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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK M. SURIANO,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction
Entered in the Circuit Court for Door County,
The Honorable D. Todd Ehlers Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ISSUE PRESENTED

> The trial court ruled that Mr. Suriano forfeited his right to counsel after three appointed attorneys withdrew from his case, despite his protestations and repeated requests for counsel, and without first warning him of the risk of losing the right to counsel or advising him of the difficulties and dangers of self-representation.
>
> Did the trial court violate Mr. Suriano's Sixth Amendment right to counsel?

The Trial court ruled that Mr. Suriano forfeited his right to counsel.

The court of appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this Court.

STATEMENT OF THE CASE AND FACTS

The State filed a single-count criminal complaint charging Mr. Suriano with obstructing an officer, contrary to Wis. Stat. § 946.41(1). The charge arose after Mr. Suriano allegedly interfered with the efforts of the Door County Sanitation Department, and accompanying sheriff's deputies, to take a soil sample from the property where he resided.

Attorney Grant Erickson accepted a State Public Defender (SPD) appointment to represent Mr. Suriano.

(8; App. 101). Attorney Erickson appeared with Mr. Suriano at the December 16, 2013, initial appearance. A $500 signature bond was set. Subsequently, Attorney Erickson moved to withdraw as counsel. (13; App. 102). He averred that, "the grounds for this motion are that the defendant and Attorney Grant. A. Erickson have differing opinions and objectives for the handling and resolution of this case." (*Id.*). On the same date, Attorney Erickson also filed a motion to suppress evidence. (14).

The Door County Circuit Court, the Honorable D. Todd Ehlers presiding, held a hearing on the withdrawal motion on January 9, 2014. (70). At the hearing, Mr. Suriano asked the court for permission to question Attorney Erickson about why he was withdrawing. The court agreed. (70:3; App. 104).

Attorney Erickson responded that he believed that he and Mr. Suriano did not have the same objectives as him for the case. (70:5-6; App. 106-07). Mr. Suriano asked Attorney Erickson what he believed that Mr. Suriano's objective was, and Attorney Erickson replied that Mr. Suriano's objectives were to prove his innocence, explore every legal or even nonlegal aspect of the case, and to be an "ass" and make it difficult or frustrating for the legal system. (70:5-6; App. 106-07). Ultimately, Mr. Suriano agreed to a new attorney, and the court granted the motion to withdraw. (70:7; App. 108). A written order was entered accordingly. (15; App. 109).

Attorney Linda Schaefer was also present in the courtroom and advised that she had agreed to accept an SPD appointment as successor counsel. (70:8-9; 16; App. 110). The court kept the previously scheduled trial date of March 4, 2014. (70:9).

Mr. Suriano asked about calendaring a date for the suppression motion that Attorney Erickson filed. (70:10). The court stated that it would not be proper to schedule a hearing yet because Attorney Schaefer had just been appointed, but assured Mr. Suriano that "absolutely. We're going to schedule it on." (70:11).

Before the next scheduled appearance, on February 3, 2014, Attorney Schaefer filed a motion to withdraw as counsel. (19, 20; App. 111-14). She stated that "a significant conflict has developed between Mr. Suriano and myself with respect to the appropriate course of action going forward in this case." (20:1; App. 113). Attorney Schaefer also filed a request to adjourn the March 4, 2014, trial date due to a conflict in her calendar. (18).

At the February 17, 2014, pretrial conference, Attorney Schaefer did not elaborate further on her motion to withdraw, and Mr. Suriano did not comment on it. (71:2; App. 116). The court granted the motion,[1] and asked Mr. Suriano "where are we at in terms of you getting a different attorney?" Mr. Suriano responded that he was not sure, but had asked Attorney Schaefer. (71:3; App. 117).

Attorney Schaefer explained that she had spoken with the SPD, and they would appoint another attorney once the court signed the withdrawal order. (*Id.*). The court advised Mr. Suriano to call the public defender's office and noted that, "you will now be on your third attorney appointed with the public defender's office. I think they have a three strike rule. Talk to them about that." (71:5-6).

Mr. Suriano again asked about his suppression motion. The court advised Mr. Suriano to ask his attorney about the

[1] A written order was entered accordingly. (21; App. 118).

motion "first thing" so they could schedule it. (71:11). The March 4, 2014, trial date was removed. (71:10).

Attorney Raj Singh agreed to accept an SPD appointment as successor counsel. (22; App. 119). At his first appearance, an April 7, 2014, status conference, Attorney Singh informed the court of discord in his relationship with Mr. Suriano. (72:4). He stated that he was not sure that Mr. Suriano wanted him as an attorney, or any attorney at all. (72:5-6).

The court again stated its belief that the SPD had a three attorney rule and "I believe Mr. Suriano's getting close to their three and out rule," and asked Singh if he was aware of that rule. (72:6-7). Attorney Singh said that he had "grave doubts" that the SPD would attempt to find a fourth attorney. (72:7).

Mr. Suriano acknowledged that he was not satisfied with Attorney Singh's "implications," but stressed that Attorney Singh should not count as a "strike" against him, because they had just met. "Similarly, Miss Schaefer, Linda, I think, came in here and withdrew as her first act, and even [Attorney] Grant [Erickson]." (72:8).

Mr. Suriano then asked the court about a court-appointed attorney. (72:9) The court responded that Mr. Suriano could apply for court-appointed counsel, but it would first need to hear from the SPD that Mr. Suriano was not eligible for public defender representation. (72:9-11). [2]

[2] After a defendant has been found ineligible for the SPD, the court may use its inherent power to appoint counsel. ***State v. Kennedy***, 2008 WI App 186, ¶¶9, 10, 315 Wis. 2d 507, 762 N.W.2d 412. But the authority is not constrained by public defender eligibility. A "court has the authority to appoint counsel whenever in the exercise of its discretion

The court asked Mr. Suriano if he wanted to "get rid of" Attorney Singh. Mr. Suriano responded that he did not believe Singh's representation was beneficial so far but, "I hesitate to go around firing people, especially because there might be consequences. It wasn't my idea." (72:12). Attorney Singh agreed there was no legal basis to withdraw at that time. (*Id.*).

