Criminal Defendants in Pennsylvania, While Constitutionally Entitled to the Right to Counsel, May Forfeit That Right if They Undertake Extreme Dilatory Conduct: *Commonwealth v. Lucarelli*

PENNSYLVANIA CRIMINAL PROCEDURE – RIGHT TO COUNSEL – FORFEITURE – WAIVER – The Supreme Court of Pennsylvania held the trial court may require a defendant to proceed *pro se*, with a forfeited right of counsel, if his actions indicate the intent not to obtain a private attorney although provided with both opportunity and financial ability.

Commonwealth v. Lucarelli, 971 A.2d 1173 (Pa. 2009).

I. THE *LUCARELLI* DECISION

On January 12, 2004, Appellee Charles Joseph Lucarelli ("Lucarelli") was charged with making terroristic threats, reckless endangerment of another, risking a catastrophe, intentional criminal mischief with pecuniary loss in excess of $5,000 and disorderly conduct[1] for his actions on January 11, 2004 in Mifflinville, Columbia County.[2] The Commonwealth accused Lucarelli of discharging an unknown substance from an electrical pump and spray system connected to his vehicle onto the vehicle owned and occupied by Michael Lee Bennett, his wife and two children.[3]

Initially appointed an attorney as stand-by counsel by the trial court, Lucarelli procured his own attorney within days after posting bond.[4] The next week, this attorney withdrew his appearance, and Lucarelli secured different counsel for representation.[5] Although this new representative filed several motions, he too petitioned to withdraw as Lucarelli's counsel by July 17, 2004, and Lucarelli filed a *pro se* petition of attorney misconduct.[6] The trial court granted the attorney's withdrawal and advised Lucarelli to pursue alternative counsel.[7]

Lucarelli proceeded to attend hearings and status listings *pro se* and, at a motions hearing

1. Commonwealth v. Lucarelli, 971 A.2d 1173, 1176 (Pa. 2009). At the trial's conclusion, the Commonwealth dismissed the charge of terroristic threats. *Lucarelli*, 971 A.2d at 1177.

2. *Id.* at 1175 (citing Commonwealth v. Lucarelli, 914 A.2d 924, 925-926 (Pa. Super. Ct. 2006).

3. *Id.* at 1175-76. When arrested, Lucarelli refused to divulge the spray's contents, which forced the local fire department and hazmat team to decontaminate Kreiser's Truck Stop, the incident's location, the Bennett vehicle and family. *Id.* Seewald Laboratories later determined the spray was both toxic and flammable, containing aromatic and aliphatic solvents, acetone, toluene, methylene chloride, ammonium hydroxide and isopropyl alcohol. *Id.* at 1176.

4. *Id.*

5. *Id.* Lucarelli hired Thomas Marsilio, Esquire. *Id.*

6. *Lucarelli,* 971 A.2d at 1176. Marsilio filed for a bill of particulars and a petition for writ of *habeas corpus*. *Id. Pro se* is defined as "one who represents oneself in a court proceeding without the assistance of a lawyer." BLACK'S LAW DICTIONARY 1021 (8th ed. 2004).

7. *Lucarelli*, 971 A.2d at 1176. Lucarelli complained that he did not wish for Marsilio to withdraw and that he was unable to retain another attorney for lack of funds after paying Marsilio $10,000. *Id.* The court advised Lucarelli to contact the public defender's office. *Id.*

on August 26, 2004, was informed by the court that his case would be heard in September or November.[8] On September 8, 2004, a bench warrant was issued for Lucarelli's arrest when he failed to appear for jury selection.[9] Lucarelli then filed nine *pro se* petitions, and the court again ordered the appointment of stand-by counsel.[10] The court also decreased Lucarelli's bail by $20,000 in order to provide him with the additional capital necessary to hire another attorney and, once again, advised him to seek private counsel.[11] In November, Lucarelli appeared at both jury selection and the start of his criminal trial without counsel and without a reason for his failure to acquire representation.[12] After he appeared *pro se* for the extent of the trial, the jury convicted Lucarelli on all charges, except dismissed terroristic threats charge.[13] Lucarelli hired counsel for representation at sentencing[14] and, later, different counsel for his appeals.[15]

On appeal, the Superior Court reversed Appellee's conviction and granted a new trial, holding Lucarelli's constitutional right to counsel had been violated.[16] The Court found that Lucarelli had not participated in extreme dilatory conduct reasonably resulting in his forfeiture of counsel.[17] Rather the Court held the trial court had neglected to advise Lucarelli through colloquy on the record, pursuant to Pennsylvania Rule of Criminal Procedure 121, regarding the knowledgeable waiver of the right to counsel.[18] The Commonwealth appealed the Superior

