WINNING BY FORFEIT?: A DISCUSSION OF NORTH CAROLINA'S FORFEITURE OF THE RIGHT TO COUNSEL SANCTION AND MENTALLY ILL DEFENDANTS

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I. INTRODUCTION

Under the Sixth Amendment to the United States Constitution, an accused enjoys the right to retain counsel at critical stages of criminal proceedings.[1] While this right is fundamental to the American criminal justice system,[2] it can be overcome in two ways.[3] First, the right to counsel can be waived.[4] Waiver involves a voluntary, knowing, and intelligent relinquishment of the right to counsel.[5] Second, and more importantly, the right to counsel can be forfeited.[6] Forfeiture of the right to counsel is involuntary and occurs "when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic combine to justify a forfeiture of that right."[7] In other words, forfeiture of the right to counsel "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."[8]

While the doctrine of waiver of the right to counsel has long been recognized by the United States Supreme Court, the doctrine of forfeiture of the right to counsel has not yet been decided, nor has it ever reached the Supreme Court.[9] Instead, several state supreme

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1. U.S. CONST. amend. VI.
2. United States v. Cronic, 466 U.S. 648, 653 (1984) ("An accused's right to be represented by counsel is fundamental component of our criminal justice system.").
3. *See* State v. Wray, 698 S.E.2d 137, 140 (N.C. Ct. App. 2010).
4. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 786 (2009).
5. *See id.*
6. *See Wray*, 698 S.E.2d at 140.
7. State v. Leyshon, 710 S.E.2d 282, 288 (N.C. Ct. App. 2011) (quoting State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000)).
8. *Montgomery*, 530 S.E.2d at 69 (quoting United States v. Goldberg, 67 F.3d 1092, 1100 (3d. Cir. 1995)).
9. *See generally* Stephen A. Gerst, *Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution*, 58 CLEV. ST. L. REV. 97, 98 (2010).

courts have recognized forfeiture as a sanction after two federal cases from 1995 referred to forfeiture in dicta.[10] One of the states that has implemented the sanction of forfeiture is North Carolina.[11] North Carolina formally recognized forfeiture in 2020.[12]

Before a defendant's waiver of the right to counsel is valid in North Carolina, a colloquy must occur between the trial judge and the defendant to ascertain whether the defendant is capable of proceeding pro se by conducting a thorough inquiry.[13] While the colloquy addresses aspects of the defendant's competency and mental health in a waiver situation, there is no such colloquy or test regarding a defendant's mental health in a forfeiture situation.[14] This is significant because forfeiture is usually applied in instances where a defendant engages in disruptive behavior during court proceedings.[15] Thus, North Carolina should employ a test for forfeiture that encapsulates a mentally ill defendant's mental health to vindicate his rights before he loses his right to counsel involuntarily.[16]

Part II of this Comment will introduce and explain the background of the right to counsel, waiver, and forfeiture in more detail. Part III will provide the analysis of a new test for forfeiture of the right to counsel that North Carolina should adopt that contemplates a defendant's mental health. Part IV will conclude that this new test is needed for a more equitable criminal justice system in North Carolina.

II. BACKGROUND

A. The Right to Counsel

The right to counsel was first recognized as a federal constitutional right in *Powell v. Alabama*.[17] In *Powell*, the United States Supreme Court overturned the conviction of nine African American adolescents after they were sentenced to death without being afforded counsel at any point throughout their trial.[18] The

10. *Id.*

11. *See* State v. Simpkins, 838 S.E.2d 439, 449 (N.C. 2020) ("A trial court may find that a criminal defendant has forfeited the right to counsel.").

12. *Id.*

13. *See* N.C. GEN. STAT. § 15A-1242 (1977); State v. Moore, 661 S.E.2d 722, 727 (N.C. 2008) (listing a fourteen-question checklist to satisfy the question of whether a defendant can proceed pro se).

14. *See* State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000) ("Defendant, by his own conduct, forfeited his right to counsel and the trial court was not required to determine, pursuant to G.S. § 15A–1242, that defendant had knowingly, understandingly, and voluntarily waived such right before requiring him to proceed pro se.").

15. *Id.*

16. *See generally* Gerst, *supra* note 9.

17. Powell v. Alabama, 287 U.S. 45 (1932).

18. *See id.* at 65.

Supreme Court specifically held that the denial of the right to counsel not only violated due process but also disregarded the "fundamental nature of that right."[19]

While the decision in *Powell* was the first step in recognizing that the right to counsel was fundamental, later Supreme Court decisions expounded on its reasoning and continued its result.[20] In *Johnson v. Zerbst*, the Supreme Court reasoned that the right to counsel is "one of the safeguards of the Sixth Amendment deemed necessary to [e]nsure fundamental human rights of life and liberty."[21] Further, the Supreme Court held in *Hamilton v. Alabama* that a defendant in a capital case is not required to show prejudice resulting from the absence of counsel prior to the overturning of his conviction.[22]

Although these early cases seemingly show a strong fundamental character of the right to counsel under both the Sixth and Fourteenth Amendments, this right was initially very limited in scope.[23] The tradition at common law was that the accused did not have the right to counsel when he was charged with treason or a felony.[24] The holdings in *Powell*, *Zerbst*, and *Hamilton* all relied on the fact that the Sixth Amendment expands the right to counsel exclusively to capital defendants, specifically by changing the dimensions of the common law.[25]

The Supreme Court holdings during these early decisions that the right to counsel only applied to capital cases was justified.[26] Several states already had an early version of the right to counsel in their respective state constitutions or statutes.[27] For instance, Georgia, in its 1798 Constitution, provided that "no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both."[28] Further, there was a general assumption under Georgia common law that the right to counsel even applied in petty crime cases.[29] This strong state protection of constitutional rights ultimately led the Supreme Court to ignore *Powell* and its progeny in its decision in *Betts v. Brady*.[30]

