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FORFEITURE-BY-WRONGDOING AND *FARETTA*: REAFFIRMING COUNSEL'S VITAL ROLE WHEN DEFENDANTS MANIPULATE COMPETING SIXTH AMENDMENT REPRESENTATION RIGHTS

*Marc C. McAllister**

I. INTRODUCTION

Just a few weeks before his trial on charges of mail fraud and conspiracy, criminal defendant John Paul Hansen filed a motion with the federal district court presiding over his case requesting “some form of hybrid counsel.”¹ Hansen requested to represent himself, at least in part, so he could challenge the court’s authority over him in ways his appointed counsel would not.² Hansen’s true intent was not to waive his right to the assistance of counsel.³ Indeed, Hansen never elected to represent himself even after being advised of his right to do so, and in pre-trial hearings, Hansen made clear that he did not desire to engage in certain aspects of the litigation, including cross-examining witnesses or filing certain motions.⁴ Rather, Hansen’s primary objective was simply to make arguments regarding the court’s authority that his attorney rightly refused to make.⁵ In short, Hansen did not wish to *fully* represent

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1. The Grand Jury Charges, *United States v. Hovind*, No. 3:14-cr-91/MCR (N.D. Fla. May 18, 2015), ECF No. 3, 2015 U.S. Dist. LEXIS 65228. Hansen was indicted in a six-count indictment. A jury trial in the case commenced on March 12, 2015. At the close of trial, the jury found Hansen guilty of two counts of criminal contempt. Thereafter, Hansen was sentenced to eighteen months in prison. Jury Verdict, *Hovind*, No. 3:14-cr-91/MCR, ECF No. 145. His appeal is presently pending with the U.S. Court of Appeals for the Eleventh Circuit.

2. Motion as Hybrid Counsel, *Hovind*, No. 3:14-cr-91/MCR, ECF No. 118.

3. *See id.*

4. *See id.*

5. The jurisdictional challenges Hansen had in mind, had they been presented by his

himself, nor did he wish to be *fully* represented by counsel. What he desired was hybrid representation, which, unlike the right to counsel and the right to self-representation, is not a constitutional right.⁶

Given Hansen's history of disregarding court orders, disrespecting the judicial process, and advancing frivolous arguments, underlying his conduct was the sense that he was playing games with the court and deliberately obstructing the proceedings by refusing to choose either of his two Sixth Amendment rights: representation or self-representation by counsel.⁷ Wisely, the judge presiding over Hansen's case denied his request for hybrid representation and forced him to clearly choose his path.⁸ Hansen could not have it both ways. He had to decide. Eventually, Hansen chose to defend the charges with counsel's assistance, and his lawyer's excellent performance at trial likely spared him from being convicted of the more serious charges against him.⁹

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants "the right to . . . the Assistance of Counsel."¹⁰ In this text, the Supreme Court has found two fundamental rights: the right to representation by counsel¹¹ and the right to self-representation.¹² Cases

attorney, would have been frivolous. See Francis X. Sullivan, Comment, *The "Usurping Octopus of Jurisdictional/Authority": The Legal Theories of the Sovereign Citizen Movement*, 1999 WIS. L. REV. 785, 795-812 (1999) (analyzing Sovereign Citizen legal arguments regarding citizenship, legal rights, jurisdiction of courts, and constitutional interpretation); see also Julia Melle, Comment, *Illogical Extremes: The Sovereign Citizens Movement and the First Amendment*, 22 TEMP. POL. & CRV. RTS. L. REV. 554, 554 (2013) ("[M]embers of the Sovereign Citizens Movement . . . [are] political extremists who reject the authority of the federal government and embrace several convoluted conspiracy theories about U.S. laws and institutions.").

6. See *Cross v. United States*, 893 F.2d 1287, 1291-92 (11th Cir. 1990) (explaining that "an individual does not have a right to hybrid representation" and concluding that a defendant "had no intention of waiving his right to counsel" when he "seemingly" requested to proceed pro se but later explained he did not wish to "get[] up and mak[e] Motions and everything else," as his wish was simply to address the jury during the opening statement and to address the court).

7. As alleged in the Superseding Indictment, Hansen had allegedly "willfully and knowingly disobey[ed] and resist[ed] a lawful process, decree, and command of [the] court" by disregarding a grand jury subpoena directing him to appear to provide handwriting samples and fingerprints. See Indictment at 8, *Hovind*, No. 3:14-cr-91/MCR, ECF No. 3. This conduct led to a criminal contempt charge against Hansen, for which he was ultimately convicted. *Hovind*, 2015 U.S. Dist. LEXIS 65228 at *1 & n. 1.

8. Order, *Hovind*, No. 3:14-cr-91/MCR, ECF No. 60.

9. Hansen was convicted only of criminal contempt, and was not convicted of the more serious mail fraud and conspiracy charges contained in the indictment. *Hovind*, 2015 U.S. Dist. LEXIS 65228 at *1 & n. 1. The author observed Hansen's entire trial and believes his attorney's excellent performance led to a hung jury on the more serious charges against Hansen. See Jury Verdict, *Hovind*, No. 3:14-cr-91/MCR, ECF No. 145.

10. U.S. CONST. amend. VI.

11. See *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963).

12. See *Faretta v. California*, 422 U.S. 806, 814-32 (1975).

like Hansen's pit these competing rights against each other,¹³ and can place courts in difficult positions, with reversible error on the line, given that the consequence for preventing a defendant from freely exercising either competing right is automatic reversal of conviction.¹⁴

Although difficult for the court, Hansen's case was made easier by the fact that he *ultimately* chose to defend the charges against him with counsel's assistance. To the dismay of courts, defendants like Hansen often refuse to elect either Sixth Amendment right all the way through the start of trial, instead peppering the court with vague and ambiguous statements regarding the two rights, often in an attempt to inject error into the record.¹⁵ In such cases, defendants will state that they wish to "involuntarily waive" their right to counsel while simultaneously claiming that they do not wish to represent themselves.¹⁶ Others will "fire" their appointed counsel but also refuse to represent themselves, hoping to make it appear on appeal as if either eventual outcome—representation by counsel or self-representation—was compelled.¹⁷ When a defendant flatly refuses to choose between the competing rights—by, for example, remaining silent when asked to decide—or deliberately equivocates when pressed to do so—by, for example, making nonsensical or conflicting statements—choices must be made for the defendant if trial is to be conducted within the confines of the Speedy Trial Act.¹⁸

13. See *United States v. Ductan*, 800 F.3d 642, 649 (4th Cir. 2015) ("[T]he right to self-representation is inescapably in tension with the right to counsel . . . because invocation of the former . . . 'requires that the defendant waive his right to counsel.'" (quoting *Fields v. Murray*, 49 F.3d 1024, 1028 (4th Cir. 1995))); see also *United States v. Bush*, 404 F.3d 263, 270 (4th Cir. 2005) ("Th[e] right to self-representation] . . . is mutually exclusive of the right to counsel guaranteed by the Sixth Amendment.").

14. See *United States v. Long*, 597 F.3d 720, 724 (5th Cir. 2010) ("An impermissible denial of self-representation cannot be harmless."); *United States v. Taylor*, 113 F.3d 1136, 1144 (10th Cir. 1997) ("[T]he right to counsel is so basic to a fair trial that [its] infraction can never be treated as harmless error.") (alteration in original); see also *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990) ("A trial court's evaluation of an individual's desire to represent himself is fraught with the possibility of error. Because self-representation necessarily entails the waiver of the sixth amendment right to counsel, a trial court can commit reversible constitutional error by either improperly granting a request to proceed pro se—and thereby depriving the individual of his right to counsel—or by denying a proper assertion of the right to represent oneself, and thereby violating *Faretta*."); *Chapman v. United States*, 553 F.2d 886, 891 (5th Cir. 1977) (explaining that harmless error analysis does not apply when the right to represent oneself is violated because "[a] defendant has a moral right," grounded in notions of free will, "to stand alone in his hour of trial and to embrace the consequences of that course of action").

15. See *infra* notes 16-23 and accompanying text.

16. See, e.g., *United States v. Garey*, 540 F.3d 1253, 1269-70 (11th Cir. 2008).

17. See, e.g., *Long*, 597 F.3d at 725-26.

18. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (2012). When a defendant remains uncooperative as trial approaches, the court might reasonably assume the defendant's intent is to

This Article considers the proper solution for cases where an indigent defendant deliberately fails to choose either self-representation or representation by counsel and chooses, instead, to confound the court with equivocal requests and ambiguous responses.¹⁹ There is presently no U.S. Supreme Court precedent that deals with this issue.²⁰ Thus, when courts are confronted with a defendant who deliberately equivocates between self-representation and counsel's assistance, some impose self-representation,²¹ while others require the accused to defend with counsel's assistance.²² This lack of uniformity among, and even

delay trial long enough to assert a Speedy Trial Act claim. *See, e.g.,* *United States v. Kelm*, 827 F.2d 1319, 1321-22 (9th Cir. 1987) (affirming defendant's conviction in a retained counsel case in which defendant manipulated his right to counsel to effect delay by obtaining three continuances for the stated purpose of securing retained counsel, eventually leading to defendant's motion to dismiss on the ground that he had not been brought to trial within the constraints of the Speedy Trial Act; in upholding *Kelm's* conviction, the Ninth Circuit declared, "a court must be wary against the 'right of counsel' being used as a ploy to gain time or effect delay" and that "[t]he trial court's determination that *Kelm's* actions constituted a waiver of his right to counsel represented a valid response to *Kelm's* dilatory tactics").

19. This Article does not consider *non-indigent* defendants who do not qualify for court-appointed counsel and effect delay by refusing to retain counsel while rejecting self-representation. According to many courts, a defendant's ability to pay for counsel, plus steadfast refusal to do so, inevitably leads to waiver of counsel and, consequently, self-representation. *See, e.g.,* *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992); *Siniard v. State*, 491 So. 2d 1062, 1063-64 (Ala. Crim. App. 1986); *State v. Jones*, 772 N.W.2d 496, 506 (Minn. 2009).

20. The best guidance the Supreme Court has provided is a footnote in *Faretta*, which notes that a defendant can waive his right to pro se representation by his obstructionist conduct. *See Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975) ("We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But . . . the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . The right of self-representation is not a license to abuse the dignity of the courtroom."). The *Faretta* footnote addresses the scenario where a defendant has already clearly and unequivocally elected to proceed pro se and, thereafter, engages in obstructionist conduct or otherwise inhibits trial. Thus, the footnote does not address the threshold question of what choice should be made for the defendant who wholly refuses to elect either Sixth Amendment right.

21. *See, e.g.,* *Garey*, 540 F.3d at 1265-70 (affirming trial court's finding that defendant waived his right to counsel by his misconduct); *Fischetti v. Johnson*, 384 F.3d 140, 146 (3d Cir. 2004) (suggesting dilatory behavior or other misconduct justifies waiver of the right to counsel); *see also* *King v. Bobby*, 433 F.3d 483, 492 (6th Cir. 2006); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005); *United States v. Oreye*, 263 F.3d 669, 670-71 (7th Cir. 2001); *McKee v. Harris*, 649 F.2d 927, 930-31 (2d Cir. 1981).

22. *See, e.g.,* *United States v. Ductan*, 800 F.3d 642, 650, 653 (4th Cir. 2015) (reversing defendant's conviction and adopting a strong preference for counsel's assistance for defendants who steadfastly refuse to exercise either Sixth Amendment right); *Long*, 597 F.3d at 728-29 (affirming defendant's conviction where trial court required defendant to defend with counsel's assistance after he fired his appointed attorney but failed to adequately elect self-representation); *United States v. Brock*, 159 F.3d 1077, 1079-81 (7th Cir. 1998) (affirming conviction and upholding trial court's finding that defendant forfeited his right to represent himself due to his obstructionist conduct and failure to answer questions regarding whether he truly wished to represent himself); *United States v. Meeks*, 987 F.2d 575, 578 (9th Cir. 1993) (reversing defendant's conviction because trial court erred in finding defendant waived his right to counsel by his misconduct); *cf.* *United States v.*

within, appellate courts places trial courts in precarious positions, leads to inconsistent outcomes in similar cases, and often heightens the danger of wrongful conviction due to inadequate trial preparation.²³

To foster uniformity in this situation and strip obstructionist defendants of a tool for manipulating courts, this Article argues that trial courts should routinely elect representation by counsel for the unruly defendant who fails to make the requisite election,²⁴ subject only to a narrow exception for instances of severe physical or verbal abuse of appointed counsel.²⁵ The solution proposed in this Article is simple. Rather than being forced to participate in the defendant's game all the way through the start of trial, where only then can a court be assured that any request for self-representation may properly be denied as untimely, a court faced with an unruly defendant should instead be permitted to make a factual finding that the defendant is intentionally refusing to make a clear choice between the right to counsel and the right to self-representation.²⁶ Such a finding could be made at any point before trial, and, once made, would give the court sole discretion to make the Sixth Amendment election for the defendant, which should ordinarily be representation by counsel. To simplify the framework for appellate courts and curtail the need for burdensome second trials, this Article further proposes that the trial court's decision on the representation issue should stand, absent a clear abuse of discretion proven only by a lack of actual obstructionist conduct by the defendant.²⁷

This proposal is supported by the Sixth Amendment's text, which directly contemplates "the Assistance of Counsel"²⁸ in one's defense and more subtly implies the right to represent oneself;²⁹ the elaborate

Myers, 503 F.3d 676, 681 (8th Cir. 2007) ("A trial judge may terminate self-representation when the defendant engages in serious obstructionist misconduct.").

23. Compare *Brock*, 159 F.3d at 1079-81 (upholding trial court's decision to revoke defendant's pro se status and defend with counsel's assistance due to defendant's obstructionist behavior), with *Oreye*, 263 F.3d at 670-71 (finding defendant to have waived his right to counsel, requiring him to defend pro se, despite having never requested to represent himself).

24. See *infra* Part V.A.

25. See *infra* Part V.D.

26. See *infra* Part V.A.

27. See *infra* Part V.A-B.

28. U.S. CONST. amend. VI.

29. See *Faretta v. California*, 422 U.S. 806, 821 (1975). In deeming the right to pro se representation a fundamental right, the Supreme Court in *Faretta* acknowledged that the right to self-representation is implied by the Sixth Amendment. See *id.* (holding that "[t]he Sixth Amendment, when naturally read, . . . implies a right of self-representation"). For a somewhat different interpretation of the Sixth Amendment text, see *id.* at 820 (noting that the counsel provision "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant"). See also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 114-15 (1998).

procedure that typically must be followed before a defendant may waive his right to representation, making it the default right;³⁰ and counsel's vital role in ensuring fair trials and preventing wrongful convictions. If a choice must be made for the obstructionist defendant, the choice should be a defense with counsel's assistance.

Finally, this Article argues that the strained waiver analysis courts have employed in these cases should be replaced with the doctrine of forfeiture-by-wrongdoing, which recognizes that a criminal defendant must not be permitted to profit from his own wrongdoing.³¹ Borrowed from the Sixth Amendment's right of confrontation, forfeiture-by-wrongdoing better characterizes the situation at hand, where it is more accurate to find that a defendant forfeits, rather than waives, his right to self-representation by intentionally engaging in obstructionist misconduct.³²

Part II of this Article examines Supreme Court precedent regarding the competing rights to counsel and self-representation.³³ Part III examines federal appellate court decisions involving defendants who manipulate the rights to counsel and self-representation to delay trial or inject error into the record, and unveils a split among courts regarding which right should prevail when a defendant steadfastly refuses to choose between the two.³⁴ Part IV examines case law governing when a request to proceed pro se may be denied as untimely, which, as it stands, permits obstructionist defendants to manipulate the judicial process all the way through the start of trial.³⁵ Part V sets forth a uniform proposal for the obstructionist defendant that, if adopted, would destroy the defendant's ability to manipulate the court while simultaneously helping prevent wrongful convictions.³⁶

30. See *United States v. Long*, 597 F.3d 720, 724 (5th Cir. 2010) (“[T]he right to counsel is in force until *waived*, [and] the right to self-representation does not attach until *asserted*.” (quoting *Moreno v. Estelle*, 717 F.2d 171, 174 (5th Cir. 1983))).

31. See *Giles v. California*, 554 U.S. 353, 358-68 (2008) (ratifying the common law doctrine that a defendant may forfeit his Sixth Amendment right to confront adverse witnesses through his own wrongdoing and holding that the Confrontation Clause's forfeiture-by-wrongdoing exception requires both an act of wrongdoing directed at a would-be witness coupled with the specific intent of preventing the potential witness from testifying).

32. See *United States v. Goldberg*, 67 F.3d 1092, 1099-1101 (3d Cir. 1995) (describing the differences between waiver and forfeiture, and noting that, “[u]nlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right”).

33. See *infra* Part II.

34. See *infra* Part III.

35. See *infra* Part IV.

36. See *infra* Part V.

II. THE COMPETING FUNDAMENTAL RIGHTS

The Sixth Amendment guarantees criminal defendants “the right to . . . the Assistance of Counsel.”³⁷ In the 1963 decision of *Gideon v. Wainwright*, the Supreme Court deemed the Sixth Amendment’s guarantee of counsel a fundamental right, and it mandated government-funded counsel for all indigent defendants facing felony charges in federal or state court.³⁸ Stressing counsel’s critical role in ensuring a fair trial, *Gideon* effectuated the “obvious truth” that “any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him.”³⁹ Three decades before *Gideon*, the Supreme Court in *Powell v. Alabama* had acknowledged that “[e]ven the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one,”⁴⁰ and thus “requires the guiding hand of counsel at every step in the proceedings.”⁴¹ Without it, the *Powell* Court declared, “though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”⁴²

In the decades following *Gideon* and *Powell*, the Supreme Court has continued to recognize the vital role of counsel in criminal trials. In 1978, the Court declared “there is no right more essential than the right to the assistance of counsel.”⁴³ In 1984, the Court stated that the right to counsel is “critical to the ability of the adversarial system to produce just results.”⁴⁴ In 2000, the Court noted that “no one . . . attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient,”⁴⁵ and in 2002, a majority of the Justices praised “the effect [the right to counsel] has on the ability of the accused to receive a fair trial.”⁴⁶

Despite the Court’s acknowledgment of counsel’s essential role in ensuring a fair trial, the Court in *Faretta v. California* held that the right of self-representation, and its corresponding right to reject counsel’s assistance, is also a fundamental right guaranteed by the same Sixth

37. U.S. CONST. amend. VI.

38. 372 U.S. 335, 344-45 (1963). While *Gideon* is somewhat unclear on the precise effect of its ruling, the Supreme Court later clarified in *Nichols v. United States* that the right applies to all felonies. See 511 U.S. 738, 743 (1994).

39. *Gideon*, 372 U.S. at 344.

40. 287 U.S. 45, 69 (1932).

41. *Id.*

42. *Id.*

43. *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

44. *Strickland v. Washington*, 466 U.S. 668, 685 (1984); see also *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (recognizing the “superior ability of trained counsel” to advocate for an accused).

45. *Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000).

46. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002).

Amendment text.⁴⁷ The *Faretta* majority conceded that the right of self-representation is not explicitly mentioned in the Sixth Amendment but deemed the right to represent oneself “implied by the structure of the Amendment.”⁴⁸ The majority grounded its ruling in notions of free will and emphasized the defendant’s right to choose between defending himself and defending through counsel.⁴⁹ The Court stated, for example, “that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.”⁵⁰ The Court also declared that early American colonial charters and declarations of rights “establish that the ‘right to counsel’ meant to the colonists a *right to choose* between pleading through a lawyer and representing oneself.”⁵¹

According to *Faretta*, a defendant who wishes to waive counsel should clearly and unequivocally request self-representation⁵² and must do so in a timely manner, typically well before trial.⁵³ Equivocal and untimely requests must be denied.⁵⁴ Once a defendant unequivocally requests self-representation, the court must then conduct a detailed inquiry to ensure the defendant’s election is knowing and intelligent.⁵⁵ The court’s inquiry must ordinarily include instruction as to the nature

47. 422 U.S. 806, 820-21 (1975).

48. *Id.* at 819, 821 (“The Sixth Amendment, when naturally read . . . implies a right of self-representation.”).

49. *Id.* at 835-36.

50. *Id.* at 817.

51. *Id.* at 828 (emphasis added). Even before *Faretta*, federal courts found a Sixth Amendment basis for the right to conduct one’s own defense, and grounded that right in notions of free will choice. See *Chapman v. United States*, 553 F.2d 886, 889-91 (5th Cir. 1977) (discussing the right of a defendant to conduct their own defense); *Middlebrooks v. United States*, 457 F.2d 657, 659 (5th Cir. 1972) (explaining that the decision to represent oneself is an exercise of defendant’s “freedom of choice”).

52. See *Faretta*, 422 U.S. at 835-36.

53. See *id.* (holding the defendant’s Sixth Amendment right to pro se representation was violated when, weeks before trial, he “clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel”).

54. Generally uncooperative and non-responsive comments in response to a judge’s attempt to establish a *Faretta* dialogue have been deemed insufficient to invoke the *Faretta* right. See, e.g., *United States v. Long*, 597 F.3d 720, 724-26 (5th Cir. 2010) (finding that, as a result of the defendant’s uncooperative conduct, he “did not clearly and unequivocally both waive his right to counsel and assert his right to self-representation”). In addition, courts have held that the right of self-representation is waived as the result of an untimely request. See, e.g., *Wood v. Quarterman*, 491 F.3d 196, 202 (5th Cir. 2007) (“[C]ourts have discretion about whether to grant a defendant’s motion to proceed *pro se* when the motion is untimely.”); *United States v. Edelman*, 458 F.3d 791, 808-09 (8th Cir. 2006) (finding district court did not abuse its discretion in denying defendant’s request to represent herself made four or five days before the start of trial in part because the request was untimely); *United States v. Davis*, 269 F.3d 514, 520 (5th Cir. 2001) (“The district court was not obliged to honor Davis’s mid-trial request to represent himself.”).

55. See *Faretta*, 422 U.S. at 835 (explaining that “the accused must ‘knowingly and intelligently’ forgo . . . relinquished benefits” of appointed counsel).

of the charges, possible penalties, and dangers of self-representation.⁵⁶ Even at this stage, a defendant who desires to represent himself but does not demonstrate adequate knowledge regarding the risks of representation must proceed with counsel.⁵⁷

By requiring courts to inform a defendant of the dangers and disadvantages of self-representation before a defendant may waive the corresponding right to the assistance of counsel, *Faretta* effectively implements a default of representation, arguably elevating assistance of counsel as the preeminent Sixth Amendment right.⁵⁸ The *Faretta* Court further acknowledged the right to counsel's preeminence over the right of self-representation by conceding, for example, that "most criminal . . . defendants could better defend with counsel's guidance than by their own unskilled efforts."⁵⁹

Having grounded its ruling in the need to uphold a defendant's free will to choose, however harmful that choice may be, *Faretta* did not determine the proper course for a defendant who fails or refuses to choose. In addition, the Supreme Court has never ruled that the Sixth Amendment guarantees hybrid representation.⁶⁰ As a result, trial courts

56. See *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2007) (deriving "a three-factor test from *Faretta*, under which '[i]n order to deem a defendant's *Faretta* waiver knowing and intelligent, the district court must insure that he understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the dangers and disadvantages of self-representation"); see also *United States v. Ductan*, 800 F.3d 642, 648-50 (4th Cir. 2015); *United States v. Jones*, 452 F.3d 223, 228-29, 228 n.2 (3d Cir. 2006) (requiring a "penetrating and comprehensive examination of all the circumstances" but acknowledging that such an inquiry "is not required in every court").

57. See *Cross v. United States*, 893 F.2d 1287, 1291 (11th Cir. 1990) ("The purpose of this hearing is to reduce the likelihood of constitutional error by eliciting from the defendant and explicitly establishing for the record his awareness of his constitutional rights, his decision to waive the right to counsel, his awareness of the risks of proceeding pro se, and his unambiguous decision to proceed without counsel.").

58. See *Long*, 597 F.3d at 724 ("[T]he right to counsel is in force until waived, [and] the right to self-representation does not attach until asserted." (alteration in original) (quoting *Moreno v. Estelle*, 717 F.2d 171, 174 (5th Cir. 1983))). But see *United States v. Garey*, 540 F.3d 1253, 1264 n.4 (11th Cir. 2008) ("Although it is true that the right to counsel attaches automatically, the Supreme Court has never declared the right to counsel 'preeminent' over the right to self-representation. To the contrary, *Faretta* clearly stated 'there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel.' We understand neither right to be inferior to the other.").

59. *Faretta*, 422 U.S. at 834.

60. See *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) ("*Faretta* does not require a trial judge to permit 'hybrid' representation of the type *Wiggins* was actually allowed."). Lower courts agree that a defendant has no constitutional right to "hybrid" representation consisting of both pro se representation and representation by counsel. See *Cross v. United States*, 893 F.2d 1287, 1291-92 (11th Cir. 1990) (explaining that "an individual does not have a right to hybrid representation" in the Eleventh Circuit); *United States v. Wolfish*, 525 F.2d 457, 462-63 (2d Cir. 1975) ("Nor did the trial court err in refusing to permit [defendant] to participate as co-counsel in his case. [Defendant] had an experienced counsel and, so long as he retained him, he could not appear *pro se*. If he wished

generally have discretion to permit hybrid representation—consisting of a co-counsel arrangement between the accused and his appointed attorney—but are often reluctant to do so to avoid jury confusion and potential conflict between the accused and his attorney.⁶¹ For these reasons, when a court denies a defendant’s request for hybrid representation, and the defendant subsequently does not elect to represent himself, the defendant may not control trial strategy or otherwise assume the role of the attorney in the litigation.⁶² If the defendant wishes to have greater control over the litigation, his only constitutional option is self-representation.

III. EQUIVOCATION, OBSTRUCTION, AND DILATORY CONDUCT

Faretta presupposes a cooperative defendant who desires to waive counsel and unequivocally voices that decision in a timely manner, typically before a jury is empaneled.⁶³ To the dismay of courts, unruly defendants sometimes voice dissatisfaction with appointed counsel while refusing to elect self-representation, thereby injecting a danger

to handle the case *pro se*, [defendant] should have discharged his retained counsel.”); *Hall v. Dorsey*, 534 F. Supp. 507, 508 (E.D. Pa. 1982) (“Under federal law, a criminal defendant has the right to appear *pro se* or by counsel The federal right, however, is disjunctive; a party may either represent himself or appear through an attorney. There is no right to ‘hybrid’ representation—simultaneously *pro se* and by counsel.”).

61. See *Gill v. Mecusker*, 633 F.3d 1272, 1292-96 (11th Cir. 2011) (upholding the district court’s decision to permit hybrid representation, and rejecting defendant’s argument on appeal that *Faretta* was violated by hybrid arrangement, where hybrid representation, rather than self-representation, was the defendant’s clear choice); *United States v. LaChance*, 817 F.2d 1491, 1498 (11th Cir. 1987) (announcing that courts in the Eleventh Circuit have discretion to permit hybrid representation and that “the right to counsel and the right to proceed *pro se* exist in the alternative and the decision to permit a defendant to proceed in a hybrid fashion rests in the sound discretion of the trial court”).

62. See, e.g., *United States v. Soto-Arreola*, No. 11-3348, 2012 WL 2855787, at *4 n.3 (10th Cir. July 12, 2012) (denying counsel’s motion to withdraw and defendant’s *pro se* request to file a supplemental brief on the grounds that there is no constitutional right to hybrid representation, after initial appellate briefs were filed); *United States v. Turner*, 677 F.3d 570, 578 (3d Cir. 2012) (refusing to consider defendant’s *pro se* briefs under the Third Circuit’s “longstanding prohibition on hybrid representation”); *Hill v. Carlton*, No. 08-5373, 2010 WL 3272800, at *5 & n.2 (6th Cir. Aug. 19, 2010) (citing a long line of Tennessee cases finding that a defendant may not file a *pro se* brief when he is represented by counsel); *United States v. Whitman*, No. 99-21067, 2001 WL 360789, at *1-4 (5th Cir. Mar. 20, 2001) (affirming district court’s denial of defendant’s *pro se* motion for “hybrid representation,” in which defendant requested permission to file *pro se* motions so that he could “decide issues of his own defense”); *United States v. Reed*, No. 13-CR-6172L, 2014 WL 4425795, at *2 (W.D.N.Y. Sept. 9, 2014) (“[T]he ample authority [that exists] that a defendant has no absolute right to hybrid representation, that is, where both the defendant, *pro se*, and his attorney file motions or other matters for court consideration.”).

63. See *supra* notes 52-54 and accompanying text.

of automatic reversal in the event a higher court finds the trial court incorrectly gauged the defendant's wishes.⁶⁴

The Supreme Court has not yet addressed whether representation by counsel or self-representation should prevail when a defendant intentionally equivocates regarding the issue of representation.⁶⁵ In these situations, trial courts may exercise various options. The first and most desirable option is to simply request the defendant to make a clear and explicit choice, which, when accomplished, simultaneously respects *Faretta's* autonomy concerns while avoiding a potential *Gideon* reversal.⁶⁶

A. Defendants Who Ultimately Make a Clear Choice

Most courts agree that a defendant's egregious attempt to delay trial and inject reversible error into the record permits a court to force the defendant to choose between self-representation and appointed counsel.⁶⁷ Once the court requires the defendant to make the requisite election, the defendant may elect to proceed with counsel or pro se, which averts the possibility of reversal,⁶⁸ or he may simply continue his

64. As noted, the remedy for either an erroneous removal of appointed counsel or erroneous rejection of pro se representation is automatic reversal of conviction. *See supra* note 14 and accompanying text. One court has explained that “[w]ithout the clear and unequivocal assertion requisite, ‘trial courts would be in a position to be manipulated by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules.’” *Russell v. State*, 383 N.E.2d 309, 313-14 (Ind. 1978) (quoting *Anderson v. State*, 370 N.E.2d 318, 320-21 (Ind. 1977)).

65. *See United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir. 2008) (“The Supreme Court has never confronted a case in which an uncooperative defendant has refused to accept appointed counsel or engage in a [*Faretta*] colloquy with the court. Consequently, the Court has never been asked to determine whether a defendant may waive counsel without making an explicit, unqualified request to represent himself.”).

66. *See infra* Part III.A.

67. *See, e.g., Garey*, 540 F.3d at 1265-66 (“When a defendant rejects his court-appointed counsel or otherwise engages in behavior that creates tension between his right to counsel and his right to self-representation, a district court does not compromise the defendant’s free choice by presenting him with accurate information regarding his lawful choices and asking him to choose between them.”); *see also McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981) (“A criminal defendant may be asked, in the interest of orderly procedures, to choose between waiver and another course of action as long as the choice presented to him is not constitutionally offensive.” (quoting *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976))).

68. This assumes, of course, that any waiver of the right to counsel is sufficiently knowing and intelligent. *See, e.g., Cross v. United States*, 893 F.2d 1287, 1291 & n.11 (11th Cir. 1990) (explaining that a defendant’s clear and unequivocal request to represent himself, such as through the statement, “I want to be allowed to represent myself through this whole trial,” requires the court to engage in a colloquy to advise the defendant of the risks of self-representation and to elicit an express waiver of his right to counsel, without which the reviewing court “would be compelled to find reversible error”).

uncooperative behavior, thereby raising the stakes for all involved, including the defendant,⁶⁹ the prosecution, and the court.⁷⁰

If, when forced to a choice, a defendant clearly elects either competing right, the defendant's choice removes any potential *Faretta* or *Gideon* error and averts the danger of automatic reversal. As compared to cases where defendants insist on delaying or disrupting the proceedings all the way through the start of trial, cases where defendants ultimately choose counsel or self-representation present little problems for reviewing courts.

United States v. Hardy exemplifies a case where a defendant initially engaged in obstructionist behavior but ultimately chose one Sixth Amendment right over the other.⁷¹ In *Hardy*, defendant David Hardy was charged with willfully failing to file federal income tax returns.⁷² At Hardy's arraignment, Hardy informed the court that he wanted to represent himself with the help of Eric R. Eleson, who was not a licensed attorney.⁷³ Cognizant of *Faretta's* requirements, the magistrate judge asked Hardy whether he understood the charges against him.⁷⁴ Eleson, on Hardy's behalf, stated that he did not, explaining that Hardy was unsure whether he was being prosecuted under the laws of the United States or under the *Uniform Commercial Code*.⁷⁵ At additional pre-trial hearings held on April 9th and May 2nd, Hardy repeated his request for Eleson's assistance and demanded dismissal on jurisdictional grounds.⁷⁶ Each time, the magistrate judge explained that Eleson was not a licensed attorney and could not represent him.⁷⁷ At the May 2nd hearing, the magistrate judge explained the dangers of appearing without counsel and offered to appoint a lawyer to represent Hardy.⁷⁸ The magistrate judge again asked Hardy if he understood the charges, and Hardy again stated that he did not.⁷⁹ At this point, the

69. The stakes are raised for the defendant because without a clear plan for trial and uncertainty regarding who will carry the burden of litigation for the defense—the defendant faces a heightened risk of conviction.

70. The stakes are raised for the prosecution and the court because, given the ambiguity that remains and the lack of a clear path from higher courts in regards to the proper solution courts should adopt in these scenarios, the danger of automatic reversal—and hence, of having to conduct a burdensome second trial—is increased.

71. 941 F.2d 893 (9th Cir. 1991).

72. *Id.* at 894.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.*

78. *Id.*

79. *Id.*

magistrate judge asked Hardy whether he wished to waive counsel, but Hardy refused, again insisting that Eleson represent him.⁸⁰

On May 29th and May 31st, Hardy twice failed to appear for scheduled pretrial conferences, causing a delay in trial. Hardy was then arrested pursuant to a bench warrant.⁸¹ On July 13th, Hardy appeared for his final pretrial conference, where he demanded criminal sanctions against the prosecutor and the court for allegedly acting outside the scope of their jurisdiction.⁸² The government then filed a motion to determine the status of Hardy's representation.⁸³ Thereafter, on five separate occasions over a two day span, the court asked whether Hardy wanted a lawyer, but Hardy continued to insist that Eleson represent him.⁸⁴ Finally, on July 31st, when the court asked, "Do you want an attorney, yes or no?," Hardy unequivocally replied, "No, I don't, your honor."⁸⁵ Trial proceeded later that day with Hardy representing himself, and Hardy was convicted of all charges.⁸⁶

On appeal, Hardy claimed that his right to counsel had been violated. Rejecting this claim, the Ninth Circuit Court of Appeals reasoned that "[Hardy] equivocated in response to the questions about his wish to waive counsel but finally answered unequivocally that he did not want a lawyer."⁸⁷ Thus, Hardy sufficiently expressed his desire to waive counsel. Finding Hardy's implied pro se election sufficiently knowing and intelligent, the court deemed it reasonable to conclude "from the conduct and responses of the defendant that he was play acting and in fact well understood what he was charged with."⁸⁸ The court found it significant that "Hardy was a well-educated man who was able to invoke case law . . . and who gave every sign of being entirely aware of knowing exactly the charges against him."⁸⁹ Thus, *Faretta's* waiver requirements were fully respected, and no Sixth Amendment error occurred.

The Ninth Circuit's analysis in *Hardy* is significant in three respects. First, although the trial court gave Hardy several chances to clearly elect self-representation or representation by counsel despite

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 894-95.

85. *Id.* at 895.

86. *Id.*

87. *Id.* at 896.

88. *Id.*

89. *Id.*

his dilatory conduct—opportunities Hardy exploited through further obstructionist behavior—the court eventually forced Hardy to a final decision on the matter. At that point, Hardy clearly stated he did not wish to be represented by an attorney, which was deemed sufficient to waive Hardy’s right to counsel.⁹⁰ In the absence of a *Faretta* or *Gideon* error, the danger of automatic reversal was averted. Second, although not necessary to resolve the case, *Hardy* recognized that sufficiently egregious misconduct may permit a court to find an implicit waiver of the right to counsel, despite no explicit statement affirmatively electing self-representation.⁹¹ Hardy stated that he did not want a lawyer; he never affirmatively declared that he wished to represent himself. Yet, both the trial and appellate court deemed his obstructionist conduct, coupled with his ultimate rejection of appointed counsel, a sufficient election of pro se representation.⁹² Finally, the Ninth Circuit recognized that courts are well-equipped to make a factual finding that a defendant is refusing to clearly choose either the right to counsel or self-representation, which, once made, allows a court to resolve the issue for the defendant.⁹³ The ability of a court to make such a factual finding is a critical aspect of this Article’s proposal and, as outlined below, is necessary to resolve cases like Hardy’s in a more uniform manner.⁹⁴

B. Defendants Who Steadfastly Obstruct: Different Approaches by Different Courts

If a defendant fails to elect either competing right even after the court instructs the defendant to make a final election on the representation issue, the trial court must make the decision for the defendant if trial is to proceed in a timely manner. When this occurs and the trial court’s decision is appealed post-conviction, appellate courts have employed differing approaches to the issue.

First, seemingly indifferent to the Sixth Amendment outcome, some appellate courts hold that a trial court’s decision on the representation issue should stand, regardless of which form of

90. *Id.* at 896-97.

91. According to the court, “Hardy engaged in game playing, typical of a tax evader, in his responses to the court as to whether he waived his right to counsel . . . [I]n appropriate circumstances a court can hold that such conduct amounts to waiver. These circumstances are present here.” *Id.* at 896.

92. *Id.* at 896-97.

93. *See id.*

94. *See infra* Part V.A.

representation the court elects, absent a clear abuse of discretion.⁹⁵ These decisions are premised not on upholding the defendant's free will decision, but on simple deference to the trial court's need to control its proceedings and manage its docket.⁹⁶

A second set of courts disfavor a finding of implied waiver of counsel and reveal a preference for representation by counsel for the obstructionist defendant.⁹⁷ Some appellate decisions in this category, however, reflect an overarching desire to affirm a defendant's conviction without taking a strong stance on the Sixth Amendment issue, making them reminiscent of the deferential approach.

Third, similar to *Hardy*, some appellate courts find that a defendant's implied rejection of appointed counsel equates to an affirmative election of self-representation.⁹⁸ According to this view, if a defendant rejects the only counsel to which he is constitutionally entitled, even impliedly so, he has necessarily chosen self-representation despite no affirmative election of that right.⁹⁹ Because defendants in such cases have not affirmatively elected either right, these decisions actually reflect a preference for self-representation for defendants who fail to make the requisite election.

Finally, similar to this Article's proposal, some courts adopt a strong preference for counsel's assistance. According to these decisions, implied waiver of counsel should be invoked only as a last resort option and only in the most egregious cases, such as a defendant's extreme abusive conduct toward appointed counsel.¹⁰⁰ Each of these categories is examined below.¹⁰¹

95. See, e.g., *United States v. Garey*, 540 F.3d 1253, 1265-68 (11th Cir. 2008) (discussing the representation issue and emphasizing the need for trial courts to exercise discretion).

96. See 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, 473-82 (2012).

97. See *infra* Part III.B.2.

98. See *infra* Part III.B.3.

99. See, e.g., *United States v. Oreye*, 263 F.3d 669, 670-71 (7th Cir. 2001); see also *King v. Bobby*, 433 F.3d 483, 492 (6th Cir. 2006) (“[Defendant] King did not straightforwardly assert his right to self-representation, and even told the trial court twice that he did not wish to represent himself. Nonetheless, by rejecting all of his options except self-representation, King necessarily chose self-representation.”).

100. See, e.g., *United States v. Meeks*, 987 F.2d 575, 579 (9th Cir. 1993) (reversing conviction because trial court erroneously found defendant waived his right to counsel by misconduct, and noting that courts should “indulge every reasonable presumption against waiver of fundamental constitutional rights, and doubts must be resolved in favor of no waiver”).

101. See *infra* Part III.B.1-4.

1. Deferential Approach

An en banc opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Garey*, exemplifies the highly deferential middle path, where the trial court's decision to impose self-representation was upheld on appeal.¹⁰²

In *Garey*, defendant Eddie Milton Garey was indicted on twenty-seven felony counts for his unsuccessful attempts to extort money by threatening to bomb various buildings near Macon, Georgia.¹⁰³ Garey had been represented by appointed counsel Scott Huggins for fifteen months when, just three days before trial, Garey moved to substitute counsel.¹⁰⁴ According to Garey, Huggins' law office was located in one of the buildings Garey had allegedly threatened to bomb, creating a conflict of interest between the two.¹⁰⁵ Finding no actual conflict, the trial court denied Garey's motion.¹⁰⁶ When Garey expressed dissatisfaction with the court's ruling, the court gave Garey the option of proceeding with Huggins or going pro se.¹⁰⁷ In response, Garey elected to "involuntarily" waive counsel,¹⁰⁸ stating "if this Court is giving me no other choice, I will have to go along with the choice of involuntarily waiving my right to counsel, involuntarily waive."¹⁰⁹ The court then ordered Garey to represent himself and appointed Huggins as standby counsel.¹¹⁰ Garey later represented himself and was convicted of the charges, receiving a sentence of thirty years.¹¹¹

A three judge panel of the Eleventh Circuit Court of Appeals initially reversed Garey's conviction, but the en banc court vacated the panel's opinion and found that Garey had waived his right to counsel by his misconduct.¹¹² In reaffirming Garey's conviction, the en banc court declared that "a valid waiver of counsel [may] occur not only when a cooperative defendant affirmatively invokes his right to self-representation, but also when an uncooperative defendant rejects the only counsel to which he is constitutionally entitled, understanding his only alternative is self-representation with its many attendant

102. 540 F.3d 1253, 1258 (11th Cir. 2008).

103. For a detailed description of the facts, see *id.*

104. *Id.* at 1258-59.

105. *Id.* at 1259.

106. *Id.*

107. *Id.*

108. For a summary of the actual exchange between Garey and the court, see *id.* at 1259-62.

109. *Id.* at 1259.

110. *Id.* at 1260.

111. *Id.* at 1262.

112. *Id.* at 1262, 1270.

dangers.”¹¹³ Applying this principle, the en banc court determined that Garey waived his right to counsel by his misconduct.¹¹⁴

Emphasizing the need for flexibility in this area, the *Garey* Court declared that appellate courts are to respect and affirm a trial court’s handling of an unruly defendant, regardless of the trial court’s decision, stating as follows:

[W]e do not suggest that district courts are bound to interpret the uncooperative behavior of *every* defendant as a waiver of the right to counsel. Nor do we suggest a district court would err by requiring any particular defendant to make a clear statement of his intention to proceed pro se before agreeing to dismiss appointed counsel. In any given case, the proper course of action will turn on factors the district court is best positioned to assess.¹¹⁵

In a similar passage, the *Garey* court noted that “a court is not *required* to relieve a criminal defendant of counsel when the defendant engages in obstructionist conduct,” and that “[o]ur decision today is meant to provide trial courts with guidance and discretion—not to force courts to discharge counsel against their better judgment.”¹¹⁶

2. Implied Waiver of Counsel Disfavored

Emphasizing the need for deference, *Garey* indicates that when a defendant engages in obstructionist conduct, a trial court may decide to relieve counsel and require the defendant to proceed pro se.¹¹⁷ However, *Garey* also notes that courts might constitutionally take the opposite approach, instead insisting that a defendant clearly and unequivocally request pro se representation before losing the right to defend with counsel’s assistance.¹¹⁸ Absent abuse of discretion, appellate courts should uphold the trial court’s decision, regardless of which competing right the court elects.

113. *Id.* at 1265. The court in *Garey* overruled a prior Eleventh Circuit decision, *Marshall v. Dugger*, which had held that the right to counsel must be waived by a defendant’s explicit request to represent himself. 925 F.2d 374, 377 (11th Cir. 1991). According to *Garey*, “[i]nsofar as *Marshall* failed to recognize waiver may occur outside the context discussed in *Faretta*, we conclude it was wrongly decided.” *Garey*, 540 F.3d at 1265.

114. *Garey*, 540 F.3d at 1266 (“[W]hen an indigent defendant rejects competent, conflict-free counsel, he 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.”).

115. *Id.* at 1266-67 (“[W]hen confronted with a defendant . . . who refuses to provide clear answers to questions regarding his Sixth Amendment rights, . . . the court may, *in the exercise of its discretion*, discharge counsel.” (emphasis added)).

116. *Id.* at 1267-68 n.9.

117. *Id.* at 1267-68.

118. *See id.* at 1264-65.

Not all courts agree with *Garey's* deferential approach. The Ninth Circuit Court of Appeals, for example, instructs trial courts to resort to implied waiver of counsel only upon a defendant's clear and explicit election of self-representation.¹¹⁹ This approach, which reflects a preference for counsel's assistance in situations where the defendant does not affirmatively request to represent himself, is exemplified by *United States v. Meeks*.¹²⁰

In *Meeks*, defendant John Meeks was charged with a firearm offense.¹²¹ Because Meeks could not afford counsel, the district court appointed Donald Hackney to represent him. Unhappy with Hackney, Meeks retained Bevan Maxey.¹²² A short time later, Meeks fired Maxey.¹²³ Less than a week later, Meeks requested appointment of counsel from a list of four attorneys.¹²⁴ After one listed attorney refused appointment, the court appointed Russell Van Camp, another attorney on the list.¹²⁵ One month later, Van Camp filed a motion to withdraw.¹²⁶ In the interim, Meeks asked the court to appoint another attorney, Michael Hemovich, also on Meeks' list.¹²⁷ Rather than appoint Hemovich, the court ordered Meeks to either retain counsel or appear for trial pro se.¹²⁸ When trial commenced, attorney Thomas Cooney appeared with Meeks.¹²⁹ Cooney asked for, but was denied, a thirty-day continuance.¹³⁰ Unable to obtain Cooney's assistance on such short notice, Meeks defended the charges pro se, and was convicted.¹³¹

On appeal, the Ninth Circuit Court of Appeals ruled that Meeks had been denied his constitutional right to counsel. The court distinguished a factually similar case involving retained counsel, *United States v. Kelm*,¹³² and reasoned that while the district court's frustration with Meeks was "understand[able]," it was improper to find waiver of counsel via defendant's misconduct.¹³³ Unlike the defendant in *Kelm*,

119. See *infra* notes 120-38.

120. 987 F.2d 575 (9th Cir. 1993).

121. *Id.* at 577.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See *United States v. Kelm*, 827 F.2d 1319, 1321-22 (9th Cir. 1987) (finding trial court properly treated defendant's failure to retain counsel as waiver of his right to counsel and invocation of self-representation).

133. *Meeks*, 987 F.2d at 579.

who was financially in control of whether or not he had counsel and chose not to retain counsel, Meeks had been appointed counsel by the court (Van Camp). Thus, the court, not Meeks, controlled whether Meeks received continued representation.¹³⁴ According to the Ninth Circuit, the trial court erred in denying Meeks' motion to substitute counsel, while simultaneously granting Van Camp's motion to withdraw, effectively "waiv[ing] Meeks' right to counsel for him, leaving him without representation."¹³⁵

Unlike *Garey*, which simply deferred to the trial court's decision to impose self-representation on the defendant despite no affirmative election of that right, the *Meeks* court set forth more specific guidelines for dealing with the obstructionist defendant, effectively requiring a defendant to affirmatively elect self-representation. According to *Meeks*, the trial court should have either (1) left Van Camp as Meeks's appointed counsel; (2) appointed Hemovich as substitute counsel; or (3) "given Meeks the opportunity to knowingly and intelligently waive his right to counsel and to proceed pro se," if that was his wish.¹³⁶ According to *Meeks*, the trial court erred in failing to employ any of these options.¹³⁷

By outlining three options for the trial court to follow, two of which would have left Meeks represented by counsel, and the third required him to affirmatively elect self-representation, *Meeks* indicates that obstructionist defendants should be represented by counsel in the absence of a genuine request to proceed pro se. The case is thus unlike *Garey*, which found that self-representation may be imposed "when an uncooperative defendant rejects the only counsel to which he is constitutionally entitled," despite no affirmative election to proceed pro se.¹³⁸

Like the Ninth Circuit in *Meeks*, several other federal circuit courts have determined that a defendant's obstructionist or dilatory conduct should result in waiver of the right to self-representation, rather than waiver of the right to counsel, including the Fourth, Fifth, Seventh, and Eighth Circuit Courts of Appeal.¹³⁹ However, some of these decisions reflect an overriding desire to affirm a defendant's conviction, causing the court to affirm the

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See *United States v. Garey*, 540 F.3d 1253, 1265 (11th Cir. 2008).

139. See *United States v. Ductan*, 800 F.3d 642, 651 (4th Cir. 2015); *United States v. Long*, 597 F.3d 720, 727-28 (5th Cir. 2010); *United States v. Myers*, 503 F.3d 676, 681 (8th Cir. 2007); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998).

trial court's ruling on the representation issue, regardless of the Sixth Amendment outcome.

A recent Fifth Circuit decision, *United States v. Long*, exemplifies a decision favoring representation by counsel, but one where the appellate court's desire to affirm the defendant's conviction may have been the driving force on appeal.¹⁴⁰ In *Long*, defendant James Michael Long repeatedly "fired" his appointed counsel while consistently refusing to represent himself.¹⁴¹ Long thwarted each of the court's attempts to hold a *Faretta* hearing until the day of trial, causing the court to make the representation decision for him.¹⁴² After the court required Long to proceed to trial with counsel's assistance, the jury found Long guilty on four counts of willfully failing to file income tax returns.¹⁴³ Long then appealed his conviction, arguing that the district court wrongfully denied him the right to represent himself and erred in denying his pro se motion to dismiss based on the Speedy Trial Act.¹⁴⁴ Rejecting Long's arguments, the court emphasized that Long never clearly and unequivocally requested to proceed pro se, as *Faretta* requires, adding that "something more than just firing one's attorney is required before one clearly and unequivocally requests to proceed *pro se*."¹⁴⁵ Recognizing the right to counsel as the default right, the court declared that "[t]he right to counsel is in force until *waived*, [and] the right to self-representation does not attach until *asserted*."¹⁴⁶

Although the court found that "Long did not clearly and unequivocally both waive his right to counsel and assert his right to self-representation,"¹⁴⁷ which was sufficient to reject his *Faretta* argument, the court went on to address whether Long had affirmatively waived his right to self-representation by his misconduct. Finding that he did, the court declared:

Even if Long had clearly and unequivocally asserted his right to self-representation, that right may be waived by his actions . . . Long's conduct in the instant case suggested disruptive and obstructionist behavior . . . Each time a magistrate judge had attempted to conduct a *Faretta* hearing, Long was extremely uncooperative. Long's actions

140. 597 F.3d 720.

141. *Id.* at 722-23.

142. *See id.* at 725-26.

143. *Id.* at 722.

144. *Id.*

145. *Id.* at 724.

146. *Id.* (second alteration in original) (quoting *Moreno v. Estelle*, 717 F.2d 171, 174 (5th Cir. 1983)).

147. *Id.* at 726.

led to the court pushing back the [proceedings] . . . [Finally], Long *denied* wanting to represent himself . . . [T]hese facts tend to suggest that Long's behavior of itself may well have resulted in the waiver of his right to self-representation.¹⁴⁸

The Seventh Circuit Court of Appeals in *United States v. Brock* followed an approach similar to *Long*, adopting what amounts to a preference for counsel's assistance for a defendant who steadfastly refuses to exercise either Sixth Amendment right but, again, was arguably driven by the court's desire to avoid reversing defendant's conviction.¹⁴⁹

Soon after being indicted on six felony charges, Michael Brock quickly "filed a *pro se* motion announcing that neither his court-appointed attorney nor any other attorney was authorized to represent him."¹⁵⁰ Thereafter, the district judge conducted a hearing to determine whether Brock wished to represent himself, during which Brock repeatedly demanded a Bill of Particulars, challenged the court's authority, and "refused to answer the [c]ourt's questions or to cooperate in any way with the proceedings."¹⁵¹ After holding Brock in contempt, the court relieved his court-appointed attorney, required Brock to proceed *pro se* and appointed another attorney, William Marsh, as standby counsel.¹⁵² The court later reconsidered its ruling, and after additional hearings in which Brock refused to discuss whether he wanted to proceed *pro se*, found that he "ha[d] forfeited his right to represent himself."¹⁵³ Brock was then tried by a jury with Marsh as his attorney and was convicted of all charges against him.¹⁵⁴

On appeal, Brock argued that his Sixth Amendment right to self-representation had been violated.¹⁵⁵ Focusing on whether the trial court erred in finding that Brock had forfeited his right to represent himself by his misconduct, the court declared that "when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within

148. *Id.* at 726-27.