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8. *Id.* at 1177. In July, Lucarelli had been provided with a public defender's application by a member of the court staff. *Id.*

9. *Id.* The bench warrant was rescinded two days later. *Id.*

10. *Id.* David Trathen, Esquire, was appointed by the trial court as stand-by counsel. *Id.* The nine *pro se* motions filed prior to Mr. Trathen's appointment included "Re-Submit Petition Hearing to Know Who all Defendants Accusers Are," "Petitioner/Hearing for Alleging That of Concealing two South Centre Township Police by Commonwealth," "Petition/Motion for Effective Counsel," "Re-Submit Petition and Motion Under the Americans with Disabilities Act," "Petition for Hearing Complaint I filed in Columbia County Prison Taken by Lieutenant Joseph Wondoloski of Being Assaulted," "Petition for Hearing for Recusal," "Petition for Hearing to Resubmit Any Unanswered Exculpatory Evidence," "Petition for Hearing for Dr. Brian Snyder for Concealing Exculpatory Evidence," and "Petition for Effective Counsel Under Sixth Amendment." *Id.*

11. *Id.*

12. *Id.*

13. *Lucarelli*, 971 A.2d at 1177. On November 16, 2004, Lucarelli was sentenced to sixty days to eighteen months confinement for the conviction of criminal mischief, but was placed on parole with requirements for community service and mental health treatment. *Id.* For the conviction of reckless endangerment, risking catastrophe, and criminal mischief, Lucarelli received two concurrent terms and one consecutive term of twelve months probation. *Id.* The court also ordered $18,300.26 in restitution for costs to the Bennett family and governmental agencies. *Id.*

14. *Id.* Lucarelli hired Carmen Marinelli, Esquire. *Id.*

15. *Id.* at 1175. Lucarelli finally hired Joseph Viola, Esquire. *Id.*

16. *Id.* at 1178 (citing *Lucarelli*, 914 A.2d at 925).

17. Id. (citing *Lucarelli*, 914 A.2d at 930-931).

18. *Id.* (citing *Lucarelli*, 914 A.2d at 930-932). A colloquy is defined as "[a]ny formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." BLACK'S LAW DICTIONARY 221 (8th ed. 2004). The pertinent Rule of Criminal Procedure 121, states, *inter alia*:

> Generally (1) The defendant may waive the right to be represented by counsel. (2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant: (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent; (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges; (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged; (d) that the defendant understands that if he or she waives the right to counsel,

Court's decision, and their petition was granted and limited to whether the Superior Court erred when they applied the doctrine of forfeiture, and requirement of colloquy, to the constitutional right to counsel.[19]

Citing the United States Constitution and the Commonwealth's Constitution, the Pennsylvania Supreme Court's majority referred to the right of a person accused of a criminal offense to assistance of counsel,[20] but found exception such that the right to counsel of choice is not absolute.[21] The Court found it necessary to balance the right of the accused to the assistance of counsel with the right of the attorney to choose clients and further with the Commonwealth's pursuit of efficient administration of justice.[22]

Drawing guidance from *United States v. Goldberg,*[23] a Third Circuit Court of Appeals opinion, the majority distinguished between the waiver and the forfeiture of the right to counsel.[24] The Court held in *Lucarelli* that Pennsylvania Rules of Criminal Procedure 121 and its requirements do not apply in the case of forfeiture, unlike waiver.[25] The majority went on to hold that where the defendant's actions indicate, although financially able and given an opportunity, the intent not to obtain a private attorney, he has forfeited his right to counsel, and the court may ultimately require the defendant to continue *pro se*.[26] The Court supported its holding by observing that multiple jurisdictions follow a similar policy to prevent unnecessary wasting of time in the case of defendants who are found to be unwilling to obtain counsel.[27]

The Commonwealth's Supreme Court concluded by finding Lucarelli undertook extreme dilatory conduct in failing to obtain consistent representation for a period of eight and a half

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> the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules; (e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and (f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently. (3) The judge or issuing authority may permit the attorney for the Commonwealth or defendant's attorney to conduct the examination of the defendant pursuant to paragraph (A)(2). The judge or issuing authority shall be present during this examination.

42 Pa. C.S.A. § 121 (2009)

19. *Lucarelli*, 971 A.2d at 1178 (citing Commonwealth v. Lucarelli, 929 A.2d 642 (Pa. 2007)).