However, Attorney Singh proceeded to outline his disputes with Mr. Suriano to the court. Mr. Suriano wanted to correspond by email but Attorney Singh refused. (72:13). Attorney Singh complained that Mr. Suriano refused to give him a phone number, but acknowledged that Mr. Suriano told him he could not afford to maintain a phone line. (*Id.*) Attorney Singh gave Mr. Suriano times when he could meet at the Green Bay Courthouse, but Mr. Suriano could not afford to travel there either. (72:13). Attorney Singh gave "examples" of the content of their conversations, revealing that Mr. Suriano asked him to conduct depositions. (72:14). Attorney Singh indicated that he did not believe the suppression motion had merit. (72:15). The court advised that it would not calendar a hearing on the suppression motion, based on Attorney Singh's indication. (72:18).

As the court was concluding the hearing, Attorney Singh again spoke up and asked the court to force Mr. Suriano to make a decision about whether he wanted Attorney Singh to represent him. (72:19). Mr. Suriano did not say yes or no. The court told Attorney Singh that because Mr. Suriano did not say he did not want Attorney Singh as his attorney, "you are his . . . counsel at this point." (72:20-21).

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it seems such action necessary." ***State v. Lehman***, 137 Wis. 2d 65, 76, 403 N.W.2d 438 (1987).

Approximately one month later, Attorney Singh filed a motion to withdraw, captioned "defendant's motion for an order of attorney's withdrawal." (25; App. 120).

The motion was addressed at a hearing held on May 14, 2014. (73). Mr. Suriano was upset that the motion was captioned "defendant's motion," because he had not asked Attorney Singh to withdraw. (73:8). Attorney Singh explained that Mr. Suriano had written a letter to the SPD criticizing his representation, which stated he needed a "real" lawyer. (73:3-4). Attorney Singh also read aloud an email Mr. Suriano sent him, criticizing him. (73:4-5). Attorney Singh complained that Mr. Suriano wanted to micromanage him. (73:4). He also said he would not meet with Mr. Suriano anywhere that didn't have a metal detector because of Mr. Suriano's hostility and anger. (73:12). Attorney Singh stated that Mr. Suriano was "totally rejecting" his representation. (73:11).

In response, Mr. Suriano expressed his concern that Attorney Singh was refusing to investigate witnesses and to litigate the suppression motion, and had given him inconsistent information. (73:8-9). He asked if it was typical for an attorney to talk about client correspondences and "bash" his client. (73:8). He stated he would not oppose a new motion to withdraw as long as it was not captioned the "defendant's" motion. (73:8). Mr. Suriano emphasized that he was not firing Attorney Singh. (73:10-11, 21). "This is his idea" to withdraw. (73:21).

The court asked the State if it wanted to weigh in. The State argued that if the court granted the motion to withdraw, that the court should also find that Mr. Suriano "forfeited his right to public representation and that he either goes alone or goes out and hires his own lawyer." (73:1-22; App. 122-23).

The court granted the motion to withdraw, finding that the attorney-client relationship was "irretrievably broken." (73:22; App. 123). A written order was entered accordingly. (29; App. 133).

The court then invited Mr. Suriano to comment on the State's argument on forfeiture. Mr. Suriano opposed the motion stating, "that would be a real prejudice against me that because the attorneys decide to withdraw should not make my life harder or difficult or have me forego representation. I need to have an attorney represent me . . . ." (73:23; App. 124).

Mr. Suriano also argued that it was unfair that the State had not given him notice of its forfeiture motion and asked to "table" it. (73:25; App. 126).[3]

The court proceeded to ask Mr. Suriano about his education. (*Id.*). Mr. Suriano replied that he had completed college and some graduate school. (73:25-26; App. 126-27).

The court then found:

> You forfeited, as far as I'm concerned, your right to have legal representation. That means, Mr. Suriano, if you want to go out and hire an attorney or you want to contact the state public defender's office and see if they will appoint another attorney for you, that is absolutely your right, sir. When I'm saying you forfeited your right to have an attorney, that doesn't mean you can't get an attorney, but I'm finding your actions have made it clear that you will not cooperate with any attorney.

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[3] *See* ***King v. Superior Court***, 132 Cal. Rptr. 2d 585, 589 (2003) (forfeiture of counsel can occur only after a hearing at which defendant is afforded full due process protections, including the assistance of counsel).

…

> We now have a trial date in this case on June 4th of 2014 and that is not coming off the calendar. You will be here, I guess, representing yourself if you don't get a new attorney between now and then, but this is a game. Yes. It's a game, Mr. Suriano, and I'm done playing it. This case is moving forward.

(73:27-29; App. 128-30).

The court then scheduled a hearing on the suppression motion. (73:29).

Mr. Suriano asked whether the court would consider appointing counsel if the SPD denied his request for another attorney. (73:30-31; App. 131-32). The court agreed to consider it and directed Mr. Suriano to get a petition from the clerk. (*Id.*). The court noted it would only appoint counsel if the SPD denied a further appointment, and for the first time, advised Mr. Suriano that the denial would need to be due to financial ineligibility. (73:30-31; App. 132-33).

On May 21, 2014, Attorney Jeff Cano of the SPD wrote to the court stating that Mr. Suriano's request for appointment of counsel had been denied. (30; App. 134). Two days later, Mr. Suriano filed a petition for a court-appointed attorney. (31; App. 135-39).

On May 27, 2014, Mr. Suriano appeared for the suppression hearing *pro se*. The court explained that it had received a call from Attorney Eric Wimberger, who indicated that Mr. Suriano arranged for his representation.[4] (74:3; App. 141). However, Attorney Wimberger was not available

[4] Although not entirely clear, it appears that Attorney Wimberger agreed to accept court-appointment rates, but was not retained by Mr. Suriano.

for the suppression hearing or for the June 4, 2014, trial date. (*Id.*).

The court denied Mr. Suriano's request for court-appointed counsel and denied his request to move the trial date. (74:3-4; App. 141-42). The court stated, "if you want an attorney, you are going to need to hire one yourself." (74:4; App. 142). The suppression hearing then proceeded with Mr. Suriano acting *pro se*. The court denied the suppression motion. (74:76).

