained that "[d]eleterious or manipulative conduct on the part of an accused also may amount to a waiver of the right to be represented by counsel." *Id.* The court cited *United States v. Jennings*, 855 F. Supp. 1427, 1445 (M.D. Pa. 1994), *aff'd*, 61 F.3d 897 (3d Cir. 1995), where waiver by conduct was found due to the defendant physically assaulting his counsel. *Id.* The court explained:

> There is no material difference between an attempt to manipulate the right to counsel through physical violence and an attempt to manipulate the right to counsel through the threat of physical violence. Neither has a proper place in the orderly and effective administration of justice, and neither will be countenanced by the court.

Goldberg, 855 F. Supp. at 732.

138. *Goldberg*, 67 F.3d at 1096.

139. *Id.* Goldberg was convicted on both counts of the indictment. *Id.* The court sentenced the defendant "to two concurrent terms of imprisonment of 24 months, to run consecutively to sentences he was already serving." *Id.*

140. *Id.* at 1103. The Third Circuit concluded that a valid waiver was impossible here in light of the Government's concession that the district court failed to inform Goldberg of the risks of self-representation. *Id.* at 1102-03. For a further discussion of the Third Circuit's analysis in *Goldberg*, see *infra* notes 141-73 and accompanying text.

141. *Goldberg*, 67 F.3d at 1094.

142. *Id.* at 1099. This reflected the Third Circuit's strict interpretation of *Faretta*. *See* Faretta v. California, 422 U.S. 806, 835 (1975) (declaring guidelines for waiver). For a further discussion of the Third Circuit's approach to waiver analysis, see *supra* notes 118-27 and accompanying text.

Goldberg claimed that the district court violated his right to counsel when it forced him to represent himself. *Goldberg*, 67 F.3d at 1099. The defendant argued that no valid waiver of the right to counsel could be based on his dilatory conduct, as the district court held. *Id.* The defendant admitted that there are certain instances where a court may find a valid waiver by conduct, but that this case was not one that warranted the "drastic" result of forcing the defendant to represent himself. *Id.* The court relied on both *Faretta* and its decision in *United States v. Welty* as

as most courts have confused the issue of waiver, the court stated that an examination of waiver was necessary in order to determine the merits of the defendant's argument.[143] The court explained that the traditional idea of waiver actually includes the concepts of "waiver," "forfeiture" and a hybrid of the two—"waiver by conduct."[144]

To examine the categories of waiver, the Third Circuit first defined "waiver" as "an intentional and voluntary relinquishment of a known right."[145] A waiver of the right to counsel, the court explained, must be knowing, intelligent and voluntary.[146] The court emphasized that the defendant must be aware of the risks of proceeding pro se, and the district judge must make a searching inquiry sufficient to demonstrate an understanding and voluntary waiver.[147]

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requiring an on the record colloquy demonstrating a knowing, voluntary and intelligent waiver of the right to counsel as well as an explanation by the trial judge of the risks of self-representation. *Id.* (citing *Faretta*, 422 U.S. at 806; United States v. Welty, 674 F.2d 185 (3d Cir. 1982)). The Government argued, however, that there were certain instances where deliberate, abusive conduct "speaks louder than words" and can result in a waiver of the right to counsel. *Id.*

The defendant also argued that the district court deprived him of his right to counsel when it refused to grant a continuance so that he could retain a new attorney. *Id.* at 1098. The court concluded that there was ample evidence supporting the district court's determination of lack of good cause. *Id.* at 1098-99. To determine this issue, the court examined whether there was "good cause" for the defendant's dissatisfaction with his attorney. *Id.* at 1098. The court stated that a district court is required to inquire as to the reasons for a last minute request. *Id.* The court defined "good cause" as a "conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with the attorney." *Id.* In addition, the court advised that there are governmental interests that also must be taken into account, such as the efficient administration of criminal justice and the rights of other defendants awaiting trial who may be prejudiced by a continuance. *Id.* Furthermore, a court has discretion to deny a request for a continuance when it is made in bad faith or to undermine the judicial proceedings. *Id.* Noting the district court's finding that the defendant's motion was meritless, the court concluded that the record "amply" supported the conclusion that there was a lack of good cause. *Id.* at 1098-99.