20. *Id.* at 1178 (citing Rothgery v. Gillespie County, 128 S. Ct. 2578, 2583 n. 8 (2008); Commonwealth v. McDonough, 812 A.2d 504, 506 (Pa. 2002)).

21. *Id.* at 1178 (citing Commonwealth v. Randolph, 873 A.2d 1277, 1282 (Pa. 2005) (quoting Commonwealth v. McAleer, 748 A.2d 670, 673-674 (Pa. 2000))).

22 *Id.* at 1178-1179 (citing *Randolph*, 873 A.2d at 1282). The majority stated that "while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice." *Id.* at 1179 (citing *Randoph*, 873 A.2d at 1282).

23. 67 F.3d 1092 (3d Cir. 1995).

24. *Lucarelli*, 971 A.2d at 1179 (citing *Goldberg*, 67 F.3d at 1099-101. The majority found waiver is "an intentional and voluntary relinquishment of a known right" as compared to forfeiture which does not require the intent to relinquish, but may result from the accused's "extremely serious misconduct" or "extremely dilatory conduct." *Id.* (citing United States v. Thomas, 357 F.3d 357, 362 (3d Cir. 2004) (quoting *Goldberg*, 67 F.3d at 1100-02). *See also* Commonwealth v. Coleman, 905 A.2d 1003, 1006-08 (Pa. Super. Ct. 2006)).

25. *Lucarelli*, 971 A.2d at 1179

26. *Id.*

27. *Id.* at 1179-80 (citing Wilkerson v. Klem, 412 F.3d 449, 454 (3d Cir. 2005); Bultron v. State, 897 A.2d 758 (Del. 2006); Minnesota v. Lehman, 749 N.W.2d 76, 81-82 (Minn. Ct. App. 2008)).

months.[28] Even after the trial judge provided him with a decrease in bail for funds, Lucarelli arrived to both jury selection and trial without explanation as to his failure to obtain a private attorney.[29] As such, the majority held the Superior Court erred in reversing the trial court's decision to request Lucarelli continue *pro se*.[30]

Chief Justice Castille concurred in the majority's opinion, finding the most significant error at Lucarelli's criminal trial was his failure to object to proceeding *pro*, not the prosecution's failure to colloquy.[31] The concurrence emphasized the constitutional right to self-representation as analogous to the right to assistance of counsel.[32] If the defendant has both funds and opportunity, the Chief Justice found the risk of failing to acquire representation is one's own responsibility.[33] The Chief Justice further determined the trial court had performed sufficiently in warning Lucarelli that trial would proceed whether or not he had representation.[34] However, the Chief Justice distinguishes himself from the majority by advising future trial courts to present all defendants continuing at trial without an attorney with the Pennsylvania Rules of Criminal Procedure Rule 121 colloquy as a manner of preventing repeated litigation of the issue *sub judice*.[35]

In Justice Todd's dissent, which Justice Saylor joined, the Justices stated the trial court failed to conduct the Pennsylvania Rules of Criminal Procedure 121 colloquy for waiver.[36] After finding the record insufficient to establish Lucarelli's actions as sufficiently egregious dilatory conduct necessary for a forfeiture of rights, the Justices advised affirmation of the Superior Court's reverse and remand.[37] The Justices reiterated the importance of a knowledgeable and intelligent waiver where a defendant chooses to proceed to trial without

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28. *Id.*

29. *Id.* at 1180. Specifically the Court stated, "[Lucarelli] had more than eight months to prepare for trial; had the financial means to retain counsel; did retain counsel on several occasions, although the attorneys were permitted to withdraw when the attorney-client relationship deteriorated; was given access to $20,000 by the trial court some five weeks before the commencement of trial for the purpose of retaining counsel; and failed to offer an explanation for not having retained counsel by the start of trial. *Lucarelli simply decided not to retain private counsel because he did not wish to spend the money.*" *Id.*

30. *Id.*

31. *Lucarelli*, 971 A.2d at 1180-81

32. *Id.* at 1182. (citing Faretta v. California, 422 U.S. 806, 821 (1975); Commonwealth v. Starr, 664 A.2d 1326, 1334-35 (Pa. 1995). "The Commonwealth is not obliged to rescue a non-indigent defendant from his own perilous decisions." *Id.*

33. *Id.* at 1182. "A waiver colloquy is a procedural device; it is not a constitutional end or a constitutional right…the colloquy does not share the same status as the right itself." *Id.* (citing Commonwealth v. Mallory, 941 A.2d 686, 697 (Pa. 2008) (addressing trial court's failure to colloquy for waiver of jury trial), *cert. denied* 129 S. Ct. 257 (2008)).