In *Betts*, the defendant was indicted for robbery but could not afford counsel to represent him.[31] When the defendant requested that the trial court appoint him counsel, the judge stated it was not

19. *Id.*
20. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 9 (2013).
21. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
22. *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Gerst, *supra* note 9, at 99.
23. *See* Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 168 (2012).
24. *Id.*
25. *Id.* at 168 n.15.
26. *Id.*
27. *Id.* at 169.
28. *Id.*
29. *Id.* at 168.
30. Betts v. Brady, 316 U.S. 455 (1942).
31. *Id.* at 456–57.

the practice of that county to appoint defendants counsel unless they were on trial for murder or rape.[32] On appeal, the Supreme Court held that the right to counsel did not apply to defendants in state court.[33] *Betts* went even further and concluded that "in the great majority of the states, it has been the considered judgment of the people, their representatives[,] and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."[34] Consequently, the defendant was convicted of robbery partially because he was denied the right to counsel and was required to proceed pro se.[35]

In the wake of *Betts*, a defendant had to rely on his own state to provide counsel.[36] However, while many states, including North Carolina, had laws providing for the right to counsel, these laws were rarely employed.[37] It was only in federal court where a defendant was assured the right to counsel.[38] However, *Gideon v. Wainwright* changed both the right to counsel analysis and the entire legal landscape.[39]

In *Gideon*, the defendant was charged in Florida state court with a felony.[40] The defendant, who was indigent, asked the trial court for appointed counsel.[41] The trial court rejected the defendant's request, reasoning that the court could only appoint counsel in capital cases.[42] As a result, the defendant represented himself to the best of his abilities, but he was ultimately convicted.[43] On appeal, the United States Supreme Court held that the Sixth Amendment right to counsel is fundamental and applicable to the states through the Fourteenth Amendment.[44] Thus, the Supreme Court took the monumental step of overruling *Betts* by affirming the fundamental nature of the right to counsel and making it binding on the states when the crime was a felony.[45] To this day, *Gideon* has an extremely

32. *Id.* at 457.

33. *Id.* at 461–62 (holding instead that the Sixth Amendment right to counsel only applies in federal court since the common law practices were not aimed to compel the state to provide counsel for a defendant, and, thus, the right to counsel was not incorporated to the states by virtue of the Fourteenth Amendment Due Process Clause).

34. *Id.* at 471 (concluding that the matter of the right to counsel has generally been deemed one of legislative policy).

35. *Id.* at 473.

36. Paul M. Rashkind, Gideon v. Wainwright*: A 40th Birthday Celebration and the Threat of a Midlife Crisis*, FLA. B.J. 12, 12–13 (2003).

37. *See* Metze, *supra* note 23, at 169 (discussing an early North Carolina right to counsel statute providing that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to council in all matters which may be necessary for his defen[s]e, as well to the facts as to law.").

38. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932).

39. Gideon v. Wainwright, 372 U.S. 335 (1963).

40. *Id.* at 336–37.

41. *Id.* at 337.

42. *Id.*

43. *Id.*

44. *See id.* at 342.

45. *See* Rashkind, *supra* note 36, at 14.

influential legacy and provides the basic framework for the right to counsel and its fundamental character.[46]

While *Gideon* signified one of the last steps towards a fundamental right to counsel,[47] the issue of whether a defendant has the right to counsel when charged with a misdemeanor was left unanswered.[48] This was eventually answered in *Argersinger v. Hamlin*.[49] In *Argersinger*, the defendant was charged with a misdemeanor.[50] The defendant was unrepresented by counsel at trial and, as a result, was convicted.[51] The United States Supreme Court held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[52]

Thus, the Supreme Court conclusively defined the right to counsel as truly fundamental and applicable in all federal and state criminal proceedings.[53] In response to these right to counsel cases, many states, including North Carolina, amended their state constitutions to add the right to counsel or to expand it to non-felony offenses.[54] While the fundamental nature of the right to counsel was finally settled by *Gideon* and *Argersinger*, other problems regarding the right to counsel remain unresolved.[55]

B. Waiver of the Right to Counsel

One of the greatest unresolved problems regarding the right to counsel was how a defendant lost the right to counsel.[56] The first answer was the doctrine of waiver.[57] Waiver was first defined in

46. *See generally* Elizabeth Berenguer Megale, Gideon's *Legacy: Taking Pedagogical Inspiration from the Briefs that Made History*, 18 BARRY L. REV. 227 (2013) (discussing that over fifty years ago, *Gideon* recognized the "fundamental right to counsel in state criminal prosecutions.").

47. *Id.* at 227–28.

48. *See* Gerst, *supra* note 9, at 100.

49. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

50. *Id.* at 26.

51. *Id.*

52. *Id.* at 27 (overruling the Florida Supreme Court, which held "the right to court-appointed counsel extends only to trials 'for non-petty offenses punishable by more than six months imprisonment.'").

53. *See generally* Rashkind, *supra* note 36, at 14 (explaining that the right to counsel is so fundamental that "Americans accept this principle as a cornerstone of criminal jurisprudence, even though the cornerstone is only 40 years old . . . .").

54. *See, e.g.*, N.C. CONST. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense . . . .").

55. *See* Geoffrey M. Sweeney, *If You Want It, You Had Better Ask for It: How* Montejo v. Louisiana *Permits Law Enforcement to Sidestep the Sixth Amendment*, 55 LOY. L. REV. 619, 629–30 (2009) (summarizing the issues that arose regarding the right to waive counsel).