By motion filed May 29, 2014, Mr. Suriano asked the court to reconsider its denial of his request for court-appointed counsel. (34; App. 144). He argued that he had found an attorney willing to represent him, and that the court's refusal to accommodate new representation violated his right to counsel. (*Id.*).

At a hearing held on June 2, 2014, the court denied the motion to reconsider. (75:5-6; App. 146-47). The court stated, "I'm not placing 100 percent of the blame on you, clearly you are an active participant in why those situations went haywire for lack of a better word." (75:5; App. 146).[5] The court stated that Mr. Suriano could hire an attorney and concluded, "you've forfeited your right for Court-appointed counsel." (75:6; App. 147).

A jury trial took place two days later. Mr. Suriano appeared without counsel. The court instructed the jury that Mr. Suriano had decided to represent himself. (76:72).

During voir dire, the prosecutor stated, "Mr. Suriano is sitting there alone. He doesn't have a lawyer with him. That's

[5] Mr. Suriano then asked the court of appeals to stay his trial, and that request was denied. (50).

his right. That's a choice that he's made." (76:56). The prosecutor then questioned one of the jurors, "are you confident that you won't ever let any potential sympathy for this poor guy sitting there without a lawyer creep into and affect your --the verdict that you might return . . . ." (76:58).

Outside the jury's presence, Mr. Suriano expressed concern about the comments on his situation. "Everybody's been using this concept that I chose not to have an attorney . . . . I didn't dismiss any attorneys. The Court dismissed them. I just can't fathom that we're telling the jury that I chose to be in the seat I'm in without an attorney." (76:90).

Trial testimony established that the Door County Sanitation Department sought a soil sample from the property where Mr. Suriano resided. When Mr. Suriano denied access to the property, the department obtained an inspection warrant. (76:123). Members of the department, accompanied by two law enforcement officers, entered the property to obtain a soil sample. (76:121).

Mr. Suriano testified that an officer came to his door and presented him with an *application* for a warrant, but not a warrant. (76:300). Mr. Suriano stated he would not consent unless he was shown a warrant. (76:301).

Over Mr. Suriano's protestations, the group proceeded to excavate a hole. As they were doing so, Mr. Suriano left his house and approached the group wearing a long coat, with his hands in his pockets. (76:206-08). Mr. Suriano testified that it was a cold day. (76:302).

Sergeant Bradley Moe testified that Mr. Suriano was walking "briskly toward him." Sgt. Moe testified that he ordered Mr. Suriano to remove his hands from his pockets, asking several times before Mr. Suriano complied. (76:208).

According to Sgt. Moe, Mr. Suriano subsequently placed his right hand back in his pocket, pulled out a camera, and stuck it in Sgt. Moe's face. (76:212). Sgt. Moe testified that he grabbed Mr. Suriano's arm and commanded him to remove his hands from his pockets. (76:214-216). Mr. Suriano tensed up and began to pull away. (76:217). Sgt. Moe forcefully pulled Mr. Suriano to the ground, and arrested him for obstructing an officer. (76:220-223).

Mr. Suriano denied rushing up to Sgt. Moe. (76:304). He also denied getting in Sgt. Moe's face. (76:309). Mr. Suriano testified that he removed his hands from his pockets after Sgt. Moe's first request. (76:304). However, he decided to remove his camera from his pocket so he could take a picture. (76:305). Mr. Suriano testified that he was simply trying to take picture. (76:309).

The jury returned a guilty verdict. Subsequently, the trial court imposed a $100 fine and court costs (totaling $814) and 10 days in jail for failure to pay within 60 days. (61; App. 149).[6]

On March 15, 2016, the court of appeals, District III, affirmed. ***State v. Suriano***, Case No. 2015AP000959-CR, slip op (Ct. App. March 15, 2016). (App. 150-160).

This Court granted review by order dated September 13, 2016.

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[6] The judgment was subsequently stayed pending appeal. (67). Mr. Suriano filed a postconviction motion to vacate the DNA surcharge and to vacate the jail time based on Mr. Suriano's inability to pay. (82). After a hearing held on April 10, 2015, the court vacated the DNA surcharge, but kept the jail time. (83). Mr. Suriano did not appeal this ruling.

ARGUMENT

The Trial Court Erred by Ruling that Mr. Suriano Forfeited his Constitutional Right to Counsel.

A. Introduction, general legal principles, and Standard of Review.

1. Introduction.

The trial court ruled that Mr. Suriano forfeited his right to counsel after the court allowed three appointed attorneys to withdraw from his case, on their own motions, despite Mr. Suriano's protestations and repeated requests for counsel.

The court did not provide any guidance to counsel or Mr. Suriano about how the attorney-client relationship should work, and never warned Mr. Suriano of any wrongful behavior. The court did not advise Mr. Suriano that he could forfeit his right to counsel or make him aware of the difficulties and dangers of self-representation.

The court of appeals affirmed, relying on this Court's decision in ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1996), which held that a defendant can forfeit the right to counsel through manipulative or disruptive conduct. This Court should reverse.

First, even under existing Wisconsin law, the record does not establish that Mr. Suriano forfeited his right to counsel.

Second, Wisconsin's law on this issue is incongruent with constitutional principles and inconsistent with the majority of other jurisdictions that have addressed it. Specifically, other jurisdictions have held that before finding that a defendant has lost the right to counsel through

disruptive or dilatory conduct, the trial court must warn the defendant of the risk of losing the right to counsel and advise the defendant of the dangers and disadvantages of self-representation.

Third, there may be extraordinary circumstances under which a lack of warning may be excused—such as a physical assault on defense counsel—but such circumstances are not present here.

As such, Mr. Suriano asks this Court to implement an in-court procedure for trial courts to follow prior to finding that a defendant has forfeited the right to counsel through disruptive or dilatory conduct, which must include notifying the defendant of wrongful behavior, warning the defendant of the risk of losing the right to counsel, and advising the defendant of the dangers and disadvantages of self-representation.