143. *Goldberg*, 67 F.3d at 1099.

144. *Id.*

145. *Id.* The court relied on the Supreme Court's opinion in *Johnson v. Zerbst* as well as Lafave & Israel's CRIMINAL PROCEDURE for authority. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938); LAFAVE & ISRAEL, *supra* note 27, § 11.3(c), at 546 n.4). The court stated that waiver is "an intentional and voluntary relinquishment of a known right." *Id.* (citing *Zerbst*, 304 U.S. at 464). The court further explained that the most commonly understood form of "waiving" a constitutional right occurs with an affirmative, verbal request. *Id.* The court listed requests to proceed pro se and requests to plead guilty as examples of this concept of waiver. *Id.*

146. *Id.* The court noted the Supreme Court's emphasis on an affirmative, on the record waiver. *Id.* (citing *Zerbst*, 304 U.S. at 464). The court further noted that there is a presumption against waiver of fundamental constitutional rights. *Id.*

147. *Id.* Citing *Faretta*, the court advised that a constitutional prerequisite to a valid waiver of the right to counsel is defendant's awareness of the dangers of proceeding pro se. *Id.* (citing *Faretta*, 422 U.S. at 806). Furthermore, relying on *Welty*, the court mandated that a trial judge must conduct an inquiry before allowing a

In contrast to waiver, the court described the opposite idea of forfeiture.[148] Forfeiture, according to the court, results in the loss of a right regardless of a defendant's knowledge or intent to waive the right.[149] Highlighting the current confusion among courts, the Third Circuit asserted that the only court that made the correct distinction between waiver and forfeiture was the Eleventh Circuit in *United States v. McLeod*.[150] The court explained one instance where forfeiture may occur is when a defendant is abusive toward his or her attorney and the defendant is forced to proceed without counsel.[151]

To complete the analysis, the court defined the hybrid situation, "waiver by conduct."[152] The court explained that once a defendant has been warned of the loss of counsel if he or she engages in dilatory or abusive tactics, any misconduct thereafter may imply a waiver by conduct of the right to counsel.[153] Combining elements of waiver and forfeiture,

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waiver of the right to counsel. *Id.* (citing *Welty*, 674 F.2d at 188-89). Such an inquiry of the defendant should include warning the defendant in "unequivocal terms" of the technical problems he or she may encounter. *Id.* at 1099-1100 (citing *Welty*, 674 F.2d at 188-89).

148. *Id.* at 1100.

149. *Id.* This is unlike waiver, which requires "a knowing and intentional relinquishment of a known right." *Id.* The court cited Lafave and Israel to support its argument that courts have confused the issue. *Id.* (citing LAFAVE & ISRAEL, *supra* note 27, § 11.3(c), at 546 n.4).

150. *Id.* The court explained that *McLeod* acknowledged the difference between waiver and forfeiture. *Id.* (citing United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995)). The Eleventh Circuit held in *McLeod* that a defendant who was abusive to his attorney may forfeit his right to counsel. *Id.* (citing *McLeod*, 53 F.3d at 325). Even *McLeod*, though, did not represent a complete analysis. *See id.* at 1101 (discussing necessity of recognizing three separate categories of waiver). The court explained that most courts are confused about the concepts of waiver and forfeiture. *Id.* at 1100. To demonstrate this confusion, the court discussed *United States v. Mitchell*, 777 F.2d 248 (5th Cir. 1986). *Goldberg*, 67 F.3d at 1100. In *Mitchell*, the Fifth Circuit held that a defendant who fails to secure counsel within a reasonable time period may waive his right to counsel. *Mitchell*, 777 F.2d at 257-58. The court reasoned, however, that because the *Mitchell* court did not discuss the implications of *Johnson* or *Faretta*, the decision actually rested on the idea of forfeiture, not waiver. *Goldberg*, 67 F.3d at 1100.