34. *Id.* Chief Justice Castille acknowledged the trial court record which stated, "we'll reschedule this for September for sure, *whether you have an attorney or not. That will give you plenty of time to get one and be ready to go*," and later, "I'm going to keep Mr. Trathen in as standby [counsel], *if you don't get an attorney*, to answer any questions you might have *because you're going to proceed by yourself, otherwise*." *Id.* at 1182-83 (citing Trial Court Record at 10/07/04 p. 3, 07/13/04 p.6, Commonwealth v. Lucarelli (Columbia County, No. 76 of 2004)).

35. *Lucarelli*, 971 A.2d at 1183. Specifically, the Chief Justice stated, "I express that preference solely as a supervisory matter; as I have explained above, I do not believe that the constitutional right to counsel requires that a non-indigent defendant be fully colloquied concerning the obvious consequences of his refusal to secure counsel." *Id.* *Sub judice* is defined as "[b]efore the court or judge for determination; at bar." BLACK'S LAW DICTIONARY 1193 (8th ed. 2004).

36. *Id.*

37. *Id.*

representation.[38] The trial court's failure to colloquy Lucarelli did not provide him with the knowledge necessary to make an intelligent decision under the Rules of Criminal Procedure.[39]

The dissent went on to describe that forfeiture without a Rule 121 colloquy is possible but would require the exhibition of more serious behavior than that displayed by Lucarelli.[40] In addition, the Justices referred to waiver by conduct, in which the defendant's continued behavior following a colloquy or warning by the court can result in a loss of rights.[41] The dissent found that under the case *sub judice*, the trial court's failure to colloquy denied Lucarelli's right to counsel.[42] Further, the dissent argued that a colloquy is both important and necessary whether in a case of waiver or forfeiture and is customary practice for protecting comparable constitutional rights.[43] The Justices concluded their dissent, finding Lucarelli had neither been properly colloquied nor behaved in an egregious manner sufficient to waive or forfeit his right to counsel.[44]

II. THE HISTORY BEHIND THE *LUCARELLI* DECISION

It is the United States Constitution's Sixth Amendment[45] which mandates that all citizens accused of a crime have the right to counsel and further extends that right to the states by the Fourteenth Amendment[46]. The Pennsylvania Constitution also assures that same standard in Article I, Section 9.[47]

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38. *Id.* Specifically, the Justices extensively quoted *Faretta v. California:*

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, *he should be made aware of the dangers and disadvantages of self-representation,* so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'

Id. (citing Faretta v. United States, 422 U.S. 806, 835 (1975)).

39. *Lucarelli*, 971 A.2d at 1183-84; 42 Pa. C.S.A. § 121.

40. *Id.* at 1184 (citing *Goldberg*, 67 F.3d at 1100. The dissent specifically found that only behavior against the attorney such as physical abuse or assault, threats of harm, and requests for unethical behavior were sufficient to constitute "egregious dilatory conduct" and that Lucarelli's behavior did not rise to that level of severity. *Id.* (citing United States v. Leggett, 162 F.3d 237 (3d Cir. 1998), *cert. denied* 528 U.S. 868 (1999); United States v. McLeod, 53 F.3d 322 (11th Cir. 1995); United States v. Jennings, 855 F.Supp 1427 (M.D. Pa. 1994)).

41. *Lucarelli*, 971 A.2d at 1884. (citing United States v. Bauer, 956 F.2d 693 (7th Cir. 1992), *cert. denied* 506 U.S. 882 (1992); United States v. Allen, 895 F.2d 1577 (10th Cir. 1990)).

42. *Id.* (citing *Goldberg*, 67 F.3d at 1100). *See also* United States v. Meeks, 987 F.2d 575 (9th Cir. 1993), *cert. denied* 510 U.S. 919 (1993).

43. *Id.* at 1185. Specifically, the dissent referred to Pennsylvania Rules of Criminal Procedure Rule 620, requiring a colloquy for waiver of jury trial, Rule 590(A)(2), requiring colloquy for guilty pleas or pleas of *nolo contendere*, and Rule 602, requiring colloquy for forfeiture of defendant's right to be present. *Id.* (citing 42 Pa. C.S.A. § 121; Commonwealth v. Vega, 719 A.2d 227 (Pa. 1998) (plurality opinion)).

44. *Id.* at 1187.

45. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense." *Id.*

46. U.S. CONST. amend. XIV. "No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* at § 1.

47. PA. CONST. art. I, § 9 (amended 2003). "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel…." *Id.*

In *Faretta v. United States*, a defendant's right to representation by counsel in criminal cases was upheld, but the Supreme Court also found that a defendant has the absolute right to self-representation if he so chooses,[48] as long as that choice is made with full knowledge and understanding.[49] Exercising this rule, Pennsylvania's Rules of Criminal Procedure 121 permits a defendant to waive his right to representation, pursuant to a knowing, voluntary and intelligent waiver ensured through the use of colloquy on the record.[50]

While the right to representation is a constitutional mandate, it is not absolute.[51] In *Commonwealth v. Randolph*, the trial court's denial of a defendant's right to choice of counsel was upheld such that while there is a constitutional right to counsel, choice of that counsel must be balanced with both the right of an attorney to select his clients and the Commonwealth's interest in swift and efficient justice.[52]

The Third Circuit distinguishes between a defendant's right to waive his right to representation, the court's power to determine that a defendant has waived his right through his conduct, and the circumstances under which a defendant may forfeit his right without warning.[53] In *United States v. Goldberg*, the district court determined that because Ronald Goldberg, the defendant, had sufficient financial means to hire an attorney but had failed to do so since the case's commencement, he had waived his right to counsel by his conduct.[54] On appeal, the government admitted that the district court failed to provide a colloquy on the record for a knowing waiver, as required by *Faretta*, but maintained that Goldberg's behavior was sufficient to find "waiver by conduct."[55] After distinguishing between waiver[56] and forfeiture[57], the circuit

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48. *Faretta*, 422 U.S. at 833. Specifically, the Court stated, "it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want." *Id.*

49. *Id.* at 835. The Court acknowledged the criminal defendant's abandonment of those advantages associated with representation by counsel when waiver occurs, stating that as such the defendant must "knowingly and intelligently" release those rights. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938)). Further expounding, the Court stated:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'

Id. (citing Adams v. United States ex re. McCann, 317 U.S. 269, 279 (1942)).

50. 42 Pa. C.S.A. § 121 (*see supra* at n.17). *See also McDonough*, 812 A.2d 504.

51. *Randolph*, 873 A.2d at 1282 (citing *Robinson*, 364 A.2d at 674, n. 13).

52. *Id.* The Pennsylvania Supreme Court previously discussed the necessity of expedient justice, stating, "While defendants are entitled to choose their own counsel, they should not be permitted to unreasonably 'clog the machinery of justice' or hamper and delay the state's efforts to effectively administer justice." *McAleer*, 748 A.2d at 674 (citing Commonwealth v. Baines, 389 A.2d 68, 70 (Pa. 1978)).

53. *Goldberg*, 67 F.3d at 1092.

54. *Id.* at 1096. Goldberg was initially provided counsel by the Commonwealth. *Id.* at 1095. After three months, the district court learned Goldberg was financially able to hire private counsel and granted his counsel's motion to withdraw after his counsel stated his client had threatened him (Goldberg was not given the opportunity to respond to the *ex parte* allegations). *Id.* at 1095-96. When Goldberg denied he was waiving his right to counsel, the district court replied, "No, and I'm not engaging in a colloquy with you with respect to that either. I'm determining that your actions have waived counsel, and that that was a knowing and voluntarily intentional act." *Id.* In the district court's opinion, the justice further stated that threats toward one's attorney were sufficient for "waiver" of the right to representation, and the removal of his previously appointed counsel was with the expeditious effort of justice as a goal. *Id.* at 1097 (citing United States v. Goldberg, 855 F. Supp. 725 (M.D.Pa. 1994)).

55. *Id.* at 1099.

court turned to the concept of "waiver by conduct," where any deliberate impropriety by a defendant who has previously been informed he could lose his right to representation may be addressed as an implied request to continue *pro se* and thereby waive his right to counsel.[58] In *Goldberg*, the circuit court determined that because the district court had not colloquied the defendant as to his pending loss of rights, the court was unable to find a knowledgeable "waiver by conduct."[59] In dicta, however, the court acknowledged that while a pure forfeiture argument had never been adopted in the Third Circuit, if one was to be accepted it would demand extremely serious misconduct for application.[60]

In 1980, the Pennsylvania Superior Court upheld the "waiver" of representation by a criminal defendant, Gerald Wentz, when he appeared for trial without assistance of counsel, after multiple admonitions by the trial court to retain an attorney.[61] The court determined that the right to representation requires that the defendant take some affirmative action in order to exercise his right, such that failure to act is a waiver of the right.[62] The Superior Court held that when a criminal defendant fails to obtain counsel and fails to offer a reasonable explanation to the court regarding that failure, but had been properly advised on both his trial date and the need for counsel, he has effectively waived his right to counsel.[63]

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56. *Id.* Waiver is the "intentional and voluntary relinquishment of a known right." *Id.* (citing *Johnson*, 304 U.S. at 464).