2. Standard of Review.

The right to counsel is a clear and critical component of both the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.[7]

Whether a defendant has been wrongfully deprived of the right to counsel is a question of constitutional fact. ***Cummings***, 199 Wis. 2d. at 748. A question of constitutional fact presents a mixed question of fact and law reviewed with a two-step process. ***State v. Hajicek***, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781. This Court reviews the circuit

[7] "The scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution." ***State v. Klessig***, 211 Wis. 2d 194, 202-03, 564 N.W.2d 716 (1997).

court's findings of historical fact under the clearly erroneous standard, but reviews the circuit court's determination of constitutional fact de novo. ***Id.***

The wrongful denial of the right to counsel is structural error; it can never be harmless. ***State v. Pinno***, 2014 WI 74, ¶50, 356 Wis. 2d 106, 850 N.W.2d 207 (citing ***Neder v. United States***, 527 1, 8 (1999)).

3. Forfeiture and waiver doctrines.

"Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts." ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612; *see also*, ***Freytag v. Comm'r***, 501 U.S. 868, 894 n.2 (1991) (Scalia, J. concurring in part) (noting that courts use the terms waiver and forfeiture interchangeably, although the "two are really not the same . . .").

"'[W]aiver is the intentional relinquishment or abandonment of a known right.'" ***Ndina***, 315 Wis. 2d 653, ¶29**.** (quoting ***United States v. Olano***, 507 U.S. 725, 733 (1993)). "[W]aiver typically applies to those rights so important to the administration of a fair trial that mere inaction on the part of a litigant is not sufficient to demonstrate that the party intended to forgo the right." ***State v. Soto***, 2012 WI 93, ¶37, 343 Wis. 2d 43, 817 N.W.2d 848.

Waiver can occur through conduct, but the waiver must still be intentional. "Intentional relinquishment by conduct occurs when a party's conduct is 'so inconsistent with a purpose to stand upon one's rights as to leave no room for a reasonable inference to the contrary.'" ***Brunton v.***

Nuvell Credit Corp., 2010 WI 50, ¶38, 325 Wis. 2d 135, 785 N.W.2d 302.

"[F]orfeiture is the failure to make the timely assertion of a right." ***Ndina***, 315 Wis. 2d 653, ¶29 (quoting ***Olano***, 507 U.S. at 733). "Rights that are subject to forfeiture are typically those whose relinquishment will not necessarily deprive a party of a fair trial . . ." ***Soto***, 343 Wis. 2d 43, ¶36.

This court has also recognized a "second aspect to forfeiture: 'doing something incompatible with the assertion of a right . . . .'" ***State v. Anthony***, 2015 WI 20, ¶55, 361 Wis. 2d 116, 860 N.W.2d 10 (quoting ***State v. Vaughn***, 2012 WI App 129, ¶21, 344 Wis. 2d 764, 823 N.W.2d 543 (citing ***Illinois v. Allen***, 397 U.S. 337, 343 (1970)).[8]

B. Wisconsin law provides for both waiver and forfeiture of the right to counsel, but under incongruous standards.

1. If the right to counsel is *voluntarily* relinquished, it must be through a knowing and intelligent waiver demonstrated by an on-the-record colloquy.

The right to counsel is fundamental and well-established. "The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." ***Gideon v. Wainwright***, 372 U.S. 335, 344 (1963).

As the United States Supreme Court stressed in ***United States v. Cronic***, 466 U.S. 648 (1984):

[8] ***Illinois v. Allen*** does not use the term "forfeiture."

> Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person 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."

Id. at 653-54 (internal footnoes omitted).

A defendant has the corollary right of self-representation. Therefore, it is also well-established that a defendant may waive his or her right to counsel. ***Faretta v. California***, 422 U.S. 806, 820 (1975).

However, so important is the right to counsel that "[n]onwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary." ***Klessig***, 211 Wis. 2d at 204.

A valid waiver requires that the defendant be shown to have "knowingly and intelligently" foregone the right to counsel. Importantly, the defendant must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" ***Faretta***, 422 U.S. at 835 (quoting ***Adams v. United States ex rel. McCann***, 317 U.S. 269, 279 (1942)).

In ***Johnson v. Zerbst***, 304 U.S. 458 (1938), the United States Supreme Court spoke of the "serious and weighty" protecting role the trial court bears in ensuring that the waiver of the right to counsel is validly made:

> 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. at 465.

The ***Johnson*** court stressed that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." ***Id.*** at 464 (quoting ***Aetna Ins. Co. v. Kennedy to Use of Bogash***, 301 U.S. 389, 393 (1937)).

Given the importance of the right to counsel, this Court in ***Klessig*** held that trial courts must conduct an on-the-record colloquy before finding that a defendant has voluntarily waived his or her right to counsel.

> Conducting such an examination of the defendant is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions.

211 Wis. 2d at 206.

"If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel." ***Id.***

"The State has the burden of overcoming the presumption of nonwaiver." ***Id.*** at 204 (citing ***State v. Baker***, 169 Wis. 2d 49, 77–78, 485 N.W.2d 237 (1992)).

2. On the other hand, in Wisconsin, a defendant may *involuntarily* forfeit the right to counsel, even in the absence of an on-the-record colloquy, by disruptive or dilatory conduct.

In contrast to the well-developed, strong protections defendants are provided when it comes to the voluntary relinquishment of the right to counsel, in Wisconsin, there is an inconsistent and less-developed line of cases that hold that a defendant may involuntarily forfeit the right under certain circumstances.

Trial courts may rule that a defendant has "forfeited the right to counsel" through behavior that purposefully disrupts or delays the court proceedings, even where the defendant has not been warned of the risk of forfeiture or advised of the dangers and disadvantages of self-representation. ***Cummings***, 199 Wis. 2d 721 at 753-56.

In ***Cummings***, the trial court had determined that the defendant (Newton)[9] was uncooperative with three appointed attorneys. ***Id.*** at 750-51. After the third attorney withdrew, the court advised Newton to contact the SPD about a fourth attorney, but Newton failed to do so.

The trial court concluded that Newton desired to delay the proceedings and was continuously dissatisfied with his counsel as a tactic to prevent the case from going to trial. ***Id.*** at 751.

