No. 2015AP959-CR

In The Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

JACK M. SURIANO,
DEFENDANT-APPELLANT-PETITIONER.

On Appeal from the Door County Circuit Court,
The Honorable Todd Ehlers, Presiding,
Case No. 2013CM249

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

When a circuit court "becomes convinced that the orderly and efficient progression of [a] case is being frustrated" by the criminal defendant's deliberate misconduct related to his counsel—for example, his "manipulative or disruptive" behavior, his "refus[al] to cooperate" with his attorneys, or his expression of "continuous[ ] and unreasonabl[e] dissatisf[action] with each of his attorneys"—may that court hold that the defendant has forfeited his right to counsel? *State v. Cummings*, 199 Wis. 2d 721, 750–54 & n.15, 546 N.W.2d 406 (1996) (citations omitted).

The circuit court and the court of appeals both answered "yes."

INTRODUCTION

After Jack M. Suriano interfered with a police officer overseeing the execution of an inspection warrant, the State charged him with obstructing an officer. In the course of the pre-trial proceedings in the circuit court, three different public defenders represented Suriano, each of whom withdrew with the court's permission due to Suriano's repeated misconduct. The first attorney described Suriano as someone who only wanted to "make[ ] it difficult [and] frustrating to the legal system." The second attorney found herself in a "significant conflict" with Suriano "with respect to the appropriate course of action" in the case. The third attorney could not "meet with [Suriano] at any location that does not have

screening with a metal detector," due to "the hostility and anger" that Suriano directed at him. Suriano's misconduct delayed the trial date three months.

The circuit court ultimately concluded that Suriano's abuse of his counsel was so extreme that he forfeited his right to counsel. Based on the ample evidence before it, the court was compelled to find that Suriano, by his own actions, "made it clear that [he] will not cooperate with any attorney." In the words of the court, Suriano's actions had been a "game," and the court was "done playing it." The court informed Suriano, however, that he could provide counsel at his own expense, so long as that counsel would be able to make the already scheduled trial date. Suriano failed to secure counsel in time, so he proceeded pro se.

The right to counsel is guaranteed by both the United States Constitution and the Wisconsin Constitution; however, the right is not unlimited. In *State v. Cummings*, this Court held that the right to counsel may be forfeited: "the triggering event for forfeiture is when the court becomes convinced that the orderly and efficient progression of the case is being frustrated," 199 Wis. 2d at 753 n.15 (citations omitted), by "the defendant's voluntary and deliberate choice[s]," *id.* at 752.

In the present case, Suriano's misconduct—which resulted in three public defenders withdrawing and a three-month delay of trial—plainly frustrated the orderly and efficient progression of his case. Therefore, the circuit court appropriately held that Suriano forfeited his right to counsel.

The court of appeals correctly affirmed this conclusion, and this Court should do so as well.

STATEMENT

1. On October 31, 2013, the Door County Sheriff's Department served an inspection warrant on Suriano to allow sanitation officials access to his yard so they could take a soil sample. R.2:3. Suriano attempted to "debate the legalities of the warrant" with the officers outside of his home. R.2:3. After "several more minutes of debate," Suriano went back into his home and the sanitation officials started to dig an inspection hole in the yard. R.2:3.

Suriano then returned outside, "quickly walking" towards the officers and sanitation officials and "wearing a long trench coat" with his hands "deep into his pockets." R.2:3–4. An officer instructed Suriano to remove his hands from his pockets. R.2:4. Suriano then "quickly pulled his left hand out of his pocket and stuck an item in [the officer's face] and said, 'It's a camera.'" R.2:4. The officer grabbed Suriano's arm to prevent him from removing his right hand from his pocket and told Suriano to turn around. R.2:4. Suriano resisted, and the officer removed Suriano from the inspection site and placed him under arrest. R.2:4. Suriano was booked at jail and released from custody. R.2:5. He was charged with resisting or obstructing an officer. *See* R.1:1 (referencing Wis. Stat. § 946.41(1)).

2. On December 2, 2013, the circuit court appointed Attorney Grant Erickson of the State Public Defender's Office to represent Suriano. R.8. Attorney Erickson filed a supplemental discovery demand, R.6:1, a motion to suppress, R.14, and a motion to disqualify the judge, R.9. At the initial appearance, Attorney Erickson appeared with Suriano. R.69.[1] After denying the pending motion to disqualify the judge, the circuit court informed Suriano that he had "the right to have legal representation throughout the case." R.69:4. The court explained that Suriano "qualified for Mr. Erickson's representation through the state public defender's office," and that if Attorney Erickson could not continue, then "you do have the right to have a different attorney." R.69:4. After Suriano waived the reading of the criminal complaint, the court entered a "not guilty" plea for Suriano. R.69:5.

On January 2, 2014, Attorney Erickson filed a motion to withdraw as Suriano's attorney. R.13. At the hearing on the motion, Attorney Erickson testified that his own objective was to "explore every avenue for resolving the case or contesting the matter" and "at the same time to try and reach a resolution with the district attorney and [Suriano] that would be

[1] Attorney Erickson was actually Suriano's second attorney. On November 25, 2013, Assistant State Public Defender Eric Maciolek appeared for Suriano at a hearing and requested a substitution, which was granted. R.3:1; R.4:1; R.64:1–3. Attorney Maciolek also filed a demand for discovery, R.5:1, but shortly thereafter stopped representing Suriano because he was "too busy with some other matters," *see* R.73:28. There is no record of a motion to withdraw or a related order.

agreeable to all parties to resolve the matter short of trial." R.70:5. In contrast, Attorney Erickson testified that Suriano's objective was to "explore every legal or even nonlegal aspect of this case for reasons of making it difficult . . . [and] frustrating to the legal system." R.70:6. Attorney Erickson further testified bluntly that Suriano's objective was "[b]eing an ass" and that Suriano believed that he had "been improperly charged," so "because of that [Suriano] desire[s] to make it difficult or frustrating for the court system to proceed." R.70:6. The court granted Attorney Erickson's motion to withdraw. R.15.

Also at the hearing, the court introduced Attorney Linda Schaefer to Suriano, who at that time was already appointed to handle Suriano's case. R.70:8; R.16. The court then showed concern for its current trial schedule, saying, "[W]e're talking about a pretrial that's about a month from now and a trial that's a month and a half from now [i.e. March 4, 2014]." R.70:9. The court did not move the March 2014 trial date, but instead encouraged Suriano to meet with his new attorney, Attorney Schaefer. R.70:9.

3. On February 3, 2014, Attorney Schaefer moved to withdraw. R.19. She explained in an affidavit in support of her motion that a "significant conflict" developed between her and Suriano "with respect to the appropriate course of action going forward in this case." R.20. "Because of this conflict, I can no longer effectively represent Mr. Suriano in the above-captioned matter." R.20. At a hearing on the matter, Suriano

did not comment on the motion; the court, after noting the affidavit, said, "I don't think anything more needs to be said about it, so I'm granting, Miss Schaefer, your motion to withdraw." R.71:3; R.21.

Before the court adjourned, however, Suriano started an argument with both the court and his former attorney as to the disposition of his file, saying, "I assume it's my file and I own it." R.71:4. Although the court said it was not going to get "in the middle of" this dispute, R.71:4, Suriano then claimed that the file contained information that had been wrongfully withheld from him, R.71:5.

The court ended the discussion by explaining to Suriano, "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." R.71:6. The court further explained, "[W]hen individuals go through three attorneys, [the Public Defender does not] appoint an attorney any longer so maybe you need to call them and talk to them about that also, sir, because, as I said, you are now going to be on your third attorney with the public defender's office." R.71:6.

The court then moved to a discussion of the trial date, and Suriano started another argument with the court, this time about a pending motion to dismiss. R.71:7–10. After several back-and-forth comments to the court, the court explained, "I told you I'm not—now I've told you three times. I'm not scheduling a hearing on your motion to dismiss until you get a new attorney involved and that attorney indicates

that he or she is going to prosecute that motion on your behalf." R.71:10. The court then took the March 4 trial date off the calendar and set a status conference for March 13, 2014. R.71:10.

4. On February 27, 2014, the Public Defender's Office appointed Raj Singh to represent Suriano. R.22. At a status conference held on April 7, 2014, Suriano told the court that, although he just met Attorney Singh that same day (as reflected in the court record), Suriano did not feel as though Attorney Singh would represent his best interests. *See* Criminal Court Docket, entry on April 7, 2014. Attorney Singh did not move to withdraw at that point, however, and continued to represent Suriano. The court ended the status conference by setting a new trial date of June 4, 2014, and a pretrial conference on May 27, 2014. *See* Criminal Court Docket, entry on April 7, 2014.

On May 7, 2014, Attorney Singh filed a motion to withdraw based on the grounds that "the defendant has effectively communicated to the undersigned attorney his absolute, complete, and total rejection of said attorney's counsel and representation." R.25. At a hearing on the motion on May 14, 2014, Attorney Singh explained that Suriano had sent an email to the State Public Defender's Office that accused Attorney Singh of "l[ying]" and "refus[ing]" to pursue sufficient discovery; Suriano also claimed that Attorney Singh's "now stated plan is to feed [him] up at trial without putting up a defense." R.73:3.

Singh then described emails he received directly from Suriano, including one calling a letter Singh had written "idiotic" and saying that "[he had] to call [Singh] out on this." R.73:4. Suriano also wrote that Singh was a "shill for the prosecution, and a liar, plain and simple." R.73:5. Suriano wrote, "No wonder the only work you can get is PD [i.e., from the public defender's office]. How many defendants have you escorted to conviction rather than defending them?" R.73:5.

Attorney Singh detailed other instances of the breakdown in their relationship, including a breakdown in their very first meeting. *See* R.73:6. "[T]he hostility and anger that this man has shown to me is such that I will not meet with him at any location that does not have screening with a metal detector." R.73:12. Attorney Singh summed it up by stating: "He will not cooperate with me at all. He wants to micromanage what I do." R.73:5. Suriano's actions and comments were "absolutely completely and totally incompatible with him continuing and me continuing with an alleged attorney-client relationship," Attorney Singh stated. R.73:12.

The court granted Attorney Singh's motion to withdraw, finding that it is "clear to me based on statements by Mr. Singh and by Mr. Suriano today that their relationship is irretrievably broken." App. 123. Notably, during this hearing, Suriano interrupted Attorney Singh repeatedly, causing the court to threaten "contempt of court" and warning "[you] will be going down to the jail." R.73:15.

5. At the same hearing, the District Attorney moved for an order finding that Suriano had "forfeited his right to public representation and that he either goes alone or goes out and hires his own lawyer." App. 123. The court granted the motion. App. 135–36. As the court explained: "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." App. 128. The court clarified, "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 fin[d]ing your actions have made it clear that you will not cooperate with any attorney." App. 128.

At this point, Suriano apparently started to talk and the court said, "Don't. I've listened to you. Don't open your mouth on this—that is going to be the third time and you are going to jail. So keep your mouth shut until I get done talking." App. 128. The court then recounted the three attorneys—Erickson, Schaefer, and Singh—and found that the facts presented in these attorney-client relationships showed that "clearly there is a problem with your relationship with any attorney." App. 129.

Moving forward, the court explained that the pretrial conference would be held on May 27, 2014, and the trial would be held on June 4, 2014, without exceptions, and that Suriano would be present "representing [him]self if [he] d[idn't] get a new attorney between now and then." App. 129–30. The

court stated that Suriano's actions had been a "game," and said, "I'm done playing it." App. 130.

6. On May 27, 2014, the court held the pretrial conference. Suriano appeared pro se, but indicated that an attorney from Green Bay, Eric Wimberger, had agreed to represent him. R.74. However, the court said to Suriano, "[Attorney Wimberger] indicated he was not available today to represent you on your pending motion to suppress." App. 141. The court stated, "I thought I made it very clear to you when we were last on the record . . . that if you were going to be seeking out your own attorney or petitioning the Court to appoint an attorney for you [to] make sure whoever you contact is available because I'm not moving the trial date again." App. 141–42. The court then denied his request for counsel. App. 142.

The court moved forward with the motion to suppress, took testimony, and denied the motion. At the end of the hearing, Suriano again asked about an attorney, to which the court responded, "You have to hire an attorney. I've already found you have forfeited your right to have an attorney. If you hire an attorney yourself, you can do so, but I am not appointing one on your behalf." R.74:81.

7. The court held the trial on June 4, 2014, as scheduled; Suriano was unrepresented. R.76:1. He was found guilty and sentenced to 10 days in jail, with the condition that jail time would be permanently stayed if Suriano paid a $100 fine in 60 days. R.77:15–16.

8. On appeal, the court of appeals affirmed. Citing *State v. Coleman*, 2002 WI App 100, 253 Wis. 2d 693, 644 N.W.2d 283—which itself relies on *Cummings*, 199 Wis. 2d 721—the court correctly explained the controlling test: A defendant may "forfeit the right to counsel by his or her conduct." App. 157, ¶ 16. The "triggering event" for such a forfeiture occurs when the "court becomes convinced that the orderly and efficient progression of the case is being frustrated by the defendant's repeated dissatisfaction with his or her successive attorneys." App. 157, ¶ 17 (citation omitted). Although the court recognized that "explicit warnings" and a "colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation" are recommended procedures, these are not constitutionally "mandatory." App. 158 (citation omitted).

Applying these rules to Suriano's case, the court recounted that "Suriano was either unable or unwilling to work with any of the three attorneys," and that Suriano's desire was to "make it difficult or frustrating for the court system to proceed." App. 159, ¶ 21 (citation omitted). The court explained that the circuit court "implicitly concluded Suriano was intentionally disrupting the progression of the case." App. 159, ¶ 21.

SUMMARY OF ARGUMENT

I. Suriano forfeited his right to counsel in the circuit court through his repeated misconduct related to his counsel.

A. Criminal defendants are guaranteed the right to assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. That right, however, is not unlimited. In *State v. Cummings*, this Court held that the right to counsel is subject to the forfeiture doctrine and described the contours of that doctrine as follows: "the triggering event for forfeiture is when the court becomes convinced that the orderly and efficient progression of the case is being frustrated," 199 Wis. 2d at 753 n.15 (citations omitted), by "the defendant's voluntary and deliberate choice[s]," *id.* at 752. No warning is required before the circuit court can hold that forfeiture has occurred. *Id.* at 753 n.15. The *Cummings* test is consistent with the test used by courts across the country for forfeiture of counsel. *See generally* 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.3(c) (4th ed. 2015); *Tennessee v. Carruthers*, 35 S.W.3d 516, 549 (Tenn. 2000); *Maine v. Nisbet,* 134 A.3d 840, 853 (Me. 2016); *Minnesota v. Jones*, 772 N.W.2d 496, 505–06 (Minn. 2009).

B. Applying the *Cummings* test here, the circuit court was correct to conclude that Suriano forfeited his right to counsel.

Suriano was represented by three separate public defenders, each of whom withdrew at least in part due to Suriano's poor behavior. *See Cummings*, 199 Wis. 2d at 750, 752. Suriano deliberately and unreasonably delayed court proceedings with his misconduct. *See id.* at 750. And Suriano was

given multiple warnings from the circuit court about his upcoming trial dates and the need to retain counsel. *See id.* at 757. This evidence strongly supports the circuit court's conclusion that Suriano's misconduct frustrated the efficient progression of trial proceedings.

C. Suriano's arguments to the contrary are unavailing.

First, he argues that the circuit court must find that the defendant, by his obstructionist actions, *intends* to cause a delay in trial. Yet this has never been the test for forfeiture. Even if it were, it is met here: The court of appeals rightly stated that the circuit court "implicitly concluded Suriano was *intentionally* disrupting the progression of the case." App. 159, ¶ 21 (emphasis added). That is plainly sufficient to show an intent to delay.

Second, Suriano argues that forfeiture was inappropriate because the circuit court exercised its discretion in granting his attorneys' motions to withdraw, and thus the court itself was responsible for any delay. Motions to withdraw are granted in the discretion of the circuit court and are appropriately granted when the attorney-client relationship has irreconcilably broken down. *Cummings*, 199 Wis. 2d at 748–49. Since the attorney-client relationships here were destroyed by Suriano's own misconduct, it is wholly appropriate to fault him with the delay due to the court's granting of the motions to withdraw.

Third, Suriano argues that the circuit court failed to justify its forfeiture holding with sufficient facts. But there

was ample ground to support the court's holding that Suriano's repeated misconduct frustrated the efficient progression of the circuit court, forfeiting the right to counsel.

II. Suriano also argues that this Court should require a four-step procedure, including a warning requirement, before a circuit court can hold that the right to counsel has been forfeited. However, there is no blanket constitutional requirement that courts must follow a specific procedure when considering whether a constitutional right has been forfeited. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970). Moreover, courts across the country apply the forfeiture-of-counsel doctrine without requiring a warning beforehand. This is justified by the narrowness of the doctrine itself and the obvious and pervasive wrongness of the defendant's misconduct. *See Cummings*, 199 Wis. 2d at 752, 756. Under the extreme circumstances of this case, this Court's precedent plainly supports the conclusion that Suriano forfeited his right to counsel.

STANDARD OF REVIEW

Whether an individual was denied his constitutional right to counsel is a "question of constitutional fact" reviewed "independently as a question of law." *Cummings*, 199 Wis. 2d at 748. The circuit court's conclusions of historical fact are reviewed for clear error, a deferential standard of review. *See State v. Martwick*, 2000 WI 5, ¶ 18, 231 Wis. 2d 801, 604 N.W.2d 552. A fact is clearly erroneous if it is "contrary to the

great weight and clear preponderance of the evidence," *id.* ¶ 18 n.8 (citation omitted); additionally, "[t]he initial determination of historical [ ] fact is no more important than the ultimate determination of constitutional fact," *id.* ¶ 23.

ARGUMENT

I. Suriano Forfeited His Right To Counsel

A. Criminal Defendants Can Forfeit Their Right To Counsel Through Their Own Misconduct

1. A criminal defendant's right to the assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, *Gideon v. Wainwright*, 372 U.S. 335, 339–40, 345 (1963), and Article I, Section 7 of the Wisconsin Constitution, *Cummings*, 199 Wis. 2d at 748. "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).

The right to counsel is not unlimited. For example, a defendant with court-appointed counsel does not have the right to the counsel of his choice, unlike a defendant paying for his own counsel. *See Rahhal v. State*, 52 Wis. 2d 144, 147, 187 N.W.2d 800 (1971); *see also Keller v. State*, 75 Wis. 2d 502, 511, 249 N.W.2d 773 (1977). Additionally, a defendant may not substitute counsel when the trial is imminent, which preserves the scarce time of the court and trial participants. *See Cullen v. State*, 26 Wis. 2d 652, 658, 133 N.W.2d 284 (1965).

2. The forfeiture doctrine, under which a defendant loses his right to counsel through his own misconduct, involves one such limitation on the right to counsel.[2] This Court defined the contours of the forfeiture doctrine in *Cummings*: "the triggering event for forfeiture is when the court becomes convinced that the orderly and efficient progression of the case is being frustrated," 199 Wis. 2d at 753 n.15 (citations omitted), by "the defendant's voluntary and deliberate choice[s]," *id.* at 752. The doctrine "most often involv[es] a manipulative or disruptive defendant" and "permit[s] a court to find that the defendant's voluntary and deliberate choice to proceed pro se has occurred by operation of law." *Id.* That is, the defendant "has deemed *by his own actions* that the case proceed" without counsel representing him. *Id.* (quoting *State v. Woods*, 144 Wis. 2d 710, 715–16, 424 N.W.2d 730 (Ct. App. 1988)).

Cummings does not require circuit courts to give "a warning" to a defendant in danger of forfeiture "before forfeiture can occur." *Id.* at 753 n.15. It does, however, "recommend" that circuit courts go through a four-part procedure with "recalcitrant defendant[s]" in danger of forfeiting their

[2] The forfeiture doctrine is distinct from the doctrine of waiver. *See United States v. Olano*, 507 U.S. 725, 733–34 (1993). "[W]aiver is the intentional relinquishment or abandonment of a known right," "[w]hereas forfeiture is the failure to make the timely assertion of a right." *See id.* at 733. This Court and courts across the country have consistently applied the forfeiture doctrine to the right to counsel, recognizing that a defendant may involuntarily lose that right through his own misconduct. *See infra* pp. 18–22.

right to counsel before holding that forfeiture has taken place. *Id.* at 756 n.18; *see infra* p. 29–31 (State's discussion of the content of the recommended procedure and why it need not be mandatory).

Applying these rules to the case before it, this Court in *Cummings* affirmed the circuit court's decision that the defendant forfeited his right to counsel. 199 Wis. 2d at 756. There, the defendant was unsatisfied with three separate court-appointed attorneys. *Id.* at 752. The defendant also filed multiple meritless letters with the circuit court, causing the court to conclude that "[the defendant] has his own agenda . . . and it's not consistent with his own legal interests." *Id.* at 751. Finally, the circuit court gave the defendant one last chance to contact the public defender's office to request an attorney, *id.* at 757, but "nothing in the record [ ] show[ed] that [the defendant] ever approached" the office, *id.* at 758.[3] Due to this pervasive "manipulative and disruptive" behavior "based solely upon a desire to delay," *id.* at 753, this Court concluded that the defendant was frustrating the orderly and efficient progression of the case. Therefore, the defendant "forfeited his Sixth Amendment right to counsel." *Id.* at 759.

[3] This Court also identified the danger of counsel representing the defendant if his behavior continued. *Cummings*, 199 Wis. 2d at 754 n.16. "[A]cquiescence to [the defendant's] tactics by an attorney could possibly result in the attorney breaching his or her ethical obligations to the court." *Id.*

Three justices dissented in *Cummings* and would have required the following rule in every forfeiture-of-counsel case: "(1) explicit warnings [from the circuit court] 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." *Id.* at 764 (Geske, J., dissenting) (second brackets in original).

3. The *Cummings* test for forfeiture of counsel—"forfeiture" occurs "when the [circuit] court becomes convinced that the orderly and efficient progression of the case is being frustrated" by "the defendant's voluntary and deliberate choice[s]," *id.* at 752, 753 n.15 (citations omitted)—is consistent with the tests used by courts across the country. Similarly, this Court's refusal to require "a warning" before forfeiture can be applied, *id.* at 753 n.15, is echoed across the country. As the LaFave treatise on criminal procedure helpfully summarizes: "[C]ourts have held . . . that the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic[s] combined [ ] justify a forfeiture [i.e., a loss of the right without intentional abandonment] of defendant's

right to counsel . . . ." LaFave, *supra*, § 11.3(c). Three cases from three state high courts are particularly instructive.

Most recently, in *Maine v. Nisbet*, the Supreme Judicial Court of Maine held that "[f]orfeiture occurs when the defendant engages in 'serious misconduct' that abuses the right to counsel." 134 A.3d at 853. The court explained its test this way: "a defendant may be deemed to forfeit [the right to counsel] only in circumstances where, in the context of that defendant's relationship with counsel, he has engaged in extremely serious misconduct that directly undermines the integrity and effectiveness of that right or frustrates the judicial process in a substantial way." *Id.* at 854. The court applied the doctrine where the defendant (1) had an "ongoing unwillingness to cooperate with counsel," (2) the court made "considerable efforts to fulfill his right to counsel through [ ] successive appointment[s]," (3) the defendant "focus[ed] on groundless issues" in the case, (4) the defendant "caus[ed] substantial and unacceptable delays of trial," and (5) the defendant had an "evident motivation to continue to engage in conduct that would delay the trial indefinitely." *Id.* at 856. The court explained that "forfeiture of the right to counsel is not predicated on a *knowing* intention to relinquish [the right]." *Id.* at 853 (emphasis added).

Similarly, in *Minnesota v. Jones*, the Supreme Court of Minnesota held that "a defendant who engages in extremely dilatory conduct may be said to have forfeited his right to

counsel." 772 N.W.2d at 505 (citation omitted). "The rationale behind applying the forfeiture doctrine is that courts must be able to preserve their ability to conduct trials." *Id.* The court applied the doctrine where a defendant (1) "engaged in conduct that was extremely dilatory," (2) "appeared for court without counsel on eight separate occasions," (3) was repeatedly "told to retain counsel," (4) "repeatedly told the district court that he was planning on retaining private counsel," and (5) "was granted three continuances solely for the purpose of giving him time" to appoint counsel. *Id.* at 506. The court explicitly stated that "[f]orfeiture does not require the court to conduct a waiver colloquy with the defendant." *Id.* at 505.

And in *Tennessee v. Carruthers*, the Supreme Court of Tennessee held that "[a] criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings." 35 S.W.3d at 549. "[F]orfeiture is appropriate even though the defendant was not warned of the potential consequences of his or her actions or the risks associated with self-representation." *Id.* at 548; *see also id.* at 550. The court applied the forfeiture doctrine to a defendant who (1) "repeatedly and unreasonably demanded that his appointed counsel withdraw and that new counsel be appointed," demands that "escalated as his scheduled trial dates drew near," (2) engaged in "conduct [that was] degenerated" and made "outrageous allegations and threats" "with each new set of attorneys," and (3) "sabotaged his relationship with each successive attorney with the obvious goal

of delaying and disrupting the orderly trial of the case." *Id.* at 550. The court explained that "forfeiture is appropriate even though the defendant was not warned of the potential consequences of his or her actions or the risks associated with self-representation." *Id.* at 548.

The overwhelming majority of courts around the country to have considered this issue have adopted the same general approach. *See, e.g.*, *Fischetti v. Johnson*, 384 F.3d 140, 146 (3d Cir. 2004) ("[T]here are occasions when a defendant can be forced to go to trial without an attorney . . . . We apply this rule of forfeiture not to punish defendants but to preserve the ability of courts to conduct trials." (citation omitted)); *Gilchrist v. O'Keefe*, 260 F.3d 87, 97 (2d Cir. 2001) (Sotomayor, J.) ("[E]ven absent a warning, a defendant may be found to have forfeited certain trial-related constitutional rights . . . . [T]here is no Supreme Court holding . . . that an indigent defendant may not forfeit . . . his right to counsel through misconduct . . . ."); *Pennsylvania v. Lucarelli*, 971 A.2d 1173, 1179 (Penn. 2009) ("forfeiture . . . does not require that the defendant intend to relinquish a right" and "colloquy requirements do not apply"); *Utah v. Pedockie*, 137 P.3d 716, 722 (Utah 2006) ("forfeiture results . . . regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right" (citation omitted)); *Siniard v. Alabama*, 491 So. 2d 1062, 1064 & n.1 (Ala. Crim. App. 1986) ("[T]he appellant offered no justification for his delay in

hiring an attorney except for his own neglect. . . . We hold that the appellant . . . forfeited [ ] his right to counsel.").

B. The Circuit Court Properly Concluded That Suriano Forfeited His Right To Counsel By His Repeated Misconduct

A defendant has forfeited his right to counsel when "the court becomes convinced that the orderly and efficient progression of the case is being frustrated" by "the defendant's voluntary and deliberate choice[s]." *Cummings*, 199 Wis. 2d at 752, 753 n.15 (citations omitted). The circuit court correctly held that Suriano forfeited his right to an attorney when his own poor conduct frustrated the efficient progression of the circuit court proceedings.

First, Suriano was represented by three separate attorneys—all public defenders paid for by the State—each of whom withdrew, at least in part, due to Suriano's poor behavior. *See id.* at 750, 752; *accord Carruthers*, 35 S.W.3d at 550; *Nisbet*, 134 A.3d at 856. With Attorney Erickson, Suriano attempted to "explore every legal or even nonlegal aspect of this case for reasons of making it difficult . . . [and] frustrating to the legal system." R.70:6. With Attorney Schaefer, Suriano experienced a "significant conflict" "with respect to the appropriate course of action [ ] in this case." R.20. "Because of this conflict," Attorney Schaefer "[could] no longer effectively represent Mr. Suriano." R.20; App. 128 (circuit court stating that "[Suriano's] actions have made it clear that [he] will not coop-

erate with *any* attorney" (emphasis added)). And with Attorney Singh, Suriano "effectively communicated . . . his absolute, complete, and total rejection of [his] counsel and representation." R.25. Suriano accused Attorney Singh of "ly[ing]" and challenged his professional loyalty by claiming that his "plan is to feed me up at trial without putting up a defense." R.73; *see also* R.73:5 (calling Attorney Singh a "shill for the prosecution, and a liar, plain and simple"); R.73:4 (calling one of Attorney Singh's letters "idiotic"); R.73:5 ("No wonder the only work you can get is PD [i.e., with the public defender]. How many defendants have you escorted to conviction rather than defending them?"). Ultimately, Suriano caused Attorney Singh to fear for his own safety: "the hostility and anger that [Suriano] has shown to me is such that I will not meet with him at any location that does not have screening with a metal detector." R.73:12.

Second, Suriano deliberately and unreasonably delayed court proceedings with his misconduct. *See Cummings*, 199 Wis. 2d at 750; *accord Carruthers*, 35 S.W.3d at 550; *Nisbet*, 134 A.3d at 856; *Jones*, 772 N.W.2d at 506. The court of appeals correctly explained that the circuit court "implicitly concluded Suriano was intentionally disrupting the progression of the case." App. 159, ¶ 21. Attorney Erickson stated that Suriano believed that he had "been improperly charged and because of that [Suriano] desire[d] to make it difficult or frustrating for the court system to proceed." R.70:6. Suriano's significant conflict with Attorney Schaefer resulted in the

trial date having to be moved by three months. R.71:10. And with Attorney Singh, Suriano complained to the court that he would not represent his best interests *the very day* he met him. *See* Criminal Court Docket, entry on April 7, 2014; *supra* p. 7. Suriano gave no specific reason for this complaint, which supports the inference that it was done simply to stall court proceedings. Additionally, he chided Attorney Singh for refusing to pursue multiple avenues of discovery which, as can be inferred from Attorney Singh's motion to withdraw, were of dubious merit. *See* R.73; App. 153, ¶ 6 (Suriano's "proposed legal issues lacked merit"); *see also Cummings*, 199 Wis. 2d at 750; *accord Nisbet*, 134 A.3d at 856. In addition, the multiple references to Suriano insisting on meritless legal positions, App. 152, ¶ 4; 153, ¶ 6, show that Suriano's attorneys were being pushed to the boundaries of their ethical duties to the court. This was another factor that supports forfeiture identified in *Cummings*. 199 Wis. 2d at 754 n.16.

Third, the circuit court gave Suriano multiple warnings about his upcoming trial dates and the need to retain counsel. *See Cummings*, 199 Wis. 2d at 757; *accord Jones,* 772 N.W.2d at 506. After Attorney Erickson withdrew, the circuit court informed Suriano of the court's concern with the current trial schedule. R.70:9. The court encouraged Suriano to meet with his second attorney in order to be prepared for this trial date. R.70:9. After granting Attorney Shaefer's motion to withdraw, the court warned Suriano, saying, "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." R.71:6. The court reiterated the warning: "when individuals go through three attorneys, [the Public Defender does not] appoint an attorney any longer so maybe you need to call them and talk to them about that also, sir, because, as I said, you are now going to be on your third attorney with the public defender's office." R.71:6. Suriano has not presented evidence that he did in fact speak with the public defender's office about this rule or the consequences of an indigent defendant going through three public defenders. *See Cummings*, 199 Wis. 2d at 757.

Notably, even after the circuit court concluded that Suriano forfeited his right to counsel, Suriano was allowed to either proceed pro se or "go[ ] out and hire[ ] his own lawyer." App. 123; App. 128. In other words, the court was unwilling to move the trial date again, but would allow Suriano to hire his own attorney to represent him at trial on that date. App. 128; App. 129.

* * *

The circuit court stated that Suriano's actions in the proceedings before it were a "game," and said, "I'm done playing it." App. 130. This is a strongly supported holding that Suriano's repeated misconduct frustrated the efficient progression of the circuit court, necessitating the forfeiture of the right to counsel. *Cummings*, 199 Wis. 2d at 752, 753 n.15.

C. Suriano's Arguments To The Contrary Are Unpersuasive

Suriano attempts to rebut the forfeiture holding here with several unpersuasive arguments.

First, he argues that the circuit court must find that the defendant, by his obstructionist actions, subjectively *intends* to cause a delay in trial. *See* Opening Br. 24, 27. Suriano hopes to graft this intent element onto the *Cummings* test and finds support for this alteration in *State v. Coleman*, 253 Wis. 2d 693, ¶ 18. This argument fails for two reasons.

As a threshold matter (and as explained extensively above, *supra* pp. 16–22), *Cummings* applied the forfeiture doctrine regardless of whether the defendant *intended* to cause delay. Rather, all that is required is the defendant's deliberate, pervasive, and unreasonable conduct—no matter his intent. *See Cummings*, 199 Wis. 2d at 752, 753 n.15. Forfeiture applies when a defendant's *voluntary* conduct frustrates the court proceedings; it makes no difference whether the defendant actually intended to delay his trial date or whether he simply intended to make the proceedings more frustrating for the court. *See id.* The court of appeals was therefore incorrect in *Coleman* to hold that "forfeiture cannot occur simply because the effect of the defendant's conduct is to frustrate the orderly and efficient progression of the case," rather, "[t]he defendant must also have the *purpose* of causing that effect." 253 Wis. 2d 693, ¶ 18 (emphasis added). This is simply inconsistent with *Cummings*. And again, courts across the country

agree with the lack-of-specific-intent approach this Court adopted in *Cummings*. *See, e.g.*, *Carruthers*, 35 S.W.3d at 549 (focusing forfeiture analysis on the defendant's conduct with no mention of the defendant's intent); *Nisbet*, 134 A.3d at 854 (same).

In any event, as a factual matter, Suriano *did* have the intent to delay the proceedings with his misconduct. *See supra* p. 11. His first attorney told the circuit court that Suriano "desire[d] to make it difficult or frustrating for the court system to proceed." R.70:6. His conflict with his second attorney—which he has not shown to be based on a reasonable disagreement—pushed the trial date back three months. S*ee supra* p. 7. He urged Attorney Singh to pursue meritless discovery and complained about Attorney Singh's competency the first day he met him. *See supra* p. 7. Based on the record, the court of appeals rightly stated that the circuit court "implicitly concluded Suriano was *intentionally* disrupting the progression of the case." App. 159, ¶ 21 (emphasis added).

Second, Suriano argues that forfeiture was inappropriate because the circuit court exercised its discretion in granting his attorneys' motions to withdraw. Opening Br. 25. Once a public defender is assigned to a case, "the circuit court," in its "sound discretion," "can relieve [him] from his duty of representation" for "good cause." *Cummings*, 199 Wis. 2d at 748–49. One good cause is the irrevocable breakdown of the "attorney-client relationship." *Id.* There is an abundance of evidence in the record that the circuit court concluded that such

a breakdown had occurred with each of Suriano's attorneys and that Suriano's misconduct was the cause of these breakdowns. *See supra* pp. 5–10 (describing the "significant conflict[s]" Suriano created, the abuse he directed at Attorney Singh, and the circuit court's conclusion that Suriano was playing a "game" with the court). Since the court found Suriano directly responsible for the breakdown of his attorney-client relationships, it was wholly appropriate for the court to fault him for the delay to the proceedings.

Suriano's argument here (Opening Br. 25–26) simply omits the reason his attorneys moved to withdraw: Suriano's pervasive misconduct with respect to those attorneys, which destroyed their attorney-client relationships. He asserts that the 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." Opening Br. 26. It is apparent from the record that the circuit court concluded that its "protecting duty" was best exercised here by permitting the withdrawal of counsel.

Third, Suriano argues that the circuit court failed to support its forfeiture holding with sufficient facts. Opening Br. 28. As already detailed extensively above, he is mistaken on this score. Briefly, Suriano's attorneys detailed his unreasonable obstructionist conduct (including causing Attorney Singh to fear for his safety), the court itself witnessed this behavior in numerous hearings, and his actions caused a three-month delay of trial. *See supra* pp. 5–10. This is ample

ground to support the court's holding that Suriano's repeated misconduct frustrated the efficient progression of the circuit court.

II. Neither The Federal Nor The State Constitution Requires The Four-Step Process Favored By The *Cummings* Dissent

In the final section of his opening brief, Suriano asks this Court to "implement a mandatory in-court procedure for trial courts to follow" before applying the doctrine of forfeiture. Opening Br. 29–35. In short, he asks this Court to make the recommended four-part procedure in *Cummings* mandatory. 199 Wis. 2d at 756 n.18.

This procedure is as follows: "(1) explicit warnings [from the circuit court] 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; [and] (4) factual findings to support the court's ruling." *Id.* at 764 (Geske, J., dissenting) (second brackets in original); *Id.* at 756 n.18 (majority opinion directing reader to part of what the dissenting opinion would have required); *see also* Opening Br. 33.

This Court should decline Suriano's request to add a mandatory procedure; there is simply no constitutional requirement that trial courts must follow a specific process

when considering whether a constitutional right has been forfeited. The rule is quite the opposite: unless a particular procedure is specifically mandated—like the colloquy that must precede an *explicit* waiver of counsel, *see generally Keller*, 75 Wis. 2d at 508—trial courts "must be given sufficient discretion to meet the circumstances of each case." *Allen*, 397 U.S. at 343 (statement made in context of defendant's right to be present at trial). There is "[n]o one formula for maintaining the appropriate courtroom atmosphere . . . in all situations." *Id.*

This Court recognized this commonsense principle in *Cummings* when it refused to require hearings before appointed counsel may be allowed to withdraw: when "the circuit court had before it" the evidence it needed to make its determination and it was "unclear how the circuit court could have gained more information" by holding a hearing, a hearing was unnecessary. 199 Wis. 2d at 749 n.12. Indeed, "all that could have been gained from a hearing would have been a delay of the trial and a senseless waste of public funds." *Id.*

This principle applies with full force to the forfeiture doctrine. Not requiring a warning procedure is justified by the narrowness of the forfeiture doctrine itself and the obvious and pervasive wrongness of the defendant's misconduct. *See Cummings*, 199 Wis. 2d at 752, 756 (describing the "unusual circumstances" in which the doctrine applies, the "manipulative or disruptive" behavior required, and the need for the doctrine to prevent an "intelligent defendant" from using

the right to counsel to "delay his trial for years"). In short, a warning should not be required because defendants should already be acutely aware that such conduct has no place in court. It is appropriate, therefore, for courts across the country to apply the forfeiture doctrine without requiring an explicit warning to the defendant beforehand. *See supra* pp. 18–22.

In any event, the separate waiver-by-conduct doctrine already addresses the concerns Suriano hopes to alleviate with the required four-part procedure. "Waiver by conduct is a separate concept" from forfeiture and applies when the defendant "engages in dilatory tactics after he has been warned that he will lose his right to counsel." *Jones*, 772 N.W.2d at 505; *see also Keller*, 75 Wis. 2d at 509 ("It is true, that the right to counsel may be waived by a defendant who fails to retain counsel within a reasonable time . . . [b]ut that waiver, by action or conduct, is subject to the same rules [as express waiver]."). Forfeiture, on the other hand, is reserved for "*extremely* dilatory tactics" or other serious misconduct, *Jones*, 772 N.W.2d at 505 (emphasis added), like Suriano's conduct here. Suriano appears to want circuit courts to be forced to utilize the waiver-by-conduct doctrine and eliminate the well-established forfeiture doctrine altogether. Suriano provides no reason to take such a drastic step.

CONCLUSION

The decision of the court of appeals should be affirmed.

Dated this 2nd day of November, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,669 words.

Dated this 2nd day of November, 2016.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 2nd day of November, 2016.

_____

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