57. *Id.* at 1100. Forfeiture is the "loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Id.*

58. *Id.* The court referenced *Illinois v. Allen* where the Supreme Court held that:

> 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 the trial cannot be carried on with him in the courtroom.

Id. at 1101 (citing Illinois v. Allen, 397 U.S. 337, 343 (1970)).

59. *Goldberg*, 67 F.3d at 1102-03.

60. *Id.* at 1103. In this case, the Court found the forfeiture standard of "extremely serious misconduct" would not have been met by Goldberg's behavior. *Id.* In particular, Goldberg's counsel's claim of a death threat had been heard *ex parte* by the District Court, and Goldberg had not been given the opportunity to respond to the allegation. *Id.*

61. Commonwealth v. Wentz, 421 A.2d 796 (Pa. Super. Ct. 1980). The trial court had notified Wentz that he was not an applicable candidate for "free" counsel, and when he appeared on the trial date with neither an attorney nor any indication that he had attempted to retain an attorney, the trial court required him to proceed *pro se*. *Wentz*, 421 A.2d at 798.

62. *Id.* at 800.

63. *Id.* Specifically, the Superior Court held:

> [A] criminal defendant who has been duly notified of the date of his trial, and who has been advised to obtain counsel to represent him and who, nevertheless, appears in court on the scheduled date without counsel and with no reasonable excuse for the lack thereof and no concrete plans for the obtaining of counsel has waived his right to counsel.

Id. In *Wilkerson v. Klem*, the Third Circuit discussed the *Wentz* decision in reference to Wilkerson's appeal to the Pennsylvania Superior Court. *Wilkerson*, 412 F.3d at 451-52. The Third Circuit said that "[w]hile the Superior Court quoted this passage [the holding] from *Wentz* cast in terms of 'waiver,' it made clear that this was a case in which the defendant had forfeited his right to counsel by his conduct and not one involving voluntary waiver of that right." *Id* at 452. In *Wentz*, the Court focused on upholding the formality of the legal process stating:

> Were we to hold that a defendant may not be tried without counsel unless he had executed a written waiver we would place our trial courts in a 'Catch-22' situation in that a 'court wise' criminal defendant could continually appear in court without counsel on the date scheduled for his trial but refuse to execute a written waiver of his right to counsel making it impossible to proceed with his trial. Obviously such a situation would render the judicial system a mockery.

In *Commonwealth v. Thomas*, the Superior Court applied the concept of forfeiture of counsel to a criminal defendant, Victor Thomas, who verbally threatened his court appointed attorney.[64] The court applied the rule of forfeiture described in *Goldberg* by the Third Circuit, such that forfeiture is the result of "extremely serious misconduct" or "extremely dilatory conduct" not of the defendant's intent.[65] The court referred to other jurisdictions' cases which involved physical attacks against attorneys, verbal abuse and threats of physical confrontation fulfilling the conduct requirement.[66] Thomas' multiple incidents of "misconduct, abuse, threats and utter failure to collaborate in his own defense" as well as opportunity to be represented by multiple attorneys appointed by the court led the Superior Court to find that he had forfeited his right to counsel.[67]

In *State v. Lehman*, the Minnesota Court of Appeals addressed the issue of forfeiture as one of first impression.[68] The defendant's in-court attack on his court appointed attorney, which involved the attorney's blood all over the attorney, the counsel table and the courtroom floor, was upheld by the court of appeals as forfeiture of the defendant's right to counsel.[69] The court narrowly focused on the impact of violence on the court, finding that where a defendant uses violence to exploit, or attempt to exploit, his counsel, the court is correct in depriving that defendant of his right to appointed representation.[70]

III. AN ANALYSIS OF THE *LUCARELLI* DECISION

While the right to counsel has long been essential to the adversarial nature of American law, Alfredo Garcia describes the recent change in the United States Supreme Court's interpretation of the right to counsel saying "one may posit that the Court has at times construed the right of the defendant to counsel as a revocable privilege rather than a fundamental right."[71] The Pennsylvania Supreme Court took the same approach described by Garcia in determining that Lucarelli forfeited his right to counsel by acting in an extremely dilatory fashion when he

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Wentz, 421 A.2d at 800.

