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STATE V. JONES AND FORFEITURE BY WRONGDOING: 
WHEN IS A DEFENDANT'S BEHAVIOR BAD ENOUGH TO RESULT IN FORFEITURE OF THE RIGHT TO COUNSEL?

Jodie L. Carlson†

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I. INTRODUCTION

Don Jones represented himself at trial, but he didn’t really want to.¹ His public defender applications were denied, and he didn’t hire a private attorney.² A divided Minnesota Supreme Court determined that Jones forfeited his right to counsel based on his “extremely dilatory” conduct in failing to retain counsel, despite being given many opportunities to do so.³ The problem with the Jones decision is that forfeiture of fundamental constitutional rights is usually reserved for more serious misconduct—for example, threatening or abusive behavior, or deliberate wrongdoing—not the type of conduct at issue in Jones.⁴

The goal of this note is to provide lawyers and judges with some guidelines to consider in assessing whether a defendant’s behavior is bad enough to result in the loss of the fundamental constitutional right to counsel. With that goal in mind, this note will first discuss the requirements for a constitutionally valid waiver of counsel, define the terms “waiver by conduct” and “forfeiture” that the Minnesota Supreme Court relied on in Jones,⁵ and explore United States Supreme Court decisions that have found that a defendant can forfeit fundamental constitutional rights based on wrongdoing.⁶ Next, this note will discuss the Minnesota Supreme Court’s decision in Jones and analyze whether Jones’s conduct was bad enough to result in forfeiture of the right to counsel.⁷ Finally, this note will provide guidelines to help lawyers and judges determine when a defendant’s behavior is bad enough to forfeit the right to counsel.⁸

¹. See State v. Jones, 772 N.W.2d 496, 502 (Minn. 2009) (Jones applied for a public defender four or five times but was denied and was unable to retain counsel on his own), cert. denied 130 S. Ct. 3275 (2010).
². Id.
³. Id. at 501.
⁴. Id. at 514 (Meyer, J., and Anderson, Paul, J., dissenting) (citing United States v. Goldberg, 67 F.3d 1092, 1101-02 (3d Cir. 1995)).
⁵. See infra Part II.
⁶. See infra Part II.
⁷. See infra Part III.
⁸. See infra Part IV.
II. DEFINITION OF TERMS—WHAT IS REQUIRED FOR WAIVER, WAIVER BY CONDUCT, AND FORFEITURE OF CONSTITUTIONAL RIGHTS?

In holding that Jones forfeited his right to counsel, the Minnesota Supreme Court discussed the concepts of waiver, waiver by conduct, and forfeiture. Because these concepts have not been universally adopted, it is important to define them.

A. Waiver

While a defendant can waive the right to counsel, the trial court is responsible for ensuring that the waiver complies with the federal constitution and state law.

1. Constitutional Requirements

The Sixth Amendment right to counsel is a fundamental constitutional right. The Sixth Amendment “is one of the safeguards ... necessary to insure fundamental human rights of life and liberty.” Further, the Sixth Amendment “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”

Although the right to counsel is a fundamental right, Faretta v. California established that a criminal defendant is also afforded the concomitant right to waive counsel and represent himself at trial. Nonetheless, as with other fundamental rights, the Supreme Court consistently guards the defendant's fundamental right to counsel by “indulging every reasonable presumption against...

9. Jones, 772 N.W.2d at 504-06.
13. Id. at 462-63.
Further, the Supreme Court “do[es] not presume acquiescence in the loss of fundamental rights.” Accordingly, a waiver is “an intentional relinquishment or abandonment of a known right or privilege.” When a defendant waives a fundamental right, the trial judge has the responsibility of ensuring that the waiver is voluntary, knowing, and intelligent.

In determining whether the defendant’s waiver of counsel meets these requirements, the trial court must, at a minimum, ensure that the defendant has enough information to make an intelligent choice. This includes warnings of the hazards and pitfalls of proceeding to trial unrepresented, as well as ensuring that the defendant understands the nature of the charges and the range of allowable punishments, so that the record establishes that he “knows what he is doing and his choice is made with eyes open.” These warnings will be referred to throughout this article as “Faretta warnings.”

Further, in exercising its duty of ensuring that the defendant’s waiver of counsel is competent and intelligent, the trial court should make this determination on the record. Finally, the determination of whether the defendant intelligently waived the right to counsel depends “upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”

16. Johnson, 304 U.S. at 464 (internal quotation marks omitted); see also Brewer v. Williams, 430 U.S. 387, 404 (1977) (“But waiver requires not merely comprehension but relinquishment . . . .”).


18. Id.


20. Faretta, 422 U.S. at 835; see also Iowa v. Tovar, 541 U.S. 77, 88–89 (2004) (citations omitted) (discussing the difference between the information the defendant must possess to make a knowing and intelligent waiver of counsel before deciding to represent himself at trial and the information the defendant must possess at other earlier stages of the proceedings, such as when entering a guilty plea).


23. Id.
2. Minnesota Law

Consistent with these principles, Minnesota law explicitly requires that a defendant’s waiver of the right to counsel be in writing.24 However, if the defendant refuses to sign the waiver, the waiver must be on the record.25 And before the court can accept the waiver, the Minnesota Rules of Criminal Procedure require the courts to advise defendants of the following:

(a) nature of the charges;
(b) all offenses included within the charges;
(c) range of allowable punishments;
(d) there may be defenses;
(e) mitigating circumstances may exist; and
(f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.26

Although Minnesota law explicitly provides that the defendant’s waiver of counsel must be in writing or on the record, the district court did not have Jones sign a written waiver of counsel. The on-the-record waiver was insufficient because it did not include the nature of the charges or the dangers and disadvantages of waiving counsel.27

B. Waiver by Conduct

Although Jones’s waiver of counsel did not comply with Faretta or Minnesota law,28 the Minnesota Supreme Court considered whether the waiver was valid under a different theory.29 The supreme court relied on the concepts of waiver by conduct and

24. MINN. STAT. § 611.19 (2010); MINN. R. CRIM. P. 5.04, subdiv. 1(4).
Minnesota Rule of Criminal Procedure 5.04 was previously numbered Minnesota Rule of Criminal Procedure 5.02, but it has not substantively changed.
25. MINN. STAT. § 611.19.
26. MINN. R. CRIM. P. 5.04, subdiv. 1(4). These requirements are consistent with the minimum requirements necessary to ensure that the waiver of counsel is knowing and intelligent, particularly the requirement that the defendant “be made aware of the dangers and disadvantages of self-representation, so that the record establishes that ‘he knows what he is doing and his choice is made with eyes open.’” Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1942)).
27. State v. Jones, 772 N.W.2d 496, 504 (Minn. 2009).
28. Id.; see also MINN. STAT. § 611.19; Faretta, 422 U.S. at 807.
29. Jones, 772 N.W.2d at 506.
forfeiture as discussed by the Third Circuit in *United States v. Goldberg.*\(^{30}\) According to the *Goldberg* definitions, waiver by conduct is a hybrid situation that combines elements of waiver and forfeiture: “once 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* and, thus, as a waiver of the right to counsel.”\(^{31}\) However, the defendant must also be advised of the dangers and disadvantages of self-representation, as required by *Faretta.*\(^{32}\) Accordingly, waiver by conduct only applies where the defendant is aware of the consequences of his actions, including the risks of self-representation.\(^{33}\)

In jurisdictions that follow the *Goldberg* definition of waiver by conduct,\(^{34}\) courts have found that the defendant waives counsel by unreasonable or uncooperative conduct that sabotages the relationship with counsel or repeatedly failing to retain counsel where the record is clear that the defendant had the demonstrated financial ability to retain counsel.\(^{35}\) On the other hand, where the

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30. 67 F.3d 1092, 1099–1102 (3d Cir. 1995).
31. Id. at 1100 (citations omitted).
32. Id.
33. Id. at 1103 (noting that any claim that Goldberg waived counsel by his conduct is precluded by the government’s concession that the district court failed to inform him of the risks of self-representation in accordance with *Faretta*).
34. Id. at 1100.
35. See, e.g., *United States v. Garey*, 540 F.3d 1253, 1265–66 (11th Cir. 2008) (holding that the defendant can waive the right to counsel by conduct in being uncooperative and rejecting appointed counsel where the defendant understands that his only alternative is self-representation with its “many attendant dangers”); *United States v. Sutcliffe*, 505 F.3d 944, 955–56 (9th Cir. 2007) (holding that the defendant waived counsel by conduct where he was warned of the disadvantages of self-representation but he deliberately sabotaged his relationship with six different appointed attorneys causing a twenty-month delay in scheduling the trial); *King v. Bobby*, 433 F.3d 483, 488, 493–94 (6th Cir. 2006) (holding defendant waived counsel by his conduct when he refused to retain an attorney despite his financial ability to do so, refused to work with his attorney, and the defendant was aware of the disadvantages of self-representation); *United States v. Oreye*, 263 F.3d 669, 672 (7th Cir. 2001) (holding that the defendant impliedly waived counsel by his conduct where he had two different court-appointed lawyers; the defendant found them unsatisfactory; the court gave him the choice of staying with the court-appointed lawyer, retaining his own lawyer, or representing himself, and the defendant appeared at trial without a lawyer; and the court’s warnings about the dangers of self-representation, although perfunctory, were adequate); *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992) (holding that the “combination of ability to pay for counsel plus refusal to do so does waive the right to counsel at trial” where the defendant was warned about the dangers of self-representation); *United States v. Weninger*, 624 F.2d 163, 166–67 (10th Cir. 1980) (finding waiver
record does not indicate that the defendant had the financial ability to retain counsel and the court failed to warn the defendant of the dangers of self-representation, courts have held that waiver by conduct does not apply.\textsuperscript{36} The Minnesota Supreme Court found that waiver by conduct did not apply to Jones’s case because he was never warned of the dangers and disadvantages of self-representation.\textsuperscript{37}

\section*{C. Forfeiture}

According to the \textit{Goldberg} definitions, forfeiture does not require any advance warnings and “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.”\textsuperscript{38} Because forfeiture is a severe sanction, the defendant’s misconduct must be “extremely dilatory” or “extremely serious.”\textsuperscript{39} Examples of “extremely serious” or “extremely dilatory” misconduct include assaulting counsel,\textsuperscript{40} verbally abusing or threatening counsel, and egregious manipulation (for example, making unreasonable demands of counsel or unreasonably discharging counsel for the

\textsuperscript{36}. See, e.g., United States v. Meeks, 987 F.2d 575, 579 (9th Cir. 1993) (finding that the defendant did not waive counsel where the defendant’s court-appointed counsel was allowed to withdraw, but the court would not allow the defendant to substitute counsel, leaving him without representation, and the court did not advise him of the dangers of proceeding pro se); Jackson v. James, 839 F.2d 1513, 1516 (11th Cir. 1988) (finding that the defendant did not waive counsel where the defendant’s court-appointed counsel withdrew, the defendant was not given an opportunity to obtain a different lawyer, and there was no evidence that the defendant understood the disadvantages of self-representation); State v. Pedockie 137 P.3d 716, 724–26 (Utah 2006) (refusing to find waiver by conduct where the defendant was not advised of the dangers and disadvantages of self-representation).

\textsuperscript{37}. State v. Jones, 772 N.W.2d 496, 505 (Minn. 2009).

\textsuperscript{38}. \textit{Goldberg}, 67 F.3d at 1100.

\textsuperscript{39}. \textit{Id.} at 1101–02.

\textsuperscript{40}. See United States v. Leggett, 162 F.3d 237, 250 (3d Cir. 1998) (concluding that defendant forfeited counsel where he punched the attorney in the head and scratched and spit on him while he was on the ground); State v. Lehman, 749 N.W.2d 76, 82 (Minn. Ct. App. 2008) (concluding that the defendant forfeited his right to counsel by attacking his public defender in open court, causing a cut lip and black eye).
purpose of delaying or disrupting the administration of justice).  

However, some courts have found forfeiture under far less serious circumstances, such as when a defendant fails to retain counsel, despite having the financial ability to do so. Nonetheless, the Third Circuit determined that Goldberg’s conduct was not sufficiently serious to warrant the extreme sanction of forfeiture, despite the fact that he threatened his attorney’s life. The Minnesota Supreme Court determined that Jones’s conduct in failing to retain counsel after being given several opportunities to do so was “extremely dilatory” as to constitute forfeiture.

United States Supreme Court Decisions on Forfeiture

Although the United States Courts of Appeals and state courts have determined that a defendant can forfeit the right to counsel by bad behavior, the United States Supreme Court has never considered this issue. Nonetheless, the Supreme Court has held

41. See United States v. Thomas, 357 F.3d 357, 363 (3d Cir. 2004) (concluding that defendant’s verbal abuse and refusal to cooperate with counsel, including his attempt to force the attorney to file frivolous claims as he had with his previous attorneys, constituted forfeiture of the right to counsel); United States v. McLeod, 53 F.3d 322, 325–26 (11th Cir. 1995) (concluding that forfeiture occurred where the defendant verbally abused and threatened to sue counsel and demanded that counsel engage in unethical conduct); State v. Carruthers, 35 S.W.3d 516, 550 (Tenn. 2000) (concluding that defendant’s conduct was “sufficiently egregious” to constitute forfeiture of counsel where the defendant made unreasonable demands of counsel and escalating threats for the purpose of sabotaging his relationship with each successive attorney for the purpose of delaying and disrupting his trial).

42. See Wilkerson v. Klem, 412 F.3d 449, 451, 455–56 (3d Cir. 2005) (concluding that the defendant forfeited his right to counsel; although the defendant’s conduct did not rise to the level of “extremely serious misconduct,” the defendant advised the court that his family was retaining counsel for him but appeared at trial without representation and the public defender acted as standby counsel); Commonwealth v. Lucarelli, 971 A.2d 1173, 1179 (Pa. 2009) (concluding that the defendant forfeited his right to counsel by failing to retain counsel despite having the opportunity and financial ability to do so).

43. Goldberg, 67 F.3d at 1102. See also State v. Hampton, 92 P.3d 871, 873–75 (Ariz. 2004) (remanding for the appointment of new counsel despite the fact that the defendant had twice made death threats against his court-appointed appellate counsel causing both of them to withdraw from representation).

44. State v. Jones, 772 N.W.2d 496, 505–06 (Minn. 2009).

45. See, e.g., supra notes 39–41 and accompanying text.

46. See Wilkerson, 412 F.3d at 454–55 (citation omitted) (analyzing a federal habeas petition, the Third Circuit noted that there were no Supreme Court decisions involving forfeiture or “providing any clear guidance as to the standard to be applied” in determining if a defendant’s misconduct warrants forfeiture of the right to counsel); see also Goldberg, 67 F.3d at 1100 (“[T]he Supreme Court has not ruled directly on this issue . . . .”).
that a defendant can forfeit other fundamental constitutional rights by engaging in wrongdoing that is purposefully directed at the constitutional right forfeited. Although these decisions do not involve forfeiture of the right to counsel, they do involve other Sixth Amendment rights that, like the right to counsel, are “fundamental to the fair administration of American justice.”

Therefore, they provide persuasive authority regarding how courts should evaluate whether the defendant can be deemed to have forfeited counsel by his or her bad behavior.

Before analyzing these decisions, it is important to remember that the Supreme Court “generally disfavor[s] inferred waivers of constitutional rights.” Nonetheless, the Court has occasionally recognized that a criminal defendant may impliedly waive or forfeit fundamental constitutional rights by misconduct. However, the forfeiture of a fundamental constitutional right only applies when the defendant’s own deliberate actions result in the constitutional violation.

As early as 1878, the Supreme Court recognized that when the defendant deliberately behaves badly, he cannot claim that his constitutional rights have been violated. In Reynolds v. United States, the defendant, who was on trial for bigamy, had procured the absence of one of his wives from testifying against him at trial by concealing her so that the State was unable to serve her with a subpoena. Reynolds argued that the use of his wife’s testimony from a prior trial violated his rights under the Confrontation Clause. But the Supreme Court held that “[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.” In other words, the defendant could not assert that his constitutional right to confront the witness against him was violated when his own wrongdoing procured her absence from the trial.

47. Faretta v. California, 422 U.S. 806, 818 (1975) (discussing the rights basic to the adversary system of justice, such as the right to confrontation).
49. See id. at 508–10 (holding that there was no error when defendant willingly went to trial in prison garb).
50. See, e.g., Reynolds v. United States, 98 U.S. 145 (1879).
51. Id. at 158.
52. 98 U.S. 145.
53. Id. at 159–60.
54. Id. at 158.
55. Id.
56. Id. at 160.
Thus, with respect to the Confrontation Clause, the Supreme Court has consistently held that the defendant’s wrongdoing in procuring a witness’s absence can constitute a forfeiture of the fundamental right of confrontation. But the Supreme Court recently clarified and narrowed this rule in *Giles v. California*, holding that the defendant’s wrongdoing must be directly related to procuring the witness’s absence from trial for the purpose of preventing the witness from testifying.

In *Giles*, the defendant was on trial for killing his former girlfriend. The State sought to admit evidence of the girlfriend’s out-of-court statements to a police officer about a prior occasion when Giles assaulted her. Giles asserted that the admission of the out-of-court statements violated his rights under the Confrontation Clause. And the Supreme Court agreed, holding that the doctrine of forfeiture by wrongdoing only applies when the defendant specifically kills the victim to prevent the victim from testifying against him. Because there was no evidence that Giles had that specific purpose, the State could not use the victim’s out-of-court statements at Giles’s murder trial. Put another way, every murder makes the victim unavailable to testify at trial, so unless the killing was done for the specific purpose of procuring the victim’s absence from trial, the defendant does not forfeit his constitutional right to confrontation by causing the victim’s death.

In some circumstances the Supreme Court has found a loss of fundamental constitutional rights based on the defendant’s bad behavior during the trial. For example, in *Illinois v. Allen*, the

57. See, e.g., Davis v. Washington, 547 U.S. 813, 833 (2006) (holding forfeiture rule applies to those who procure the silence of witnesses in order to undermine the integrity of the judicial process).
59. Id. at 2684.
60. Id. at 2681.
61. Id. at 2681–82.
62. Id. at 2682.
63. Id. at 2687–88.
64. Id. at 2693.
65. See, e.g., United States v. Nunez, 877 F.2d 1475, 1477 (10th Cir. 1989) (removing defendant from court after multiple verbal disruptions); Scurr v. Moore, 647 F.2d 854, 855 (8th Cir. 1981) (assaulting a jailer during recess and making obscene outbursts at trial); Jones v. Poole, No. 04 Civ. 0303 (SHS) (THK), 2005 LEXIS 46297, at *4 (S.D.N.Y. Aug. 9, 2005) (communication of dissatisfaction with appointed counsel to judge and jury and an attempt to spit on counsel); Russ v. Israel, 531 F. Supp. 490, 492–93 (E.D. Wis. 1982) (pro se representation “peppered with vulgar remarks”).
Court held the following:

[A] defendant can lose his [Sixth Amendment] 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 his trial cannot be carried on with him in the courtroom. 67

In Allen, the defendant insisted on representing himself, but the court appointed an advisory counsel to assist him during the trial. 68 During jury selection, the defendant argued with the judge in an abusive and disrespectful manner; when the court asked the appointed counsel to continue with the voir dire, the defendant objected, threw papers on the floor, and threatened to kill the judge. 69 The court warned the defendant that if he continued his disrespectful conduct, he would be shackled or removed from the trial. 70 The defendant persisted, was removed from the courtroom for most of the trial, and the advisory counsel conducted his defense in his absence. 71 The Court held that although the Sixth Amendment guarantees the right of confrontation, this right cannot “handicap a trial judge in conducting a criminal trial.” 72 Accordingly, a criminal defendant can lose his right to be present at trial based on his disruptive and disrespectful behavior towards the court. 73

These cases all involve the fundamental Sixth Amendment right of confrontation. And they share a common theme—the defendant deliberately engaged in wrongdoing that was directly related to the constitutional right lost. In other words, these cases stand for the proposition that a defendant cannot complain about the loss of constitutional rights when his or her own wrongdoing is responsible for the loss.

67. Id. at 343.
68. Id. at 339.
69. Id. at 339–40.
70. Id.
71. Id. at 341.
72. Id. at 342.
73. Id. at 342–43.
III. THE JONES CASE AND DECISION

The next question is how the Minnesota Supreme Court applied the concepts of waiver, waiver by conduct, and forfeiture to the facts in Jones.

A. The Case

Don Jones was charged with three felony offenses: check forgery, offering a forged check, and theft by swindle. These offenses arose from the allegation that Jones deposited a forged payroll check from a closed business account for a towing company he and his girlfriend operated. The check was signed in Jones’s girlfriend’s mother’s name, who denied signing the check. Jones endorsed the check and used the majority of the proceeds to pay for the down payment on a Lincoln Navigator. The check was returned because the account was closed, and Jones never repaid the money.

At his initial appearance in court, Jones, unrepresented by counsel, posted bail and told the court that he was “going to get a private attorney.” So the court continued the next court hearing to give him a chance to do so. At the next appearance on May 5, 2006, Jones was unemployed and had not retained counsel, so he applied for a public defender. Jones was living with his sister, his girlfriend, and their one-year-old daughter. Jones’s rent and food

75. Jones, 772 N.W.2d at 500.
76. Id.
78. Jones, 772 N.W.2d at 500.
79. Id.
80. Id. (internal quotation marks omitted).
81. See id.
82. Id. Jones applied for a public defender several times. Id. at 508 (Page, J., dissenting). However, only two applications were in the district court file. Id. Both applications are attached to Justice Page’s dissenting opinion. See id. at 510–13. The State argued that Jones “failed to provide a sufficient record for appellate review.” Id. at 502 n.1 (majority opinion). But the supreme court disagreed and held that the district court did not abuse its discretion in denying Jones’s public defender applications. Id. at 503.
83. Id. at 500.
were paid by his sister, but he had other debts and expenses—child support for other children, a car payment, and insurance—totaling between $1384 and $1484 per month. Jones’s girlfriend was employed, earning a monthly income of $2080. Although the application listed the Lincoln Navigator as an asset, the value of the car was equal to the debt owed. The words “deny—over guidelines” were written and circled on the application form. The court recommended that Jones try to retain counsel from the list of reduced-fee attorneys, and Jones indicated that he could probably hire an attorney in a month. He also acknowledged that he was probably denied a public defender because of the Lincoln Navigator and he would have to sell it.

On June 9, 2006, Jones appeared in court without counsel and explained he had applied for the public defender twice but his applications were denied and none of the reduced-fee attorneys had “worked out for him.” Jones waived his right to an attorney for this appearance. On September 8, 2006, Jones appeared for an omnibus hearing. Jones was unrepresented by counsel but told the court he was “kind of getting a little stable” and he would contact one of the reduced-fee attorneys.

Jones appeared for trial on January 16, 2007, without counsel. He objected to proceeding without counsel. Jones was employed, and the court told him that his current income would disqualify him from the public defender. Jones had a private attorney on a different case but stated that he could not afford to have him handle both cases, he reasserted that his public defender applications had been denied and the reduced-fee lawyer option

84.  Id. at 508 (Page, J., dissenting).
85.  Id.
86.  Id.
87.  Id.
88.  Id. (internal quotation marks omitted).
89.  Id. at 500 (majority opinion).
90.  Id. at 500–01. The Lincoln Navigator, having been purchased with the proceeds of the allegedly forged check, was repossessed. See Appellant’s Brief, supra note 77, at 24.
91.  Jones, 772 N.W.2d at 501.
92.  Id.
93.  Id.
94.  Id.
95.  Id.
96.  Id.
97.  Id.
98.  Id.
had also not worked for him.\textsuperscript{99} The district court continued the trial date to February 14, 2007, after confirming with the attorney representing Jones on the other case that he was waiting for Jones to pay the retainer.\textsuperscript{100} The district court also “acknowledged that Jones has been doing the things he has to do but just not finalizing them.”\textsuperscript{101}

Jones appeared at trial on February 14 without counsel.\textsuperscript{102} The court assumed that Jones was choosing to represent himself because he had not retained anyone by the trial date, but Jones argued that was not true because he was wrongly denied a public defender based on his girlfriend’s income.\textsuperscript{103} The court ordered Jones to fill out another application for a public defender.\textsuperscript{104} Jones was employed, earning $12 an hour, and his girlfriend was also employed.\textsuperscript{105} The application listed their combined gross monthly income as $3784 and expenses as $3592.\textsuperscript{106} The court collector explained that the reason for denying the application was because Jones’s income alone, $2280, was greater than 125\% of the federal poverty guidelines.

Although the prosecutor asked the court to make a record regarding the waiver of counsel,\textsuperscript{108} the court did not obtain a written waiver of Jones’s right to counsel.\textsuperscript{109} The court advised Jones on the record that he had the right to counsel, that his public defender applications had been denied four or five times, and that he had not been able to retain counsel.\textsuperscript{110} But the court did not advise Jones of the nature of the charges, the dangers and

\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. (internal quotation marks omitted).
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 508 (Page, J., dissenting).
\textsuperscript{107} Id. at 501 (majority opinion). While the federal poverty guidelines may create a presumption of eligibility, they cannot be used as the sole basis for cutting off eligibility because appointment of counsel is based on the court’s determination of the defendant’s financial ability to pay. State v. Ferris, 540 N.W.2d 891, 894–95 (Minn. Ct. App. 1995). Justice Page, in his dissent, expressed concern that the district court did not properly exercise discretion when it denied Jones’s public defender applications based on the poverty guidelines. Jones, 772 N.W.2d at 508 (Page, J., dissenting).
\textsuperscript{108} Jones, 772 N.W.2d at 502.
\textsuperscript{109} Id. at 504.
\textsuperscript{110} Id. at 502.
disadvantages of self-representation, and Jones objected to proceeding without counsel.111 Jones represented himself at the three-day jury trial and did not have standby or advisory counsel to assist him.112

Jones was convicted and sentenced to thirty months in prison for the check forgery conviction.113 Jones appealed his conviction to the Minnesota Court of Appeals.114 The court of appeals affirmed, holding that the district court did not abuse its discretion in denying Jones’s applications for the public defender and that Jones waived counsel by his conduct in repeatedly failing to retain counsel.115 The Minnesota Supreme Court granted Jones’s petition for further review on November 25, 2008.116

B. The Minnesota Supreme Court Decision

1. No Valid Waiver of Counsel

In a four-three decision, the supreme court affirmed Jones’s convictions.117 First, the supreme court considered whether Jones’s waiver of counsel was constitutionally valid. The supreme court noted that there are three ways in which a defendant may relinquish the constitutional right to counsel: (1) waiver, (2) waiver by conduct, and (3) forfeiture.118 Applying these concepts to Jones’s case, the supreme court acknowledged that there was no “attempt by the district court to obtain a written waiver of counsel from Jones” as required by Minnesota law.119

The supreme court also found that the on-the-record colloquy was insufficient because the district court did not advise Jones of the nature of the charges or the advantages and disadvantages of

111. *Id.* at 504–05.
112. See *id.* at 507; see also State v. Clark, 722 N.W.2d 460, 466–67 (Minn. 2006) (reasoning that there is no state constitutional right to advisory counsel).
114. *Id.*
115. *Id.* at 334.
117. *Jones*, 772 N.W.2d at 507.
118. *Id.* at 504 (citing State v. Pedockie, 137 P.3d 716, 721 (Utah 2006)); see United States v. Goldberg, 67 F.3d 1092, 1099–1102 (3d Cir. 1995) (defining the concepts of waiver, waiver by conduct, and forfeiture).
119. *Jones*, 772 N.W.2d at 504; see also MINN. STAT. § 611.19 (2008) (requiring defendant waiving counsel to do so in writing); MINN. R. CRIM. P. 5.04, subdiv. 1(4) (requiring written or on-the-record waiver of the right to counsel).
Jones’s decision to waive counsel.\textsuperscript{120} The court also noted that “[m]ore importantly, Jones objected twice to proceeding without counsel.”\textsuperscript{121} Accordingly, the supreme court concluded that, on this record, the waiver of counsel was not knowing, intelligent, and voluntary.\textsuperscript{122}

2. No Waiver by Conduct

Waiver by conduct requires the same colloquy regarding the dangers and disadvantages of self-representation as required for an affirmative waiver of counsel.\textsuperscript{123} Further, waiver by conduct only “applies to those defendants who voluntarily engage[d] in misconduct knowing what they stand to lose.”\textsuperscript{124} Applying these principles, the supreme court had no choice but to hold that Jones did not waive counsel by his conduct because the district court failed to conduct a sufficient, on-the-record colloquy.\textsuperscript{125}

3. Jones Forfeited Counsel by His Dilatory Conduct

Under Goldberg, forfeiture requires “extremely serious” or “extremely dilatory” misconduct.\textsuperscript{126} The supreme court determined that Jones forfeited his right to counsel because he “engaged in conduct that was extremely dilatory” by refusing to retain counsel after being given the opportunity to do so on “eight separate occasions.”\textsuperscript{127} In making this determination, the supreme court was persuaded by the following facts: the district court repeatedly advised Jones to retain counsel, he applied for and was denied the public defender at least three times, he told the court that he was planning on retaining private counsel, he was granted three continuances for the purpose of giving him time to do so, the court delayed the trial date to give him a chance to retain counsel, and the court warned him he would get no more continuances.\textsuperscript{128}

\begin{thebibliography}{9}
\bibitem{120} Jones, 772 N.W.2d at 504.
\bibitem{121} Id. at 504–05.
\bibitem{122} Id. at 505.
\bibitem{123} Id.
\bibitem{124} Id. (internal quotation marks omitted) (citing United States v. Goldberg, 67 F.3d 1092, 1101 (3d Cir. 1995)).
\bibitem{125} Id. (citations omitted).
\bibitem{126} Goldberg, 67 F.3d at 1101–02.
\bibitem{127} Jones, 772 N.W.2d at 506.
\bibitem{128} Id.
\end{thebibliography}
4. The Dissent

But in a separate dissent, Justice Meyer, who was joined by Justice Paul Anderson, disagreed that Jones’s conduct was “extremely dilatory” so as to constitute forfeiture. First, Justice Meyer noted that forfeiture usually only applies in “extreme circumstances,” such as when the defendant verbally or physically abuses counsel. Second, Justice Meyer acknowledged that forfeiture might apply in circumstances where a “defendant’s purposeful manipulation of the judicial system blocks a court’s ability to ensure a sufficient waiver.” But where the defendant does not “purposefully abuse the privilege, and the court could assess the defendant’s awareness of the risks of self-representation, forfeiture should not be applied.”

Justice Meyer also recognized that “[a] very small number of courts have found misconduct ‘extremely dilatory’ when a defendant’s actions in obtaining, working with, or changing representation have led to excessive delay or inconvenience.” But there was no doubt in these cases that the defendants were purposefully trying to manipulate or delay the proceedings, because the defendants were being uncooperative and unreasonable.

Jones’s case, on the other hand, “does not show such purposeful manipulation as to be labeled ‘extremely dilatory misconduct.’ Jones’s financial situation made it unclear whether he

129. Id. at 513–14 (Meyer, J., dissenting) (citing United States v. Leggett, 162 F.3d 237, 250 (3d Cir. 1998); United States v. McLeod, 53 F.3d 322, 325–26 (11th Cir. 1995); State v. Lehman, 749 N.W.2d 76, 81–82 (Minn. Ct. App. 2008)).

130. Id. at 514 (citing Commonwealth v. Lucarelli, 971 A.2d 1173, 1179 (Pa. 2009)) (holding that where the unrepresented defendant refuses to engage in the colloquy process, the defendant cannot be allowed to “clog the machinery of justice or hamper and delay the state’s efforts to effectively administer justice”).

131. Id. (citing State v. Hampton, 92 P.3d 871, 874–75 (Ariz. 2004) (declining to find forfeiture, even though the defendant threatened his attorney’s life)).

132. Id. at 514–15 (citing United States v. Mitchell, 777 F.2d 248, 257–58 (5th Cir. 1985); State v. Cummings, 546 N.W.2d 406, 418–20 (Wis. 1996)). In Mitchell, the issue on appeal involved the court’s denial of Mitchell’s counsel’s request for a continuance, but the court analyzed it under waiver of counsel because the denial of the continuance meant that Mitchell represented himself at trial. Mitchell, 777 F.2d at 258. The court held that the defendant cannot deliberately manipulate his choice of counsel for the purpose of delaying the trial where the defendant knows of the trial date and deliberately retains counsel knowing counsel has a conflict with that date. Id. at 257–58.

133. See Mitchell, 777 F.2d at 257–58; Jones, 772 N.W.2d at 514–15; Cummings, 546 N.W.2d at 418–20.
would qualify for a public defender, and his applications for such representation were denied with no clear explanation as to why he did not qualify. Finally, Justice Meyer recognized that the district court never made any findings that Jones’s conduct was “done in bad faith or to purposefully delay the proceedings.” In fact, the contrary is true because the district court “acknowledged that Jones was doing what needed to be done, but simply failed to ‘finalize’ things.” For these reasons, the dissent concluded that Jones did not forfeit counsel.

IV. Analysis of the Jones Decision and Guidelines for Future Cases

A. Analysis

Clearly, Jones did not waive counsel under Faretta or Minnesota law. Nor did he waive counsel by his conduct because he was never advised of the dangers and disadvantages of self-representation. Left with no other option, the court appears to have relied on forfeiture to get around the inadequate on-the-record colloquy. But the problem with applying the extreme sanction of forfeiture to the Jones facts is that, as the dissent recognized, Jones did not engage in any purposeful wrongdoing.

He did not abuse or threaten counsel. He did not make unreasonable demands of counsel in order to sabotage the attorney-client relationship for purposes of delay. In fact, he was never represented by counsel. And his conduct in failing to retain counsel, where the record is not clear that he actually had

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134. Jones, 772 N.W.2d at 515; see also id. at 508 (Page, J., dissenting) (“Because the court below failed to make any findings or explain its reasons for denying the application on the record in any meaningful way, it is impossible to apply an abuse of discretion standard of review to the court’s denials of these applications.”).
135. Id. at 515 (Meyer, J., dissenting).
136. Id.
137. Id.
138. Id.
140. Cf. State v. Cummings, 546 N.W.2d 406, 418–20 (Wis. 1996) (finding forfeiture where the defendant consistently refused to cooperate and was unreasonably dissatisfied with each of his three court-appointed attorneys so that they were allowed to withdraw, leaving him to represent himself).
141. Jones, 772 N.W.2d at 501.
the financial ability to do so, cannot be construed as a deliberate attempt to manipulate the proceedings and delay the trial. In fact, the district court actually “acknowledged that Jones was doing what needed to be done . . . .” On this record, Jones’s conduct in failing to retain counsel cannot be construed as forfeiture.

United States Supreme Court precedent does not support the result reached by the Minnesota Supreme Court in Jones. The forfeiture cases decided by the Supreme Court have all involved purposeful wrongdoing or misconduct that is directly responsible for the loss of the constitutional right. These decisions are also consistent with the general principle that the defendant cannot complain about the loss of constitutional rights when his or her own deliberate actions are responsible for the loss. But these principles do not apply to the facts of Jones’s case where the record is not clear that Jones deliberately refused to hire counsel to delay or manipulate the proceedings, or if he was simply financially unable to retain counsel.

B. Guidelines

The Minnesota Supreme Court in Jones adopted a framework for analyzing when a defendant’s behavior is bad enough to forfeit constitutional rights. Although the framework doesn’t really fit the facts of Jones’s case, that doesn’t mean it is unworkable. The concepts of waiver, waiver by conduct, and forfeiture can be applied, provided the court follows these guidelines:

- A defendant’s waiver of counsel must be explicit and in writing.

142. Cf. United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (explaining that the defendant’s inability to retain counsel at public expense was a consequence of his decision to be vague and withhold access to his financial records); Commonwealth v. Lucarelli, 971 A.2d 1173, 1179 (Pa. 2009) (explaining that the defendant forfeited his right to counsel by failing to retain counsel, despite having the opportunity and financial ability to do so).

143. Jones, 772 N.W.2d at 515.

144. Cf. Gladden v. State, 110 P.3d 1006, 1008-10 (Alaska Ct. App. 2005) (reversing defendant’s conviction and concluding that the defendant’s conduct in stubbornly refusing to accept appointed counsel and failing to take the steps necessary to hire private counsel were not so egregious to constitute forfeiture, nor could the defendant’s conduct be considered waiver by conduct because the defendant was not warned of the risks of self-representation).


146. See id.; Reynolds v. United States, 98 U.S. 145, 158 (1879).

147. MINN. STAT. § 611.19 (2008); MINN. R. CRIM. P. 5.04, subdiv. 1(4).
• If the waiver of counsel is not in writing, the waiver must be on the record, include an advisory that complies with Minnesota law, and include the nature of the charges, the possible penalties, and the dangers and disadvantages of self-representation.\footnote{148} 

• If the defendant does not waive counsel in writing or on the record, but is engaging in manipulative behavior that is making it difficult for the court to proceed with the trial, then the court must warn the defendant that the continued behavior will result in the loss of the constitutional right to counsel, and the court must warn the defendant of the dangers and disadvantages of self-representation.\footnote{149} 

• If the defendant persists in the manipulative conduct and the defendant has been warned that (1) the continued behavior will result in self-representation and (2) of the dangers and disadvantages of self-representation, then the defendant has waived counsel by conduct.\footnote{150} 

• If the defendant assaults, abuses, or verbally threatens counsel, no warning is required; the defendant has forfeited the right to counsel.\footnote{151} 

• If the defendant engages in egregious manipulative behavior, such as unreasonably discharging appointed or retained counsel, making unreasonable demands of counsel that subvert the attorney-client relationship and that cause counsel to withdraw, or repeatedly refusing to hire counsel despite a clearly demonstrated financial ability to do so, this conduct may, in a given case, be sufficiently serious to warrant the sanction of forfeiture.\footnote{152} However, the better practice is still to conduct a colloquy on the record, warning the defendant that the behavior will result in self-representation and of the dangers and disadvantages of self-representation.\footnote{153} 

\footnote{148} MINN. STAT. § 611.19; MINN. R. CRIM. P. 5.04, subdiv. 1(4); see also Faretta v. California, 422 U.S. 806, 835 (1975) (discussing the information the defendant must possess to make a knowing and intelligent waiver of counsel). 

\footnote{149} See United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992); Commonwealth v. Lucarelli, 971 A.2d 1173, 1179 (Pa. 2009). 


\footnote{151} See United States v. Leggett, 162 F.3d 237, 250 (3d Cir. 1998); United States v. McLeod, 53 F.3d 322, 325–26 (11th Cir. 1995); State v. Lehman, 749 N.W.2d 76, 81–82 (Minn. Ct. App. 2008). 

\footnote{152} United States v. Goldberg, 67 F.3d 1092, 1099–1101 (3d Cir. 1995). 

\footnote{153} Faretta, 422 U.S. at 836.
V. CONCLUSION

Although jurisdictions disagree on how badly the defendant must behave before he or she can be deemed to have forfeited the right to counsel, under the *Goldberg* rubric adopted by the Minnesota Supreme Court, Jones’s conduct was not bad enough.\textsuperscript{154} Certainly a defendant who mistreats his or her lawyer by abusive or threatening conduct forfeits the right to counsel.\textsuperscript{155} It is also apparent that a defendant who deliberately sabotages his or her relationship with counsel, causing counsel to withdraw, or who has the financial ability to retain counsel but fails to do so to purposefully delay the trial can be deemed to have forfeited the right to counsel.\textsuperscript{156} These circumstances are consistent with the principle that a defendant cannot argue that his constitutional rights are violated when his own conduct leads to the violation.\textsuperscript{157} But Jones was never represented by counsel,\textsuperscript{158} so he did not forfeit the right to counsel based on wrongful conduct towards counsel. And Jones’s conduct in failing to retain counsel cannot be construed as an attempt to manipulate or delay the trial because it is not clear that Jones actually had the financial ability to retain counsel.\textsuperscript{159} Therefore, Jones conduct cannot be considered forfeiture under any definition.

\textsuperscript{154} *Goldberg*, 67 F.3d at 1099–01.
\textsuperscript{155} See *Leggett*, 162 F.3d at 250; *McLeod*, 53 F.3d at 325–26; *Lehman*, 749 N.W.2d at 81–82.
\textsuperscript{156} See United States v. Garey, 540 F.3d 1253, 1265–66 (11th Cir. 2008); United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992); Commonwealth v. Lucarelli, 971 A.2d 1173, 1179 (Pa. 2009).
\textsuperscript{157} *Bauer*, 956 F.2d at 695.
\textsuperscript{158} State v. Jones, 772 N.W.2d 496, 501 (Minn. 2009).
\textsuperscript{159} Id. at 509 (Page, J., dissenting).