No. 18-___

IN THE

Supreme Court of the United States

TONY VON CARRUTHERS,

Petitioner,

v.

TONY MAYS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I

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CAPITAL CASE

QUESTION PRESENTED

This Court has repeatedly held that the right to counsel is an essential constitutional protection for the accused, such that serious precautions are necessary before it can be waived away. For example, *Argersinger v. Hamlin* held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, … unless he was represented by counsel at his trial." 407 U.S. 25, 37 (1972). And *Faretta v. California* cautioned that, before a criminal defendant may waive his representation and conduct his own defense, he must "clearly and unequivocally declare[] to the trial judge that he want[s] to represent himself and d[oes] not want counsel," and the record must reflect that he is "voluntarily exercising his informed free will." 422 U.S. 806, 835-36 (1975). Moreover, this Court has suggested that although "[s]ome rights may be forfeited by means short of waiver," the right to counsel "may not." *Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment).

In this case, an indigent *capital* defendant was forced to represent himself—at his trial and death-penalty sentencing stage—not because he waived the right to representation voluntarily on the record, but as an "extreme sanction" for his alleged misconduct. Courts of last resort are split on whether criminal defendants in *any* case (let alone capital cases) may be forced to represent themselves pro se in this fashion. The Question Presented is:

Does depriving a criminal defendant of trial counsel against his will, without at least the warnings and voluntary waiver required by *Faretta*, violate the Sixth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tony Von Carruthers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 889 F.3d 273. The opinion of the district court (Pet. App. 42a-341a) is unpublished. The opinion of the Tennessee Supreme Court (Pet. App. 342a-457a) is reported at 35 S.W.3d 516.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2018. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on June 26, 2018. Pet. App. 458a. On September 14, 2018, Justice Kagan extended the time to file this petition through November 23, 2018. No. 18A256. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment of the U.S. Constitution provides in relevant part:

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

INTRODUCTION

Petitioner Tony Von Carruthers was sentenced to death in Tennessee after the state trial judge sanctioned him by removing his right to counsel. The Tennessee courts thus forced petitioner to represent himself—against his will, and despite the offer of two attorneys ready and willing to represent him—at both the guilt and capital sentencing phases of his trial. There is an active split among courts of last resort as to whether a defendant can be deprived of counsel as a sanction for misconduct; indeed, some courts hold that *no* conduct can amount to an implicit waiver of the right to representation. And this case is a remarkably well-tailored and important vehicle through which to decide this question because, absent this Court's intervention, petitioner Carruthers will be the first person to be executed after being forced to represent himself at trial in almost a century. *Cf. Riddick v. Commonwealth*, 115 S.E. 523 (Va. 1923).

STATEMENT OF THE CASE

1. In March 1994, petitioner and an accomplice were arrested and charged with robbing, kidnaping, and murdering three individuals. *See* Pet. App. 344a-357a. After petitioner's retained counsel withdrew due to a conflict of interest, the trial court appointed attorneys to represent him. *Id.* at 366a. In the ensuing months, petitioner and his co-defendant sent "an abundance of correspondence" to the trial court "expressing concern about the pretrial investigation" their attorneys conducted, leading to a hearing. *Id.* at 368a. Petitioner's counsel said "'some enmity' had developed between him and Carruthers, but indicated that he believed the problem could be resolved." *Id.* at

369a. Counsel failed to prepare for trial, however, and petitioner later filed a motion for substitution. *Id.*[*] Counsel "was allowed to withdraw because of 'personal physical threats' made by Carruthers that had escalated to the point that [counsel] did not 'feel comfortable or safe'" in representing him. *Id.* at 370a. This process repeated itself a second time—counsel were appointed, did virtually nothing to investigate, and after angry communications from petitioner were allowed to withdraw—before the court ultimately appointed William Massey and Harry Sayle to represent him. *Id.* at 371a-375a.

As with petitioner's previous counsel, Massey failed adequately to prepare for trial—for example, by waiting until just weeks before the trial date to seek a mitigation specialist for sentencing, which even the trial judge found appalling. R.55-5, at 196-202 ("[I]t's December the 19th today and you all are talking to me about mitigation proof. You need to get on it right away, big time, because the case is going to trial on January the 8th, and [will not be continued again]."). The prosecution had already made clear that they would seek the death penalty, so petitioner, fearing for his life, reacted to what he perceived as deficient rep-

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[*] In the year-and-a-half before his final set of counsel were appointed, petitioner's initial attorneys failed to contact any of the 125 witnesses identified by the prosecution (indeed, one counsel could not name any witness that had been interviewed by the defense); spent almost no time with petitioner; and hired no investigator for either the guilt phase or potential capital sentencing proceeding. R.55-4, at 76; R.55-5, at 126-27. (The transcripts of petitioner's state criminal trial were filed in the district court below at Doc. 55 through 55-10 and will be cited herein as "R.55-x.")

resentation by making hostile calls and sending intemperate letters to Massey's office. Massey responded by moving to withdraw as counsel, arguing that he could no longer represent petitioner because of the threats. Pet. App. 376a-379a. The trial court denied the motion. *Id.* at 379a-382a.

Massey renewed his motion to withdraw just six days before trial, after receiving additional hostile letters that questioned the competency of his representation. Pet. App. 382a. The trial judge initially denied Massey's motion, advising instead that petitioner assist his attorneys in preparing for trial, which was only days away, and that if he failed to do so, the court would force him to proceed pro se. *Id.* at 383a-384a. The judge later cautioned petitioner that in representing himself, he would "be held to the same standard that attorneys are held to during a trial," and "[r]ules of evidence, rules of procedure [would] apply," stating that "the charges that are pending and the potential for imposition of the death penalty … should be very apparent to [petitioner] at this point." *Id.* at 386a-387a. Sayle said he was "perfectly willing to continue" representing petitioner, but needed additional time to prepare if Massey would no longer be involved. R.55-5, at 271-72. The trial judge refused—if Massey and petitioner could not reconcile, the judge stated, "[n]either of you will be representing him. He'll be proceeding pro se." *Id.* at 272-74.

Petitioner protested that Massey was not adequately representing him, and that he was not capable of representing himself:

> I can't represent myself. I haven't been to law school. I don't have a degree to practice law in your courtroom. … [Massey] is on cocaine.

> He did not investigate my case. I've got six potential witnesses. He has not seen not one. I had several requests that I asked him to do, and he refused to do it. He denied my phone calls. He didn't want to talk to me. He don't come see me.

R.55-5, at 278-79. Petitioner had no attorney to advocate for him at this hearing, and no one to argue the unfairness of removing all counsel, including Sayle, who was willing and able to step in. Instead, Massey affirmatively *suggested* that petitioner should "just go 'pro se,'" against his client's express wishes. *See* Pet. App. 382a. Perhaps as a result, the court made no serious effort to probe petitioner's allegation that Massey was failing to investigate his case.

The following week, Massey returned to the court, alleging that he had received additional threatening letters from petitioner. Pet. App. 389a. The trial judge held that petitioner's misconduct "created a situation that compels that he go forward pro se." R.55-5, at 316. Petitioner protested the ruling, arguing that Massey had refused to communicate with him at all since the previous hearing, and he reiterated that he was incapable of representing himself:

> [The court] told me Friday to see if I could reconcile my differences with Mr. Massey and Mr. Sayle. … I said, I can't represent myself because I don't know anything about the law. I say I'm hoping Mr. Massey will come in, you know, Monday and represent me. But he wouldn't come to the phone, you know. So I am asking that the Court ask Mr. Massey to do his job as being appointed my counsel to

> represent me because I know nothing about the law.

Id. at 317. Massey agreed, stating that he did "not think" petitioner "[wa]s competent to go forward representing himself, nor [did he] think it[was] fair" to require him to do so. *Id.* at 318. Nevertheless, the court sanctioned petitioner for what it found to be dilatory and threatening conduct by requiring him to represent himself, with Massey and Sayle to remain only as "elbow counsel." *Id.* at 321-24. Once again, no attorney representing petitioner's interests was present at the hearing, and he was left to argue on his own that the trial court was violating his constitutional right to counsel.

At the outset of trial, Massey reversed course and said he was willing to conduct petitioner's defense. R.55-5, at 363. In return, petitioner would "admit that [his accusations against Massey] [were]n't true" and "cooperate during this trial." *Id.* The trial judge refused—apparently treating petitioner's conduct as a *permanent* forfeiture of any right to an attorney. *Id.* at 367; *see id.* at 323-24 (stating that the court "will not allow for the substitution of Mr. Massey at any point once the trial begins," even if "all of a sudden Mr. Carruthers and Mr. Massey patch up their differences and Mr. Massey asks to be substituted in or to be allowed to begin his representation at that time"). According to the trial judge, petitioner was being denied willing representation because he had "*involuntarily* waived" his right to counsel. *Id.* at 352 (emphasis added).

During voir dire, the prosecution requested a three-month continuance, which the court granted—despite its earlier concerns with potential delay. Pet.

App. 392a. In light of the continuance, petitioner once again pleaded with the trial judge to re-appoint his counsel. Once again, the trial judge refused. *Id.* In the end, petitioner was forced to represent himself for the entirety of his trial and capital sentencing, even though Massey and Sayle had each said they would willingly represent him, while his co-defendant was represented by counsel. *Id.* at 392a-395a. The jury convicted both petitioner and his co-defendant on all counts, and sentenced each of them to death. *Id.* at 357a.

2. On direct appeal, petitioner argued that he was deprived of his right to trial counsel in violation of the Sixth Amendment. The Tennessee Supreme Court disagreed. Recognizing that this was "the only capital case in the country in which a defendant has been held to have implicitly waived or forfeited the right to counsel and has been required to represent himself at trial and sentencing," the court nevertheless found that petitioner's actions were "extreme and egregious." Pet. App. 406a & n.28. The "record in this case," according to the court, "supports" the "*extreme sanctions*" of "both implicit waiver and forfeiture," so denying petitioner his constitutional right to counsel was "appropriate under the circumstances." *Id.* at 403a, 406a (emphasis added).

The Tennessee Supreme Court understood how fatal the pro se defense was to petitioner's case. In the very same opinion, it determined that the trial judge had abused his discretion in declining to sever petitioner's co-defendant from the case. Petitioner's pro se defense so prejudiced his co-defendant, the court found, that the co-defendant's conviction and sentence had to be vacated, and a new trial conducted. Pet.

App. 410a-416a. The court was prescient: Petitioner's co-defendant has since served his sentence and been released. *See Memphis Man Convicted of Triple Murder Goes from Death Row to Free*, WREG Memphis (Sept. 26, 2016), http://bit.ly/2B88QFB.

3. Petitioner filed state-court petitions for post-conviction and habeas relief, all of which were denied. *Carruthers v. State*, 2007 WL 4355481 (Tenn. Crim. App. Dec. 12, 2007); *Carruthers v. Worthington*, 2008 WL 2242534 (Tenn. Crim. App. June 2, 2008). He then filed a habeas petition in federal court, arguing, in part, that the State violated his Sixth Amendment right to counsel when it sanctioned him by requiring him to proceed pro se based on his pre-trial conduct. The district court denied the petition. Pet. App. 76a-79a, 131a-147a.

4. On appeal, the Sixth Circuit affirmed. Among other issues, the court granted a certificate of appealability on whether "the trial court violated [petitioner]'s right to counsel when it compelled him to proceed pro se at trial." C.A. Doc. 24, at 3 (Dec. 28, 2015). The Sixth Circuit found it "troubling that the state trial court … required [petitioner] to proceed pro se through his capital murder trial without giving him the warnings typically required in the distinct context of a defendant's affirmatively waiving his right to counsel"—*i.e.*, the warnings and colloquy required under *Faretta v. California*, 422 U.S. 806 (1975). Pet. App. 35a. But despite its evident concerns, the court of appeals held that the state court's decision was neither contrary to nor an unreasonable application of clearly established federal law under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Pet. App. 38a.