64. Commonwealth v. Thomas, 879 A.2d 246 (Pa. Super. Ct. 2005). Thomas had initially been appointed, over the course of pre-trial, five different attorneys and eventually motioned to proceed *pro se*, but at the start of trial, stated he wished to have his appointed stand-by counsel become lead counsel. *Thomas*, 879 A.2d at 251-253. On the third day of the trial, the court permitted his counsel to withdraw following a verbal threat, testified to by the sheriff's deputies who had been in the process of forcibly transporting Thomas from the courtroom to a holding cell. *Id.*

65. *Id.* at 257 (citing Thomas, 357 F.3d at 362 (quoting *Goldberg*, 67 F.3d at 1100-02)).

66. *Id.* at 257-258 (citing *Thomas*, 357 F.3d at 363; *Leggett*, 162 F.3d 237; *McLeod*, 53 F.3d 322).

67. *Id.* at 258. The Court stated, "the record amply supports the trial court's determination that appellant put himself in this position intentionally." *Id.* at 259 (citing Trial Court Record at 04/16/03. P.65, Commonwealth v. Thomas (Blair County, Nos. 2001-1021 & 2001-968)). Specifically, the Court found "to reward appellant for his extremely serious, abusive and threatening misconduct would be illogical and against the interests of justice. . . . Appellant forfeited his right to counsel through continuing, extremely serious misconduct." *Id.*

68. *Lehman*, 749 N.W.2d 76.

69. *Id.* at 81-82. The court of appeals cited to eleven extra-jurisdictional cases in which forfeiture had been upheld for reasons of "extremely serious misconduct" including violence, threats and manipulation. *Id.* (citing, *inter alia*, *Wilkerson*, 412 F.3d at 455)). Specifically, the court found, "[w]e are aware that forfeiting a defendant's right to court appointed counsel is an extreme sanction. But the outrageous and manipulative conduct of appellant in this instance justified the district court's decision." *Id.* at 82.

70. *Id.*

71. ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 48-49 (Greenwood Press) (1992).

failed to obtain counsel for his criminal trial.

Over the last eighty years, the Commonwealth and United States Supreme Courts have increasingly interpreted the Sixth Amendment's right to representation at a criminal trial as a limited right to be weighed on several factors including protecting the defendant's rights,[72] allowing an attorney to select and represent those clients he so chooses,[73] and the criminal justice system's overall concern for quick and effective administration of law.[74] Forfeiture must be addressed on the same principles as the right to be present at one's trial[75] or the right to represent one's self[76]. Pennsylvania attempts to protect criminal defendants by requiring the trial court to perform a colloquy when the accused chooses to take the responsibility of their defense into their own hands and proceed to trial *pro se*.[77] The colloquy's overall purpose is to properly notify a defendant of the threats that self-representation can pose.[78]

It has generally been determined, and held here in *Lucarelli*, that instances of forfeiture do not require the performance of a colloquy. A Rule 121 colloquy requires a conversation between the judge, attorneys and defendant and further requires the defendant to orally waive his right to representation.[79] Forfeiture, however, *should* occur in situations where a defendant refuses to comply with the court's demands or behaves in an unreasonable manner toward the court or his attorney.[80] As such, it is impossible to imagine that a thoroughly noncompliant defendant would agree to orally waive his right to counsel because the court has requested he do so through a Rule 121 colloquy. Rather, by making a colloquy and waiver mandatory, the defiant defendant would be permitted the freedom to manipulate the presiding judge's ability to proceed with trial.

In this case, the trial court encouraged Lucarelli on multiple occasions to seek counsel, even providing him with funds from his bail for hiring a personal attorney. Lucarelli was appropriately regarded by both the trial court and the Supreme Court majority as disrespectful, avaricious, and exhibiting extreme dilatory conduct.[81] Chief Justice Castille's concurrence pointed out that Lucarelli also failed to object to proceeding *pro se* at either jury selection or trial but was still provided with the assistance of court appointed stand-by counsel.[82] The majority and dissent ignore this significant factor. If Lucarelli had objected, as the concurrence properly suggested, the trial court could have colloquied him immediately, precluding the issue of forfeiture.[83] Chief Justice Castille further advised that to prevent additional litigation in this area,