This Court acknowledged that "a defendant can generally only proceed pro se if the circuit court first

[9] ***Cummings*** was a consolidated appeal concerning two defendants. The right to counsel issue was limited to defendant Newton.

determines that the defendant voluntarily and knowingly waived his or her right to counsel." ***Id.*** at 752.

However, "unusual circumstances, 'most often involving a manipulative or disruptive defendant,' permit a court to find that the defendant's voluntary and deliberate choice to proceed pro se has occurred by operation of law." ***Id.*** at 752 (quoting ***State v. Haste***, 175 Wis. 2d 1, 22, 500 N.W.2d 678 (1993), citing ***State v. Woods***, 144 Wis. 2d 710, 424 N.W.2d 730 (Ct. App. 1988)).[10]

This Court emphasized the fact that the trial court told Newton to contact the SPD for a fourth attorney but Newton never did. "[T]his lack of initiative by Newton clearly represented to the court that he wished to proceed pro se. As such, it was solely through the defendant's own actions that the case proceeded in such a manner." ***Cummings***, 199 Wis. 2d at 757.

This Court in ***Cummings*** was sharply divided, with three justices in dissent. ***Id.*** at 759-66. The dissent, authored by Justice Geske, argued that Newton was not "properly forewarned" of the potential consequences of his behavior, and therefore he could not be held to have forfeited his right to counsel. ***Id.*** at 761.

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[10] In ***Woods***, the defendant was required to represent himself after he dismissed five appointed attorneys and was "unwilling to proceed with a public defender, but ... also refus[ed] to waive his right to counsel." ***Id.*** at 713 The court of appeals affirmed. "When the trial court became convinced that the orderly and efficient progression of this case was being frustrated by Woods' repeated dissatisfaction with his successive attorneys," the court could properly proceed. ***Id.*** at 715. The ***Woods*** court emphasized that, "[t]he trial court properly forewarned Woods" before making its ruling. ***Id.***

The dissent pointed to Wisconsin precedent holding that a prerequisite to a valid waiver of counsel requires the court to make the defendant aware of the difficulties and disadvantages of self-representation, the seriousness of the charges, and the potential penalties that could be imposed. ***Id.*** at 763.

Arguing that "[i]mposition of forfeiture of this important right requires no less," the dissent maintained that, "a circuit court contemplating forfeiture *must* make sure that a defendant understands the implications of his or her actions." ***Id.*** at 764.[11] (emphasis added). The dissent further stated:

> The record should reflect: (1) explicit warnings that, if the defendant persists in "X" [specific conduct], the court will find that the right to counsel has been forfeited and will require the defendant to proceed to trial pro se; (2) a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation; (3) a clear ruling when the court deems the right to counsel to have been forfeited; (4) factual findings to support the court's ruling; and (5) appointment of standby counsel. [12]

Id.

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[11] The dissent also relied on this Court's prior holding in ***Keller v. State***, 75 Wis. 2d 502, 249 N.W.2d 773 (1977), which reversed the trial court for finding that a defendant forfeited the right to counsel and urged that, "[w]hen considering actions and conduct which purport to constitute a waiver of this fundamental right, all relevant inquiries into the nature and intent of those actions and conduct must be pursued prior to imposing upon the defendant with the consequences of waiver." ***Id.*** at 509.

[12] The steps appear to have originated with the Jury Instructions Committee's special materials, *see* Wis JI–Criminal SM–30, which continue to use mandatory language even post-***Cummings***.

The ***Cummings*** majority agreed that trial courts should follow these steps, but stopped short of making them mandatory. Instead, the majority "recommend[ed]" them. ***Id.*** at 756, n. 18.

Subsequently, in ***State v. Coleman***, 2002 WI App 100, ¶¶24-25, 253 Wis. 2d 693, 644 N.W.2d 283, the court of appeals characterized forfeiture of counsel as a "drastic" and "extreme" remedy.

The ***Coleman*** court emphasized that, "[f]orfeiture cannot occur simply because the effect of the defendant's conduct is to frustrate the orderly and efficient progression of the case. The defendant must also have the purpose of causing that effect." ***Id.***, ¶18.

In ***Coleman***, the trial court ruled that the defendant forfeited his right to counsel after he appeared for sentencing without counsel. ***Id.***, ¶8. Previously, the defendant had asked to replace his first appointed attorney, and the court granted the request, telling Coleman that the SPD had a "two strike rule." ***Id.***, ¶3. Successor counsel was appointed and Coleman entered a guilty plea. ***Id.***, ¶¶4-5. Two days before the sentencing hearing, defense counsel withdrew. ***Id.***, ¶7. The trial court advised Coleman to contact the SPD for appointment of subsequent counsel. ***Id.*** Coleman appeared at sentencing alone, but stated that he still wished to have an attorney. The court proceeded to sentence the defendant. ***Id.***, ¶8.

The court of appeals reversed, finding that the record did not support "the extreme remedy of forfeiting Coleman's constitutional right to counsel." ***Id.***, ¶24. The court repeated the four steps from ***Cummings*** that trial courts should follow:

> (1) [provide] explicit warnings that, if the defendant persists in [specific conduct], the court will find that the right to counsel has been forfeited....;
>
> (2) [engage in] a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;
>
> (3) [make] a clear ruling when the court deems the right to counsel to have been forfeited; and
>
> (4) [make] factual findings to support the court's ruling....

Coleman, 253 Wis. 2d 693, ¶22.[13]

The ***Coleman*** court acknowledged that the four steps from ***Cummings*** were not mandatory, but observed the incongruity between the protections provided to defendants who voluntarily give up their right to counsel through waiver as opposed to those who involuntarily lose the right to counsel through forfeiture. The court quoted an oft-cited holding of the United States Supreme Court:

> 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." To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.

[13] Whether waiver or forfeiture applies, trial courts must also ensure that that defendant is competent to represent himself. ***Id.***, ¶32.

Id., ¶25 ((quoting ***Von Moltke v. Gillies***, 332 U.S. 708, 723-24 (1948)).