149. 159 F.3d 1077 (7th Cir. 1998).

150. *Id.* at 1078.

151. *Id.* (alteration in original).

152. *Id.* at 1079. Some courts view *pro se* representation with the assistance of standby counsel as a suitable "middle path." Gerwig-Moore, *supra* note 96, at 447. Nevertheless, trial with the assistance of standby counsel generally does not satisfy a defendant's Sixth Amendment right to counsel. See *United States v. Davis*, 269 F.3d 514, 520 (5th Cir. 2001) ("Standby assistance of counsel, however, does not satisfy the Sixth Amendment right to counsel. 'The assistance of standby counsel, no matter how useful to the court or the defendant, cannot qualify as the assistance of counsel, required by the Sixth Amendment.'" (quoting *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991))).

153. *Brock*, 159 F.3d at 1079 (alteration in original).

154. See *id.*

155. *Id.*

the trial judge's discretion to require the defendant to be represented by counsel."¹⁵⁶ The court analogized the case to *United States v. Brown*,¹⁵⁷ a case in which the Seventh Circuit likewise found a defendant to have "forfeited his right to represent himself" by his obstructionist conduct.¹⁵⁸ The court emphasized that, like the defendant in *Brown*, Brock made requests that were denied by the district judge, expressed dissatisfaction with the judge's rulings by refusing to proceed, and steadfastly refused to cooperate even *after* being cited for contempt.¹⁵⁹ The court further emphasized that "Brock stubbornly . . . insist[ed] that the court . . . state the basis for its authority," a scenario common in these cases, and consistently "refus[ed] to answer the court's [specific] questions" regarding whether he truly desired to represent himself.¹⁶⁰ Thus, the court found that the trial judge was "within her discretion in revoking Brock's *pro se* status."¹⁶¹

Although the Eleventh Circuit in *Garey* upheld a finding of waiver of counsel by misconduct, thereby ratifying judicially-imposed self-representation, the Fifth Circuit in *Long* and the Seventh Circuit in *Brock* invoked nearly identical misconduct to support the opposite outcome, leading to loss of the right to self-representation. Despite having reached different results on the representation issue, all three decisions reflect a preference for deferring to trial courts in this difficult area, and each may be explained by the overriding desire to avoid reversing a conviction and remanding for a new trial.¹⁶²

3. Implied Election of Self-Representation

Unlike *Long* and *Brock*, which reflect only a subtle preference for counsel's assistance, some courts have taken more extreme positions in such cases, even where the result is reversal of conviction. At one extreme is a case from the Seventh Circuit Court of Appeals, *United States v. Oreye*, which upheld the trial court's finding of an implied waiver of the right to counsel's assistance despite very little misconduct on the defendant's part and without the defendant having expressed any preference on the issue (i.e., without the defendant having "rejected" appointed counsel).¹⁶³

156. *Id.*

157. 791 F.2d 577 (7th Cir. 1986).

158. *Brock*, 159 F.3d at 1080; *Brown*, 791 F.2d at 579.

159. *Brock*, 159 F.3d at 1080.

160. *Id.*

161. *Id.*

162. *But see* *United States v. Meeks*, 987 F.2d 575, 578-79 (9th Cir. 1993) (reversing defendant's conviction due to a Sixth Amendment error).

163. 263 F.3d 669 (7th Cir. 2001).

In *Oreye*, defendant James Oreye was indicted and appointed counsel named Steven Saltzman.¹⁶⁴ After Oreye filed a motion to dismiss the indictment on the basis of mistaken identity, Oreye became dissatisfied with Saltzman, likely because he did not agree with Oreye's mistaken identity defense, prompting the judge to appoint a substitute counsel named Steven Shanin.¹⁶⁵

Six business days before trial was to begin, Shanin filed a motion to withdraw as Oreye's attorney, stating that they had an irreconcilable difference of opinion over how to conduct the defense.¹⁶⁶ The trial court held a hearing on the motion, which concluded with the judge giving Oreye the following options: (1) stay with Shanin; (2) find another lawyer who would be ready to go to trial on schedule (with no extension of the trial date); or (3) represent himself.¹⁶⁷ Oreye, however, failed to select any of the three options, and indeed "never said he wanted to proceed pro se."¹⁶⁸ Nevertheless, the trial court determined that Oreye had waived his right to counsel and required him to personally defend the charges with Shanin serving as standby counsel.¹⁶⁹ Oreye was then convicted of most charges against him.¹⁷⁰

On appeal, the Seventh Circuit Court of Appeals found no error in the trial court's handling of the Sixth Amendment issue, reasoning as follows:

If you're given several options, and turn down all but one, you've selected the one you didn't turn down. Granted, some cases from other circuits require evidence of misconduct to establish waiver [of the right to counsel] by conduct. But . . . we think these cases are wrong. The question of waiver is one of inference from the facts. As a matter both of logic and of common sense, . . . if a person is offered a choice between three things and says "no" to the first and the second, he's

164. *Id.* at 670; see *United States v. Oreye*, No. 98-CR-434, 1999 WL 558127, at *1 (N.D. Ill. July 26, 1999).

165. See *Oreye*, 263 F.3d at 670; *Oreye*, 1999 WL 558127, at *1. The trial court explained that Oreye and Saltzman "had problems almost from the very outset," and that in cases involving "irreconcilable differences," its approach is to "treat[] a falling out between lawyer and client as pretty much equivalent to no-fault divorce, so that withdrawal is granted irrespective of who requests it." *Oreye*, 1999 WL 558127, at *1.

166. *Oreye*, 263 F.3d at 670.

167. *Id.*

168. *Id.*

169. *Oreye*, 1999 WL 558127, at *1 (explaining that the trial court elected to treat Oreye's "overall conduct as amounting to a waiver—perhaps more accurately a forfeiture—of his right to counsel," and "the relevant case law on the subject" led the court to grant the motion for Shanin's withdrawal while denying the motion for appointment of new counsel).

170. *Oreye*, 263 F.3d at 671; *Oreye*, 1999 WL 558127 at *2.

chosen the third even if he stands mute when asked whether the third is indeed his choice.¹⁷¹

Although *Oreye*'s reasoning has a certain allure, the decision disregards the Sixth Amendment's inherent representation default, brushes aside *Faretta*'s elaborate waiver procedure, and ratifies this approach even in the absence of genuine misconduct on the defendant's part.¹⁷² Regarding the *Faretta* waiver process, the *Oreye* Court acknowledged that "the warnings given by the district judge . . . were rather perfunctory," and that the judge "mentioned 'difficulties' of self-representation but did not dilate on them," further noting that *Oreye* is a foreigner whose English was poor.¹⁷³ Given *Faretta*'s clear emphasis on respecting a defendant's free will decision to represent himself,¹⁷⁴ which *Faretta* indicated should occur *only after* a defendant is made fully aware of the dangers and disadvantages of self-representation,¹⁷⁵ a defendant like *Oreye*, who fails to actually elect self-representation and who is never informed of the dangers and disadvantages of doing so, should not be forced to proceed in that manner.¹⁷⁶

An additional flaw with *Oreye*'s reasoning, which posits that a person necessarily chooses the last of three options by rejecting the first and second, is in disregarding the possibility of a fourth option: appointment of substitute counsel (in this instance, to represent *Oreye* in lieu of *Shanin*). Moreover, *Oreye*'s reasoning would presumably lead to a different result had the court simply re-ordered the three options it

171. *Oreye*, 263 F.3d at 670-71 (citations omitted).

172. As the trial court explained, *Oreye* asked *Shanin* to withdraw because, according to *Oreye*, with only two weeks left before trial, *Shanin* revealed to *Oreye* that he had developed no defense for trial and tried to persuade *Oreye* to change his plea to guilty. *Oreye*, 1999 WL 558127, at *2 n.1.

173. *Oreye*, 263 F.3d at 671-72.

174. See *Faretta v. California*, 422 U.S. 806, 817 (1974) ("[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.").

175. See *id.* at 835 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits.").

176. See, e.g., *United States v. Welty*, 674 F.2d 185, 188-89 (3d Cir. 1982) (describing a proper *Faretta* warning as requiring the district court to advise the defendant of the technical problems he may encounter in acting as his own attorney and of the risks he takes if his defense efforts are unsuccessful, including, for example, instruction that the defendant will have to conduct his defense in accordance with the Federal Rules of Evidence and Criminal Procedure, rules with which he may not be familiar; that the defendant may be hampered in presenting his best defense by his lack of knowledge of the law; and that the effectiveness of his defense may be diminished by his dual role as attorney and accused); *City of Tacoma v. Bishop*, 920 P.2d 214, 217-221 (Wash. Ct. App. 1996) (recognizing that a defendant may forfeit the right to counsel but concluding that the trial court abused its discretion when it ordered the defendant to proceed pro se without warning him of the consequences).

presented. Under *Oreye*'s logic, had the trial court first offered Oreye the options of representing himself or finding another lawyer, and had Oreye rejected those two options, his "choice" would have necessarily become the only remaining option: staying with Shanin. Under the circumstances, it would have been just as simple for the trial court to deny Shanin's motion to withdraw and require Oreye to defend exclusively with Shanin's assistance, and doing so would have guaranteed a more effective defense for Oreye, thereby generating a more legitimate outcome.

On facts similar to *Oreye*, the Ninth Circuit Court of Appeals in *Meeks* reversed a conviction upon finding that the defendant was denied his Sixth Amendment right to counsel, which occurred when the trial court simultaneously denied his motion to substitute counsel while granting his appointed counsel's motion to withdraw, effectively "waiv[ing] Meeks' right to counsel for him."¹⁷⁷ According to *Meeks*, the trial court should have either denied counsel's motion to withdraw, leaving Meeks represented; appointed a new attorney to represent him; or permitted Meeks to clearly and affirmatively elect pro se representation.¹⁷⁸ In the Ninth Circuit's view, the trial court erred in failing to employ any of these options, instead forcing Meeks to proceed pro se despite no clear election of that right.¹⁷⁹ Under the *Oreye* approach, the trial court in *Meeks* would not have erred.

Because an indigent defendant has a right to competent counsel, but no right to a particular counsel of his choosing, courts facing scenarios like *Oreye* and *Meeks* would arguably be justified in refusing to appoint substitute counsel.¹⁸⁰ Even eliminating that option, however, courts in such cases still have the option of requiring representation by the defendant's original appointed counsel, a scenario that is usually superior to forcing an accused to defend himself on the eve of trial despite little desire or ability to do so. With nothing more than a mere difference in opinion regarding trial strategy between the defendant and his appointed counsel, courts facing such scenarios should focus more broadly on the Sixth Amendment's fair trial guarantee and not require an accused to defend himself unless that is his choice.

177. See *United States v. Meeks*, 987 F.2d 575, 579 (9th Cir. 1993).

178. See *id.*

179. *Id.*

180. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (recognizing that defendants do not have a "Sixth Amendment right to choose their counsel" and declaring that "[t]he [Sixth] Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts").

4. Strong Preference for Counsel's Assistance

A recent decision of the Fourth Circuit Court of Appeals, *United States v. Ductan*, adopted the most desirable approach for these cases and, like this Article's proposal, ratifies a strong preference for representation by counsel.¹⁸¹

In *Ductan*, in facts reminiscent of *Oreye*, the Fourth Circuit Court of Appeals found the lower court to have erred in ruling that defendant Phillip Ductan forfeited his right to counsel.¹⁸² Similar to *Oreye*, Ductan was initially represented by an attorney named Charles Brant, but Brant filed a motion to withdraw as Ductan's attorney.¹⁸³ At a hearing on Brant's motion, the magistrate judge confirmed that Ductan no longer wanted Brant to represent him and explained that Ductan's options were to (1) represent himself, (2) hire new counsel, or (3) ask the court to appoint counsel.¹⁸⁴ At this point, "Ductan began making nonsense statements," requesting "a form 226 form," and stating that he was "a secured party creditor."¹⁸⁵ After the prosecutor informed Ductan of the charges and maximum penalties, he responded, "I do not understand what he is saying. I'm only here for settlement of the account."¹⁸⁶ The magistrate judge then found that Ductan had "forfeited his right to counsel" as a result of his "nonsense statements," despite acknowledging that he "had not knowingly and intelligently waived" that right.¹⁸⁷

At a subsequent hearing, the magistrate judge reiterated that Ductan had waived his right to counsel, leaving only two options: to "hire a lawyer or represent himself."¹⁸⁸ Ductan later informed the court that he was seeking private counsel and "could not properly represent [him]self," and made additional statements about being a "secured party creditor."¹⁸⁹

Jury selection began the following day with Ductan representing himself with the aid of standby counsel, Randy Lee.¹⁹⁰ At the start of jury selection, Ductan made additional nonsense statements and informed the court that the "defense is not prepared right now to move

181. 800 F.3d 642 (4th Cir. 2015).

182. *Id.* at 653.

183. *Id.*

184. *Id.* at 644-45.

185. *Id.* at 645.

186. *Id.*

187. *Id.* The magistrate judge directed the federal defender to remain as standby counsel for Ductan. *Id.*

188. *Id.*

189. *Id.* at 645-46 (alteration in original).

190. *Id.* at 646.

forward with any proceedings.”¹⁹¹ The court then held Ductan in contempt and removed him from the courtroom until the end of jury selection, at which point Ductan again informed the court that he “d[id] not want to represent [him]self, . . . would like to seek private counsel,” and did not want standby counsel, Randy Lee, to assume the role of appointed counsel.¹⁹² At this point, if trial were to continue as scheduled, a decision had to be made for Ductan: self-representation, which he had expressly rejected, or representation by Ductan’s standby counsel, which he had also expressly rejected. The court imposed self-representation, and Ductan was convicted of the charges against him.¹⁹³

On appeal, Ductan argued that he was denied his Sixth Amendment right to counsel when the magistrate judge found that he forfeited his right to counsel by his conduct.¹⁹⁴ The court agreed. Acknowledging that “the right to self-representation is inescapably in tension with the right to counsel,”¹⁹⁵ the court declared that “the right to counsel is preeminent and hence, the default position,” in part because access to counsel “affects a defendant’s ability to assert any other rights he may have.”¹⁹⁶ The court further noted that it had “never held that counsel can be relinquished by means short of [a defendant’s knowing and voluntary] waiver”¹⁹⁷ and had instructed lower courts to “indulge in every reasonable presumption” against that option.¹⁹⁸ Thus, despite the fact that Ductan had created “an undeniably difficult position”¹⁹⁹ by taking inconsistent positions—declaring that he did not wish to represent himself while adamantly refusing appointed counsel—the court held that the magistrate judge erred in finding that Ductan had forfeited his right to counsel.²⁰⁰ Because the error was not harmless, the court vacated Ductan’s conviction and remanded for a new trial.²⁰¹

191. *Id.*

192. *Id.*

193. *Id.* Like in *Oreye*, the court permitted standby counsel Randy Lee to assist Ductan in his defense as needed. *See id.*

194. *Id.*

195. *Id.* at 649.

196. *Id.*

197. *See id.* (noting disagreement with other courts holding that the right to counsel may be relinquished either intentionally or unintentionally).

198. *Id.* (quoting *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995)).

199. *Ductan*, 800 F.3d at 651.

200. *Id.* at 653.

201. *Id.* (noting that denial of counsel is a structural error that is not subject to harmless error analysis).

IV. THE “TIMELY” REQUEST REQUIREMENT

Most courts require a defendant to request pro se representation “in a timely manner.”²⁰² Thus, even when a defendant makes a clear and unequivocal request to represent himself, a court may deny the request if untimely.²⁰³ Courts across the country have considered at what stage in the trial proceedings a request for self-representation is waived as untimely.²⁰⁴ As with the obstructionist defendant who does not clearly choose between the right to self-representation and the right to counsel’s assistance, there is no uniform solution to this issue. Moreover, courts have held that automatic reversal is warranted where a trial court improperly denies a pro se request as untimely.²⁰⁵

In deciding what makes a pro se request timely, the Fifth Circuit Court of Appeals has held, consistent with most courts, that a defendant must have a last clear chance to assert his right to self-representation before the jury has been empaneled and trial has commenced (unless the court finds the request a tactic to secure delay).²⁰⁶ The Ninth Circuit Court of Appeals has similarly determined that a defendant’s request to proceed pro se is timely if made before meaningful trial proceedings have begun. Thus, the Ninth Circuit has determined that reversible error occurs when a trial court denies a defendant’s clear and unequivocal request to proceed pro se made the day before trial, noting that such requests made before the jury is empaneled are “timely as a matter of law,” unless they are a tactic to secure delay.²⁰⁷ Other courts, including the Second Circuit Court of Appeals, Fourth Circuit Court of Appeals, and the U.S. Court of Appeals for the District of Columbia, agree with this approach.²⁰⁸

202. *Martinez v. Court of Appeal*, 528 U.S. 152, 161-62 (2000).

203. *See United States v. Edelmann*, 458 F.3d 791, 808 (8th Cir. 2006).

204. *See infra* notes 205-13 and accompanying text.

205. *See, e.g., Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977) (“If the denial of self-representation as untimely asserted was error we must reverse.”).

206. *See id.* at 893 (“In the interest of minimizing disruptions and maintaining continuity at trial, most courts of appeals have established the rule that the fundamental right to conduct the case pro se must be claimed before the trial begins.”); *see also United States v. Davis*, 269 F.3d 514, 520 (5th Cir. 2001) (“The district court was not obliged to honor Davis’s mid-trial request to represent himself.”).

207. *See Armant v. Marquez*, 772 F.2d 552, 555-56, 556 n.1 (9th Cir. 1985) (reversing defendant’s conviction in a habeas case in part because the trial court denied defendant’s numerous unambiguous requests to represent himself, which were made well before trial, and finding that defendant’s final request, made on the eve of trial, was not made for purposes of delay).

208. *See United States v. Dunlap*, 577 F.2d 867, 868-69 (4th Cir. 1978) (holding that once a trial begins, it is within the trial court’s discretion whether to allow the defendant to dismiss counsel and proceed pro se, noting that “a defendant does not have an absolute right to dismiss counsel and conduct his own defense after the trial has commenced”); *United States v. Dougherty*, 473 F.2d 1113, 1123-24 (D.C. Cir. 1972) (“The bulk of the cases cited to us . . . do no more than apply the

The reasons underlying the general trial commencement rule are simple. Once the jury has been empaneled and trial has begun, trial courts should have the ability to deny mid-trial requests to proceed *pro se* in order to minimize disruptions, avoid inconvenience and delay, maintain continuity in representation, and avoid confusing the jury.²⁰⁹

An alternative approach among courts is to require any request to proceed *pro se* to be made “within a reasonable time prior to the day on which the trial begins,” thereby making day-of-trial requests untimely.²¹⁰ As one court explained: “[n]one of the interests involved here, the right of self-representation, the right to counsel, or the interest in preserving an orderly criminal process, are furthered by the allowance of a last minute request such as [one] made [on the morning of trial].” Also, according to this court, “day of trial assertions of the self-representation right are likely to lead to a rushed procedure, increasing the chances that the case should be reversed because some vital interest of the defendant was not adequately protected.”²¹¹ In addition, such last minute requests negatively impact the orderly administration of the courts. According to one court, “[d]ay of trial assertions of the self-representation right, whether before or after empaneling of the jury, disrupt the time schedules of judges, counsel, and potential jurors, all who have been assembled for the occasion and who can be [re]assembled only at the expense of extra time and money.”²¹² They also disrupt the schedules of other matters on the court’s docket, which have been planned around the present trial.²¹³

V. UNIFORM PROPOSAL FOR THE OBSTRUCTIONIST DEFENDANT

Instances where a trial court suspects a defendant is deliberately manipulating the Sixth Amendment and attempting to inject error into

recognized principle that the fundamental right to conduct the case *pro se* is one that must be claimed timely, before the trial begins. . . . When the *pro se* right is claimed after trial has begun, the court exercises its discretion [in deciding whether to grant or deny the request].”); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 16 (2d Cir. 1965) (holding that if defendants “clearly sought to represent themselves, after their cases had been called on the calendar but before the jury had been chosen, they had an unqualified right to have their requests granted [because] [a]t this stage there was no danger of disrupting proceedings already in progress” (footnote omitted)).

209. *Dunlap*, 577 F.2d at 868.

210. See *Russell v. State*, 383 N.E.2d 309, 314 (Ind. 1978) (noting disagreement among the courts about how the timeliness requisite is to be applied, and recognizing two approaches to the issue, one which holds that an assertion of the right of self-representation is timely if it is made “before the jury is empaneled and sworn,” and the other finding such an assertion timely only when made “within a reasonable time prior to the commencement of trial”).

211. *Id.*

212. *Id.* at 315.

213. *Id.*

the record present unique challenges for courts. The variety of approaches courts have adopted to deal with these issues has created uncertainty in this area and only heightens the twin dangers of erroneous conviction, due to inadequate representation at trial, and reversal of an otherwise warranted conviction on appeal, due to a perceived *Faretta* or *Gideon* error where the evidence is otherwise sufficient to affirm. Although some scholars contend there is no “one-size-fits-all” solution for these cases, a more uniform approach to the issue is warranted.²¹⁴

A. Proposal

Rather than being forced to participate in the defendant’s game all the way through the start of trial, where only then a court may confidently deny a request for self-representation as untimely, a trial court faced with an unruly defendant should instead be permitted to make a factual finding, based on a preponderance of evidence, that the defendant is intentionally refusing to make a clear choice between the right to counsel and the right to self-representation. Such a finding could be made at any point before trial but must be justified by the defendant’s deliberately obstructionist or dilatory conduct prior to that point, which should be reflected in the record.

Once the factual finding is made, the court would then be justified in making the Sixth Amendment election for the defendant. In the usual case, the choice should be representation by counsel, subject only to an exception for cases where a defendant has physically or verbally abused his appointed counsel, at which point substitute counsel should be appointed. If and when a court must step into the shoes of the obstructionist defendant and substitute its judgment for the defendant’s, assistance of counsel should be the near universal remedy.

A critical aspect of this proposal is that once the court makes the requisite factual finding and resolves the representation issue for the defendant, the defendant’s right to choose among his Sixth Amendment rights would completely terminate. This requirement is necessary to prevent further manipulation of the competing rights and is justified by the notion that the defendant has forfeited his right to elect his representation path once the factual finding is made.

Finally, the abuse of discretion standard should apply to any Sixth Amendment argument a convicted defendant makes on appeal. For

214. See Gerwig-Moore, *supra* note 96, at 444 (“[W]hile no one-size-fits-all answers will magically clarify puzzles that have perplexed a number of state and federal appellate judges, there is enough of a problem here to warrant some study, organized thinking, and perhaps even modification of existing approaches.”).

defendants who appeal a conviction, the trial court's factual finding and decision on the representation issue should stand, absent a clear abuse of discretion proven only by a lack of evidence of actual obstructionist conduct by the defendant.

B. The Triggering Condition: Intentionally Obstructionist or Dilatory Conduct

Under this Article's proposal, a trial court faced with obstructionist misconduct may find that a defendant has forfeited his right to represent himself through his wrongdoing, but only if the court makes the following two findings, each based on a preponderance of evidence: first, that the defendant has engaged in misconduct of an obstructionist or dilatory nature; and second, that the defendant has done so with the intent to delay the proceedings, obstruct the judicial process, or create reversible error for purposes of securing a new trial on appeal. As explained below, distinct act and intent requirements bring the instant proposal in line with the related doctrine of forfeiture-by-wrongdoing, which requires evidence of both an act of wrongdoing directed at a would-be witness, along with the specific intent of preventing the witness from testifying—as in cases where a defendant has bribed or intimidated a potential witness to prevent her from testifying against the defendant.²¹⁵

Determining a defendant's true intent is often difficult, and as the criminal law has long recognized, is sometimes only capable of being inferred from one's conduct.²¹⁶ Despite these difficulties, certain common types of misbehavior should permit a court to infer that a defendant is intentionally obstructing or delaying the proceedings, thereby triggering the proposed factual findings.

Upon review of the cases outlined in Part III, above, at least six factors emerge as ones that might justify a trial court's finding of deliberate obstruction.²¹⁷ The first factor is whether the defendant at issue has been charged with obstruction-related crimes, as with Hansen, who had been charged with criminal contempt for having

215. See *infra* Part V.E.

216. See, e.g., *United States v. Peters*, 462 F.3d 953, 959 (8th Cir. 2006) (noting that the government, in a criminal prosecution, “was permitted to prove the intent element of the [criminal] charge with circumstantial evidence, which is often the only available evidence of a defendant’s mental state”); see also Marc McAllister, *Down but Not Out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393, 431-33 (2009) (examining cases where a defendant’s intent to silence a potential witness was inferred from the wrongdoer’s conduct under the forfeiture-by-wrongdoing exception to the right of confrontation).

217. See *supra* Part III.

willfully disobeyed a grand jury subpoena directing him to appear to provide handwriting samples and fingerprints.²¹⁸ Other, similar crimes might include those relating to witness intimidation and bribery, particularly those committed to obstruct a pending criminal investigation or prosecution.

The second factor is whether the defendant at issue, as in Hansen's case, has informed the court of his desire to present frivolous arguments his appointed counsel refuses to make and, to accomplish that objective without entirely losing the benefits of counsel's assistance, vacillates between the competing Sixth Amendment rights.

A third factor is whether a defendant represented by counsel has filed multiple pro se motions even after the court has instructed him not to do so, as such conduct reveals the defendant's indifference to the court's instructions and a general disrespect for the judicial process.

A fourth factor is the defendant's use of tactics that secure delay, including hiring and firing multiple attorneys, making conflicting statements to force continuations of hearings or trials, and peppering the court with lengthy motions advancing frivolous arguments.

A fifth factor, noted in *Hardy*, is whether the defendant is well educated and able to invoke complex case law, which, unlike defendants who unwittingly engage in similar obstructionist behavior, is an indication that the defendant's obstructionist actions are intentional.²¹⁹

Factors that may weigh against a finding of intentional obstruction include mental health issues and nonsensical behavior, which might cause a court to conclude that the defendant's obstructionist behavior is really not intentional, particularly where the defendant is not well educated. In such situations, rather than going forward to trial with appointed counsel, the court should ensure the defendant is truly capable of making the requisite Sixth Amendment election and, in extreme cases, actually competent to stand trial.

As with various criminal procedure concepts, such as the notion of probable cause, this Article's proposed framework is a totality of circumstances test where no one factor is dispositive, but where certain factors remain highly relevant to the analysis.²²⁰ Ultimately, only a trial

218. See *supra* notes 7-9 and accompanying text.

219. See *United States v. Hardy*, 941 F.2d 893, 896-97 (9th Cir. 1991).

220. Under Fourth Amendment law, the test for whether probable cause exists is based on the totality of circumstances where no one factor is dispositive, but where certain factors remain highly relevant to the analysis. See *Illinois v. Gates*, 462 U.S. 213, 230-39 (1983) (adopting the totality of circumstances test for determining probable cause and discussing its advantages over the previous, two-pronged test). Similarly, in determining whether a private person should be deemed an agent of the government for Fourth Amendment purposes, courts examine the degree of government involvement in the situation in light of the totality of circumstances but focus primarily on two

judge who actually interacts with a defendant like Hansen, often in several hearings occurring over a lengthy period of time, is capable of making the findings necessary to trigger forfeiture of the self-representation right.

C. *Advantages of This Proposal*

In a practical way, the framework this Article proposes permits courts to distinguish between a defendant's sincere desire to represent himself, which would result in pro se representation, and a defendant's effort to obstruct the court, which would result in the proposed factual findings and consequent representation by counsel.²²¹ The primary advantage of this proposal is the certainty it creates for both trial and appellate courts in dealing with the obstructionist defendant. Under this proposal, before pro se representation would be permitted, defendants will be required to clearly and unequivocally request to proceed pro se, to do so in a timely manner, and to affirmatively demonstrate a knowing, intelligent, and voluntary waiver of the right to counsel upon being fully advised of the dangers of self-representation.²²² As the Fourth Circuit Court of Appeals has held, all of these requirements are absolute, which would in turn create greater certainty by allowing the court "to presume that 'the defendant should proceed with counsel *absent an unmistakable expression by the defendant* that so to proceed is contrary to his wishes.'"²²³

Mandating firm waiver requirements also blocks a skillful defendant from manipulating the court.²²⁴ As the Supreme Court has recognized, "[t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated."²²⁵ To alleviate this concern, once the proposed factual findings are made, the defendant forfeit the ability to make the Sixth Amendment election, and consequently, lose the means to obstruct the proceedings.²²⁶ In the

factors: (1) whether the government knew of and acquiesced in the intrusive conduct at issue and (2) whether the party performing the conduct at issue intended to assist law enforcement or, rather, intended to further his own ends. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989); Bryan R. Lemons, *Public Education and Student Privacy: Application of the Fourth Amendment to Dormitories at Public Colleges and Universities*, 2012 B.Y.U. EDUC. & L.J. 31, 43-46 (2012).

221. See *United States v. Edelman*, 458 F.3d 791, 808-09 (8th Cir. 2006).

222. See *supra* Part V.A.

223. *United States v. Ductan*, 800 F.3d 642, 650 (4th Cir. 2015) (quoting *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995)).

224. See *id.* at 649-50.

225. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

226. Courts have recognized the importance of refusing to cooperate in a criminal defendant's obstructionist game. See, e.g., *State v. Lehman*, 749 N.W.2d 76, 82 (Minn. Ct. App. 2008) ("[T]he

usual case, defendants also lose the means to secure reversible error on appeal, further prohibiting defendants from profiting from their own wrongdoing.²²⁷

This Article's proposal also promotes judicial economy and the prompt administration of justice. By enabling courts to prevent an obstructionist defendant from changing his mind on the representation issue once the requisite factual findings are made, courts would be better positioned to proceed to trial more expeditiously. When more and more obstructionist-minded defendants are precluded from engaging in obstructionist behavior as a result of the factual findings this Article proposes, the very misconduct that has generated this dilemma would subside.²²⁸ As a result, the tactic of injecting error into the record through ambiguous actions, equivocal comments, and dilatory tactics will fade away as defendants discover that such tactics no longer have promise.²²⁹

Perhaps most importantly, this Article's proposal accounts for the acknowledged truth that self-representation is almost always inferior to counsel's assistance. The fact that an appointed defense attorney is typically better suited to defend an individual charged with a serious criminal offense cannot reasonably be disputed. The *Benchbook for U.S. District Court Judges*, for example, recommends the following warning for pro se defendants:

I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not

most appropriate response to the type of cynical manipulation of the right to counsel engaged in by [defendant] is to refuse to allow the manipulation, in the sense that the defendant should not be provided with the advantage sought.”)

227. Cf. *Allen*, 397 U.S. at 345 (stating that “[a] court must guard against allowing a defendant to profit from his own wrong” by manipulating his Sixth Amendment rights).

228. See *supra* Part V.A–B.

229. Cf. *United States v. Jennings*, 855 F. Supp. 1427, 1442 (M.D. Pa. 1994) (“[I]t should be added that [defendant’s] attempt to substitute counsel was a transparent attempt to use the right to counsel to manipulate the judicial system and delay trial. It is part of a pattern of attempts at manipulation by inmates of [the prison] appearing before the court.”). For the same reasons, the author’s proposal eliminates ambiguity for courts in responding to defendants who attempt to invoke their right to pro se representation *during trial*. See *Chapman v. United States*, 553 F.2d 886, 894 (5th Cir. 1977) (refusing to decide how to treat the right to defend pro se when it is asserted during trial but recognizing that clarification is needed in the circuit); see also *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972) (setting forth factors courts should consider in determining whether to grant pro se requests made after trial has commenced, including the inconvenience threatened by defendant’s belated request, the potential prejudice to the defendant in denying the request, the circumstances at the time, whether defendant has engaged in prior disruptive behavior, and whether the trial is in an advanced stage).

familiar with the rules of evidence. I strongly urge you not to try to represent yourself.²³⁰

Along with ensuring that a defendant is not convicted on the strength of inadmissible or unreliable evidence, which the rules of evidence are often designed to prevent,²³¹ an attorney is vital to ensuring a fair trial because an attorney, as compared to a pro se litigant, will better ensure that other critical constitutional rights are upheld.²³² For example, an attorney who understands the complex law governing the Sixth Amendment's right of confrontation will better ensure that a defendant is not convicted on presumptively unreliable evidence.²³³ This idea was expressed by the Supreme Court of Arizona in a recent en banc opinion concerning the right to counsel on appeal, which declared:

[The defendant] should be aware that proceeding without counsel in a capital appeal will be extraordinarily difficult. In many respects, this appeal may be the defendant's last meaningful opportunity to challenge his convictions and death sentence. If he represents himself, [defendant] will be required to examine the record of his criminal case, identify constitutional or other infirmities in the criminal proceedings against him, and make complex legal arguments to this court. Without the assistance of counsel, the obstacles to success may well be insurmountable.²³⁴

In addition to a defendant's general incompetence in trying cases, a defendant's effectiveness in presenting his own defense may be diminished by his dual role as attorney and accused.²³⁵ In some

230. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 7 (6th ed. 2013).

231. The rules regarding authentication, for example, are designed to ensure that only genuine and authentic items of evidence are admitted at trial. *See* FED. R. EVID. 901(a). Likewise, relevancy rules contemplate the exclusion of certain otherwise admissible evidence where the item's probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, and other similar dangers. *See* FED. R. EVID. 403; *see also* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

232. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997) (recognizing that the "vast body of [constitutional criminal procedure] law depends for its enforcement on criminal defense counsel, the private attorneys general of the Fourth, Fifth, and Sixth Amendments"). *But see* Pamela R. Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants' Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2559-70 (2013) (arguing that the constitutional right to counsel guaranteed by *Gideon* actually minimizes the invocation of certain adversarial rights by empowering attorneys, rather than defendants, to control them).

233. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence.").

234. *State v. Hampton*, 92 P.3d 871, 875 (Ariz. 2004).

235. *See* McMahon v. Fulcomer, 821 F.2d 934, 945 (3d Cir. 1987).

instances, such as with alleged crimes involving no eyewitnesses and no victims (e.g., tax evasion crimes), defendants are best equipped to provide critical evidence on the issue of their own innocence. Separating the roles of advocate and accused helps ensure that any evidence the defendant is able to present on the issue of his own culpability will not go unheard.

Finally, by enabling courts to cut off a defendant's ability to obstruct judicial proceedings much earlier in the proceedings than currently permitted by the case law relating to timeliness, this Article's proposal prevents the judicial system from being degraded by obstructionist-minded defendants and upholds the integrity of the courts. As the Supreme Court has declared:

[O]ur courts . . . cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes [I]f our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with [a defendant's] scurrilous, abusive language and conduct²³⁶

A potential objection to this Article's proposal is that it restrains the freedom of defendants to choose self-representation and control matters of defense strategy. This objection is unfounded. First, this Article's proposal governs only a narrow slice of cases—for example, those involving an obstructionist or delay-minded defendant. Under this proposal, defendants will remain free to elect self-representation all the way up to the start of trial, as long as they do not manipulate this right in order to create reversible error or obstruct the proceedings. Thus, defendants who are truly dissatisfied with counsel or who desire to control their defense remain free to elect self-representation. Second, even in the unusual case involving the obstructionist defendant, such defendants will have already exercised their free will by choosing *not* to elect either Sixth Amendment right but to instead obstruct the judicial process. To the extent such a defendant's free will is "obstructed," it is only due to the return of the defendant's own obstructionist boomerang. Third, under this Article's proposal, an accused who is represented by counsel will retain ultimate authority, as he does in every case, to make certain fundamental decisions regarding his defense, including whether

236. *Illinois v. Allen*, 397 U.S. 337, 346-47 (1970).

to plead guilty, whether to waive his right to a jury trial, and whether to testify on his own behalf.²³⁷ Finally, the increased use of appointed counsel in such cases will reduce the potential for erroneous convictions, and there is no better way to curtail a defendant's freedom than to place him behind bars. In sum, the minimal restraint on freedom of choice necessary to prevent obstructionist behavior is a small price to pay for greater clarity in this area and a reduced likelihood of erroneous convictions.

D. Proposed Exception for Cases of Verbal or Physical Abuse

An exceptional line of cases are those where a defendant has physically abused or verbally threatened his appointed counsel with physical harm. In such cases, rather than immediately resorting to pro se representation, trial courts should first appoint special counsel who have training and experience in handling unruly defendants.

Under this Article's proposal, any time a trial court is compelled to appoint substitute counsel as a result of severe obstructionist conduct by the defendant, there should be a corresponding tolling of the Speedy Trial Act, and a continuance of trial for whatever period of time is reasonably necessary for substitute counsel to prepare for trial—typically in thirty day increments depending on the complexity of the case. This tolling would be justified by a provision of the federal Speedy Trial Act, which excludes, for purposes of computing the time within which a criminal trial must commence, “[a]ny period of delay resulting from a continuance granted by any judge . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.”²³⁸ It would also be justified by the law relating to the granting of continuances, which generally gives trial courts discretion regarding whether to grant or deny a continuance of trial.²³⁹

Nevertheless, if there is any evidence that a defendant, after being appointed substitute counsel, continues his abusive behavior toward his second appointed attorney, the court should then be permitted to find that the defendant has entirely forfeited his right to counsel. Although

237. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

238. 18 U.S.C. § 3161(h)(7)(A) (2012).

239. See *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (“In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.”).

forfeiture of the right to counsel should be rare, it would be justified in the case of a defendant's repeated abuse of the very person appointed to assist his defense.

Courts have had little trouble applying the concept of forfeiture of the right to counsel in this context. In a particularly egregious case, *United States v. Leggett*, the Third Circuit Court of Appeals upheld the trial court's ruling that a criminal defendant had forfeited his right to counsel at sentencing after he punched his attorney in the head in open court and choked, scratched, and spit on him while he lay supine on the floor.²⁴⁰ Likewise, in *State v. Lehman*, the Court of Appeals of Minnesota held that a defendant forfeited his right to counsel by attacking his attorney in open court, punching him repeatedly and causing him serious injuries.²⁴¹ Other courts have similarly applied the forfeiture rationale in cases involving physical attacks of appointed counsel.²⁴²

Courts have likewise found that extreme verbal threats toward appointed counsel justify forfeiture of the right to counsel. In *United States v. Thompson*, for example, the Eighth Circuit Court of Appeals held that a defendant's threat to kill his appointed counsel was sufficient to permit counsel to withdraw and to further refuse to appoint substitute counsel.²⁴³ Other courts have reached the same result in cases of serious verbal abuse, even where such behavior does not involve threats of violence.²⁴⁴

240. See *United States v. Leggett*, 162 F.3d 237, 240, 250-51 (3d Cir. 1998).

241. See *State v. Lehman*, 749 N.W.2d 76, 81-82 (Minn. Ct. App. 2008) (relying on the holdings of courts in similar cases to find that the district court did not abuse its discretion by determining that defendant had forfeited his right to counsel by attacking his public defender in open court).

242. See, e.g., *Gilchrist v. O'Keefe*, 260 F.3d 87, 93-100 (2d Cir. 2001) (ruling that habeas petitioner had not been unconstitutionally deprived of counsel during a sentencing hearing based on a state court finding that defendant forfeited his right to counsel by punching his attorney in the head).