"Nothing in [its] opinion [wa]s intended to bless the state trial court's actions or the merits of the Tennessee Supreme Court's opinion," according to the court. Pet. App. 35a. And although Judge Stranch agreed with the panel majority's opinion, she concurred to clarify that she "c[ould] not agree" with the Tennessee court's reasoning "that a criminal defendant may be denied his Sixth Amendment right to counsel as a form of punishment." *Id.* at 41a (Stranch, J., concurring). That was because, in her view, the "vocabulary of sanction does not have a place" in determining when a defendant waives his right to counsel. *Id.*

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether the Sixth Amendment permits a court to strip a criminal defendant of his right to counsel against his will, as a sanction for misconduct, without at least the formal warnings required before an ordinary waiver of that same right. The correct answer is almost certainly "no." Nearly three decades ago, Justice Scalia identified the right to counsel as among the set of rights that may not "be forfeited by means short of waiver," *Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment), and, accordingly, this Court has long required very stringent, formal warnings even before the right to counsel may be *voluntarily* waived away. *See Faretta v. California*, 422 U.S. 806 (1975). Those rules logically require the holding that—contrary to the Tennessee Supreme Court's view—the right to counsel cannot be *involuntarily* forfeited as some kind of sanction for misbehavior, at least absent the formal warnings that are required before a defendant may give up that same right on purpose.

Nonetheless, there is confusion in the lower courts on this issue. Some courts correctly recognize that no involuntary waiver of the right to counsel can be permitted. And even those courts that permit forms of (what they call) "implicit waiver" of the right to counsel—typically used to deal with dilatory misconduct by criminal defendants—will usually require procedural protections or due process guarantees like formal *Faretta* warnings of the kind the Tennessee Supreme Court ignored here. What is certain is that only a few courts would permit outright involuntary forfeiture of the right to counsel, such that most courts of last resort would have decided this case differently from those below. This split in lower court authority should be resolved in favor of this Court's longstanding rule that the right to counsel cannot be involuntarily relinquished.

This is an especially good vehicle for considering this question. The stakes are high, as petitioner would be the first capital defendant in a century to be executed after being forced to represent himself. And the facts are clear: The lower courts described their deprivation of petitioner's rights as a "sanction," refused the participation of attorneys who were ready and willing to represent him, granted a continuance to *the government* after the sanction (eliminating any concern with delay), and refused petitioner's efforts to cure the problem and restore his full representation by an attorney. This usefully isolates the impermissible effort to punish a recalcitrant defendant by forcing him to represent himself from the potentially permissible efforts courts must sometimes undertake to prevent dilatory behavior by defendants who do not allow their trials to move forward.

In short, this case is a perfect opportunity to resolve an important issue on which lower courts of last resort are divided. The right to assistance of counsel is a "fundamental right," essential to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 340, 344-45 (1963). And the right is especially vital "in a capital case" like this one, "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like." *Powell v. Alabama*, 287 U.S. 45, 71 (1932). It is thus "the duty of the court," in such circumstances, "whether requested or not, to assign counsel for him as a necessary requisite of due process of law." *Id.* Certiorari should be granted and this critical protection for defendants maintained.

I. Courts Of Last Resort Are Split On Whether A Criminal Defendant May Be Forced Involuntarily To Represent Himself As A Sanction For Misconduct.

At the outset, it is important to distinguish between the concepts of waiver and forfeiture in the context of the Sixth Amendment right to counsel. "Waiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). Waiver, in this context, is typically understood as the voluntary and "*intentional* relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added); *see Faretta*, 422 U.S. at 835. Forfeiture, "[u]nlike waiver, … 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." *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995). Although courts sometimes confuse these concepts, removing the right to counsel

as a permanent "sanction" clearly falls on the "forfeiture" side of the line, since the involuntary waiver of the right is by definition contrary to a defendant's preference and intent.

1. There is an acknowledged split among courts of final review on whether and when a criminal defendant may be forced against his will to represent himself as a sanction for bad behavior. It has been recognized by the leading treatise, 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.3(c) (4th ed. 2017), and in other scholarly works. *See* Marc C. McAllister, *Forfeiture-by-Wrongdoing and* Faretta*: Reaffirming Counsel's Vital Role When Defendants Manipulate Competing Sixth Amendment Representation Rights*, 44 Hofstra L. Rev. 1227, 1230-32 (2016). Like these scholarly materials, many of the cases discussed below recognize the disagreement among authorities as well. *See, e.g.*, *United States v. Ductan*, 800 F.3d 642, 649, 651 (4th Cir. 2015) (per curiam); *State v. Suriano*, 893 N.W.2d 543, 553-54 (Wis. 2017), *cert. denied*, 138 S. Ct. 638 (2018); *State v. Porter*, 815 S.E.2d 753 (N.C. Ct. App. 2018) (table).

The Third and Eleventh Circuits, like the Tennessee court below, hold that a defendant who engages in misconduct can be forced involuntarily to represent himself. *Goldberg*, 67 F.3d at 1099-1101; *United States v. McLeod*, 53 F.3d 322, 325-26 (11th Cir. 1995). "Once a defendant has been warned that he will lose his attorney if," for example, "he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel." *Goldberg*, 67 F.3d at 1100. These courts have recognized that these "are not 'waiver' cases in the true sense of the word," because

"although [these defendants] are voluntarily engaging in misconduct knowing what they stand to lose, they are not affirmatively requesting to proceed *pro se*." *Id.* at 1101. But these circuits will permit a trial court, in its discretion, to strip a defendant's right to counsel with no prior warnings at all—"regardless of the defendant's knowledge" of the risks "and irrespective of whether the defendant intended to relinquish the right" to counsel—if the misconduct is "extremely serious." *United States v. Leggett*, 162 F.3d 237, 250-51 (3d Cir. 1998) (quoting *Goldberg*, 67 F.3d at 1100-02); *McLeod*, 53 F.3d at 326.

Other federal circuits allow the same—requiring defendants involuntarily to proceed pro se when they have been warned, and under some circumstances, even when they have not. *See United States v. Sutcliffe*, 505 F.3d 944, 954-56 (9th Cir. 2007); *United States v. Thompson*, 335 F.3d 782, 785 (8th Cir. 2003). Numerous state supreme courts, including the Tennessee Supreme Court here, Pet. App. 399a-403a, have adopted the Third and Eleventh Circuits' framework, expressly citing *Goldberg* and often *McLeod* with approval. *See, e.g.*, *State v. Hampton*, 92 P.3d 871, 874-75 (Ariz. 2004) (en banc); *Bultron v. State*, 897 A.2d 758, 764 (Del. 2006); *Commonwealth v. Means*, 907 N.E.2d 646, 656 (Mass. 2009); *State v. Nisbet*, 134 A.3d 840, 851 (Me. 2016); *State v. Jones*, 772 N.W.2d 496, 504-05 (Minn. 2009); *Commonwealth v. Lucarelli*, 971 A.2d 1173, 1179 (Pa. 2009); *State v. Holmes*, 302 S.W.3d 831, 838-39 (Tenn. 2010); *State v. Pedockie*, 137 P.3d 716, 721-23 (Utah 2006); *see also King v. Superior Court*, 132 Cal. Rptr. 2d 585, 592-93 (Ct. App. 2003); *State v. Montgomery*, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000); *State v. Boykin*, 478 S.E.2d 689, 691

(S.C. Ct. App. 1996); *cf. Suriano*, 893 N.W.2d at 552 (defendants may either voluntarily waive or involuntarily be stripped of right to counsel).

In the Fourth Circuit, on the other hand, a defendant may never be required to proceed pro se absent an express, voluntary, knowing, and intelligent waiver. As the Fourth Circuit recognizes, the right to counsel may not be "relinquished" by "means short" of knowing and intelligent waiver under this Court's precedents. *Ductan*, 800 F.3d at 649. The Fourth Circuit has considered and expressly rejected the approach of those "courts [that] have found that a defendant can validly waive the right to counsel by conduct or implication" after being warned, because representation is the "default position" and waiver of counsel must be "clear and unequivocal." *Id.* at 650. *A fortiori*, the Fourth Circuit has "never endorsed t[he] notion" that "a defendant can forfeit the right to counsel" without any warnings at all, heeding Justice Scalia's observation that although "'[s]ome rights may be forfeited by means short of waiver,'" the right to counsel "'may not.'" *Id.* at 651 (quoting *Freytag*, 501 U.S. at 894 n.2) (Scalia, J., concurring in part and concurring in the judgment).

One particularly important aspect of this split, as can be seen above, is that the Fourth Circuit now has a different rule than multiple state courts within the same geographical area. North Carolina has recently observed, for example, that the Fourth Circuit's holding in *Ductan* "is contrary to established North Carolina precedent." *Porter*, 815 S.E.2d at *6. South Carolina also permits its courts to remove a defendant's attorney as a sanction. *State v. Roberson*, 675 S.E.2d 732, 733-34 (S.C. 2009); *see Boykin*, 478 S.E.2d at 692

(S.C. Ct. App.) (following *Goldberg* framework). This causes particular mischief when federal courts review collateral attacks on state court convictions within the strictures of AEDPA's standard of review, so it is important for this Court to resolve the issue.

Like the Fourth Circuit, Colorado also rejects the idea that a criminal defendant may be forced to represent himself involuntarily, requiring instead that the "record as a whole … show that the defendant knowingly and willingly undertook a course of conduct that evinces an unequivocal intent to relinquish or abandon his right to legal representation." *King v. People*, 728 P.2d 1264, 1269 (Colo. 1986) (en banc). Even when a defendant engages in a "pattern of obstreperous, truculent, and dilatory behavior," Colorado trial courts have the duty to "properly advise the defendant" of "the consequences of his or her actions," and engage in a *Faretta* colloquy to determine the "defendant's awareness of the right to counsel and the defendant's understanding of the many risks of self-representation," before finding that a defendant "evince[d]" an "unequivocal intent" to relinquish counsel. *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006) (en banc).

Finally, a few jurisdictions that permit the sanction still severely limit the circumstances under which a court may impose it. Absent prior warnings, Massachusetts and California, for example, require that a court provide notice and a hearing, at which the defendant is entitled to *separate* counsel to represent the defendant's interests in maintaining representation, before the sanction may be imposed. *See, e.g.*, *Means*, 907 N.E.2d at 664 (judge "must give notice of and conduct a hearing in which the defendant is given a full and fair opportunity to show why so severe a sanction"

as forfeiture "should not be imposed"); *King*, 132 Cal. Rptr. 2d at 600 ("Before a finding of forfeiture is made, the court must conduct a hearing and give defendant notice of the hearing."). These courts hold that involuntary forfeiture of counsel "should be a court's last resort" and "should occur only after lesser measures to control defendant, including but not limited to a warning" and even "physical restraints or protections, have failed." *King*, 132 Cal. Rptr. 2d at 588-89.

There is thus a square disagreement between the Fourth Circuit and Colorado Supreme Court on the one hand, and (at least) the Tennessee Supreme Court and the Third and Eleventh Circuits on the other, over whether involuntary forfeiture of the right to counsel is permissible under the Sixth Amendment. And while other courts (including state supreme courts within the jurisdiction) have recently disagreed with the Fourth Circuit's absolutist position, many impose far greater limitations on so-called "implicit waiver" or "waiver by conduct"—in truth, involuntary waiver, *see Goldberg*, 67 F.3d at 1101—than the Tennessee Supreme Court imposed below.

2. Indeed, even setting aside the Fourth Circuit and Colorado—which always require that the defendant be found to have voluntarily waived the right to counsel—jurisdictions that permit involuntary removal of defense counsel are split as to the procedural process required to do so. This is particularly true of the *Faretta* warnings that this Court requires for *ordinary* relinquishment of the right to counsel, and which many lower courts of last resort accordingly require for involuntary waiver.