Compared to waiver, the ***Coleman*** court believed that "arguably, a finding of forfeiture imposes an even greater responsibility upon the court." ***Coleman***, 253 Wis. 2d 693, ¶25. Thus, the court of appeals found it significant that the trial court did not warn the defendant that if he continued to be dissatisfied with his attorneys, his right to counsel would be forfeited or advise him of the difficulties of proceeding without counsel. ***Id.***, ¶26.

The trial court did warn Coleman that he might lose his right to a public defender. However, the court found that warning insufficient, stating, "[t]hat warning was not clear that Coleman was in danger of altogether forfeiting his right to counsel. Rather, it arguably was a warning that the public defender would not appoint a third attorney." ***Id.***, ¶29.

In the instant case, the court of appeals took a much different tact. The court did not acknowledge that forfeiture of counsel should be reserved for "extreme" circumstances, *See* ***Coleman***, 253 Wis. 2d 693, ¶¶24, 25.

Moreover, the court of appeals was not troubled by the trial court's failure to warn Mr. Suriano, stating, "[u]ltimately, our concern is not whether the defendant understood the ramifications of his actions." ***State v. Suriano***, Case No. 2015AP000959-CR, slip op (Ct. App. March 15, 2016). (App. 158).

C. Even under existing Wisconsin law Mr. Suriano should prevail because the record does not support a forfeiture ruling.

Under ***Coleman***, a trial court cannot find that a defendant forfeited the right to counsel unless the court finds that the defendant frustrated the orderly and efficient progression of the case, and had the *purpose* to do so. ***Coleman***, 253 Wis. 2d 693, ¶18 (emphasis added).

Here, the trial court made no such finding.

A defendant's "continue dissatisfaction" with counsel may demonstrate an obstructionist purpose, if it is "based solely upon a desire to delay." ***Cummings***, 199 Wis. 2d at 753.

However, the record does not demonstrate that Mr. Suriano's dissatisfaction with counsel was either continual or based solely on a desire to delay. Mr. Suriano did not express dissatisfaction with Attorney Erickson until after Attorney Erickson called him an "ass" in open court. And Mr. Suriano never expressed dissatisfaction with Attorney Schaefer at all. His dissatisfaction with counsel cannot be fairly characterized as "continual."

The trial court never found that Mr. Suriano was attempting to delay the trial, nor was there any suggestion that he had anything to gain from a delay. To the contrary, Mr. Suriano persistently requested a hearing on his suppression motion. The trial was adjourned only once, after Attorney Schaefer withdrew. However, Attorney Schaefer had already filed a motion to adjourn the trial due to a scheduling conflict. (18). Therefore, the trial would likely have been adjourned even had Attorney Schaefer not withdrawn.

Moreover, while in ***Cummings***, the defendant was provided a final chance to contact the SPD for appointment of counsel, and never did, here, Suriano asked the court about court-appointed counsel and followed up on his request for counsel by submitting a petition for court-appointed counsel and locating an attorney willing to take his case. Mr. Suriano cannot be accused of showing a "lack of initiative" that "clearly represented to the court that he wished to proceed pro se." *See* ***id.*** at 757.

The court was not required to grant the attorneys' motions to withdraw. An appointed attorney "cannot walk away from the case, once he has accepted the appointment. All that he can do is to request the appointing court that he be relieved of the responsibility to further represent the defendant." ***State v. Johnson***, 50 Wis. 2d 280, 283, 184 N.W.2d 107 (1971).

Whether the request of either defendant or appointed counsel for termination of services is to be granted "is directed to the sound discretion of the trial court, a discretion that will include consideration of the amount of preparatory work done at public expense and the avoidance of delay or dilatory tactics." ***Id.***

"Mere disagreement over trial strategy does not constitute good cause to require the court to permit an appointed attorney to withdraw." ***State v. Darby***, 2009 WI App 50, ¶29, 317 Wis. 2d 478, 766 N.W.2d 770.

The trial court had the power to ensure the orderly and efficient progression of the case, but by allowing counsel to withdraw, the court *itself* compromised this objective.

The trial court stated that Mr. Suriano's situation with counsel had "nothing to do with me." (71:5-6). The court was

mistaken. Both this Court and the United States Supreme Court have frequently stressed the special protecting duty that a trial court assumes when dealing with an unrepresented defendant. ***State ex rel. Burnett v. Burke***, 22 Wis. 2d 486, 492, 126 N.W.2d 91 (1964) (quoting ***Von Moltke v. Gillies***, 332 U.S. at 723 (1948)); ***Keller***, 75 Wis. 2d at 507. "The situation that confronted the trial court in this does not transcend the fact that the trial judge also had an obligation to the defendant." ***Id.***

The trial court should have assumed its protecting duty by helping counsel and Mr. Suriano understand their respective roles and obligations, and by encouraging them to work together. Had the court provided Mr. Suriano and counsel with guidance and support, rather than taking the hands-off approach, the problem might have resolved itself. [14]

Importantly, the trial court failed each and every one of the ***Cummings***/***Coleman*** steps. The court never engaged Mr. Suriano in a colloquy to warn him that he could forfeit his right to counsel or to advise him of the difficulties and

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[14] A comment on counsel's ethical duties is warranted. As the California appellate court in ***King*** observed, "while counsel remains defendant's attorney, he owes defendant a duty of loyalty." 132 Cal. Rptr. 2d 585, 601. Attorneys should be mindful of Supreme Court Rules 20:1.6 (confidentiality) and 20:1.9 (duties to former clients), as well as their duty of loyalty. *See* SCR 20:1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

If a trial court is considering ruling that a defendant has lost the right to counsel through misconduct and determines that it is necessary to have counsel reveal the reasons for withdrawal, the defendant should be given new adversary counsel to advocate for his interests. *See* ***King***, 132 Cal. Rptr. 2d at 950. Moreover, the disclosure of attorney-client confidences should be guarded. For example, "the better practice" is to exclude the prosecutor. *See* ***id.*** at 599.

dangers of self-representation. The court never even told Mr. Suriano what he was doing wrong.