For a discussion of *United States v. McLeod*, see *supra* notes 109-17 and accompanying text.

151. *See Goldberg*, 67 F.3d at 1100 (explaining that *McLeod* court stated that " 'a defendant who is abusive toward his attorney may forfeit his right to counsel' " (quoting *McLeod*, 53 F.3d at 325)).

152. *Id.*

153. *Id.* The Third Circuit suggested that this was more appropriately termed "forfeiture with knowledge." *Id.* at 1101. There are numerous cases that involve waiver by conduct, although courts have not distinguished them from pure waiver cases. *See, e.g.*, United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (finding failure to secure counsel when financially able to do so was waiver by conduct). In *Bauer*, the magistrate held a hearing to determine whether the defendant was financially unable to retain counsel. *Id.* at 694. The magistrate concluded that, based on the defendant's ambiguous, evasive and implausible answers, the defendant could afford counsel if he wanted. *Id.* The Seventh Circuit appointed counsel to represent the defendant on appeal. *Id.* The court concluded that the combina-

the court concluded that waiver by conduct may result if the defendant receives warnings about the dangers of waiving counsel, even though the defendant did not affirmatively request to waive counsel.[154] Although the Supreme Court has not distinguished waiver by conduct cases from waiver cases, the Third Circuit interpreted Supreme Court precedent to support the proposition that a defendant may lose a fundamental right where the defendant was aware of the consequences of his or her actions, but did not affirmatively seek to forego the right.[155]

The Third Circuit next illustrated the significance of recognizing the difference between forfeiture and waiver by conduct.[156] On the one hand, the court held that due to the extreme nature of the sanction, forfeiture requires extreme dilatory misconduct.[157] On the other hand, waiver by conduct requires less severe conduct because the defendant is warned about the consequences of his or her conduct.[158] Therefore, the court concluded, a defendant cannot claim that the right to counsel was forfeited if he or she was first warned about the consequences of dilatory conduct.[159] In addition, a distinction between waiver by conduct and for-

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tion of ability to pay for counsel plus refusal to do so waives the right to counsel at trial. *Id.* at 695. The court explained:

> *Faretta* did not consider such cases and does not exclude the possibility of waiver in this fashion. Doubtless any defendant should be well warned of the dangers before he sets out to represent himself—whether by spurning proffered counsel or by refusing to dig into his pockets. Bauer was warned of these dangers. The magistrate judge found out that Bauer knew nothing of the rules of evidence and procedure, told him that the rules would be enforced against him nonetheless, and warned him that it was accordingly foolish to proceed without counsel. Bauer persisted in his position that he would not retain counsel, because he could not. If the magistrate judge and district judge were right in concluding that Bauer indeed could pay, then the stubborn refusal to do so was waiver by conduct.

Id. The court further rejected the defendant's argument that the magistrate judge failed to inform him of the operation of the sentencing guidelines, as required in the BENCHBOOK FOR UNITED STATES DISTRICT COURT JUDGES § 1.02(3) (1989), because this was not part of the Sixth Amendment. *Bauer*, 956 F.2d at 695. The court emphasized that the magistrate told the defendant enough to "steer any reasonable person away from self-representation," and that *Faretta* requires nothing more. *Id.*

154. *Goldberg*, 67 F.3d at 1101. The court-issued warnings are commonly referred to as "Faretta" warnings. *Id.* at 1100; STUCKEY, *supra* note 6, at 146-47.

155. *Goldberg*, 67 F.3d at 1100-01. The Third Circuit described the circumstances of *Illinois v. Allen*, 397 U.S. 337 (1970). *Id.* This case held that a trial court may remove an unruly defendant from the courtroom due to his or her disruptive behavior once the judge has warned of the consequences of such conduct. *Allen*, 397 U.S. at 343. Although the Supreme Court did not make it clear whether these warnings are constitutionally mandated, the Third Circuit concluded that the Court approved of the idea. *Goldberg*, 67 F.3d at 1101.

156. *Goldberg*, 67 F.3d at 1101.

157. *Id.*

158. *Id.*

159. *Id.*

feiture is necessary to assist appellate review.[160] Absent a clear distinction, the reviewing court would not know whether warnings were necessary, as with waiver by conduct, or whether a defendant's conduct was dilatory enough to render the right to counsel forfeited.[161]

Applying these analytical categories of waiver to *Goldberg*, the court found that although the defendant and the Government argued under the rubric of traditional waiver, the case actually turned primarily on whether there was a valid forfeiture.[162] The court explained that the relevant evidence offered pertained solely to the defendant's conduct.[163] Thus, the case did not involve a traditional voluntary waiver.[164] In addition, the court explained that a waiver by conduct analysis was precluded because the Government admitted that the judge did not issue the requisite warnings.[165] The court found that even if the defendant's behavior was dilatory enough for waiver by conduct, but insufficient for forfeiture, Goldberg's behavior could not have resulted in a waiver by conduct.[166] Hence, the court was left to decide whether there was a valid forfeiture of the right to counsel, the only remaining category of waiver.[167]

Examining Goldberg's behavior, the court refused to hold that the defendant's behavior resulted in a pure forfeiture of his right to coun-

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160. *Id.*

161. *Id.* Because a true forfeiture does not require any warning about engaging in misconduct, the court explained, "[a] district court that refers to 'waiver by conduct' instead of 'forfeiture' . . . would be on tenuous ground if it failed to follow the dictates of *Faretta* and *Welty*, even if the conduct in the case before it was sufficiently dilatory to constitute a forfeiture." *Id.* Thus, the distinction between waiver by conduct and forfeiture is imperative to generate an accurate record and aid appellate review of alleged Sixth Amendment violations. *Id.*

162. *Id.* at 1101-02. The court reasoned that "[w]hile both parties implicitly have discussed the central issue in the instant appeal as pertaining to 'waiver by conduct,' we think 'forfeiture' is the better approach to this case." *Id.* at 1101.

163. *Id.* The court explained that Goldberg alleged that his "conduct was not so dilatory as to warrant the severe sanction of requiring him to proceed to trial pro se." *Id.* Further, the court stated that while the Government advanced their argument under a waiver analysis, in reality it advanced a forfeiture argument. *Id.* The Government acknowledged that this case did not fit within any reported case that deals with waiver of counsel. *Id.* at 1102. The Government, however, argued that "actions speak louder than words." *Id.*

164. *Id.*

165. *Id.* at 1101. The defendant contended that his conduct was not so dilatory to force him to represent himself. *Id.* Such extreme punishment, the defendant argued, is only for extraordinary cases. *Id.* The Government also argued under the concept of forfeiture and not waiver. *Id.* Conceding that the conventional way to find a waiver in the Third Circuit is to engage in a colloquy as defined in *Welty*, the Government asserted that due to his conduct, Goldberg lost his right to counsel. *Id.* at 1102. Moreover, the Third Circuit stated that the district court also used the forfeiture idea in its analysis. *Id.* The district court relied on the findings of Goldberg's dilatory tactics in its holding that he had waived his right to counsel. *Id.*

166. *Id.*

167. *Id.*

sel.[168] The court noted that the Third Circuit has never adopted a pure forfeiture analysis.[169] The court added that even if it were to agree to a forfeiture argument, it required "extremely serious misconduct" which was not proven in this case.[170] The court concluded that the defendant's conduct could not be used as a basis for forfeiture, because the defendant's interests were not represented at the court's hearing concerning the alleged death threats.[171] Thus, because these threats to counsel were essential to the forfeiture argument, without this evidence, the record failed to provide any indication of "abusive conduct" that would forfeit Goldberg's right to counsel.[172] Accordingly, the court concluded that Goldberg was deprived of his Sixth Amendment right to counsel.[173]

B. *A Break from Tradition: Rejecting One Dimensional Waiver Analysis*

1. *Distinguishing "Waiver," "Forfeiture" and "Waiver by Conduct"*

In *Goldberg*, the Third Circuit separated traditional waiver analysis into three distinct analytical categories.[174] The *Goldberg* court was in a difficult position—the court was forced to balance the defendant's right to counsel against the societal interests of justice and judicial efficiency.[175] Although

168. *Id.*

169. *Id.* Although the Third Circuit recognized forfeiture in another case, it was affirmed in an unpublished opinion and therefore, lacked precedential value. *See* United States v. Jennings, 855 F. Supp. 1427, 1445 (M.D. Pa. 1994) (holding defendant's outrageous conduct implied waiver of defendant's right to counsel), *aff'd*, 61 F.3d 897 (3d Cir. 1995).

170. *Goldberg*, 67 F.3d at 1102.

171. *Id.* The court declined to make any finding concerning the implications on the defendant's Fourteenth Amendment right to procedural due process. *Id.* The court declared, though, that "an ex parte hearing where the defendant's interests were not represented cannot be used to justify a post hoc forfeiture argument." *Id.* The court added that even in *McLeod*, where forfeiture was found, the defendant was allowed to testify at the hearing concerning his conduct. *Id.*

172. *Id.*

173. *Id.* at 1103. The court also rejected the argument that the error was harmless. *Id.* The court pointed to the well-settled rule that the erroneous deprivation of a defendant's Sixth Amendment right to counsel is per se reversible error. *Id.*

174. For a discussion of the traditional waiver analysis, see *supra* note 57 and accompanying text.

175. *See Goldberg*, 67 F.3d at 1094 (stating that defendant appeared to be manipulating his right to counsel to delay his trial); United States v. McDowell, 814 F.2d 245, 248-49 (6th Cir. 1987) (describing difficult position judges face when forced to determine whether defendant validly waived counsel); Yee, *supra* note 49, at 921 (stating right of defendant to choose his or her best defense must be weighed against governmental interests of fair trial and judicial efficiency). A court may deny a defendant's right to counsel of his or her choice "if that right significantly compromises the integrity of the trial process." *Id.* A court, however, is reluctant to deny defendant's request because an arbitrary denial of choice of counsel is per se reversible error. *Id.*; *see also* United States v. Salemo, 61 F.3d 214, 221-22 (3d Cir.), *cert. denied*, 116 S. Ct. 546 (1995); United States v. Welty, 674 F.2d 185, 194 n.6. (3d Cir. 1982) (noting infraction on right to counsel never treated as harmless error).

one other court had recognized a difference between forfeiture and waiver, this was the first attempt by any court to divide waiver into three analytical categories.[176] The court correctly recognized that all waiver cases are not the same.[177] Therefore, it was necessary to first determine the applicable waiver category before any decision could be made whether the defendant had waived his right to counsel.[178]

Beginning with the analytical category of "waiver," the court appropriately relied on the traditional concept of waiver—"an intentional and voluntary relinquishment of a known right."[179] The court also correctly interpreted *Faretta* to require a "searching inquiry" for a traditional waiver.[180] This ensures that the defendant is aware of the risks of proceeding pro se and makes any decision "knowingly and intelligently."[181]

Next, the Third Circuit correctly defined "forfeiture" as the opposite of "waiver."[182] A pure forfeiture lacks any voluntariness or intent on the part of a defendant to relinquish the right to counsel.[183] Thus, it was appropriate to require egregious conduct for forfeiture because it is such a

176. *See* United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995) (recognizing distinction between waiver and forfeiture). For a discussion of the Eleventh Circuit's holding in *McLeod*, see *supra* notes 109-17 and accompanying text.

177. For a discussion of the various circumstances where waiver may be implicated, see *supra* notes 94-117 and accompanying text.

178. *Goldberg*, 67 F.3d at 1099. Noting the confusion among courts and the parties to this case concerning the "important distinction" among the types of waiver that exist, the court emphasized that "the resolution of . . . [the] confusion has important implications for the Sixth Amendment . . . ." *Id.* Thus, before the court could turn to the merits of the case, it was necessary for the court to discuss waiver, waiver by conduct and forfeiture. *Id.*

179. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1937)) (describing waiver as intentional relinquishment of known right or privilege).

180. *Id.* For a discussion of the Supreme Court's holding in *Faretta v. California*, see *supra* notes 66-73 and accompanying text.

181. *See* Faretta v. California, 422 U.S. 806, 835 (1975) (discussing requirements for waiver).

182. *Goldberg*, 67 F.3d at 1100. *See* LAFAVE & ISRAEL, *supra* note 27, at 545-46 (describing difference between forfeiture and waiver). Forfeiture occurs when a defendant is forced to proceed pro se. *Id.* at 546. Although courts have commonly referred to these cases as involving waiver, it is more appropriately termed forfeiture. *Id.* One author explained:

> What these courts have held, in effect, is that the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combined to justify a forfeiture of defendant's right to counsel in much the same way that defendant's disruptive behavior or voluntary absence can result in the forfeiture of his right to be present at trial.

Id. It is interesting to note that the only two courts to have made this distinction, *Goldberg* and *McLeod*, cited this treatise for the proposition that waiver and forfeiture of the right to counsel are two distinct ideas. *Goldberg*, 67 F.3d at 1100; United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995).

183. *Goldberg*, 67 F.3d at 1100.

drastic measure and impedes the constitutional rights of defendants.[184] The court, however, failed to provide a clear standard for the "extremely serious misconduct" necessary to trigger a forfeiture.[185] Because waiver by conduct may only be implied if the court affirmatively warns the defendant of the consequences of his or her conduct, the Third Circuit correctly concluded that waiver by conduct requires less extreme conduct.[186] Significantly, the Third Circuit's definition of "waiver by conduct" was further supported by Supreme Court jurisprudence.[187]

As the Third Circuit noted, identifying distinct categories within waiver of the right to counsel has significant implications on the Sixth Amendment right to counsel and appellate review.[188] The court suggested that there were only two forms of implied relinquishment of the right to counsel due to conduct—forfeiture and waiver by conduct.[189] Although the court advised that the required severity of conduct corresponds to the severity of the sanction—forfeiture requires extreme conduct, while waiver by conduct requires less extreme conduct—the court did not clarify the threshold warnings necessary to implicate a waiver by conduct analysis instead of a forfeiture analysis.[190]

2. *Applying the Categories of Waiver of the Right to Counsel*

The court properly found that waiver by conduct was precluded here in light of the lack of any judicial warnings on the record.[191] Left with only the category of forfeiture, the court rejected the Government's argu-

184. *See* United States v. Jennings, 855 F. Supp. 1427, 1444 (M.D. Pa. 1994) (explaining extreme conduct requires extreme sanction of forfeiture of right to counsel), *aff'd*, 61 F.3d 897 (3d Cir. 1995).

185. *See Goldberg*, 67 F.3d at 1101 (stating forfeiture requires "extremely dilatory conduct" without further explanation).

186. *Id.*

187. *Id.* at 1100-01. While the elements that the Supreme Court would require for different levels of waiver analysis are still uncertain, the Third Circuit's interpretation of *Illinois v. Allen* as recognizing the hybrid concept of "waiver by conduct" was fair. *See* Illinois v. Allen, 397 U.S. 337, 343 (1970) (requiring warning, but not intent for valid waiver of defendant's right to be present at trial). The *Goldberg* court analogized waiver by conduct to the trial judge's privilege to exclude a defendant from trial if the defendant engages in disruptive or disrespectful conduct. *Goldberg*, 67 F.3d at 1101.

188. *Goldberg*, 67 F.3d at 1101. For a discussion of the impact of the opinion in *Goldberg*, see *infra* notes 199-205 and accompanying text.

189. *See Goldberg*, 67 F.3d at 1100-01 (describing waiver as voluntary, but waiver by conduct and forfeiture as involuntary result of defendant's conduct).

190. *See id.* (asserting that waiver by conduct requires warnings about consequences of defendant's conduct, with no further explanation). The court most likely was referring to the *Faretta*-style warnings. *See id.* at 1100 (explaining that no valid waiver occurs unless defendant receives *Faretta* warnings). The Supreme Court, however, has not attempted to clarify these standards, and confusion remains. *See* United States v. McDowell, 814 F.2d 245, 249 (6th Cir. 1987) (discussing confusion among circuits); Parker, *supra* note 1, at 364-65 (describing Supreme Court's unclear standards of waiver).

191. *Goldberg*, 67 F.3d at 1101.

ment that a forfeiture occurred solely due to the defendant's conduct. Declining to make any statement about the necessary "technical due process," the court nevertheless relied on the defendant's absence from the evidentiary hearing to disregard the defendant's alleged death threats.[192] Left with little other evidence of "abusive conduct," the court had no choice but to remand the case.[193] The court, however, suggested that the defendant's death threats would have been dilatory enough for waiver by conduct if proper procedure was followed.[194] It thus remains unclear whether the Third Circuit will only find a valid waiver if the defendant was informed of the risks of self-representation, regardless of the severity of the defendant's behavior. Refusing to recognize that a forfeiture of the right to counsel can occur as a matter of law leaves the door open for manipulative, egregious conduct.

3. *Consistency of Result Within Third Circuit Cases*

The Third Circuit's reluctance to find forfeiture was consistent with Third Circuit waiver of the right to counsel precedent.[195] Strictly construing *Faretta* and *von Moltke*, the Third Circuit has consistently required a formal, on the record colloquy to ensure a "knowing and intelligent" decision.[196] Determining that such a warning must also exist for a waiver by conduct, then, was a natural progression for the court. In addition, the court's reluctance to adopt a pure forfeiture analysis reflects the Third Circuit's formalistic approach of requiring judicial warnings for a valid waiver. The Third Circuit is protective of the right to counsel, and therefore, the court is likely to invalidate the defendant's waiver whenever there is no *Faretta*-type warning.[197] The Third Circuit appears to preclude a valid waiver unless the defendant is warned of the dangers of self-representation. Such an inflexible standard for determining waiver is disturbing

192. *Id.* at 1102.

193. *See id.* (holding without alleged death threats, record insufficient to find "abusive conduct"). The court, however, declined to recommend any procedural requirements for fact-finding regarding a defendant's alleged conduct. *See id.* (commenting that ex parte hearing on evidence undermines due process, but refraining from advising future procedure).

194. *See id.* (stating without evidence of death threats, record was otherwise insufficient for forfeiture).

195. For a discussion of the Third Circuit's approach to waiver analysis, see *supra* notes 118-27 and accompanying text.

196. For a discussion of the Third Circuit's reluctance to find a valid waiver of the Sixth Amendment right to counsel, see *supra* notes 118-27 and accompanying text. For a discussion of the Supreme Court's opinion in *von Moltke* and *Faretta*, see *supra* notes 59-73 and accompanying text.

197. *See* United States v. McDowell, 814 F.2d 245, 249 (6th Cir. 1987) (explaining that Third Circuit was only circuit to reverse conviction when lower court failed to make searching inquiry). This is problematic because an overprotective court may infringe on a defendant's right to waive counsel and proceed pro se, and may be subject to reversal. *See* Faretta v. California, 422 U.S. 806, 834-36 (1975) (declaring court may not force counsel upon unwilling defendant).

because the defendant may engage in extreme dilatory conduct as long as the trial judge fails to issue warnings to the defendant. Thus, the defendant is permitted to mock the Sixth Amendment right to counsel.[198]

V. IMPACT

The Third Circuit established three categories of waiver analysis in *Goldberg*, rejecting traditional waiver analysis and the inconsistent results it produced.[199] Other circuits should follow the Third Circuit's lead in recognizing the various ways that a defendant may lose his or her Sixth Amendment right to counsel in order to clarify the appropriate analysis for waiver cases.

The recognition of different forms of waiver has a significant effect on a defendant's Sixth Amendment rights.[200] A defendant should not be deprived of his or her right to counsel without proper court warnings.[201] A defendant, however, should also not be permitted to engage in extreme conduct or manipulate the right to counsel.[202] Differentiating between waiver by conduct and forfeiture provides a balance for these competing interests. The defendant's right to counsel is protected by fixed waiver requirements under the waiver by conduct analysis, but "extreme or manipulative" conduct is not permitted under the forfeiture analysis. Further definition of "extreme" conduct, nevertheless, is necessary to clarify the distinction between waiver by conduct and forfeiture.

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198. *See* Anderson, *supra* note 6, at 385-86 (commenting that informal requirements may result in less reversals based on technicalities). Formal requirements may lead to reversals based on procedural technicalities. *Id.*; *see Goldberg*, 67 F.3d at 1102-03 (reversing conviction due to procedural technicality). Allowing some flexibility permits a court to determine on a case-by-case basis what is truly fair. *See* Anderson, *supra* note 6, at 386 (explaining that non-formal requirements could lead to a "truer form of justice"). Informal requirements, however, create problems such as inconsistent application of the right to waive counsel and arbitrary decisions. *Id.* For a further discussion of the problems resulting from unclear waiver requirements, see *supra* notes 6, 15 and accompanying text.

199. *See* Parker, *supra* note 1, at 364-65 (describing inconsistency of application of Sixth Amendment rights due to unclear Supreme Court guidelines). Traditional waiver analysis recognized only one form of waiver. *Faretta*, 422 U.S. at 835. For a discussion of the three categories of waiver explained in *Goldberg*, see *supra* notes 141-73 and accompanying text.

200. *See Goldberg*, 67 F.3d at 1101 (discussing implications of different levels of waiver analysis on Sixth Amendment rights).

201. *See* Bateman, *supra* note 1, at 104-06 (describing burden on courts due to inevitable appeals of defendants who represented themselves).

202. *See* United States v. Allen, 895 F.2d 1577, 1578 (10th Cir. 1990) (describing limits of right to waive counsel). The *Allen* court explained that the defendant's right to waive counsel "does not grant the defendant license 'to play a "cat and mouse" game with the court, or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where . . . the judge appears to be arbitrarily depriving the defendant of counsel.'" *Id.* (quoting United States v. McMann, 386 F.2d 611, 618-19 (2d Cir. 1968)). For a discussion of the policy reasons for prohibiting abusive conduct in the courtroom, see *supra* notes 104-17 and accompanying text.

Until the Supreme Court settles the appropriate analysis of waiver of the right to counsel, courts should require warnings on the record to achieve a valid waiver.[203] Courts should allow an exception to this rule, however, where a defendant engages in extreme conduct and recognize that forfeiture of the right to counsel may occur as a matter of law.[204] Otherwise, even a defendant's extreme conduct will not result in waiver of the right to counsel if the court did not give the proper warnings. Furthermore, the Third Circuit must be more willing to find forfeiture when the defendant has engaged in extreme or manipulative conduct.[205] Violent, disruptive behavior has no place in the courtroom.

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203. For a discussion of the Third Circuit's approach to waiver analysis, see *supra* notes 118-27 and accompanying text.

204. *See* Anderson, *supra* note 6, at 385 (suggesting formal requirements may lead to reversals based on technical procedures).

205. *See* Faretta v. California, 422 U.S. 806, 834-35 n.46 (1975) (noting that right to represent oneself does not include right to destroy dignity of courtroom); United States v. Dougherty, 473 F.2d 1113, 1126 (D.C. Cir. 1972) (finding right of self-representation rests on presumption of reasonable cooperation); Tait v. State, 362 So. 2d 292, 293 (Fla. Dist. Ct. App. 1978) (noting that judge has duty to prevent "roman circus" in courtroom), *rev'd*, 387 So. 2d 338 (Fla. 1980).