Many jurisdictions require that, before continued misconduct can be taken as an implicit waiver of the

right to counsel, the court must engage the defendant in a colloquy on the dangers and disadvantages of self-representation of the kind set out in *Faretta*. *See, e.g.*, *King v. Bobby*, 433 F.3d 483, 493 (6th Cir. 2006) (imputing waiver "requires … the minimum *Faretta* warnings"); *Goldberg*, 67 F.3d at 1102 (no imputed waiver because "the district court failed to inform [defendant] of the risks of self-representation in accordance with *Faretta*"); *Bultron*, 897 A.2d at 764 (Del.) (holding that there can be no valid implicit waiver "unless the defendant also receives *Faretta* warnings") (internal quotation marks omitted); *Jones*, 772 N.W.2d at 505 (Minn.) ("The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct."); *People v. Smith*, 705 N.E.2d 1205, 1207-08 (N.Y. 1998) (affirming reversal of implicit waiver finding when trial court failed to perform "searching inquiry" to be "reasonably certain" that defendant appreciated the "dangers and disadvantages of giving up the fundamental right to counsel") (internal quotation marks omitted); *Trujillo v. State*, 2 P.3d 567, 575 (Wyo. 2000) (reversing implicit waiver finding when trial court failed to give defendant a warning "comparable" to *Faretta* warnings); *see also Sutcliffe*, 505 F.3d at 955 (9th Cir.) (before finding implicit waiver, "[t]he court correctly advised Defendant of the risks of self-representation, the nature of the charges against him, and the penalties he faced"); *Means*, 907 N.E.2d at 658 (Mass.) (citing *Goldberg*, 67 F.3d at 1102).

But others, like Tennessee, do not require warnings sufficient to meet *Faretta*'s standards. Pet. App. 35a (noting that Tennessee court did not provide "the warnings typically required" by *Faretta*); *Jones v.*

State, 536 S.E.2d 511, 513 (Ga. 2000) (holding that defendant "was attempting to use the discharge and appointment of other counsel as a dilatory tactic, which was the functional equivalent of a knowing and voluntary waiver of appointed counsel") (quotation marks and brackets omitted); *Roberson*, 675 S.E.2d at 733-34 (holding "*Faretta* inapplicable" when "waiver by conduct of the right to counsel is inferable from [defendant]'s actions"); *see also Jackson v. State*, 868 N.E.2d 494, 501 (Ind. 2007) (finding waiver by conduct even though "defendant ha[d] made no indication to the trial court that he intend[ed] to proceed pro se").

Moreover, as noted above, those jurisdictions that sometimes permit involuntary waiver without a *Faretta* warning also differ on whether notice, a hearing, and separate counsel are required before sanctioning a defendant by removing his right to counsel, like Massachusetts and California do. *Means*, 907 N.E.2d at 662-64; *King*, 132 Cal. Rptr. 2d at 600. In contrast, the Third and Eighth Circuits have allowed imposition of involuntary forfeiture of counsel when there were no prior warnings, and no notice or hearing was conducted beforehand. *See, e.g.*, *Thompson*, 335 F.3d at 785; *Leggett*, 162 F.3d at 240.

The wide confusion in the lower courts on this issue is evident, and this Court could clear it up with a decision in this case outlining what protections (if any) must be imposed before involuntary waivers of the right to counsel can be imposed. But even on the narrow Question Presented, the split in authority is clear and bright. By our count, there are now (at least) twelve jurisdictions in which involuntary waivers without *Faretta* warnings have been permitted, and at least six jurisdictions in which they have not. And

that is before considering the other protections that some jurisdictions require and petitioner did not receive in Tennessee.

The intractable split in authority on this issue is inappropriate for a right so fundamental. Had his trial taken place in Colorado, Carruthers could not have "implicitly waived" his right to counsel unless he had received the *Faretta* colloquy and the record evinced an "unequivocal intent to relinquish or abandon his right to legal representation." Massachusetts and California would have reversed for failure to appoint separate counsel to represent Carruthers' interests at a hearing on whether he should be sanctioned with the loss of counsel. And in federal court in the Fourth Circuit, Carruthers could not have been stripped of his counsel at all—only an express, knowing, intelligent, and voluntary waiver would do, so the trial court would have been reversed. Yet just down the street, in a state court in the Carolinas, the trial court's sanction may have been affirmed under the standards employed in those States. So too in the jurisdictions that have adopted the Third and Eleventh Circuits' *Goldberg* and *McLeod* approach. Petitioner's Sixth Amendment right to trial counsel should not depend on which of these jurisdictions he was tried in. And only this Court can bring uniformity to the issue.

II. Jurisdictions That Recognize The Sanction Apply It Inconsistently And Unpredictably, Leading To Indefensible Results.

In practice, the confusion outlined above has led to inconsistent and unpredictable results incompatible with the orderly administration of justice. For example, in jurisdictions that permit a trial court to force

defendants to proceed pro se as a sanction for misconduct, like Tennessee, courts seem to have no regularized account of what behavior is egregious enough to warrant such an extreme sanction. Sometimes, for example, courts find that a "defendant's threats of violence or acts of violence against defense counsel or others" are sufficient. *See Means*, 907 N.E.2d at 660 (Mass.); *see also Leggett*, 162 F.3d at 240 (3d Cir.) (forfeiture upheld when defendant attacked counsel in the courtroom); *McLeod*, 53 F.3d at 325-26 & n.13 (11th Cir.) (forfeiture upheld when defendant verbally abused and threatened counsel); *People v. Sloane*, 262 A.D.2d 431, 432 (N.Y. App. Div. 1999) (forfeiture upheld when defendant engaged in "persistent pattern of threatening, abusive, obstreperous, and uncooperative" behavior towards counsel).

But sometimes other, far worse conduct involving threats and acts of violence are found to be insufficient to support involuntary forfeiture of the right to counsel. *See, e.g.*, *Holmes*, 302 S.W.3d at 848 (Tenn.) (reversing forfeiture-of-counsel sanction, even though defendant not only threatened his trial counsel, but also "physically attacked" him); *King*, 132 Cal. Rptr. 2d at 589-90, 596 (Ct. App.) (reversing trial court's forfeiture decision even though defendant "head-butted his first attorney" and "grabbed" a subsequent attorney, threatening to "crush" his "head," among other misconduct, because trial court could have taken less drastic measures); *Smith*, 705 N.E.2d at 1206 (N.Y.) (affirming reversal of forfeiture finding even though defendant threatened that he "would put a knife in the attorney's head"); *see also Goldberg*, 67 F.3d at 1102 (reversing forfeiture even though defendant threatened to kill attorney, among other things); *Hampton*,

92 P.3d at 872-73 (Ariz.) (remanding for appointment of counsel even though defendant had "strong ties with the Aryan Brotherhood" and made credible death threats to counsel).

And courts have sometimes permitted the sanction when a defendant has gone through "more than one appointed counsel, perhaps because in those circumstances the means of proceeding with counsel have been exhausted or found futile." *Means*, 907 N.E.2d at 659 (Mass.); *see, e.g.*, *Leggett*, 162 F.3d at 240 (3d Cir.) (second appointed counsel); *McLeod*, 53 F.3d at 325 (11th Cir.) (second appointed counsel); *Sloane*, 262 A.D.2d at 432 (N.Y. App. Div.) (fourth appointed counsel). But sometimes they have not, even for the most dilatory of conduct. In one case, the state supreme court reversed a trial court's forfeiture sanction for a revocation proceeding, even though, "over the course of … seven years," the defendant had a "turbulent relationship" with "nine different attorneys," seven of whom "had been permitted to withdraw because of the defendant's pattern of verbally threatening conduct against them." *Commonwealth v. Gibson*, 54 N.E.3d 458, 468-69 (Mass. 2016). In another, a trial court's forfeiture sanction was reversed because the defendant's "pattern of serious misconduct, violence and threats of violence, against a succession of court-appointed attorneys" was found insufficient to justify forfeiture. *King*, 132 Cal. Rptr. 2d at 589 (Ct. App.).

A last example, particularly significant here: Some courts caution that the sanction should not be "applied to deny a defendant representation during trial." *Means*, 907 N.E.2d at 659 (Mass.). The "forfeiture of counsel at sentencing," for instance, "does not deal as serious a blow to a defendant as would the

forfeiture of counsel at the trial itself." *Leggett*, 162 F.3d at 251 n.14 (3d Cir.); *see McLeod*, 53 F.3d at 326 n.13 (11th Cir.) (affirmance of trial court's forfeiture expressly "limited" to "forfeiture of … right to counsel at the hearing on the motion for a new trial"). But again, courts have been unpredictable, sometimes affirming the sanction of forced pro se representation at trial for conduct far less serious than when other courts reverse. *Compare United States v. Garey*, 540 F.3d 1253, 1269 (11th Cir. 2008) (en banc) (affirming forfeiture for trial stage when defendant was "uncooperative" with first and only counsel), *Suriano*, 893 N.W.2d at 545 (Wis.) (affirming forfeiture for trial stage when defendant was uncooperative with and verbally abused counsel), *and Kostyshyn v. State*, 51 A.3d 416, 417 (Del. 2012) (affirming forfeiture for trial stage when defendant called counsel "an idiot," threatened to sue him for malpractice, and alleged that he was colluding with the prosecutor), *with Goldberg*, 67 F.3d at 1102 (3d Cir.) (reversing forfeiture for trial stage even though defendant threatened to kill attorney, among other things), *and King*, 132 Cal. Rptr. 2d at 591 (Ct. App.) (reversing forfeiture for trial stage even though defendant threatened multiple attorneys, violently attacked one, and physically assaulted another).

These are merely examples from various appellate and state supreme courts around the country. They show that sometimes courts permit the sanction for threats and violence, and sometimes they do not. They sometimes permit a defendant to have multiple court-appointed attorneys, and sometimes they do not. They sometimes limit the involuntary loss of counsel to proceedings other than trial, and sometimes they do not.

Even courts of the same jurisdiction fail to apply their standards consistently. *Compare, e.g.*, *McLeod*, 53 F.3d at 326 & n.13 (11th Cir.) (limiting forfeiture to hearing on the motion for a new trial when defendant was "repeatedly abusive, threatening, and coercive" to several attorneys), *with Garey*, 540 F.3d at 1257, 1269 (11th Cir.) (affirming forfeiture for entirety of trial when defendant was "uncooperative" with first and only counsel). The case law is replete with additional examples of inconsistent application among state and federal trial courts as well, too impracticable to address.

This kind of inconsistency is inappropriate with respect to such a fundamental right. The constitutional right to counsel both protects all the other constitutional rights of a defendant at trial, and also helps to build the record necessary to vindicate *itself*. Put another way, once a defendant is involuntarily deprived of counsel, it may be difficult to ensure the creation of an adequate record that will explain whether that sanction was itself appropriate or not. For this reason, it is important to have clear and uniform standards before such a severe sanction is imposed. The *status quo* does not approach that goal, however—there seem to be no regular rules, and even the standards some jurisdictions have created are inconsistently applied within those jurisdictions themselves.

When it comes to a criminal defendant's Sixth Amendment counsel right, such uncertainty is intolerable. There is a "need for clarity and certainty in the criminal law," and this Court has not hesitated to reject criminal-law standards that "differ widely in their application." *Burrage v. United States*, 571 U.S. 204, 217 (2014) (rejecting "substantial" or "contributing

factor" tests of causation because "criminal cases differ widely in their application of" the standards). This case provides a prime opportunity to bring clarity and certainty to the issue, so that defendants need not guess at whether they will be forced to represent themselves against their will, sometimes for doing little more than challenging their counsel's adequacy. *See, e.g.*, *Garey*, 540 F.3d at 1257, 1269 (affirming forfeiture when defendant was "uncooperative" with counsel who defendant alleged "was unable to advocate zealously on his behalf").

III. The Decision Below Is Incorrect.

The Tennessee Supreme Court affirmed the "extreme sanction" of forcing petitioner involuntarily to represent himself in his capital case, for the entirety of trial through sentencing. Predictably, he was sentenced to death. In doing so, the Tennessee court violated this Court's clear precedent.