As in ***Coleman***, the trial court here did state its belief that the SPD had a limit on how many attorneys it would appoint a defendant, which the court referred to as the "three-strike rule." However, as the ***Coleman*** court stated, this type of warning fails to provide adequate notice that the defendant is "in danger of altogether forfeiting his right to counsel." 253 Wis. 2d 693, ¶29.[15]

Furthermore, the court failed to make a clear ruling on forfeiture. Instead, the court's ruling was confusing and self-contradictory. The court stated that:

> You forfeited, as far as I'm concerned, your right to have legal representation. That means, Mr. Suriano, if you want to go out and hire an attorney or you want to contact the state public defender's office and see if they will appoint another attorney for you, that is absolutely your right, sir. When I'm saying you forfeited your right to have an attorney, that doesn't mean you can't get an attorney, but I'm finding your actions have made it clear that you will not cooperate with any attorney.

(73:27-29; App. 119-121).

How could Mr. Suriano still have the right to contact the SPD and hire an attorney if he forfeited his right to counsel?

The State phrased its request as one of forfeiture of the right to *public* representation, but cited no authority in the law for such a distinction. Indeed, a common scenario in which

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[15] "The trial court has the authority to appoint counsel whenever in the exercise of its discretion it deems it necessary." ***Lehman***, 137 Wis. 2d at 76.

courts have found that a defendant has lost the right to counsel through misconduct involves a *non*-indigent defendant who delays hiring counsel.[16] As the court of appeals held, after the forfeiture ruling, Mr. Suriano had no right to counsel at all. (App. 159). He could have won the lottery, been able to afford the best criminal defense lawyer in the country, and would still have had no right to do so.

Finally, the court failed to make factual findings to support its ruling. The court did not find that Mr. Suriano was solely responsible for the breakdown in his relationship with his attorneys. Instead, the court stated, "while I'm not placing 100 percent of the blame on you, clearly you are an active participant in why those situations went haywire for lack of a better word." (74:6; App. 146). In fact, Attorney Schaefer, did not detail the reasons for her withdrawal, so the court would have had to speculate in order to place the blame on Mr. Suriano.

In sum, the record does not establish that Mr. Suriano acted with the purpose of frustrating the orderly and efficient progression of his case. Thus, the "drastic" and "extreme" remedy of forfeiture of counsel was unwarranted, and Mr. Suriano is entitled to a new trial with representation of counsel. *See* ***Coleman***, 253 Wis. 2d 693, ¶¶24-25.

[16] *See, e.g.*, ***United States v. Bauer***, 956 F.2d 693, 695 (7th Cir. 1992).

D. This Court should implement a mandatory in-court procedure for trial courts to follow prior to ruling that a defendant has lost the right to counsel.

Even though Suriano prevails under existing Wisconsin law, this Court should take the opportunity to further develop standards to govern the involuntary loss of the right to counsel through disruptive or dilatory conduct.

Given the importance of the right to counsel and the need for a knowing, voluntary, and intelligent waiver of this right, it begs the question: how can a court, consistent with the constitution, find that a defendant *involuntarily* lost the right to counsel through disruptive or dilatory conduct?

The United States Supreme Court has not directly addressed this question.

However, it has considered a close analogy. In ***Illinois v. Allen***, 397 U.S. 337, 343 (1970), the Supreme Court held that "a defendant can lose his right to be present at trial if, *after he has been warned* by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (emphasis added).

"Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."[17] ***Id.***

[17] Notably, ***Allen*** did not use either the term waiver or forfeiture. Instead, the court used the general term "lose."

Allen suggests that, at minimum, before finding that a defendant has lost the right to counsel through disruptive or dilatory conduct a trial court is required to warn the defendant. In his concurrence, Justice Brennan emphasized that, "[o]f course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior." ***Id.*** at 350.

The United States Supreme Court's other holdings also strongly suggest that trial courts would be violating the constitution by ruling that a defendant has lost the right counsel without first ensuring that the defendant understood the risk of losing the right to counsel and the dangers and disadvantages of self-representation.

In ***Faretta***, the Supreme Court held that prior to allowing a defendant to voluntarily waive the right to counsel in order to represent himself, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" 422 U.S. at 835 (quoting ***Adams***, 317 U.S. at 279).

In ***Johnson v. Zerbst***, 304 U.S. 458, the Supreme Court spoke of the "serious and weighty" protecting role the trial court bears in ensuring that the waiver of the right to counsel is validly made and stressed that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." ***Id.*** at 464 (quoting ***Aetna***, 301 U.S. at 393).

These holdings indicate that, if the right to be counsel is to be lost against a defendant's wishes, the defendant is entitled to basic knowledge including the risk of losing the right to counsel and the dangers and disadvantages of self-

representation. Otherwise, the defendant's actions and the consequences thereof cannot be said to have been taken with "eyes open." *See* ***Faretta***, 422 U.S. at 835.

The majority of jurisdictions that have considered this question agree.[18] Only in extreme circumstances, generally involving a violent attack against defense counsel, have other courts been willing to excuse a lack of prior warning.[19]

For example, in ***United States v. Goldberg***, 67 F.3d 1092, 1099-1102 (3d Cir. 1995), the Third Circuit Court of Appeals set forth a framework that has been adopted by several other courts.[20] ***Goldberg*** uses three terms: waiver, waiver by conduct, and forfeiture.

"Waiver" reflects traditional notions of a voluntary, intelligent, and knowing relinquishment of a right. ***Id.*** at 1099.

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[18] *See generally*, Sarah Gerwig-Moore, *Gideon's Vuvuzela: Reconciling the Sixth Amendment's Promises with the Doctrines of Forfeiture and Implicit Waiver of Counsel*, 81 MISS. L.J. 439 (2012); *See, e.g.,* ***United States v. Garey***, 540 F.3d 1253, 1265-66 (11th Cir. 2008) (defendant "may waive his right to counsel by his uncooperative conduct, so long as his decision is made with knowledge of his options and the consequences of his choice."); ***United States v. Sutcliffe***, 505 F.3d 944, 955-56 (9th Cir. 2007) (using the term "implicit waiver"); ***Bauer***, 956 F.2d at 695.

[19] *See, e.g.,* ***Commonwealth of Massachusetts v. Means***, 907 N.E. 646, 660, n. 21 (Mass. 2009) ("We are not aware of any case where forfeiture has been upheld solely because of the dilatory tactics of a criminal defendant.").