56. *Id.*

57. *Id.*

Zerbst.[58] In that case, the Supreme Court defined waiver as "an intentional relinquishment or abandonment of a known right or privilege."[59] The *Zerbst* Court also held that a trial court must indulge "every reasonable presumption against waiver."[60]

While the *Zerbst* Court defined the meaning of waiver in the right to counsel context, it failed to determine the requirements for a defendant to validly waive his Sixth Amendment right to counsel.[61] In 1975, the Supreme Court determined the requirements for a defendant to validly waive his right to counsel and the effects of doing so.[62] In *Faretta v. California*, the Supreme Court held that a defendant has the right to conduct his own defense and appear pro se, which necessarily requires a voluntary waiver of the right to counsel.[63] Specifically, before a defendant can appear pro se, he "must 'knowingly and intelligently' forgo" the benefits of the right to counsel.[64] Thus, to ensure a defendant knowingly and intelligently waives the right to counsel, he should "be made aware of the dangers and disadvantages of self-representation" by the trial court.[65]

North Carolina, through its Constitution and General Assembly, generally followed the federal government's example regarding waiver of the right to counsel by incorporating *Faretta*.[66] For example, North Carolina requires that "[t]he waiver of counsel . . . must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will."[67]

North Carolina also requires that a statutory colloquy occur between a defendant and the trial court to ascertain whether he can voluntarily waive his right to counsel and proceed pro se.[68] Specifically, the trial court judge must ask a defendant whether he has been advised of his right to counsel, whether he understands and appreciates the consequences of waiver, and whether he comprehends the nature of the charges and proceedings and the range of permissible punishments.[69]

Further, to ensure the waiver is voluntary and a defendant is competent to proceed pro se, "[the] trial court has a continuing duty to monitor the situation even after [a] defendant has elected to

58. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
59. *Id.*
60. *Id.*
61. Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After* Montejo v. Louisiana, 71 LA. L. REV. 345, 352–53 (2010) (explaining how *Faretta v. California* elaborated on the waiver standard).
62. *See* Faretta v. California, 422 U.S. 806 (1975).
63. *See id.* at 819.
64. *Id.* at 835 (citing *Zerbst*, 304 U.S. at 464–65).
65. *Id.*
66. *See* N.C. GEN. STAT. § 15A-1242 (1977); N.C. CONST. art. I, § 23.
67. State v. Thacker, 271 S.E.2d 252, 256 (N.C. 1980) (citing *Faretta*, 422 U.S. at 835).
68. *See* N.C. GEN. STAT. § 15A-1242 (1977).
69. *Id.*

proceed pro se."[70] This is because "it is possible that [a] defendant may become so emotional, agitated, or confused that the waiver should be deemed withdrawn."[71] Thus, North Carolina, like most states, seeks to protect waiver and ensure it is truly voluntary because of the exceedingly delicate nature of the process.[72]

C. Forfeiture of the Right to Counsel

While waiver represented one answer to the issue of a defendant's loss of his right to counsel, forfeiture of the right to counsel represented the other.[73] Forfeiture of the right to counsel has not explicitly been addressed at the federal level but, rather, has only appeared in dicta.[74] However, the North Carolina Supreme Court has officially recognized forfeiture of the right to counsel as a sanction against a defendant.[75] Before forfeiture of the right to counsel was officially recognized by the North Carolina Supreme Court, several North Carolina lower court decisions found that forfeiture was required.[76] In *State v. Blakeney*, the North Carolina Court of Appeals held that "a defendant who is abusive toward his attorney may forfeit his right to counsel."[77] Other North Carolina Court of Appeals cases allowed forfeiture where a defendant intentionally delayed court proceedings.[78]

After years of North Carolina lower courts employing forfeiture of the right to counsel as a sanction, the North Carolina Supreme Court formally recognized forfeiture as a sanction in *State v. Simpkins*.[79] In *Simpkins*, the defendant was arrested during a traffic stop.[80] At trial, the defendant appeared without counsel and objected to the court's jurisdiction.[81] The trial court called in standby counsel and found that the defendant waived his right to counsel for the

70. Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 68 (2003).

71. *Id.*

72. *Id.* at 65–66.

73. *See* State v. Montgomery, 530 S.E.2d 66, 68 (N.C. Ct. App. 2000) (citing United States v. Goldberg, 67 F.3d 1092, 1100 (3d. Cir. 1995)).

74. *See* Gerst, *supra* note 9, at 104–07; United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995); *Goldberg*, 67 F.3d at 1100.

75. *See generally* State v. Simpkins, 838 S.E.2d 439, 445–46 (N.C. 2000) (describing how the Court of Appeals first analyzed the applicable statute of waiver and why forfeiture of counsel was determined).

76. *Id.*

77. State v. Blakeney, 782 S.E.2d 88, 94 (N.C. Ct. App. 2016) (quoting *Montgomery*, 530 S.E.2d at 69).

78. State v. Joiner, 767 S.E.2d 557, 564 (N.C. Ct. App. 2014) ("[A] defendant may lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial." (quoting State v. Boyd, 682 S.E.2d 463, 467 (N.C. Ct. App. 2009))).

79. *Simpkins*, 838 S.E.2d at 449.

80. *Id.* at 443.