1. First, and most importantly, there is not one single case where this Court has ever allowed an implicit waiver, nor recognized an involuntary forfeiture, of the Sixth Amendment right to counsel. Rather, the Court has reaffirmed time and again that the right to counsel is fundamental and must be affirmatively waived, and that waiver must be knowing and intelligent. *Faretta*, 422 U.S. at 835; *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Boyd v. Dutton*, 405 U.S. 1, 2-3 (1972) (per curiam); *Gideon*, 372 U.S. at 340; *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *Tomkins v. Missouri*, 323 U.S. 485, 488 (1945); *Zerbst*, 304 U.S. at 463-64.

The "controlling rule" since at least 1972, this Court has plainly stated, is "that 'absent a knowing

and intelligent waiver, no person may be imprisoned for any offense … unless he was represented by counsel at his trial.'" *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (quoting *Argersinger*, 407 U.S. at 37). Thus, for a criminal conviction to stand, a defendant must either have been "represented by counsel at his trial," or knowingly and intelligently waived the right. *Id.* Waiver must be clear and unequivocal, and the record must show that the defendant was "literate, competent, and understanding, and that he was *voluntarily* exercising his informed free will." *Faretta*, 422 U.S. at 835 (emphasis added).

These precedents strongly suggest that any involuntary waiver of the right to counsel is inappropriate—indeed, they say so on their face. *See, e.g.*, *Faretta*, 422 U.S. at 835; *see also Boyd*, 405 U.S. at 2-3 (right to counsel may "be waived only by voluntary and knowing action"); *Carnley*, 369 U.S. at 516 ("Presuming waiver from a silent record is impermissible."). And this is an administrable rule. Though courts have worried that this would allow defendants to engage in dilatory conduct, there are several other sanctions that could be tried before permanent stripping of the right to counsel of the kind the Tennessee Supreme Court employed here. For example, defendants could be excluded from the courtroom, they could be deprived of their *choice* of counsel, or they could even be physically restrained, and each would have a far less prejudicial effect than punishing a defendant by preventing even a ready and willing attorney from representing him. *See Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (defendant may be excluded from courtroom); *United States v. Brown*, 785 F.3d 1337, 1343 (9th Cir. 2015) (indigent defendant may be forced to

proceed with counsel unless conflict "is so extreme as to constitute a constructive denial of counsel altogether") (internal quotation marks omitted); *King*, 132 Cal. Rptr. 2d at 589 (involuntary loss of counsel permissible only after physical restraints or protections have failed).

But even if this Court were unwilling to endorse a rule that forbid all involuntary waivers of the right to counsel, it is unambiguously clear that *Faretta* warnings are the minimum procedural requirement necessary before that right can be involuntarily waived through defendant misconduct. *Faretta* itself logically requires as much. If a defendant must receive formal warnings before we accept his *express* desire to represent himself, 422 U.S. at 835-36, surely the same warnings are required before that desire can be *implied* by his (mis)conduct.

The Tennessee Supreme Court's holding cannot be squared with this Court's precedents. It failed to mention this Court's controlling rule in *Argersinger*, instead creating its own rule that the right to counsel at trial is "*[o]rdinarily*" subject to knowing, intelligent, and voluntary waiver. Pet. App. 397a (emphasis added). And the Sixth Circuit below found it "troubling that the state trial court, after several hearings at which [petitioner] was effectively unrepresented, required [petitioner] to proceed pro se through his capital trial without giving him" *Faretta* warnings. *Id.* at 35a.

Accordingly, the Sixth Circuit erred in holding that the Tennessee Supreme Court did not unreasonably apply this Court's clearly established precedent. Pet. App. 35a-36a; *see, e.g.*, *Gilchrist v. O'Keefe*, 260 F.3d 87, 100 (2d Cir. 2001) (finding it was not

unreasonable under AEDPA for state court to order sanction of forfeiture in non-capital case, and only for sentencing). *Argersinger*'s command that "no person may be imprisoned for any offense" absent either representation or "knowing and intelligent waiver," 407 U.S. at 37, is perfectly clear, and left no room for the Tennessee Supreme Court to create exceptions. Pet. App. 406a (holding that "extreme sanctions" of "implicit waiver" and "forfeiture" are both permissible exceptions to Supreme Court's requirements that waiver be voluntary, knowing, and intelligent). And there is no logical way whatsoever to square *Faretta*'s requirement of formal warnings before an express waiver of the right to counsel with Tennessee's failure to require such warnings before imposing an extraordinary sanction with the same effect. Moreover, Tennessee's unreasonable application of the Sixth Amendment is evident in the extreme expansion of the sanctioning power that it allows. Again, absent this Court's intervention, Tennessee will be the first jurisdiction in a century to execute a defendant forced to represent himself in a capital trial and sentencing. *See, e.g.*, *Cotto v. Herbert*, 331 F.3d 217, 248, 251 (2d Cir. 2003) (state court's application of federal law unreasonable under AEDPA, when "no other case" had applied "forfeiture-by-misconduct" so broadly to confrontation clause right, "in light of the countervailing, clearly established right to cross-examine for bias").

2. Those courts that seem to believe, like Tennessee, that loss of counsel can be an appropriate "sanction" for misconduct, are also engaging in an unreasonable misapplication of this Court's decision in *Illinois v. Allen*, *supra*. There, this Court held that—

> a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.

397 U.S. at 343. "Deplorable as it is to remove a man from his own trial, even for a short time," this Court found that the trial judge did not err in doing so when the defendant "was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner." *Id.* at 346-47. This Court specified that "as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings," the "right to be present can, of course, be reclaimed." *Id.* at 343. At all times that Allen was excluded from the courtroom, court-appointed counsel represented him in absentia.

The Eleventh Circuit in 1995 became the first federal court of appeals to expand *Allen* and hold that "a defendant who is abusive toward his attorney may forfeit his right to counsel." *McLeod*, 53 F.3d at 325. The Third Circuit quickly followed suit, citing *McLeod* with approval. *Goldberg*, 67 F.3d at 1100. And it is to these two cases that nearly every jurisdiction points as support for stripping defendants of their counsel for misbehavior. *See supra* Part I.1. But these cases plainly misapply *Allen*.

First, sanctioning a defendant by requiring him to proceed pro se is the very opposite of what *Allen* permits—removing a defendant's implied right to *self-*

representation as a means of maintaining orderly proceedings. The defendant in *Allen* actually "wished to conduct his own defense," and after "considerable argument" with the judge, was permitted to proceed pro se. 397 U.S. at 339 (internal quotation marks omitted). But he lost the right when he was disorderly and disruptive during the trial. *Id.* What *Allen* permits is "*terminat[ing]* self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," not *requiring* self-representation. *Faretta*, 422 U.S. at 834 n.46 (emphasis added). *Compare* Pet. App. 398a n.26 (citing *Faretta* as a "*cf.*" for the inverse proposition).

"Of the two rights"—the implied right to self-representation and the right to counsel explicit in the text of the Sixth Amendment—"the right to counsel is preeminent and hence, the default position." *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). Thus, even when Allen regained his Sixth Amendment right to be present, he lost his right to reject trial counsel. *See Allen*, 397 U.S. at 341; *Golden v. Newsome*, 755 F.2d 1478, 1482 (11th Cir. 1985) (a defendant waives his right to be present if he absconds during trial, but does not waive his right to counsel, because "courts must 'indulge every reasonable presumption against waiver'" of right to counsel) (quoting *Zerbst*, 304 U.S. at 464-65).

Second, nothing in *Allen* remotely supports the concept of forfeiture of any Sixth Amendment right, let alone the fundamental right to counsel, without prior warnings, as allowed in the Third and Eleventh Circuits, and those jurisdictions that follow them, like Tennessee. To the contrary, *Allen* only allowed "that a defendant can lose" his right to represent himself

"*after he has been warned by the judge*." *Allen*, 397 U.S. at 343 (emphasis added). This Court has further expanded on what kind of warnings are required—courts that do not provide the warnings set forth in *Faretta* thus unreasonably apply this Court's precedents in an additional way.

All of this makes plain sense, when one looks at the text of the Sixth Amendment. The right of self-representation is only implied, *Faretta*, 422 U.S. at 819, but the right to "Assistance of Counsel" is right there in the text. U.S. Const. amend. VI. And the Amendment provides that a defendant shall have that right "in *all* criminal prosecutions," not "*some* criminal prosecutions" or "criminal prosecutions in which you comport yourself well" or the like. Petitioner of course acknowledges that dilatory behavior, particularly after the court engages defendant in a *Faretta* colloquy, might be a basis on which to impose some sanction so that the trial can move forward. Indeed, the orderly and prompt administration of justice is what *Allen* was all about. But absent that contingency, there is no basis in the constitutional text for *permanently* and *involuntarily* depriving a defendant of the right to representation by a ready and willing counsel.

IV. This Case Is A Good Vehicle For The Important Question Presented.

1. This case is a good vehicle to resolve the important Question Presented, because there are no obscuring facts. Petitioner had not one, but two criminal defense attorneys who were present and willing to represent him at trial. And for his part, petitioner pleaded with the court to allow Massey to represent him. Moreover, further delay was not an issue—the

trial court granted a three-month continuance to the government after it sanctioned defendant with denial of his right to counsel, during which time the trial court could easily have reversed course without any negative effect on the orderly administration of justice. Yet the trial court still refused to restore petitioner's right to be represented by a ready and willing attorney, making clear that it was imposing that measure as a punishment for previous misconduct and not as a temporary measure (or implied, temporary waiver) necessary to move the trial forward. And that holding was further clarified by the Tennessee Supreme Court, which expressly referred to the deprivation of counsel as a "sanction" and not an administrative necessity. *See* Pet. App. 41a (Stranch, J., concurring) (quoting the Tennessee Supreme Court and noting that language of sanction should not be applied in this context). Finally, the Sixth Circuit clarified that *Faretta* warnings were not given, *id.* at 35a (majority opinion), thus isolating the precise Question Presented in a setting entirely free from ancillary concerns about trial delay or the like.

2. In addition to its clarifying facts, this case is a good vehicle because its capital posture makes plain the importance of this issue. Tennessee may be the first jurisdiction in a century to attempt to deprive a capital defendant of his right to counsel at trial and sentencing, but the creeping influence of the split in authority outlined above has now brought other courts close to the same precipice as well.

For example, the Supreme Court of Pennsylvania recently found that a capital defendant, by engaging in "extremely serious" misconduct, forfeited his right to counsel on collateral review, even though the defen-

dant had not previously been warned that he might be so sanctioned. *Commonwealth v. Staton*, 120 A.3d 277, 286 (Pa. 2015) (internal quotation marks omitted). Although the defendant in no way "inten[ded] to relinquish a right," the court found that the defendant's "physical assault of his counsel in the presence of the court constitute[d] extremely serious conduct establishing the forfeiture of the right to counsel," even though the defendant received no prior warnings that misconduct could result in the loss of his attorney. *Id.* (internal quotation marks omitted).

The Supreme Court of Arizona also has contemplated stripping away a capital defendant's right to counsel. In *State v. Hampton*, the defendant, directly appealing multiple capital murder convictions and death sentences, made threats against various appellate counsel, each of whom was permitted to withdraw in turn. 92 P.3d at 872-73. Although the court remanded for appointment of counsel for procedural reasons particular to the case, it "t[ook] t[he] occasion … to expressly warn the defendant that any future misconduct c[ould] be deemed a waiver of his right to counsel and may result in him being forced to represent himself in his capital appeal." *Id.* at 875. The court further warned "that conduct of the sort alleged … has extremely serious potential consequences with respect to future representation by appointed counsel," and presaged that "serious misconduct by a criminal defendant" might well "result in forfeiture of the right to counsel without prior warning." *Id.*

It should be clear from this Court's precedents over the past 85 years that involuntary deprivations of the right to counsel in *capital* cases is a bridge too far—or at least requires the most stringent procedural

protections available. As this Court has put it, "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense … , it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." *Powell*, 287 U.S. at 71. "To hold otherwise would be to ignore the fundamental postulate" "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Id.* at 71-72 (internal quotation marks omitted).

In sum, this case presents a good vehicle to resolve a split that is ready for this Court's intervention. There are reasoned opinions addressing every angle of the issue from courts of final review all over the country, and the issue is unlikely to benefit from further percolation. This Court's intervention is necessary to bring uniformity and predictability to the administration of a fundamental right. And without this Court's involvement, that right will continue to be eroded in a way that allows more defendants—including capital defendants—to be involuntarily deprived of the representation that the plain text of the Sixth Amendment guarantees. This Court should thus grant the writ and reverse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 23, 2018

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0083p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-5457

Appeal from the United States District Court for the Western District of Tennessee at Memphis.

No. 2:08-cv-02425—Jon Phipps McCalla, District Judge.

TONY VON CARRUTHERS,
Petitioner-Appellant,

v.

TONY MAYS, WARDEN,
Respondent-Appellee.

Argued: June 13, 2017

Decided and Filed: May 3, 2018

Before: COLE, Chief Judge; ROGERS and STRANCH, Circuit Judges.

* * *

ROGERS, J., delivered the opinion of the court, in which COLE, C.J. and STRANCH, J., joined. STRANCH, J. (pg. 25), delivered a separate concurring opinion.

OPINION

ROGERS, Circuit Judge. Tony Von Carruthers appeals the district court's judgment denying his petition for a writ of habeas corpus. A Tennessee jury

convicted Carruthers in 1996 of three counts of first-degree, premeditated murder and imposed a death sentence for each of the three murder convictions. The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed the convictions and sentences on direct appeal. After the state courts denied Carruthers postconviction relief, he filed a petition for a writ of habeas corpus with the district court, arguing, among other things, that he was denied counsel at critical stages of the proceedings in violation of *United States v. Cronic*, 466 U.S. 648 (1984), when the trial court granted his appointed counsel's motion to withdraw and ordered Carruthers to proceed pro se, that the trial court violated his Sixth Amendment right to counsel when it ordered him to proceed pro se, and that he was not competent to stand trial or to represent himself. The district court denied Carruthers's petition, and this court granted a certificate of appealability on these three issues. The district court correctly denied relief, because Carruthers has procedurally defaulted his *Cronic* and competency claims, and the Tennessee Supreme Court's decision that Carruthers forfeited his right to counsel was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

I.

A Tennessee jury convicted Carruthers of three counts of first-degree, premeditated murder in 1996. *State v. Carruthers*, 35 S.W.3d 516, 524 (Tenn. 2000). The facts of the underlying crimes are relevant to this appeal only as background. In short, the prosecution introduced evidence at trial to show that, in February of 1994, Carruthers and an accomplice, James Montgomery, assaulted two men and a woman, robbed

them, then buried the three alive. *See id.* at 524-31. The victims' bodies were found buried in a cemetery in Memphis, Tennessee about a week after they had disappeared. *Id.* at 524. The jury found that the aggravating circumstances surrounding Carruthers's crimes outweighed the mitigating circumstances beyond a reasonable doubt and imposed a death sentence for all three murder convictions. *Id.* at 531-32.

A.

Carruthers's interactions with his appointed counsel leading up to trial, which ultimately resulted in his representing himself during the capital murder trial, are most relevant to this appeal. These facts, as recited by the Tennessee Supreme Court, are:[1]

> Carruthers' family initially retained AC Wharton, Jr., to represent him. Wharton was allowed to withdraw on March 19, 1994, because of a conflict of interest. On May 31, 1994, the trial court appointed Larry Nance to represent Carruthers. . . . At a hearing held on July 15, 1994, the trial court scheduled a pre-trial motions hearing for September 30, 1994 and set the case for trial on February 20, 1995. Carruthers was present at this hearing and asked the trial court, "I'd like to know why this is being dragged out like this. I asked Mr. Nance if we can go forward with a motion of discovery and he's asking for a reset. And I'd like to know why." Nance

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[1] "[F]actual findings made by a state appellate court based on the state trial record" are presumed correct in federal habeas proceedings under 28 U.S.C. § 2254(e)(1). *Mason v. Mitchell*, 320 F.3d 604, 614 (6th Cir. 2003).

informed the court that he was planning to visit the prosecutor's office later in the week to review the discoverable materials and evidence. The trial judge then advised Carruthers in pertinent part as follows:

> [G]iven the fact that the trial isn't until February, we're setting the next Court date in September for the arguing of motions. Between now and September, your attorney and the attorneys representing your two co-defendants can get with the prosecutors and can obtain their discovery. They're all excellent attorneys. And they'll all do that. And once they've obtained the discovery, they'll meet with their clients and they'll file appropriate motions, which will be heard on September 30th, which will still be well in advance of the trial date, which will give everyone ample time to then evaluate the case, after the motions have been heard and ruled on. So given the fact that we can't get a three-defendant capital case that's still in the arraignment stage to trial any earlier than February, there's plenty of time for your attorneys to meet with the prosecutors, get the discovery, meet with the clients, file motions, argue motions. Just because he hadn't done it yesterday, because you want him to have it done yesterday, doesn't mean that he's not working on your case diligently and properly. He'll have everything done well in advance of the next Court date. And so,

> you know, he may not do it the very moment you want it done, but you're going to have to work with him on that because there's ample time for him to get it done.

. . . When the pre-trial motions hearing convened on September 30, 1994, all defense attorneys involved in the case requested a continuance until November 14, 1994 so that additional pre-trial motions could be filed. . . .

Because the trial judge had received "an abundance of correspondence from both Mr. Montgomery and Mr. Carruthers expressing concern about the pretrial investigation that has been conducted by their attorneys," the defendants were brought into open court and advised of the continuance. The trial judge then asked the attorneys to "state, for the record, the work that they've done and the work they intend to continue doing on behalf of their client." Each team of defense lawyers reported to the trial judge on the work that had been completed and on the work they intended to complete in the following days.

. . . Nance admitted that "some enmity" had developed between him and Carruthers, but indicated that he believed the problem could be resolved.

Carruthers also was allowed to voice his complaints about his attorneys on the record, and his primary complaint was that his attorneys had not met with him as often as he had expected. After hearing the comments of both

Nance and Carruthers, the trial judge concluded as follows:

> in my opinion, what has been done thus far in this case, given the fact that there are still six more weeks before the next motion date, and then a full three months beyond that before the trial date, is appropriate and well within the standards of proper representation.

. . .

On November 14, 1994, Carruthers filed his first motion for substitution of counsel. . . .

Although the record does not reflect that a hearing was held, the trial court allowed Nance to withdraw from representing Carruthers on December 9, 1994. According to statements made by the trial court at a later hearing, Nance was allowed to withdraw because of "personal physical threats" made by Carruthers that escalated to the point that Nance did not "feel comfortable or safe, personally safe, in continuing to represent Mr. Tony Carruthers."

Coleman Garrett was appointed to replace Nance and represent Carruthers along with Morton [another attorney who had been appointed to assist Nance]. The trial judge also authorized James Turner, a third attorney, to assist the defense as an investigator. . . . On May 5, investigator/attorney James Turner was allowed to withdraw because he was a solo practitioner and could not maintain his practice and effectively perform

the investigation needed on the case. However, the trial court appointed another attorney, Glenn Wright, to act as investigator. . . .

On June 23, 1995, Garrett, Morton, and Wright sought and were granted permission to withdraw by the trial court. The record reflects that Carruthers also filed a motion for substitution of counsel. At a hearing on July 27, 1995, the trial court appointed William Massey and Harry Sayle to represent Carruthers. During this hearing, the trial judge commented as follows:

> All right. I understand that these three defendants are on trial for their lives and that these are the most serious of charges and that they are all concerned that they are well represented and properly represented, and it's everyone's desire to see to it that they are well represented and properly represented. And toward that end, efforts are being made that they are represented by attorneys that have enough experience to handle this type of case and by attorneys that can establish a rapport with their clients that would allow them to represent their clients well.
>
> We have gone through several attorneys now in an effort to accommodate the defendants' requests in that regard, but at some point—and in my opinion, each of the attorneys and each of the investigators that has represented these defendants that has been relieved have been

eminently qualified to do the job, but I have allowed them to be relieved for one reason or another.

I want the record to be perfectly clear at this point because of some suggestions that have already been raised by some of the correspondence that I have received from Mr. Carruthers, and all of it, by the way, will be made a part of the record. *But Mr. Carruthers has suggested, in his correspondence, that some of the previous attorneys have been relieved because they weren't capable or competent to do the job. And that is, in my opinion, at least—my humble opinion as the judge in this case—absolutely and totally an inaccurate statement. The attorneys that have been relieved thus far have been fully capable and fully competent and had been doing an outstanding job, but for a variety of reasons, I've allowed them to withdraw from the case.*

. . .

Mr. Carruthers has raised, through his correspondence, and apparently through direct communication with his previous attorneys, certain matters that are pretty outrageous suggestions, but because of the nature of the matters that he's raised, the attorneys that represented him previously felt that an irreparable breach had occurred between their ability—between Mr. Carruthers and themselves—[a]ffecting their ability to

continue to represent them. *And at some point—and that could well have been the point, but it wasn't. But at some point these matters that are raised by the defendants cannot continue to be used to get new counsel because it gets to be a point where they're—it's already well beyond that point, but, obviously, at some point, gets to the point where they're manipulating the system and getting what they want—Mr. Carruthers, sit still, please, or you can sit back there—gets to the point where they're manipulating the system and getting trial dates and representation that they want and are calling the shots.* That's another matter that's been raised by Mr. Carruthers in some of his correspondence, that he wants his attorneys to know that he's the man calling the shots in this case, and he's the man to look to.

Well, of course, again, it's a free country, and he can say whatever he wants, and he can think whatever he wants, but as far as I'm concerned—and this applies to all three defendants and any defendants that come through this court that are represented by counsel—and this gets back to what Mr. McLin alluded to earlier—the attorneys are calling the shots in this case. They are trying the case except for certain areas where the defendant has the exclusive and final say, such as areas of whether he wants to testify or not and that sort of thing. The

attorneys are in here representing these clients and will do so to the best of their ability. They are the ones who have been to law school. They are the ones that have been through trial many times before, and they're the ones that are here for a reason, and that reason is to represent these individuals. And, so you know, if there's a conflict between the attorney and client with regard to how to proceed in the case, you all resolve it as best you can, but ultimately the attorney is trying the case. And, you know, we don't pull people in off the sidewalk to try these cases, and the reason we don't is because of certain things that they need to learn and certain experiences they need to have professionally before they're prepared to try these cases. So they're here for that reason and for that purpose.

. . .

So that gets me to the reason for our being here. *Because of the matters raised by Mr. Carruthers, I have granted the request of his previous two attorneys and investigator reluctantly because, in my opinion, they were doing an outstanding job of representing Mr. Carruthers and his interests.*

. . .

Because of the most recent rash of allegations raised by Mr. Carruthers in his many letters that he's sent me—I assume

he's sent copies of the letters to his counsel and to others, but I've certainly got them, and they will be made a part of the record. And because of the types of things he alleged in those letters and the position that it put his previous attorneys in, and their very, very strong feelings about not continuing to represent Mr. Carruthers under those circumstances, I have reluctantly agreed to let them withdraw.

And in an effort again to get attorneys who I'm satisfied have the experience and the willingness to handle a case of this seriousness, I have approached and am inclined to appoint Mr. Harry Sayle . . . and Mr. Bill Massey, to represent Mr. Carruthers.

. . .

And as I have stated, I'm running out of patience with regard to these different issues—and I use that word advisedly—being raised by the clients with regard to any objections they have with regard to their attorneys. And as far as I'm concerned, these are the attorneys that will represent these men at trial. It's going to have to be one gigantic conflict—one gigantic and real proven, demonstrated conflict before any of these men will be relieved from representation in this case. There will be no more perceived conflicts, no more unfounded, wild allegations raised through correspondence, no more

> *dissatisfaction with how my attorney is handling my case for anybody to be relieved in this case.*
>
> *These are the attorneys, gentlemen. You either work with them or don't. It's up to you. But they're the men that are going to be representing you at trial.*

. . . Massey requested and was afforded a trial continuance until January 8, 1996. Like previous counsel, Massey and Sayle filed many pre-trial motions on behalf of Carruthers. By November 17, 1995, Massey informed the trial court that all necessary and appropriate pre-trial motions had been filed.

However, about a month later, on December 19, 1995, Massey filed a motion requesting permission to withdraw as counsel. As grounds for the motion, Massey stated that his relationship with Carruthers had "deteriorated to such a serious degree that [counsel] can not provide effective assistance as required by state and federal law. . . . Counsel's professional judgment cannot be exercised solely for the benefit of Defendant, as counsel fears for his safety and those around him." Attached to the motion were several letters Carruthers had sent to Massey, both at his home and at his office in late November and early December of 1995. In the letters, Carruthers accused Massey of lying, and of being on drugs, threatened counsel, and expressed overall dissatisfaction with counsel's handling of the case. Massey made the following

statements to the trial court at the hearing on his motion to withdraw:

> I would just say that in 15 years of practicing law, I have never ever made a motion of this nature. I have never—I've never found it difficult to advocate on behalf of a case. I wouldn't find it difficult to advocate on behalf of this case. *I do at this point, however, find it very difficult to advocate on behalf of Mr. Carruthers. And that is simply because he's made it that way.* If I were receiving letters that merely stated I was incompetent and that I wasn't handling his case right, and those type of letters—we all get those time to time—I don't mind those. Those don't bother me. *When I have letters that come to me that are threatening, when I have telephone calls that come to my office that are threatening the safety of me and my staff and those around me, I have real problems with that. It's gotten so bad, your Honor, that my secretary is having nightmares. The last call Mr. Carruthers made is Exhibit E to this verified motion. She called me in absolute tears crying uncontrollably, hysterically crying over his antics.* That's the same way he's been doing me. I just haven't broken down and started crying about it. But I do have very, very strong, such strong personal reservations as I have never experienced before as an advocate. . . .

. . . Despite Massey's argument, the trial judge denied Massey's motion, stating as follows:

> With regard to Mr. Massey's concerns, I certainly believe that everything Mr. Massey has stated in his motion is factually accurate and correct. I don't have any reason to doubt that his secretary received the phone call that she says she received in the memo she prepared, or that any of these other things transpired. *But I do think and I do agree with Mr. Massey's characterization that these efforts by Mr. Carruthers are a part of an overall ploy on his part to delay the case forever until something happens that prevents it from being tried.*
>
> . . .
>
> In my opinion, to try to make the record reflect as clearly and accurately as possible the fact that the system is doing everything it can to make sure that Mr. Carruthers is properly and thoroughly represented in this case. . . . *The system has done all it can, in my opinion, to make sure that Mr. Tony Carruthers is well represented.* And I've tried to be as patient as I can be in listening to the concerns of defense counsel and investigators in making sure that no conflict existed in the representation of either of these men. The specific reasons, the narrow specific reasons for the excusal of the previous attorneys and investigators differ a little

> bit from those complaints that Mr. Massey has raised today. . . .

. . . The trial court also emphasized that Carruthers' ploy had become more apparent over the course of the proceedings.

. . .

On January 2, 1996, six days before the trial was scheduled to begin, Massey renewed his motion to withdraw. Massey informed the trial court that he had continued to receive threatening letters at his home and was concerned for his daughter's safety because Carruthers had described the car she drove. Massey indicated that he cared more about Carruthers' right to a fair trial than did Carruthers himself, but given the recent and ongoing threats, Massey declared, "I don't want to represent this man. I can't represent him. I won't represent him."

. . .

. . . The trial court then ruled on Massey's motion to withdraw, stating as follows:

> Now, this is the way that the case is going to proceed on Monday. Mr. Massey is still on the case. He still represents Mr. Carruthers. If between now and Monday Mr. Carruthers chooses to discuss with Mr. Massey the case and to cooperate with Mr. Massey in his preparation of the defense in this case, then I'll look to Mr. Massey to go forward in representing Mr. Carruthers. . . . And I would hope that Mr. Carruthers would between now and

> Monday, work with Mr. Massey and Mr. Sayle in preparation for a trial. *If Mr. Carruthers elects not to, however, he will go forward representing himself. . . . And in my judgment, the only option that is still available if Mr. Carruthers chooses not to work with Mr. Massey and Mr. Sayle in going forward with this case next Monday, is for him to represent himself. And I'll provide him with a copy of the rules of Tennessee procedure, the rules of evidence. And he can sit at counsel table and voir dire the jury, and question witnesses, and give an opening statement, as any lawyer would, and he would be required to comply with all the rules as any lawyer would, if he chooses to go forward on his own. If he chooses to say nothing, then that's his prerogative, and—But that's what the situation will be next Monday, Mr. Carruthers. And the choice is yours. Again, the choice is yours. . . .* If you go forward representing yourself, I will require Mr. Massey and Mr. Sayle to be available as elbow counsel so that at any recess or overnight, you can seek advice from them, and they can confer with you and advise you in any way that they deem appropriate. . . .

The record reflects that at a hearing held the next day, January 3, 1996, Carruthers was "glaring" at Massey while "gritting his jaw." Upon observing Carruthers' conduct,

the trial court once again cautioned the defendant as follows:

> *And again, as I did yesterday, I want to remind Mr. Carruthers that if it is his decision not to proceed with Mr. Massey and to proceed pro se—just a minute. I'll let you speak in a moment—then he needs to understand that he will be held to the same standard that attorneys are held to during a trial. Rules of evidence, rules of procedure will apply. And he will need to familiarize himself as best he can with those procedures and those rules between now and trial date because in proceeding pro se, he will certainly be held to that same standard.* Obviously, he realizes the charges that are pending and the potential for the imposition of the death penalty involved in this case. We've had numerous hearings and motions over the past fifteen or eighteen months, and all of those matters should be very apparent to Mr. Carruthers at this point in time.

Responding to the trial court's admonition, Carruthers said he did not want Massey representing him because Massey was on cocaine.

Following this hearing, Massey filed an application for extraordinary appeal in the Court of Criminal Appeals challenging the trial court's ruling that he remain on the case either as counsel or as advisory counsel. In an order dated January 8, 1996, the Court of Criminal Appeals held that Massey should be

allowed to immediately withdraw from further representation . . . .

The same day this order was filed, but before the trial judge had received the order, a hearing was held in the trial court. After learning that Massey had received seven more pieces of certified mail at his home since the hearing on January 2, and after being advised by Massey that the difficulties with Carruthers had not improved, the trial judge concluded that Carruthers,

> through his actions, through his accusations, and letters, he has forced himself into a situation where I have no option but to require that he proceed pro se. And so in deference to your request, I will go forward with my previous statement and that is that you and Mr. Sayle will remain as elbow counsel. Mr. Carruthers will represent himself.

. . .

Upon hearing the trial court's ruling, Carruthers claimed that he had attempted to reconcile with Massey and complained that he was not qualified to represent himself. The trial judge responded [by reiterating that Carruthers had brought the situation upon himself].

After the trial court ruled, Carruthers offered to waive any conflict, to allow Massey to continue representing him, to apologize to Massey, and to testify that the accusations he had made against Massey were untrue. The

> trial court refused, finding that Carruthers was merely using another tactic to delay the proceeding.
>
> The next day, January 9, 1996, the Court of Criminal Appeals entered an addendum to its previous order and allowed Massey to be completely relieved from further representation or participation in the case including providing assistance as "elbow counsel." However, Sayle continued on the case as elbow or standby counsel.

Id. at 534-44 (several alterations in original) (footnotes omitted).

The trial was ultimately delayed until April 15, 1996, after the State requested a continuance for reasons unrelated to Carruthers's self-representation. *Id.* at 544. In February 1996, the trial court allowed Sayle to withdraw as elbow counsel after his relationship with Carruthers further deteriorated. *Id.* at 545. Between early January and April 1996, the trial court denied Carruthers's five motions to appoint new counsel, *id.* at 544-45, and Carruthers represented himself during the guilt and sentencing phases of trial, *id.* at 545. The trial court did not appoint new counsel until Carruthers's motion-for-new-trial proceedings. *Id.*

In his direct appeal, Carruthers argued that the trial court's forcing him to represent himself violated the Fourteenth Amendment's Due Process Clause. *See id.* at 545-46. The Tennessee Supreme Court rejected this constitutional argument on the merits:

> Both the United States and Tennessee Constitutions guarantee an indigent criminal defendant the right to assistance of appointed

counsel at trial. The right of an accused to assistance of counsel, however, does not include the right to appointment of counsel of choice, or to special rapport, confidence, or even a meaningful relationship with appointed counsel. The essential aim of the Sixth Amendment is to guarantee an effective advocate, not counsel preferred by the defendant.

Ordinarily, waiver of the right to counsel must be voluntary, knowing, and intelligent. Typically, such a waiver occurs only after the trial judge advises a defendant of the dangers and disadvantages of self-representation and determines that the defendant "knows what he is doing and his choice is made with eyes open." Many courts, however, have recognized that the right to counsel is not a license to abuse the dignity of the court or to frustrate orderly proceedings. Accordingly, several courts have acknowledged that, like other constitutional rights, the right to counsel can be implicitly waived or forfeited if a defendant manipulates, abuses, or utilizes the right to delay or disrupt a trial.

Some courts have attempted to distinguish the concepts of implicit waiver and forfeiture. These courts hold that an implicit waiver occurs when, after being warned by the court that counsel will be lost if dilatory, abusive, or uncooperative misconduct continues, a defendant persists in such behavior. In contrast, forfeiture results regardless of the defendant's intent to relinquish the right and irrespective of the defendant's knowledge of

the right. Accordingly, where a defendant engages in extremely serious misconduct, a finding of forfeiture is appropriate even though the defendant was not warned of the potential consequences of his or her actions or the risks associated with self-representation.

However, many courts considering this issue do not distinguish between the two concepts and have used the terms implicit waiver and forfeiture interchangeably.

Although this Court has never considered the precise question presented in this appeal, when discussing a non-indigent defendant who fired his attorney in open court and thereafter repeatedly protested about going to trial without a lawyer, we recognized that even "[t]hough a defendant has a right to select his own counsel if he acts expeditiously to do so . . . he may not use this right to play a 'cat and mouse' game with the court. . . ." The idea that the right to counsel may not be used to manipulate or toy with the judicial system applies equally to indigent and non-indigent defendants. Although an indigent criminal defendant has a constitutional right to appointed counsel, that right may not be used as a license to manipulate, delay, or disrupt a trial. Accordingly, we conclude that an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings. We also hold that the distinction between these two concepts is slight and that

the record in this case supports a finding of both implicit waiver and forfeiture.

When Garrett and Morton were allowed to withdraw and Massey and Sayle were appointed, the trial court advised Carruthers that Massey and Sayle would be the lawyers representing him at trial and that there would be no further withdrawal and new appointments absent a "gigantic conflict." Despite this admonishment, Carruthers once again launched personal attacks and threats against Massey, threats that eventually extended to Massey's office staff and family members. When Massey renewed his motion to withdraw on January 2, 1996, the trial court specifically and clearly advised Carruthers that he had two choices—cooperate with Massey or represent himself. Carruthers also was advised that if he chose not to cooperate with Massey and to represent himself, he would be required to comply with all procedural rules as if he were an attorney. The trial court repeated his admonishment at a hearing on January 3, 1996. Despite the trial court's clear warnings, quoted fully earlier in this opinion, Carruthers persisted with his attitude of hostility toward Massey, as is evidenced both by his "glaring" at Massey during the hearings and by the letters Massey received after those hearings. In our view, Carruthers implicitly waived his right to counsel, because, after being warned by the trial court that he would lose his attorney if his

misconduct continued, Carruthers persisted in his misconduct.

In so holding, we reject Carruthers' claim that the warnings given him by the trial court were not sufficient to support a finding of implied waiver. The cases upon which Carruthers relies in support of this claim are inapposite because they involve explicit, voluntary waiver cases. We decline to hold that a trial court must provide extensive and detailed warnings when a defendant's conduct illustrates that he or she understands the right to counsel and is able to use it to manipulate the system. We conclude that an implicit waiver may appropriately be found, where, as here, the record reflects that the trial court advises the defendant the right to counsel will be lost if the misconduct persists and generally explains the risks associated with self-representation.

Even assuming the warnings given Carruthers were insufficient to support a finding of implicit waiver, however, we conclude that Carruthers' conduct was sufficiently egregious to support a finding that he forfeited his right to counsel. The circumstances culminating in the trial court's ruling have been fully summarized. Carruthers repeatedly and unreasonably demanded that his appointed counsel withdraw and that new counsel be appointed. Carruthers' demands escalated as his scheduled trial dates drew near. As the trial court recognized, the "ploy" to delay the trial became increasingly apparent with each

new set of attorneys. In addition, Carruthers' conduct degenerated and his outrageous allegations and threats escalated markedly with each new set of attorneys. As the trial court emphasized, Carruthers was the author of his own predicament and sabotaged his relationship with each successive attorney with the obvious goal of delaying and disrupting the orderly trial of the case. Under these circumstances, the trial court was fully justified in concluding that Carruthers had forfeited his right to counsel. Indeed, in situations such as this one, a trial court has no other choice but to find that a defendant has forfeited the right to counsel; otherwise, an intelligent defendant "could theoretically go through tens of court-appointed attorneys and delay his trial for years."

As did the trial court and the Court of Criminal Appeals, we have carefully considered the ramifications of holding that an indigent criminal defendant in a capital case has implicitly waived and forfeited his valuable right to counsel. We are aware that both implicit waiver and forfeiture are extreme sanctions. However, Carruthers' conduct was extreme and egregious. The sanction is appropriate under the circumstances and commensurate with Carruthers' misconduct. We reiterate that a finding of forfeiture is appropriate only where a defendant egregiously manipulates the constitutional right to counsel so as to delay, disrupt, or prevent the orderly administration of justice. Where the record

> demonstrates such egregious manipulation a finding of forfeiture should be made and such a finding will be sustained, even if the defendant is charged with a capital offense. Persons charged with capital offenses should not be afforded greater latitude to manipulate and misuse valuable and treasured constitutional rights.

Id. at 546-50 (alterations in original) (footnotes and citations omitted).

B.

The procedural history surrounding Carruthers's mental health during his criminal proceedings is also relevant to this appeal. Concerns about Carruthers's competence developed early in the proceedings. At the request of pre-trial counsel, a clinical psychologist evaluated Carruthers in December 1994. That psychologist concluded that Carruthers was competent to stand trial. Again in May 1995, a different psychologist determined that Carruthers had the mental capacity to stand trial.

Counsel did not further question Carruthers's competency until his state postconviction proceedings in 2004, when appointed counsel arranged for Carruthers to be evaluated by psychiatrist Dr. William Kenner. Kenner concluded that Carruthers suffered from bipolar disorder with hypomanic symptoms. Kenner further concluded that Carruthers had been incompetent to stand trial, that he remained incompetent to make decisions about his postconviction proceedings, and that his mistreatment of counsel "represented symptoms of [his mental illness]." Based on Kenner's report, counsel argued in Carruthers's

postconviction petition that Carruthers had not been mentally competent in 1996.

However, Carruthers demanded that counsel not pursue any claim based on incompetency. Believing themselves nevertheless ethically bound to pursue the competency claim, counsel filed a petition for the appointment of a guardian ad litem to decide for Carruthers whether to move forward with the claim. In order to determine whether Carruthers was competent to waive his underlying competency claim, the state postconviction court appointed psychiatrist Dr. Stephen Montgomery. Montgomery drafted a report based on the lengthy medical records available after Carruthers refused to meet with him in person. Montgomery diagnosed Carruthers as suffering from antisocial, paranoid, and narcissistic personality disorders, as well as drug abuse and dependence, and opined that Carruthers retained the ability to make a rational choice regarding whether to waive any challenge to his competency at trial. Based on Montgomery's report and the other relevant record evidence, the state postconviction court concluded that Carruthers was competent to make the waiver decision and therefore denied the request to appoint a guardian ad litem.

In denying counsel's request to appoint a guardian ad litem, the postconviction court also directed counsel to "submit within thirty days the withdrawal and waiver" of Carruthers's incompetency claims. In response, Carruthers's counsel told the court that Carruthers had refused to sign a proposed pleading withdrawing and waiving the incompetency claim. Carruthers also submitted the following written statement to the court: "I do not wish to relieve any attorneys pre-trial or post-trial of any negligence for not

having me tested before being forced pro se! about my competency to represent myself." The court noted that, after "[h]aving fought for the right to waive these claims," Carruthers "now specifically declines to waive" them, and concluded that "[a]ll claims in the amended petition remain before the Court." Apparently Carruthers's position changed again at some point before the postconviction court issued its final decision, however. The court's opinion stated:

> The petitioner and his counsel in this proceeding have chosen purposely not to raise any issues regarding the petitioner's mental state, possible insanity defense, or competency to stand trial or waive counsel. The Court has previously held that the petitioner is competent to waive such claims in this proceeding and by purposely not raising them in this proceeding he has waived these claims.

Carruthers made no further attempt to litigate any incompetency challenge until his federal habeas proceedings.[2]

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[2] Carruthers submitted additional evidence challenging his competency to the district court below. This evidence includes: a lengthy social history prepared in 2011, which concluded that Carruthers's "actions and behaviors demonstrate that he is seriously mentally ill and emotionally disturbed and that he probably has significant organic brain damage;" a psychiatrist report from 2011, which opined that Carruthers was incompetent at the time of his trial, was not competent to represent himself, and was not competent to waive his mental health claims during the state postconviction proceedings; and a neuropsychologist report from 2011, which noted a number of abnormalities in different regions of Carruthers's brain that could cause diminished executive

C.

After the Tennessee Supreme Court rejected Carruthers's direct appeal, *see Carruthers*, 35 S.W.3d at 572, and the state courts denied both his petition for postconviction relief, *see Carruthers v. State*, No. W2006-00376-CCA-R3-PD, 2007 WL 4355481, at *1 (Tenn. Crim. App. Dec. 12, 2007), and his petition for state habeas relief, *see Carruthers v. Worthington*, No. E2007-01478-CCA-R3-HC, 2008 WL 2242534, at *1 (Tenn. Crim. App. June 2, 2008), Carruthers petitioned the district court for a writ of habeas corpus. Among other things, Carruthers argued that (1) he was denied his Sixth Amendment right to counsel at critical stages of the proceedings, in violation of *United States v. Cronic*, at the December 19, 1995, January 2, 1996, and January 3, 1996 hearings, which resulted in his being forced to represent himself at trial; (2) the trial court violated his Sixth Amendment right to counsel by compelling him to proceed pro se during trial; and (3) he was not competent to stand trial or represent himself in 1996.

The district court rejected each of Carruthers's constitutional claims. The court first reasoned that Carruthers procedurally defaulted his *Cronic* claim by failing to raise it in the state-court proceedings. The court rejected Carruthers's argument that ineffective assistance of his postconviction counsel constitutes cause for the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012).

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functioning, deficits in analytic processing, hyper-activity, reduced self-control, and impaired rational performance.

The district court also held that Carruthers procedurally defaulted his incompetency claims by failing to adequately present them to the Tennessee courts. The court rejected as inconsistent with Sixth Circuit precedent Carruthers's argument that substantive competency claims cannot be defaulted. The district court also concluded that ineffective assistance of postconviction counsel cannot excuse the procedural default of Carruthers's competency claims under *Martinez*, and rejected Carruthers's miscarriage-of-justice argument.

Finally, applying the deference, required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the district court rejected Carruthers's Sixth Amendment challenge to being forced to represent himself. The court noted that "[t]here is no clearly established Supreme Court precedent on the issue of implied waiver or forfeiture of the right to counsel based on a defendant's conduct and/or what, if any, warnings are constitutionally required." The district court held that the Tennessee Supreme Court's decision that Carruthers implicitly waived and forfeited his right to counsel "is [therefore] not contrary to or an unreasonable application of clearly established Supreme Court precedent," as would be required to grant relief under AEDPA. *See* 28 U.S.C. § 2254(d)(1).

Carruthers now appeals.

II.

A.

Carruthers has procedurally defaulted his *Cronic* claim, and he cannot show cause and prejudice to overcome the default. Carruthers admits that his counsel never claimed in state court that Carruthers suffered a per se violation of the Sixth Amendment when he

was effectively unrepresented at the December 19, 1995 and January 2 and 3, 1996 hearings at which the state trial court decided he would be forced to represent himself. Tennessee limits state prisoners to one postconviction petition, absent three statutory exceptions that do not apply to Carruthers's *Cronic* claim. *See* Tenn. Code Ann. § 40-30-102(c) (2012). The *Cronic* claim is therefore unexhausted, but no state remedy remains available. Under these circumstances, the claim is procedurally defaulted, and a federal habeas court may not review the claim absent a showing of cause and actual prejudice, which is not present here. *Hodges v. Colson*, 727 F.3d 517, 529-30 (6th Cir. 2013).

The alleged ineffective assistance of Carruthers's postconviction counsel in not raising the *Cronic* claim does not establish cause for this procedural default. As a general rule, counsel's performance in state postconviction proceedings cannot constitute cause to excuse a procedural default, because there is no constitutional right to counsel in such proceedings. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991). In *Martinez*, the Supreme Court announced a narrow exception to this rule: the ineffective assistance of postconviction counsel can establish cause to overcome the default of a claim of ineffective assistance of trial counsel "where the State effectively requires a defendant to bring [the ineffective-assistance-of-trial-counsel] claim in state postconviction proceedings rather than on direct appeal." *Davila v. Davis*, 137 S. Ct. 2058, 2062-63 (2017) (citing *Martinez*).

It is doubtful that the *Martinez* exception, which the Supreme Court has repeatedly characterized as a "narrow" one, *e.g.*, *Davila*, 137 S. Ct. at 2065, could apply to excuse a habeas petitioner's default of an

underlying *Cronic* claim. But we need not definitively decide that issue because Carruthers cannot overcome *Martinez*'s second limiting factor. Tennessee law does not effectively require defense counsel to bring a *Cronic* claim on postconviction review, rather than on direct appeal. In *Sutton v. Carpenter*, 745 F.3d 787, 792 (6th Cir. 2014), we held that Tennessee defendants are "highly unlikely to have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," but that decision was silent as to how Tennessee treats claims of total deprivation of counsel at critical pre-trial proceedings. Carruthers makes no argument that Tennessee effectively limits such *Cronic* claims to postconviction review. In fact, Carruthers in his brief admits that the denial-of-counsel issue could have been raised in his direct appeal. At oral argument, Carruthers's counsel attempted to backtrack on this concession by arguing that, because Carruthers's motion-for-new-trial counsel was also his counsel on direct appeal, a conflict of interest precluded his direct-appeal counsel from raising the *Cronic* claim as a "dropped issue." However, because the attorney representing Carruthers during his motion for a new trial and on direct appeal did not represent Carruthers during the pre-trial proceedings at which Carruthers claims he was completely deprived of representation, no conflict precluded that attorney from raising the *Cronic* issue on direct appeal.

Thus, because Tennessee does not effectively require defendants to raise claims pertaining to total deprivation of counsel at pre-trial proceedings for the first time in postconviction review, Carruthers cannot use *Martinez* to overcome his procedural default. Furthermore, Carruthers's only alternative argument to

excuse his procedural default of the *Cronic* claim is insufficient. At oral argument, Carruthers asserted for the first time on appeal that a claim of total deprivation of counsel at a critical stage in the criminal proceedings cannot be defaulted because it alleges structural constitutional error. Carruthers relies on *Railey v. Webb*, 540 F.3d 393 (6th Cir. 2008), for the contention that claims of structural constitutional error cannot be procedurally defaulted. In *Railey*, while analyzing a state prisoner's judicial-bias claim under 28 U.S.C. § 2254, we noted "that judicial bias is structural error, not susceptible to forfeiture (or harmless error analysis)." *Id.* at 399. *Railey* is inapposite. Forfeiture and procedural default are distinct concepts. *Hodges*, 727 F.3d at 540. Thus, proclaiming that a right may not be forfeited or waived does not necessarily mean the right may not be procedurally defaulted. *See id.* In addition, our statement in *Railey* pertained to an underlying judicial-bias claim and said nothing about *Cronic* claims. Carruthers therefore is unable to support his contention that claims based on deprivation of counsel at critical stages of criminal proceedings cannot be defaulted.

Carruthers never raised his *Cronic* claim in the state-court proceedings, resulting in procedural default for which Carruthers has not shown cause and prejudice. Therefore, the *Cronic* claim does not entitle Carruthers to habeas relief.

B.

Carruthers is also not entitled to habeas relief based on his claim that the state trial court deprived him of his Sixth Amendment right to counsel by compelling him to proceed pro se during his capital murder

trial and sentencing. Because the Tennessee Supreme Court decided this constitutional challenge on the merits during Carruthers's direct appeal, *see Carruthers*, 35 S.W.3d at 533-52, the state court's decision is entitled to AEDPA deference under 28 U.S.C. § 2254(d). The decision was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent and was not based on an unreasonable determination of the facts.

The Tennessee Supreme Court's decision that Carruthers forfeited his right to counsel through his pre-trial "misbehavior" is not contrary to clearly established Supreme Court precedent. A state-court decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), "if the state court arrives at a conclusion opposite to that reached by th[e] Court on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). The Supreme Court has never addressed whether a criminal defendant may forfeit his right to counsel by effectively rejecting appointed counsel after filing complaints against and threatening multiple court-appointed attorneys. Thus, the state supreme court's decision that Carruthers forfeited his right to counsel through such conduct does not contradict U.S. Supreme Court precedent.

In particular, the Tennessee court's decision is not contrary to *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In *Argersinger*, the Supreme Court held that the Sixth Amendment right to counsel applies to criminal defendants being tried for any offense, "whether classified as petty, misdemeanor, or felony." *Id.* at 37.

There, although the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial," *id.*, because the case did not address whether forfeiture is possible, it does not foreclose the possibility that a criminal defendant may forfeit his right to counsel in circumstances like Carruthers's.

Additionally, it was not error for the Tennessee Supreme Court to take into account lower federal court opinions, many of which have held that a defendant may forfeit the right to counsel through misconduct, when making its decision. *See Carruthers*, 35 S.W.3d at 547-48. It is true that "AEDPA prohibits [a federal habeas court from using] lower court decisions in determining whether the state court decision is contrary to, or is an unreasonable application of, clearly established federal law." *Miller v. Straub*, 299 F.3d 570, 578-79 (6th Cir. 2002). However, nothing prohibits a *state* court from examining decisions of the lower federal courts when interpreting the Constitution in the first place.

The Tennessee Supreme Court's decision also was not an unreasonable application of clearly established Supreme Court precedent. AEDPA imposes a high bar before a federal court can find this sort of error in a state-court decision. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Given the lack of Supreme Court precedent on this issue, and considering the close interplay

between the right to counsel and the right to self-representation, we cannot say that the state court erred so clearly as to entitle Carruthers to habeas relief.

Nothing in this opinion is intended to bless the state trial court's actions or the merits of the Tennessee Supreme Court's opinion affirming those actions. Despite Carruthers's mistreatment of his own counsel, it is still troubling that the state trial court, after several hearings at which Carruthers was effectively unrepresented, required Carruthers to proceed pro se through his capital murder trial without giving him the warnings typically required in the distinct context of a defendant's affirmatively waiving his right to counsel. We usually require federal district courts to conduct a formal inquiry before allowing a defendant to voluntarily waive his right to representation. *King v. Bobby*, 433 F.3d 483, 492 (6th Cir. 2006). At the very least, a defendant must "be made aware of the dangers and disadvantages of self-representation" before waiving his right to counsel. *Swiger v. Brown*, 86 F. App'x 877, 880 (6th Cir. 2004) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)); *see also King*, 433 F.3d at 493. Formal warnings of this sort did not occur here. All the state court did to warn Carruthers about the effect of "choosing" to represent himself by refusing to cooperate with Massey was tell Carruthers that he would be expected to abide by Tennessee's rules of evidence and procedure. However, no clearly established Supreme Court precedent dictates that formal warnings are required, even in the context of a defendant's waiving his right to counsel, *see Swiger*, 86 F. App'x at 881-82, as would be required to overturn the state court's decision under AEDPA.

Finally, the Tennessee Supreme Court's decision rejecting Carruthers's right-to-counsel claim was not based on an unreasonable determination of the facts. Carruthers attacks the state court's opinion for relying on unsupported facts. In particular, Carruthers contends that, because holes exist in the record regarding why his first appointed counsel, Larry Nance, and his second group of appointed attorneys, Garrett, Morton, and Wright, were dismissed, the Tennessee Supreme Court's decision was based on a distorted record. Under § 2254(d)(2), these arguments entitle Carruthers to relief only if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

The state court did not unreasonably interpret the facts in the record before it regarding why Nance was removed as counsel. When describing Nance's removal, the court noted that "the record does not reflect that a hearing was held," then quoted from a transcript of a later hearing before the trial court: "According to statements made by the trial court at a later hearing, Nance was allowed to withdraw because of 'personal physical threats' made by Carruthers that escalated to the point that Nance did not 'feel comfortable or safe, personally safe, in continuing to represent Mr. Tony Carruthers.'" *Carruthers*, 35 S.W.3d at 535. However, at a later, postconviction hearing, Nance testified that he never felt personally fearful of Carruthers. Furthermore, while Nance testified that his attorney-client relationship with Carruthers deteriorated after Carruthers started refusing his visits, Nance never filed a motion to withdraw before the trial court informed him he was being relieved. Rather, the trial court was acting on Carruthers's motion for

Nance's removal when it allowed Nance to withdraw as counsel.

Despite the fact that the statements quoted by the Tennessee Supreme Court about Nance's receiving personal threats and fearing for his safety were contradicted by Nance's later testimony, the state court's assessment was not unreasonable in light of the evidence before it at the time. The only evidence the state supreme court had about the reason for Nance's removal came from the trial court's description at a later hearing; Nance's postconviction testimony that contradicts the trial court's description was not available to the Tennessee Supreme Court when it decided Carruthers's direct appeal. Furthermore, even if the state court somehow unreasonably interpreted the record before it, any erroneous statement of the facts surrounding Nance's removal did not affect its ultimate decision. The true facts—that Carruthers had Nance removed as counsel after baselessly refusing to meet with Nance and then claiming Nance was ineffectively representing him—still support the Tennessee Supreme Court's view that Carruthers was manipulating his right to counsel to delay trial proceedings. Thus, a misstatement by the Tennessee Supreme Court in this regard does not provide grounds for habeas relief.

The same is true for Carruthers's arguments surrounding Garrett's, Morton's, and Wright's removal. The only record evidence of these attorneys' removal is the state trial court's "order substituting counsel" from July 27, 1995, which grants Carruthers's request to substitute his appointed counsel but does not discuss the underlying reasons for the substitution. The trial court also made vague references at later hearings about how Carruthers's request to substitute these

attorneys was part of his overall "ploy" to delay trial. The Tennessee Supreme Court did not infer anything about the reason for Garrett's, Morton's, and Wright's removal beyond what this evidence suggests.

In sum, given AEDPA deference, Carruthers is not entitled to habeas relief under § 2254 based on his claim that the state trial court unconstitutionally deprived him of the right to counsel by requiring him to represent himself during the capital murder trial.

C.

Carruthers has procedurally defaulted his competency claims and cannot establish cause and prejudice for the default. Carruthers never adequately argued to the Tennessee courts that he was not competent to stand trial or represent himself, as required to exhaust these claims under 28 U.S.C. § 2254(b). Carruthers admits he never presented these arguments to the state trial or appellate courts, and he abandoned the arguments during his state postconviction proceedings. Because Tennessee limits state prisoners to one postconviction petition for relief absent exceptions that do not apply here, *see* Tenn. Code Ann. § 40-30-102(c), no state remedy remains available, and Carruthers has procedurally defaulted his competency claims.

Hodges v. Colson, 727 F.3d 517 (6th Cir. 2013), forecloses Carruthers's argument that his competency claims could not be procedurally defaulted. In *Hodges*, we recognized that the Sixth Circuit is not among those courts to have adopted such a rule, and we held that "substantive competency claims are subject to the same rules of procedural default as all other claims that may be presented on habeas." *Id.* at 540. This

holding makes clear that Carruthers could, and in this case did, default his competency claims.

Hodges also prevents Carruthers from relying on the alleged ineffective assistance of his postconviction counsel to overcome this procedural default. In *Hodges*, we held that a habeas petitioner may not rely on ineffective assistance of postconviction counsel to excuse default of an underlying substantive competency claim. *See id.* Thus, the *Martinez* exception does not allow Carruthers to show cause through ineffective assistance of his postconviction counsel.

Finally, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), does not require us to overturn Carruthers's conviction, regardless of AEDPA, if he was convicted while incompetent to stand trial or represent himself. *Montgomery* involved direct Supreme Court review of state-court collateral proceedings. The case does not address procedural default in federal habeas cases under AEDPA. In *Montgomery*, the Supreme Court held that the U.S. Constitution requires state collateral-review courts, in addition to federal habeas courts, to give retroactive effect to new substantive rules of federal constitutional law. *See id.* at 729 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). Substantive constitutional rules include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* Under Carruthers's argument, *Montgomery* dictates that every time a federal or state court reviews a conviction that violates a substantive rule of federal constitutional law, the court must invalidate the conviction. However, *Montgomery*'s holding is not so broad; *Montgomery* and *Teague v. Lane*, 489 U.S. 288 (1989), together require courts to apply new substantive rules of constitu-

tional law retroactively when otherwise properly presented. *Id.* at 732. *Montgomery* does not provide a new exception to federalism-based limits on habeas review under AEDPA.

Because Carruthers has not shown cause and prejudice to overcome his procedural default, he is not entitled to habeas relief on his competency claims.[3]

III.

The judgment of the district court is affirmed.

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[3] Carruthers argued to the district court that his procedural default should be excused under the miscarriage-of-justice exception, but did not renew that argument on appeal.

CONCURRENCE

JANE B. STRANCH, Circuit Judge, concurring. I join the opinion in full. I write separately to note my concern with a part of the Tennessee Supreme Court's analysis of implicit waiver or forfeiture of the right to counsel. The Court found Carruthers's conduct "extreme and egregious," and then explained its decision to compel Carruthers to proceed without counsel at his capital trial as an extreme but appropriate "sanction" that was "commensurate with Carruthers's misconduct." *State v. Carruthers*, 35 S.W.3d 516, 550 (Tenn. 2000). Though I believe the dividing line between intentional misconduct and manifestations of mental illness can be very difficult to draw, I recognize that courts may be called upon to make that determination. In those cases, judges must discern whether the facts reveal the intentionality of forfeiture or the blunder of mental illness. That is based on a finding of fact, one that entails serious consequences. The vocabulary of sanction does not have a place in that determination. I cannot agree that a criminal defendant may be denied his Sixth Amendment right to counsel as a form of punishment.