[20] *See e.g.* ***Gilchrist v. O'Keefe***, 260 F.3d 87, 100 (2d Cir. 2001); ***Com. v. Means***, 907 N.E. at 656; ***State v. Jones***, 772 N.W.2d 496, 502 (Minn. 2009); ***Bultron v. State***, 897 A.3d 758, 764 (Del. 2006); ***State v. Pedockie***, 137 P.3d 716, 721, n.15 (Utah 2006); ***State v. Hampton***, 92 P.3d 871, 874-75 (Ariz. 2004); ***King v. Superior Court***, 132 Cal. Rptr. 2d 585, 592 (2003).

"Waiver by conduct" is a "hybrid situation" that combines elements of waiver and forfeiture. It applies when a defendant has exhibited manipulative or dilatory behavior. ***Goldberg***, 67 F.3d at 1101. In such circumstances, the trial court must warn the defendant about the consequences of his or her conduct and must advise the defendant of the risks of proceeding pro se.[21]

"Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel." ***Id.*** at 1100.

"Forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." ***Id.*** "Forfeiture" is reserved for "extreme" conduct, such as a physical assault on counsel. Only in extreme cases might the absence of warnings be excused. ***Id.***[22]

In order to bring Wisconsin law in line with ***Allen Faretta*** and ***Johnson***, and the majority of other jurisdictions, this Court should implement an in-court procedure for trial

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[21] The court observed that this term is not quite right, as waiver typically describes an affirmative request by the defendant. Thus, the court also thought "forfeiture with knowledge" was fitting. But the bottom line is, defendants "are voluntarily engaging in misconduct *knowing what they stand to lose*." ***Goldberg***, 67 F.3d at 1101 (emphasis added).

[22] To a certain extent, labels are unimportant. It is the substance of the doctrine that matters. However, mixing up labels could frustrate appellate review. *See* ***id.*** at 1101. Given the variety of terms used, using the general term "lose" as the ***Allen*** Court did, may be preferable.

courts to follow for finding that a defendant has lost the right to counsel through disruptive or dilatory conduct.[23]

The simplest way would be to take ***Cummings*** one step further by changing the four steps to mandatory instead of recommended, as the ***Cummings*** dissent and jury instructions committee have advocated.

For a court to find that a defendant has lost the right to counsel through disruptive or dilatory conduct, the court *must*:

> (1) [provide] explicit warnings that, if the defendant persists in [specific conduct], the court will find that the right to counsel has been forfeited....;
>
> (2) [engage in] a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;
>
> (3) [make] a clear ruling when the court deems the right to counsel to have been forfeited; and
>
> (4) [make] factual findings to support the court's ruling....

Coleman, 253 Wis. 2d. 693, ¶22 (citing ***Cummings***, 199 Wis. 2d at 764 (Geske, J., dissenting).

Implementing a mandatory procedure will not only protect defendants' rights. It will also promote judicial efficiency and economy. If a defendant is acting inappropriately, the court may deter such behavior by alerting the defendant to the problem and making the defendant aware of the consequences of his or her actions.

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[23] This Court has supervisory authority over all of the courts of this state. Wis. Const. art. VII § 3(2)-(3).

Moreover, a mandatory in-court procedure will create a clear and complete record, which will facilitate appellate review. *See* ***Klessig***, 211 Wis. 2d at 206 (a colloquy "is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions.").[24] "A circuit court's decision to impose a sanction that deprives a party of a constitutional right ought to require standards that are susceptible to meaningful review." ***Rao v. WMA Securities, Inc.***, 2008 WI 73, ¶109, 310 Wis. 2d 623, 752 N.W.2d 220 (Prosser, J. dissenting).

In Wisconsin, a defendant cannot be found to have lost the right to counsel unless the record shows that the defendant *purposefully* frustrated the orderly and efficient progression of the case. ***Coleman***, 253 Wis. 2d 693, ¶18.

Evidence that a defendant has been put on notice that his or her conduct is unacceptable and could result in the loss of a fundamental constitutional right would be compelling proof that any prospective delay or disruption was purposeful and done with knowledge of the likely consequence. *See* Wis. Stat. § 939.23(4) ("With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result).

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[24] The ***Klessig*** colloquy (for voluntary waiver of the right to counsel) additionally requires courts to ensure that the defendant was aware of the seriousness of the charges and the general range of penalties that could have been imposed. 211 Wis. 2d at 721. This information is not explicitly included in the ***Cummings***' four steps as they are presently written, but it should be.

In sum, if a defendant can lose the right to counsel through disruptive or dilatory conduct, the defendant must first be put on notice that his or her behavior is unacceptable, warned of the risk of losing the right to counsel, and advised of the dangers and disadvantages of self-representation.

There may be extreme circumstances in which a defendant's conduct is so abusive that the right to counsel may be lost without forewarning, such as physical assault on counsel, but such circumstances are not present here.[25]

The trial court failed to warn Suriano that he could lose his right to counsel and failed to advise him of the dangers and disadvantages of self-representation. Therefore, Suriano is entitled to a new trial with the assistance of counsel. *See* ***Klessig***, 211 Wis. 2d at 206 ("If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.")[26]

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[25] *See* ***United States v. Leggett***, 162 F.3d 237, 250 (3d Cir. 1998) (defendant punched his attorney in the head and scratched and spit on him); ***State v. Lehman***, 749 N.W.2d 76, 82 (Minn. Ct. App. 2008) (defendant attacked his public defender in open court); *but see* ***State v. Hampton***, 92 P.3d 871, 874-75 (Ariz. 2004) (declining to find forfeiture, even though defendant threatened his attorney's life).

[26] As this Court held in ***Klessig***, on review, it should be the State's burden of proof on appeal. *See* 211 Wis. 2d. at 204 ("The State has the burden of overcoming the presumption of nonwaiver.").

CONCLUSION

For all of the reasons stated above, Mr. Suriano respectfully asks this Court to reverse the court of appeals and trial court and remand for a new trial with the assistance of defense counsel.

Dated this 13th day of October, 2016.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,241 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of October, 2016.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

A P P E N D I X

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of October, 2016.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner