

No. 17-5452

In the Supreme Court of the United States

JACK M. SURIANO, *PETITIONER*,

v.

STATE OF WISCONSIN, *RESPONDENT*

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT*

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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INTRODUCTION

This Court has not addressed whether and how a defendant may involuntarily lose or “forfeit” the Sixth Amendment right to counsel, and there is a significant division of opinion among the federal courts of appeal and state courts of last resort on the issue. Geographical variance on such an important issue of federal constitutional law is troublesome. Review is warranted to establish and implement a uniform standard on this important federal issue, and to correct Wisconsin’s unconstitutional forfeiture-of-counsel doctrine. *See* Sup. Ct. R. 10(b) and 10(c).

ARGUMENT

- I. This Court has not addressed whether and how a criminal defendant may forfeit the constitutional right to counsel, and the lower federal and state courts are split.

The Respondent attempts to exploit a superficial distinction in vocabulary to downplay the doctrinal split on the issue presented in this case. As Mr. Suriano explained in his Petition, courts have employed different terminology in addressing the same underlying question, namely: Can a defendant lose the Sixth Amendment right to counsel short of a knowing, intelligent, and voluntary waiver, and if so, how?

In grappling with this question, some courts, like Wisconsin, have elected to use two terms—waiver and forfeiture—while other courts have added nuance by selecting a third term, such as “wavier by conduct,” “implied waiver,” or “forfeiture with knowledge.” Such terms are used to describe a middle ground between

traditional waiver, in which a defendant intentionally and explicitly requests to give up a right, and forfeiture, in which a defendant loses a right regardless of his or her intent and without forewarning. These middle terms apply when: (a) a defendant declines to explicitly waive counsel, yet (b) engages in misconduct that is incompatible with the right to counsel (for example, by repeatedly discharging counsel without good cause) but (c) the misconduct is not extreme enough to warrant forfeiture of counsel. *See, e.g., United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995); *State v. Hampton*, 92 P.3d 871, 874-75 (Ariz. 2004); *King v. Superior Court*, 132 Cal. Rptr. 2d 585, 592 (Cal. Ct. App. 2003); *Bultron v. State*, 897 A.3d 758, 764 (Del. 2006); *Commonwealth v. Means*, 907 N.E.2d 646, 656 (Mass. 2009); *State v. Jones*, 772 N.W.2d 496, 502 (Minn. 2009); *State v. Pedockie*, 137 P.3d 716, 721, n.15 (Utah 2006).

The difference between “waiver by conduct” on the one hand and “forfeiture” on the other is that a waiver-by-conduct finding requires that the judge has warned the defendant of the possibility of losing counsel and the risks and dangers of self-representation, whereas a forfeiture finding may be made even in the absence of warnings. Under “waiver by conduct,” “[o]nce a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se” *Goldberg*, 67 F.3d at 1100.

The Respondent relegates to footnotes cases that use three terms instead of two. *See* Respondent’s brief at 12, n.2 and 15, n.3. But piercing the surface of the terminology quickly reveals that the underlying issue and questions are the same: Can a defendant lose the constitutional right to counsel short of a knowing, intelligent, and voluntary waiver? If so, how serious must a defendant’s misbehavior be to justify an involuntary loss of the right to counsel? Must the defendant be forewarned? What are the judge’s responsibilities in this context? What is the appropriate standard of appellate review? Even though Wisconsin has chosen to use only two terms, the *Suriano* court still acknowledged cases that use a third term. *State v. Suriano*, 893 N.W.2d 543, 553 (Wis. 2017).

Other courts that consider these questions also note the variance in terms, but correctly recognize that the central issue is the same. *See, e.g., State v. Carruthers*, 35 S.W.3d 416, 548 (Tenn. 2000); *Goldberg*, 67 F.3d at 1101 (contemplating whether “waiver by conduct” or “forfeiture with knowledge” is the better middle term but acknowledging that, the bottom line is: defendants “are voluntarily engaging in misconduct knowing what they stand to lose.”). Simply put, it puts form over substance to disregard as “irrelevant” all cases that use two terms instead of three when the underlying issue is the same.¹ And later in its brief, the

¹ The secondary sources likewise consider all cases on the issue together, regardless of whether they use two terms or three. Wayne R. LaFare, et al, *Criminal Procedure* § 11.3(c) (4th ed.); Jodie L. Carlson, *State v. Jones and Forfeiture by Wrongdoing: When is a Defendant’s Behavior Bad Enough to Result in Forfeiture of the Right to Counsel?* 37 WM. MITCHELL L. REV. 819 (2011); Sarah Gerwig-Moore, *Gideon’s Vuvuzela: Reconciling the Sixth Amendment’s Promises with the*

Respondent cites and relies on *Bultron*, 897 A.3d 758 (Respondent’s brief at 15). But that case used three terms—wavier, waiver-by-conduct, and forfeiture. This shows that the Respondent will in fact acknowledge the relevance of cases that use three terms instead of two, but only when it suits its position.

Conveniently, the cases the Respondent relegates to footnotes are favorable to Mr. Suriano’s position. For example, in *Goldberg* (relegated to n.2), counsel told the judge that the defendant had been “threatening [him] and demanding that I do certain things I don’t feel are prudent.” *Id.* at 1095. The trial judge declared that the defendant forfeited his right to counsel. The Third Circuit reversed. The court acknowledged that a death threat could rise to the level of extreme misconduct, and could therefore potentially justify a forfeiture finding, but held that because the judge failed to hold an evidentiary hearing on the allegation, it could not support the ruling. *Id.* at 1102. Next, the court held that the other alleged misconduct was not extreme enough to warrant a forfeiture finding. *Id.* Finally, the court held that the other alleged misconduct might be significant enough to warrant waiver-by-conduct, but because the judge failed to forewarn the defendant of the dangers and disadvantages of self-representation, it could not support the ruling. *Id.*

Under the facts and holding of *Goldberg*, it is clear that Mr. Suriano would have prevailed on appeal in the Third Circuit. Attorney Singh claimed that

Doctrines of Forfeiture and Implicit Waiver of Counsel, 81 Miss. L.J. 439 (2012); Stephen A. Gerst, *Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution*, 58 CLEV. L. REV. 97 (2010).

Mr. Suriano was rude to him and demanded that he file motions Attorney Singh deemed improper. Attorney Singh also suggested that he felt afraid of Mr. Suriano, though he did not allege that Mr. Suriano threatened him. Even if Attorney Singh *had* alleged a threat, the judge never held an evidentiary hearing, so it could not support a forfeiture finding under *Goldberg*. The other alleged misconduct was not severe enough to warrant a forfeiture finding. All three attorneys who agreed to represent Mr. Suriano withdrew on their own motions—Mr. Suriano never asked them to withdraw. Moreover, only two of the three criticized Mr. Suriano. The other withdrew due to an unnamed conflict and did not level any complaints against Mr. Suriano. Finally, the judge never forewarned Mr. Suriano of the risks and disadvantages of self-representation, so there could be no finding of waiver by conduct.² Thus, the Third Circuit would have reversed.

In *United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008), another case deemed “irrelevant” by the Respondent based on its use of the term “waiver-by conduct” (Respondent’s brief, n.3), the Eleventh Circuit acknowledged that it *also* recognized a forfeiture-of-counsel doctrine, but simply held that it did not apply in that particular case. 540 F.3d 1253, n. 5.³ The fact that the Eleventh Circuit

² The parties disagree about whether the judge’s inaccurate advisement about the public defender’s “3 strike rule” in this case constituted a sufficient warning about the possibility of losing the right to counsel. Regardless, it is undisputed that the judge never warned Mr. Suriano about the risks and disadvantages of self-representation, which is a separate requirement under *Goldberg*.

³ Note 5 reads: “This case does not present, and therefore we do not address, the situation in which a defendant forfeits his right to counsel by engaging in conduct that is highly disruptive or abusive. *See, e.g., United States v. McLeod*, 53 F.3d 322, 325 (11th Cir.1995).”

recognizes a forfeiture of counsel doctrine but did not believe it was invoked by the facts of the case is telling—it shows that the alleged misconduct was not extreme enough to justify forfeiture. In *Garey*, the defendant’s conduct resembled the alleged misconduct of Mr. Suriano. He was demanding and unsatisfied with counsel, but refused to affirmatively waive his right to counsel. *Id.* at 1257. In the Respondent’s words (characterizing Mr. Suriano), the defendant “filibustered” the court’s attempt to make him choose whether to represent himself or accept counsel. Respondent’s brief at 5. Ultimately, *Garey* upheld the lower court’s finding that the defendant waived by conduct his right to counsel, but only because the lower court judge sufficiently forewarned the defendant. *Id.* at 1258.

Garey shows that Mr. Suriano’s would have been treated in the Eleventh Circuit as a waiver-by-conduct case—meaning that Mr. Suriano’s alleged misconduct was not extreme enough to invoke the forfeiture doctrine. As such, warnings were required. But because the judge failed to forewarn Mr. Suriano, the Eleventh Circuit would have reversed.

The Respondent also obfuscates the holdings of relevant cases by merely reciting the rule that has been declared without addressing the application of that rule to the facts of the case. For example, the Respondent correctly recites the rule from *Maine v. Nisbet*, 134 A. 3d 840, 853 (ME 2016) that a defendant can forfeit the right to counsel through “serious misconduct,” but fails to mention that the serious misconduct in that case was repeated, direct, and “graphic” threats of violence

toward counsel. *Id.* at 855. This fits a theme in the Respondent's brief, which is to claim that the lower courts are in agreement simply because the majority of them acknowledge that after engaging in "serious" or "extreme" misconduct, a defendant can forfeit the Sixth Amendment right to counsel. This argument is superficial because it ignores the threshold question: what, specifically, constitutes "serious" misbehavior? The Respondent also fails to mention the second part of *Nisbet's* holding—that "forfeiture should be a last resort in response to the most grave and deliberate misconduct," and "forfeiture requires a determination by the court that there are no lesser judicial responses that can reasonably be expected to prevent or ameliorate the ongoing effects of the defendant's misconduct." *Id.* at 854. No such limiting principle exists in Wisconsin.

The Respondent acknowledges that this Court has not addressed whether a defendant can lose the right to counsel short of a knowing, intelligent, and voluntary waiver; however, it asserts that this Court would agree with Wisconsin's forfeiture-of-counsel doctrine by analogy to this Court's per curiam decision in *Taylor v. United States*, 414 U.S. 17 (1973). There, the defendant absented himself from trial after it had already begun. The case centered on a federal rule of evidence, and the appellant failed to raise the constitutional issue in the trial court below. *Id.* at 20. In its brief discussion of the constitutional right to be present, the Court found that it was not credible to believe that a defendant who had been

present for the first part of his or her trial—with the witnesses, jury, and parties present and ready—would not know that the trial could proceed in his absence. *Id.*

But in the context of the right to counsel, it is far from obvious that the consequence of acting obstreperously toward counsel is the complete loss of the Sixth Amendment right to counsel. Losing what this Court has deemed to be a criminal defendant's most fundamental constitutional right is simply not an obvious and natural consequence in this context. *See Lakeside v. Oregon*, 435 U.S. 333, 341 (1978) (“[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.”).

In sum, this Court's precedent does not answer the important constitutional question presented in this case. In the absence of controlling precedent, the lower courts have adopted varying and inconsistent approaches. It is time for this Court to weigh in.

II. This case is the right vehicle for this Court to determine whether forfeiture of counsel is constitutional, and if so, under what circumstances.

This case is a good vehicle for addressing the question of whether and when a defendant can involuntarily lose the right to counsel because: (a) the issue was fully preserved and addressed on its merits below, (b) the issue is the only issue presented in this case and its resolution will be dispositive, and (c) Wisconsin's doctrine is not only wrong, it is egregious. A defendant in Wisconsin can forfeit the right to counsel by virtue what other courts deem “less serious” misconduct—such as rude and manipulative behavior toward appointed counsel. Forfeiture of counsel

can be triggered in Wisconsin by a defendant's mere "defiant" attitude if the court is inconvenienced by it. *Suriano*, 893 N.W.2d at 552. And the trial judge need not warn a defendant that forfeiture of counsel is a possibility or advise him of the dangers and disadvantages of self-representation. *Id.* at 555-56. And finally, a defendant in Wisconsin is not entitled to procedural due process rights, such as notice and a meaningful opportunity to be heard, prior to a forfeiture finding. *Id.* at 552 (stating that waiver of counsel requires a hearing, but forfeiture of counsel is "very different.").

The Seventh Circuit has recognized that Wisconsin's forfeiture-of-counsel doctrine is unconstitutional. In *Smith v. Grams*, 565 F.3d 1037, 1047 (7th Cir. 2009), the Seventh Circuit granted a defendant's writ of habeas corpus after he was forced to represent himself at trial. The facts were analogous to Mr. Suriano's case, involving a perceived lack of cooperation and dissatisfaction with appointed counsel on the part of the defendant. *Id.* at 1039-40. The Wisconsin appellate court held that the defendant lost his right to counsel "by operation of law" even though the trial judge did not forewarn him. The Seventh Circuit disagreed, holding that, "even the Supreme Court's minimal guidance makes it clear that the procedures followed by the Wisconsin state trial court were inadequate." *Id.* at 1047.

The Respondent highlights that Mr. Suriano was convicted of a "simple" misdemeanor, perhaps to downplay the importance of this case. Respondent's brief at 1. Make no mistake: the holding below applies equally to *every* criminal

defendant in Wisconsin. Under the rule set forth, a person facing mandatory life imprisonment can involuntarily lose the right to counsel with no forewarning or meaningful opportunity to be heard on the matter. Simply by being “defiant,” and thereby causing inconvenience to the court, a Wisconsinite can be forced to stand before a jury and judge against the full weight and power of the government with no legal expertise or experience, and with no attorney to assist in their defense.

The Respondent’s brief uses the term “abuse” no fewer than five times (four times in the Introduction alone); but to be clear, the so-called “abuse” in this case consisted of verbal disagreement with counsel and heated rhetoric. There was never any allegation that Mr. Suriano became physical with counsel or even *threatened* to become physical. The trial judge did not even find that the breakdown in the attorney-client relationships in this case were fully attributable to Mr. Suriano, stating: “I’m not placing 100 percent of the blame on you, clearly you are an active participant in why those situations went haywire for lack of a better word.”

Any attorney who has represented a client understands that client management can be difficult. See *Carruthers*, 35 S.W.3d at 538 (Tenn. 2000) (if counsel was “merely” receiving letters calling him incompetent, instead of threatening him, he would not move to withdraw because “we all get those time to time. . .”). In particular, indigent defendants in criminal cases are commonly experiencing some of the most difficult times in their life. Their reputations, property, and liberty are at stake. And because they are indigent, they are not

entitled to a lawyer of their choosing. See *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). High stakes decisions are being made in their cases, and they are commonly, and understandably, fearful, nervous, and anxious.

Moreover, a large percentage of indigent defendants suffer from cognitive impairment, language difficulties, and mental illness. These individuals may present as rude or “defiant,” but there may be explanations for their undesirable conduct. What the Respondent is really saying is that only nice and popular people deserve attorneys. Not so. The right to counsel is not only for the nice and popular. It is for all. “Lawyers in criminal cases ‘are necessities, not luxuries.’” *United States v. Cronin*, 466 U.S. 648, 653-54 (1984).

In sum, Wisconsin’s forfeiture-of-counsel doctrine is extreme, compared with the federal courts of appeal and other state courts of last resort. Thus, this case is a good vehicle because it brings to clear focus the doctrinal variances on this important constitutional issue. It is also a good vehicle because Wisconsin’s doctrine is flagrantly unconstitutional, and in the interest of justice, it must be corrected.

CONCLUSION

For the reasons stated above and in his petition for a writ of certiorari, Mr. Suriano respectfully asks the Court to grant his Petition to answer the critically important question of whether, and under what circumstances, a criminal defendant can involuntarily lose the Sixth Amendment right to counsel.

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