243. 335 F.3d 782, 785 (8th Cir. 2003). Regarding the refusal to appoint substitute counsel, the court stated that "[i]n light of the seriousness of the allegation, and [defendant's] willful failure to submit any explanation or to otherwise refute the allegation, our refusal to appoint substitute counsel did not unconstitutionally abridge [defendant's] right to be represented on appeal." *Id.*

244. See, e.g., *United States v. McLeod*, 53 F.3d 322, 325-26 (11th Cir. 1995) (finding defendant had forfeited his right to counsel based on testimony of defendant's second appointed attorney that defendant was "verbally abusive," threatened to harm and sue him, and tried to persuade him to engage in unethical conduct; nevertheless, the court was "troubled by the fact that McLeod was not warned that his misbehavior might lead to *pro se* representation"); *United States v. Travers*, 996 F. Supp. 6, 17 (S.D. Fla. 1998) (finding forfeiture as a result of the defendant's "persistently abusive, threatening and coercive" dealings with his attorney, and noting that the defendant had been repeatedly warned that his failure to cooperate could result in a finding of forfeiture); *Bultron v. State*, 897 A.2d 758, 766 (Del. 2006) (finding defendant forfeited his right to counsel by use of "continuing profanity and insulting conduct directed toward his counsel . . . and

These decisions are undoubtedly correct. As compared to less egregious misconduct, such as delay caused by a defendant's mere indecision on the representation issue, forfeiture of the right to counsel is appropriate in cases involving physical violence, threats of violence, or extreme verbal abuse towards appointed counsel due to the obvious rift such conduct creates between a defendant and his attorney. Moreover, forfeiture of the right to counsel in this particular context "is the most effective means of deterring repetition of such conduct" by criminal defendants.²⁴⁵ Although forfeiture of the right to counsel should be rarely imposed, it is appropriate here.

E. Forfeiture: The Better Rationale

Courts that have addressed the effect of a defendant's obstructionist behavior on the Sixth Amendment right to counsel and the right to self-representation have applied theories of "waiver," "forfeiture," and a hybrid of the two, "waiver by conduct."²⁴⁶

Waiver is a common concept in criminal law and typically requires evidence of a knowing and intentional relinquishment of a constitutional right.²⁴⁷ The most common method of "waiving a constitutional right is by an affirmative, verbal request," such as, in this particular context, a defendant who clearly and unequivocally requests to relinquish his right to counsel and to represent himself instead.²⁴⁸ Unlike waiver, forfeiture involves the loss of a right regardless of whether the defendant intended to relinquish it.²⁴⁹ In the context of the Sixth Amendment as a whole, which contains various rights designed to assure a fair trial,²⁵⁰ forfeiture has been applied to strip criminal defendants of their Sixth Amendment

his refusal to make peace with counsel," contrary to the trial court's instructions, even though defendant's behavior fell short of violence or threats of violence but cautioning that "forfeiture of the right to counsel is an extraordinary circumstance not established by mere disagreements between client and counsel"); *People v. Sloane*, 693 N.Y.S.2d 52, 53 (App. Div. 1999) (holding that "defendant forfeited his right to counsel by his persistent pattern of threatening, abusive, obstreperous, and uncooperative behavior" towards four successive appointed attorneys); *State v. Carruthers*, 35 S.W.3d 516, 549-50 (Tenn. 2000) (finding that defendant had forfeited his right to counsel where defendant was appointed three sets of counsel, repeatedly demanded that counsel withdraw and that new counsel be appointed, and verbally attacked and threatened his last appointed counsel personally, as well as counsels' office staff and family members).

245. *Lehman*, 749 N.W.2d at 82.

246. *See United States v. Goldberg*, 67 F.3d 1092, 1099-1103 (3d Cir. 1995).

247. *See id.* at 1099; *see also Metzger*, *supra* note 232, at 2556-57 (explaining that fundamental criminal procedure rights are so personal to the accused that only the accused can waive them, which requires a defendant's intentional relinquishment or abandonment of the right).

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

249. *Id.* at 1100.

250. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979).

right to confront an out-of-court declarant—and hence to object on grounds that the declarant is unavailable to be cross-examined at trial—where evidence shows that the defendant intentionally caused the declarant’s absence from trial (as in, for example, a case of witness intimidation).²⁵¹ Some courts have applied the concept of “waiver by conduct,” a hybrid of waiver and forfeiture, in cases where a defendant has been warned that he will lose his right to counsel if he engages in dilatory tactics—such as disregarding the court’s instructions to hire counsel where he has the financial ability to do so.²⁵²

The key distinction between waiver and forfeiture is the element of intentional choice.²⁵³ Although courts have applied the concept of “waiver by conduct” in instances where a court is forced to resolve the representation issue for the defendant due to the defendant’s indecision, the lack of an intentional election of either competing right by the defendant makes forfeiture the more appropriate rationale. As the Third Circuit Court of Appeals recently noted:

In many situations there will be defendants who engage in dilatory conduct but who vehemently object to being forced to proceed *pro se*. These defendants cannot truly be said to be “waiving” their Sixth Amendment rights because although they are voluntarily engaging in misconduct knowing what they stand to lose, they are not affirmatively requesting to proceed *pro se*.²⁵⁴

Although the Supreme Court has not directly determined whether forfeiture or waiver is the appropriate concept to apply in the case of a defendant who manipulates the Sixth Amendment representation rights, the Court’s precedents on related Sixth Amendment issues are

251. See *Giles v. California*, 554 U.S. 353, 359-60 (2008); see also *Commonwealth v. Szerlong*, 933 N.E.2d 633, 638 (Mass. 2010) (analyzing the wrongdoing requirement of the forfeiture-by-wrongdoing exception, and noting that “[a] defendant’s involvement in procuring a witness’s unavailability need not consist of a criminal act;” but rather, all that is required is an intentional act of making or helping the witness to become unavailable to testify, such as colluding with the witness to ensure that the witness will not be heard at trial).

252. See *Goldberg*, 67 F.3d at 1100 (citing *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992)).

253. See *United States v. Leggett*, 162 F.3d 237, 249-50 (3rd Cir. 1998) (discussing the distinction between waiver and forfeiture and noting that “forfeiture ‘results in the loss of a right regardless of . . . whether the defendant intended to relinquish the right’” (quoting *Goldberg*, 67 F.3d at 1100)).

254. *Goldberg*, 67 F.3d at 1101; see also *Bultron v. State*, 897 A.2d 758, 763-65 (Del. 2006) (“If a defendant’s behavior is sufficiently egregious, it will constitute forfeiture. Forfeiture, unlike waiver, does not require *Faretta* warnings or a warning to discontinue bad conduct. ‘Forfeiture can be found “regardless of whether the defendant has been warned about engaging in misconduct, and regardless of whether the defendant has been advised of the risks of proceeding *pro se*.”’” (quoting *United States v. Thomas* 357 F.3d 357, 362 (3d Cir. 2004)).

instructive.²⁵⁵ For example, in *Illinois v. Allen*, the Court considered whether a trial court could remove an unruly defendant from court without violating the defendant's Sixth Amendment right to be present at trial.²⁵⁶ Despite acknowledging that "[o]ne of the most basic of the rights guaranteed by the [Sixth Amendment] is the accused's right to be present in the courtroom at every stage of his trial," the Court held that it is constitutionally permissible to remove a defendant from court as a result of his extreme, obstructionist behavior.²⁵⁷

Similarly, in *Giles v. California*, the Supreme Court determined that a defendant may forfeit his Sixth Amendment right to confront adverse witnesses through the defendant's own wrongdoing.²⁵⁸ In *Giles*, the Court held that the Confrontation Clause's forfeiture-by-wrongdoing exception requires both an act of wrongdoing directed at a would-be witness coupled with the specific intent of preventing the potential witness from testifying, such as murdering a prosecution witness specifically to prevent her from testifying at a subsequent trial.²⁵⁹ Along the way, the Court ratified the "broad forfeiture principles" that underlined the exception at common law, stating, for example, that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts,"²⁶⁰ and that the rule permitting forfeiture of the confrontation right "'has its foundation' in the principle that no one should be permitted to take advantage of his wrong."²⁶¹

The same combination of wrongful act and specific intent mandated by *Giles* is required under this Article's proposal, which rests on the

255. Indeed, the Court's statements in this regard have at times been conflicting or confusing. See *Freytag v. Comm'r*, 501 U.S. 868, 894-95 n.2 (1991) (Scalia, J., concurring in part and concurring in judgment) ("The Court uses the term 'waive' instead of 'forfeit.' The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. Waiver, the 'intentional relinquishment or abandonment of a known right or privilege,' is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver, but others may not [including the right to counsel]. A right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true." (citations omitted) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

256. 397 U.S. 337, 338 (1970).

257. See *id.* at 338, 343-47. The court concluded that defendant "lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial" due to his extreme unruly conduct in court. *Id.* at 346.

258. 554 U.S. 353, 359-60 (2008).

259. See *id.* at 358-68 (examining whether the forfeiture-by-wrongdoing exception to the confrontation right requires proof that the defendant engaged in conduct designed to prevent the target witness from testifying); see also *Carlson v. Att'y Gen. of Cal.*, 791 F.3d 1003, 1009-10 (9th Cir. 2015) (discussing the *Giles* actus reus and mens rea requirements at length).

260. *Giles*, 554 U.S. at 366 (alteration in original) (quoting *Reynolds v. United States*, 98 U.S. 145, 158 (1878)).

261. *Id.* (quoting *Reynolds*, 98 U.S. at 159).

same underlying equitable principles. Under this Article's proposal, a trial court faced with obstructionist misconduct may find that a defendant has forfeited his right to represent himself through his wrongdoing but only if the court first finds, based on a preponderance of evidence, that the defendant (1) has engaged in misconduct of an obstructionist or dilatory nature; and (2) has done so with the intent to delay the proceedings, obstruct the judicial process, or create reversible error for purposes of securing a new trial on appeal. Once the requisite factual findings are made, the same type of deference owed to the trial court's finding that is due under *Giles* would also be due on appeal.²⁶²

Clearly articulating the basis for this ruling as forfeiture, rather than waiver, has practical implications. First, as the Third Circuit Court of Appeals has recognized, forfeiture can occur either when a defendant is informed of the likely consequences of his misconduct, such as when he has been warned that his dilatory conduct may result in the loss of his right to represent himself, or when he is not so informed, such as when a court deems the defendant to have forfeited his right to self-representation without first advising him of that possibility. By analogy, nothing in *Giles* requires the court to first educate a defendant likely to engage in witness intimidation of the consequences of doing so; what matters is the defendant's action and intent, not whether the defendant was warned ahead of time that his obstructionist behavior might cause him to forfeit his right to confront the would be witness. In the instant scenario, regardless of whether the court informs the defendant of the likely consequences of his actions, forfeiture still justifies the findings this Article proposes.

Second, a finding of forfeiture does not require the court to follow *Faretta's* elaborate waiver process. This is important in the exceptional case involving abusive conduct toward one's appointed attorney, as courts in such cases should be permitted to apply the forfeiture rationale regardless of whether the defendant has been advised of the dangers associated with self-representation, a requirement that would not make

262. See *United States v. Dinkins*, 691 F.3d 358, 383, 386 (4th Cir. 2012) (noting that “[b]efore applying the forfeiture-by-wrongdoing exception, a trial court must find, by a preponderance of the evidence, that ‘(1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness’” and finding that the trial court properly admitted certain hearsay statements against the defendant under the forfeiture-by-wrongdoing exception due to ample record evidence supporting the trial court's ruling (quoting *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005))); see also *United States v. Cazares*, 788 F.3d 956, 974-75 (9th Cir. 2015) (affirming district court's application of the forfeiture-by-wrongdoing doctrine after finding that the district court's stated reasons, and the record as a whole clearly supported application of the exception).

sense in that particular context, where there is no longer any realistic choice to be made between the representation rights.²⁶³

VI. CONCLUSION

Two fundamental rights exist within the Sixth Amendment's guarantee to "the assistance of counsel" for one's defense: the right to representation by counsel and the right to self-representation.²⁶⁴ Manipulative defendants often pit these competing rights against each other and fail to clearly choose between them, placing courts in precarious positions with reversible error on the line.²⁶⁵ As the U.S. Supreme Court has recognized, defendants who deliberately obstruct the judicial process must not be permitted to take advantage of their own wrongdoing, and, in this particular context, must not be allowed to gain a new trial in the event of judicial misstep caused by muddled case law.²⁶⁶ Perhaps the best method for stripping manipulative defendants of this tool is greater uniformity and certainty in this area. Although appellate courts often defer to trial courts in such cases, regardless of whether the trial court imposes self-representation or representation by counsel, the more routine use of counsel for the unruly defendant who fails to make the requisite election is warranted.²⁶⁷ If and when a court must step into the shoes of the obstructionist defendant and substitute its judgment for the defendant's, assistance of counsel should be the usual remedy.²⁶⁸

263. See *United States v. Goldberg*, 67 F.3d 1092, 1101 (3d Cir. 1995).

264. See *supra* notes 10-12 and accompanying text.

265. See *supra* notes 13-18 and accompanying text.

266. See *supra* Part V.E.

267. See *supra* Part V.D.

268. See *supra* Part V.A.