81. *Id.* at 444.

duration of the trial.[82] The defendant was ultimately convicted, and he appealed.[83] The North Carolina Supreme Court, in a matter of first impression, held that "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel."[84]

As *Simpkins* and the Court of Appeals cases demonstrate, forfeiture of the right to counsel is not as complicated as a waiver in North Carolina.[85] Forfeiture of the right to counsel in North Carolina, unlike waiver, does not require a colloquy between a trial judge and a defendant.[86] Further, forfeiture does not require a knowing and voluntary relinquishment.[87] Rather, forfeiture only requires a showing of egregious conduct by a defendant.[88] Yet, the standard of egregious conduct does not necessarily take into account a defendant's mental health and how it affects his behavior in court.[89]

III. ANALYSIS

A. "Willfulness," Mental Health, and the Problem Facing North Carolina Courts

The current test for forfeiture of the right to counsel in North Carolina is based on the serious or egregious misconduct of a defendant.[90] Egregious conduct can be open to interpretation and requires a fact-specific inquiry.[91] North Carolina has provided three situations that typically qualify as egregious conduct, including:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in

82. *Id.*

83. *Id.* at 445 (Defendant argued on appeal that the trial court erred by not thoroughly inquiring into his decision to proceed pro se, but the State argued that the inquiry was not required because Simpkins forfeited, rather than waived, his right to counsel).

84. *Id.* at 446.

85. *See, e.g.*, *Simpkins*, 838 S.E.2d at 445–46; State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000).

86. *Simpkins*, 838 S.E.2d at 447.

87. State v. Boyd, 682 S.E.2d 463, 467 (N.C. Ct. App. 2009) (quoting *Montgomery*, 530 S.E.2d at 69).

88. *Id.*

89. *See generally* Gerst, *supra* note 9, at 111 (finding that "extremely serious misconduct [is] in the eyes of the beholder" and can lead to disparate decision-making between courts).

90. *Simpkins*, 838 S.E.2d at 446.

91. *See* State v. Atwell, 862 S.E.2d 7, 13 (N.C. Ct. App. 2021) (determining the degree of misconduct required to justify forfeiture of a defendant's right to counsel is undefined and, as such, is largely subjective).

> the judicial process, or insistence on nonsensical and nonexistent legal "rights."[92]

A requirement across all these situations is some sort of willful behavior by a defendant.[93]

Since North Carolina bases its sanction of forfeiture on willful behavior, it is important to define willfulness.[94] Willfulness is defined as "[t]he quality, state, or condition of acting purposely or by design; deliberateness; intention."[95] This is significant because there has historically been a strong correlation between the lack of willful behavior, mental illness and criminal incarceration.[96] Specifically, about ten to twenty-five percent of United States prisoners suffer from serious mental illnesses, such as major affective disorders or schizophrenia.[97] Further, twenty percent of juveniles involved in the juvenile justice system have a serious mental illness, and up to forty percent of adults suffering from a serious mental illness will come into contact with the criminal justice system at some point.[98] Additionally, schizophrenia, substance abuse, and depression are the more common mental illnesses among defendants.[99] Serious mental illness can cause a defendant to engage in abnormal or disruptive behavior, which may not be indicative of how a defendant really feels.[100] If a defendant's actions in court are involuntary due to a serious mental illness, then his actions are necessarily not willful, which creates a problem if the court decides to impose forfeiture as a sanction against him.[101]

While North Carolina recognizes the confluence of mental illness and willfulness in determining competency to stand trial, there is no history of applying this competency standard or considering mental health in forfeiture of the right to counsel situations.[102] Instead,

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92. State v. Blakeney, 782 S.E.2d 88, 94 (N.C. Ct. App. 2016).

93. *See* State v. Mee, 756 S.E.2d 103, 114 (N.C. Ct. App. 2014) (quoting State v. Quick, 634 S.E.2d 915, 917 (N.C. Ct. App. 2006)).

94. *Id.*

95. *Willfulness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96. Jennifer L. Morris, *Criminal Defendants Deemed Incapable to Proceed to Trial: An Evaluation of North Carolina's Statutory Scheme*, 26 CAMPBELL L. REV. 41, 42 (2004).

97. Lorna Collier, *Incarceration Nation*, 45(9) MONITOR ON PSYCH. 56 (Oct. 2014), https://www.apa.org/monitor/2014/10/incarceration.

98. Liesel J. Danjczek, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-Violent Offender Limitation*, 24 J. CONTEMP. HEALTH L. & POL'Y 69, 76–77 (2007).

99. Joe Hennell, *Mental Illness on Appeal and the Right to Counsel*, 29 J. CONTEMP. HEALTH L. & POL'Y 350, 353 (2013).

100. *See Schizophrenia*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes/syc-20354443 (last visited Feb. 6, 2023) ("[Behavior] may show in a number of ways, from childlike silliness to unpredictable agitation . . . Behavior can [also] include resistance to instructions, inappropriate or bizarre posture, a complete lack of response, or useless and excessive movement.").

101. *See generally* Traynor v. Turnage, 485 U.S. 535, 550 (1988) (distinguishing between alcoholism caused by willful conduct and alcoholism caused by mental illness).

102. *See* Morris, *supra* note 96, at 43; N.C. GEN. STAT. § 15A-1001(a) (1973) ("No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness

North Carolina courts have only held that the competence that is required of a defendant to appear pro se is not the same as the competency required for a waiver of the right to counsel.[103] Thus, North Carolina has recognized two distinct categories of competency: competency to stand trial and competency to proceed pro se.[104] However, most mentally ill defendants fall in a gray area where they are "competent enough to stand trial but . . . still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[105] Thus, a defendant may be competent enough to proceed to trial but not to conduct his own defense because he is mentally ill.[106]

For instance, in *State v. Cureton*, the North Carolina Court of Appeals held that the Sixth Amendment prohibits the court from forcing a gray-area defendant to proceed without counsel.[107] In that case, a forensic examiner and a forensic psychologist noted the defendant's "inability to communicate," which prevented a competency determination.[108] Further, the defendant argued that his borderline mental capacity prevented him from fully understanding his Sixth Amendment rights, citing his IQ of 82 and his history of past mental illness.[109] Nonetheless, the North Carolina Court of Appeals held that forfeiture was appropriate.[110]

The problems that willfulness, gray-area defendants, and competency pose for North Carolina courts can be seen in other Court of Appeals cases.[111] For example, in *State v. Montgomery*, the defendant grew frustrated with his first attorney, which resulted in multiple replacements.[112] The defendant's right to counsel was forfeited even though he had a learning disability resulting in a third-grade education and insisted "that he needed counsel, wanted counsel, and was not competent to represent himself."[113] Similarly, in *State v. Blakeney*, the defendant still forfeited his right to counsel after repeated hiring and firing of his attorney even though he displayed a lack of understanding of key legal and factual issues and

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or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.").

103. State v. Lane, 707 S.E.2d 210, 218–19 (N.C. 2011) (quoting Godinez v. Moran, 509 U.S. 389, 399–400 (1993)).

104. *See id.* (describing the two-step process used by North Carolina courts in determining competency at both stages).

105. State v. Cureton, 734 S.E.2d 572, 582 (N.C. Ct. App. 2012) (citations omitted) (quoting State v. Lane, 669 S.E.2d 321, 322 (N.C. 2008)).

106. *Id.*

107. *Id.* at 587–88.

108. *Id.* at 576.

109. *See id.* at 580.

110. *See id.* at 588.

111. *See, e.g.*, State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000).

112. *Id.*

113. Defendant-Appellant's Brief at 15, 18, *Montgomery*, 530 S.E.2d 66 (N.C. Ct. App. 2000) (No. COA 99-757).

of the consequences of appearing pro se.[114] These cases demonstrate that North Carolina does not necessarily take into account the level of understanding a defendant has for forfeiture purposes if he engages in disruptive behavior.[115] Thus, a North Carolina defendant can lose his right to counsel through no fault of his own.[116]

B. Potential Solutions to the Forfeiture Issue

A better test for forfeiture of the right to counsel would include a different definition of competency and willfulness that involves a statutory colloquy or warning similar to N.C.G.S. § 15A-1242.[117] If a defendant is found to be infirm under this colloquy, then the court should reevaluate whether forfeiture would be appropriate through a court-ordered psychiatric evaluation.[118] While it is difficult to determine what an intentional action on behalf of a defendant is, North Carolina courts should make the effort to determine if he is a "gray-area" defendant who has the competency to stand trial but not the competency to proceed pro se.[119] If a defendant is a "gray-area" defendant, then a North Carolina trial court should be more hesitant to apply the sanction of forfeiture of the right to counsel.[120] Thus, North Carolina can better protect a defendant's constitutional rights by making it more difficult for a mentally ill criminal defendant to unknowingly waive counsel, to proceed pro se, and to forfeit the right to counsel.[121]

Another way to clarify the willfulness requirement of forfeiture is to analogize it to the civil commitment standards for competency in North Carolina.[122] Specifically, "in certain non-criminal cases involving allegations of mental infirmity, North Carolina's statutes appear to require representation by counsel."[123] In other words, if there are mere allegations of infirmity, a defendant may be

114. Defendant-Appellant's Reply Brief at 12, State v. Blakeney, 782 S.E.2d 88 (N.C. Ct. App. 2016) (No. COA 15-622).

115. *See, e.g.*, *Cureton*, 734 S.E.2d at 580 (explaining that evidence of mental illness alone is not enough for waiver or competency issues).

116. *See id.*

117. *See* Gerst, *supra* note 9, at 111–12 (discussing the efficacy of warnings on defendants facing the sanction of forfeiture).

118. *See generally* Kerrin Maureen McCormick, *The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake*, 30 AM. CRIM. L. REV. 1329 (1993).

119. *See* Jona Goldschmidt, *Autonomy and "Gray-Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J. L. & SOC. POL'Y 130, 177 (2011).

120. *See* Indiana v. Edwards, 554 U.S. 164, 178 (2008) ("States [are permitted to] insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.").

121. Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 325 (2009).

122. *See In re* Watson, 706 S.E.2d 296, 301 (N.C. Ct. App. 2011).

123. 1 RUBIN ET AL., N.C. DEF. MANUAL: PRETRIAL, § 12.6, at 12–35 (2d ed. 2013); *See* N.C. GEN. STAT. § 122C-268(d) (2021); N.C. GEN. STAT. § 35A-1107 (2003).

considered incompetent under the civil commitment system and cannot be removed.[124] This includes cases where a defendant may not want counsel but is so seriously mentally ill that counsel must be afforded to protect him.[125] This standard, while potentially infringing on the right to self-representation, would better protect a seriously mentally ill defendant from unnecessary forfeiture of the right to counsel by assuring him counsel.[126] Further, this limitation on the right to self-representation under *Faretta* has already been recognized in competency to stand trial cases involving a mentally ill defendant.[127] Similarly, there are circumstances where a North Carolina court does not necessarily have to honor a defendant's request to proceed pro se.[128] While a defendant could use this new competency standard to intentionally obstruct proceedings,[129] many more mentally ill defendants will be protected from forfeiting their right to counsel.[130] Thus, if there are allegations of mental infirmity, the trial court should hesitate before employing the sanction of forfeiture.[131]

A final way to clarify the willfulness requirement is to require some form of warning or admonition to a defendant or his counsel.[132] The best time for the court to give this warning or admonition would be at a critical stage, such as arraignment, specifically when a defendant is asked about whether he can afford an attorney.[133] Further, while giving one warning early in the proceedings may be sufficient, giving multiple warnings or signed written warnings would be best practice.[134] One or more warnings "may act to deter a defendant from acting out . . . as he then knows the right to appointment of counsel is not an unlimited right and is aware of the types of conduct that could put his right to counsel at risk."[135] If a defendant is too mentally ill, then a trial court should continually re-warn him about forfeiture whenever any counsel-related issues arise.[136] Thus, requiring a warning by a trial court could save a

124. *See* N.C. GEN. STAT. § 122C-268(d) (2021) ("The respondent *shall* be represented by counsel of his choice. . .") (emphasis added).

125. *See In re* G.G., 165 A.3d 1075, 1088 (Vt. 2017) (refusing to allow a patient to represent himself pro se, finding that due process required counsel in civil commitment hearings).

126. *See* Faretta v. California, 422 U.S. 806, 819 (1975).

127. James Vicini, *Court: Mentally Ill Defendants Can't Be Own Lawyer*, REUTERS (June 19, 2008, 10:29 AM), https://www.reuters.com/article/us-usa-court-lawyer/court-mentally-ill-defendant-cant-be-own-lawyer-idUSN1947181220080619.

128. *See* 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.5(d) (6th ed. 2017).

129. *See id.*

130. *See In re* G.G., 165 A.3d at 1088 (stopping a patient from proceeding pro se and waiving his right to counsel).

131. *See id.*

132. Gerst, *supra* note 9, at 112.

133. *Id.*

134. *Id.* at 112–13.

135. *Id.* at 113.

136. *Id.*

mentally ill defendant's fundamental right to counsel from forfeiture.[137]

C. Standby Counsel and Use of Hybrid Representation

Another potential solution for a mentally ill defendant to avoid the consequences of forfeiture of the right to counsel is to allow for hybrid representation.[138] Under North Carolina law, a defendant is allowed standby counsel when he is appearing pro se, even in cases of forfeiture.[139] However, North Carolina, like many states, generally prohibits hybrid representation between a defendant and standby counsel because this type of relationship may infringe upon the right to self-representation.[140] Hybrid representation consists of concurrent self-representation and representation by counsel, which differs considerably from the traditional standby counsel model.[141] Under the hybrid representation model, a defendant and his attorney share the role of counsel, as opposed to a pro se defendant acting as his own counsel, but consulting their standby attorney at reasonable times.[142] Further, under hybrid representation, a defendant and his attorney share responsibilities in such activities as jury selection, opening statements, examination of witnesses, and closing arguments.[143]

While having standby counsel is generally beneficial for a mentally ill defendant, it is not enough to protect him from losing the right to counsel due to forfeiture.[144] Hybrid representation is preferable because it is a "potential workable solution to the judiciary in reaching that all-important balance between the constitutional rights of the pro se defendant . . . and the competing demands of the judicial system."[145] Further, hybrid representation is also beneficial for the trial court.[146] Specifically, the court can use

137. *Id.* at 112.

138. *See* Tiffany Frigenti, *Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn Supreme Court of New York Appellate Term, Second Department*, 28 TOURO L. REV. 1019, 1039 (2012).

139. *See* N.C. GEN. STAT. § 15A-1243 (1977).

140. *See* State v. Thomas, 484 S.E. 2d 368, 370 (1997); Colquitt, *supra* note 70, at 76 (finding that both federal and state courts have found no right to hybrid representation); Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are They Phone Psychics? Theatrical Understudies? Or Both?*, 24 S. CAL. REV. L. & SOC. JUST. 133, 188–89 (2015) (discussing the distinction between the right to representation and the right to assistance).

141. *See* Colquitt, *supra* note 70, at 74.

142. *Id* at 75.

143. *Id.*

144. *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 677 (2000) (explaining that courts often provide standby counsel to alleviate the burden of presiding over the trial of a pro se criminal defendant and possibly to avert an unfair trial).

145. Kelly Rondinelli, *In Defense of Hybrid Representation: The Sword to Wield and the Shield to Protect*, 27 WM. & MARY BILL RTS. J. 1313, 1316 (2019).

146. *See id.*

hybrid representation as a shield to protect against the inherent problems of a pro se defendant, while also providing a sword to him to combat the challenges of the judiciary, particularly when he is seriously mentally ill.[147] Hybrid representation could provide a mentally ill defendant with the control needed to avoid engaging in disruptive behavior.[148]

In addition to the benefits hybrid representation would provide to both North Carolina defendants and courts, it would also shift the burden of determining mental illness for the purposes of forfeiture from the defense attorney back to the court. This would include psychiatric evaluations and interviews with the defendant.[149] The law as it is in North Carolina places the burden of determining whether a defendant has a serious mental illness on his attorney.[150] However, defense attorneys deal with heavy caseloads and are not trained to look for signs of serious mental illness.[151] Further, defense attorneys tend to only raise issues of mental illness in serious felony cases, not in the vast majority of cases.[152]

To prevent this overwhelming of defense counsel, the onus of determining a defendant's mental health should shift back to the court.[153] A defendant could have hybrid representation while the court determines whether his outburst was intentional or caused by a serious mental illness.[154] Shifting this burden back to the court would alleviate the pressure on both defense attorneys and defendants by removing stressors. It could even prevent a triggering event for a seriously mentally ill defendant that results in forfeiture of the right to counsel.[155] Thus, hybrid representation could equalize the burdens on defense attorneys, defendants, and courts, while simultaneously helping a mentally ill defendant gain access to representation by competent counsel.[156]

D. Other States' Approaches to Forfeiture of the Right to Counsel

While North Carolina's standard for the sanction of forfeiture of the right to counsel is easy to meet, several states have created their own tests that are more stringent and better protect a mentally ill

147. *Id.*
148. *Id.* at 1323–24.
149. *See* Davoli, *supra* note 121, at 321.
150. *See id.*
151. *Id.*
152. *Id.* at 320.
153. *See* Rondinelli, *supra* note 145, at 1331–32.
154. *Id*. at 1327.
155. *See generally* Adam Felman & Rachel Ann Tee-Melegrito, *What is Mental Health?*, MED. NEWS TODAY (Dec. 23, 2022) https://www.medicalnewstoday.com/articles/154543 (finding that stress, depression, and anxiety all affect mental health and disrupt a person's home).
156. *See generally* Rondinelli, *supra* note 145.

defendant's right to counsel.[157] For instance, Oregon requires that "[a] defendant must have received 'an advance warning that a repetition of behavior that amounts to misconduct will result in [a] defendant having to proceed *pro se*'" before his right to counsel is forfeited.[158] Oregon courts have reasoned that it "is necessary to alert [a] defendant to the fact that a repetition of demonstrated misconduct may result in a waiver of the right to counsel, rather than some other consequence."[159]

Similarly, Indiana also subscribes to the rule that "[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."[160] Florida requires both a warning and an opportunity to be heard before the right to counsel is forfeited by a defendant.[161] The approaches to forfeiture of the right to counsel in Oregon, Indiana, and Florida which require warnings and a hearing are more equitable than that of North Carolina.[162] North Carolina courts have no duty to warn a defendant that his conduct could result in the loss of counsel.[163] This puts a mentally ill defendant in North Carolina at a material disadvantage and at greater risk of forfeiture.[164] Giving warnings and an explanation of behaviors which may amount to forfeiture could help a mentally ill or gray-area defendant understand how he could lose his constitutional right.[165]

Oregon, Indiana, and Florida are just three of many states that have a more equitable test for forfeiture of the right to counsel than North Carolina.[166] For example, Virginia requires that the court "view [a] defendant's conduct in its entirety, together with all the other

157. *See, e.g.*, Frigenti, *supra* note 138, at 1030–36.

158. State v. Stanton, 511 P.3d 1, 7 (Or. 2022) (quoting State v. Langley, 273 P.3d. 901, 913 (Or. 2012)).

159. *Id.*

160. Vonhoene v. State, 165 N.E.3d 630, 636 (Ind. Ct. App. 2021) (emphasis added).

161. Oliver v. State, 283 So. 3d 829, 830 (Fla. Dist. Ct. App. 2019) ("The right to proceed pro se may be forfeited where it is determined, after proper notice and an opportunity to be heard, that the party has abused the judicial process by repeatedly filing successive or meritless collateral claims in a criminal proceeding.").

162. *See generally* Gerst, *supra* note 9, at 112 (concluding that a warning would protect defendants from the sanction of forfeiture).

163. *See* State v. Simpkins, 838 S.E.2d 439, 449 (N.C. 2020) (concluding that the trial court is not required to follow the requirements of N.C.G.S. § 15A-1242 in cases of forfeiture, "which the court would otherwise be required to do before permitting a defendant to proceed pro se").

164. *See* Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 996 (2007) (quoting "Justice Blackmun's famous assertion that 'one who is his own lawyer has a fool for a client'").

165. *See* Gerst, *supra* note 9, at 112 (concluding that an on-the-record warning would put defendants on notice about the sanction of forfeiture).

166. *See, e.g.*, People v. Settles, 385 N.E.2d 612, 616, 618 (N.Y. 1978) (concluding that the right to counsel in New York is indelible and a criminal defendant under indictment and in custody may not waive his right to counsel unless he does so in the presence of an attorney who acquiesces).

circumstances of the case, that support the conclusion his . . . conduct tended to unreasonably and unjustifiably delay trial" before forfeiture is appropriate.[167] In other words, Virginia requires a totality of the circumstances approach when determining whether forfeiture of the right to counsel is an appropriate sanction.[168] Virginia also requires that the trial court's finding of forfeiture include a specific recitation of how a defendant's conduct shows an unequivocal intent to relinquish or abandon his right to counsel.[169] Similarly, Ohio recognizes that the "right to counsel must be balanced against [a] trial court's authority to control its docket, as well as its awareness that a 'demand for counsel may be utilized as a way to delay the proceedings or trifle with [a] court.'"[170] Additionally, Connecticut recognizes that "[w]hile courts must be assiduous in their defense of an accused's right to counsel," it must be balanced with the administration of justice.[171]

North Carolina courts should employ a balancing test, a totality of the circumstances approach, or a specific recitation under North Carolina law. Presently, none of these approaches are required by law in North Carolina and, thus, it is within the discretion of an individual trial judge to determine what constitutes egregious conduct.[172] To better protect a mentally ill defendant's Sixth Amendment right to counsel, North Carolina courts should emulate the approaches taken by these states and, at a minimum, require a balancing test based on the totality of the circumstances.[173] This would necessarily take a defendant's mental illness into account.[174] If the totality of the circumstances approach uncovers evidence of mental illness in a defendant, then this would become a factual issue that should be addressed in an additional evidentiary hearing before the right to counsel is forfeited.[175]

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167. Walker v. Commonwealth, 839 S.E.2d 123, 127 (Va. Ct. App. 2020) (quoting Bailey v. Commonwealth, 568 S.E.2d 440, 445 (Va. Ct. App. 2002)).

168. *See id.* at 127–28 (viewing the record based on the totality of the circumstances and concluding that the appellant "knowingly and intentionally waived his right to counsel").

169. McNair v. Commonwealth, 561 S.E.2d 26, 31 (Va. Ct. App. 2002).

170. State v. Baskin, 137 N.E.3d 613, 621 (Ohio Ct. App. 2019) (quoting State v. Stein, No. 10-17-13, 2018 WL 3026049, at *4 (Ohio Ct. App. June 18, 2018)).

171. State v. Kukucka, 186 A.3d 1171, 1184 (Conn. App. Ct. 2018).

172. *See* State v. Boderick, 812 S.E.2d 889, 895 (N.C. Ct. App. 2018) (discussing that a certain level of misconduct will rise to the level of forfeiture).

173. *See generally* Sarah Gerwig-Moore, Gideon*'s Vuvuzela: Reconciling the Sixth Amendment's Promises with the Doctrines of Forfeiture and Implicit Waiver of Counsel*, 81 MISS. L.J. 439, 451 (2012) (discussing how several states utilize a hearing that considers the totality of the circumstances before forfeiture is appropriate).

174. *See id.* at 473 (describing a scenario in which a defendant's mental health causes him to lose his right to counsel).

175. *See* Gerst, *supra* note 9, at 113 (concluding that factual issues may need to be determined at an evidentiary hearing regarding the seriousness of a defendant's conduct before the defendant loses his or her right to counsel).

E. Policy Reasons for a New Forfeiture Test

There are also several policy reasons why North Carolina courts should be hesitant to apply the sanction of forfeiture of the right to counsel to a mentally ill defendant.[176] First, North Carolina courts have generally "applied a presumption against the casual forfeiture of U.S. Constitutional rights."[177] This is especially true for the right to counsel.[178] The right to counsel is particularly important because "[i]t guarantees that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[179] It also has the secondary effect of safeguarding "the fairness of the trial and the integrity of the factfinding process."[180] If a mentally ill defendant had his right to counsel forfeited without a thorough inquiry or warning, he would be left to his own devices in facing the prosecutorial forces of organized society.[181] In other words, a mentally ill defendant would be at a disadvantage at trial through no fault of his own, which goes against the fundamental fairness that the right to counsel is designed to protect.[182]

Second, the current forfeiture test under North Carolina law can lead to nonsensical results.[183] For instance, if a defendant is found to have forfeited his right to counsel for assaulting his defense attorney, then he will be forced to proceed pro se on the current charge, yet is entitled to the appointment of counsel on the charge of assaulting an attorney.[184] If a mentally ill defendant engages in this behavior, it is illogical to terminate his right to counsel on one charge while allowing counsel on another charge.[185]

Finally, the decision to involuntarily remove a mentally ill defendant's right to counsel could be considered arbitrary and capricious.[186] The lack of a definition of egregious conduct has created a wide disparity in what courts deem sufficient to invoke the sanction of forfeiture[187] A consistent definition of egregious conduct

176. *See id.* at 112.

177. State v. Wray, 698 S.E.2d 137, 141 (N.C. Ct. App. 2010).

178. *See id.* (acknowledging that the right to counsel has long been considered fundamental).

179. State v. Simpkins, 838 S.E.2d 439, 446 (N.C. 2020) (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)).

180. *Id.* (quoting Brewer v. Williams, 430 U.S. 387, 426 (1977) (Burger, C.J., dissenting)).

181. *Id.* at 535–36 (quoting Moran v. Burbine, 475 U.S. 412, 430 (1986)).

182. *See generally* Nannette Jolivette Brown, *75th Anniversary of* Powell v. Alabama *Commemorated*, 56 LA. B.J. 19 (2008) (discussing the right to counsel, *Powell*, and fundamental fairness).

183. Gerst, *supra* note 9, at 111.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

that considers a defendant's mental illness will help create more uniformity and fewer arbitrary results.[188]

IV. CONCLUSION

It is clear that North Carolina needs a more equitable test to determine whether a mentally ill defendant should lose his right to counsel through forfeiture. Not only is the current test poorly defined, but several states already have a better system that considers a defendant's mental illness. However, there have recently been some positive developments in North Carolina law regarding forfeiture.[189] Just last year, the North Carolina Supreme Court decided the case of *State v. Harvin*.[190] In *State v. Harvin*, the Court held that a juvenile defendant, accused and convicted of first-degree murder, did not forfeit his right to counsel, even after he fired two court-appointed attorneys and sought new counsel on the day of trial.[191] Additionally, the Court recognized that the defendant had a mental illness and that it potentially had an effect on his behavior.[192] While there was just a slight mention of mental illness, its acknowledgment by the North Carolina Supreme Court is a positive development.[193]

While *State v. Harvin* was a step toward adopting a more stringent forfeiture of the right to counsel test, this is no guarantee.[194] A new forfeiture of the right to counsel test must be employed in North Carolina to protect a mentally ill defendant's constitutional right to counsel.[195] This new test should require at least a warning, allow for hybrid representation, and follow other states' approaches. Finally, this new test will help both mentally ill defendants and the court system by creating a more equitable system of justice.[196]

188. *See id.* (explaining how the lack of a definition for "extremely serious" misconduct could result in disparate decision-making).

189. *See, e.g.*, State v. Harvin, 879 S.E.2d 147 (N.C. 2022).

190. *See id.*

191. *Id.* at 162.

192. *See id.*

193. *See id.* (recognizing that being a juvenile and having a limited educational level can also impact the right to counsel and forfeiture).

194. *Compare* State v. Harvin, 879 S.E.2d 147, 162 (N.C. 2022) (suggesting that the mental illness and limited educational level could be weighed against the sanction of forfeiture), *with* State v. Simpkins, 838 S.E.2d 439, 446 (N.C. 2020) (determining that egregious conduct is all that is required for forfeiture of the right to counsel).

195. *See generally* Gerwig-Moore, *supra* note 173 (arguing that forfeiture of the right to counsel should be more like the traditional sanction of contempt).

196. *See generally* Gerst, *supra* note 9 (discussing how forfeiture of the right to counsel is "unhinged from the Constitution" and creates inequitable results).