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72. *See*, *inter alia*, *Faretta*, 422 U.S. at 833; *McDonough*, 812 A.2d 504.
73. *See Randolph*, 873 A.2d at 1282 (citing *Robinson*, 364 A.2d at 674, n. 13).
74. *See McAleer*, 748 A.2d at 674 (citing *Baines*, 389 A.2d at 70).
75. *See Allen*, 397 U.S. at 343.
76. *See*, *inter alia*, *Faretta*, 422 U.S. at 833.
77. 42 Pa. C.S.A. § 121.
78. *Faretta*, 422 U.S. at 835 (citing *Adams*, 317 U.S. at 279)
79. 42 Pa. C.S.A. § 121; BLACK'S LAW DICTIONARY 221 (8th ed. 2004).
80. *Lucarelli*, 971 A.2d at 1179 (citing *Thomas*, 357 F.3d at 362 (quoting *Goldberg*, 67 F.3d at 1100-02)). *See also Coleman*, 905 A.2d 1006-08).
81. *Id.* The majority stated, "Appellee simply decided not to retain private counsel because he did not wish to spend the money." *Id.* at 1180.
82. *Id.* at 1181.
83. *Id.* The majority did mention the court's failure to address forfeiture on the record with Lucarelli stating:

> The trial court imposed forfeiture by calling the case to trial. . . . there would have been no point in the trial court conducting a Rule 121 waiver colloquy, because Appellee had made it clear from the outset that he was *not interested* in waiving his right to counsel. That is precisely why the trial court found itself with no choice…"

he would prefer that trial judges colloquy all potential *pro se* defendants, even in cases of forfeiture, so a verbal warning is on the record.[84] Such formality would best protect not only the misbehaving defendant, but also the trial court judge from attacks on his discretion in safeguarding the accused's constitutional rights.

As Lucarelli failed to object, the trial court correctly addressed his blatant failure to obtain counsel, after being provided the opportunity to do so by the court in the form of advice, time and funds, as a forfeiture of the right to counsel. The Third Circuit had previously refused to address the issue of pure forfeiture in *Goldberg*, depending rather on the rule of "waiver by conduct," which still required the trial court to perform a colloquy with the defendant before forcing him to proceed *pro se*.[85] In *Lucarelli* however, the Supreme Court accurately determined Lucarelli's failure to obtain private representation following months of advice and warnings by the trial court warranted the pure forfeiture issue alluded to by the Third Circuit in *Goldberg*. The Supreme Court appropriately decided that in some situations it was necessary to force a "recalcitrant defendant," who would refuse to submit to the colloquy, to proceed *pro se* in order to prevent administration by the justice system.[86]

The majority in *Lucarelli* addressed the Third Circuit *Wilkerson v. Klem* opinion only parenthetically,[87] but the circuit court's reference to and analysis of *Commonwealth v. Wentz* could have provided a clear rule for this Court to adopt as their own. The 1980 *Wentz* opinion demanded that a defendant with appropriate funds for obtaining an attorney must take affirmative action to do so or "waive" his right to counsel.[88] The Superior Court's rule in *Wentz* was directly applicable to Lucarelli, a defendant with funds (provided by the trial court from his bail), who was notified of the date of his trial, was advised to obtain counsel, and appeared for both jury selection and the start of trial without an attorney or explanation of lack of counsel.[89] The Third Circuit in *Wilkerson* clarified the *Wentz* holding, interpreting *Wentz* as a clear issue of forfeiture of the right to counsel and not one of waiver.[90] The most significant factor in interpreting the *Wentz* opinion as forfeiture rather than waiver is the circuit court's focus on preventing the mockery of the judicial system by a criminal defendant who refuses to waive his rights thereby manipulating the court and making any procession of his trial impossible.[91] The majority in *Lucarelli* failed to appropriately reference the *Wentz* opinion as persuasive authority in the area of forfeiture for the Commonwealth.

Alternatively, the majority preferred to reference cases involving court appointed attorneys who withdrew after the relationship broke down with their clients who exhibited outrageous behavior, including physical attacks, misconduct, threats and abuse.[92] It is unclear why the Court would choose to accredit their holding of forfeiture to persuasive authority which appears to factually differ so greatly from *Lucarelli*. In *Lucarelli*, there are additional factors,

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Id. at 1178, n. 3 (emphasis in original).

84. *Lucarelli*, 971 A.2d at 1183. Specifically, the concurrence states, "I express that preference solely as a supervisory matter; as I have explained above, I do not believe that the constitutional right to counsel requires that a non-indigent defendant be fully colloquied concerning the obvious consequences of his refusal to secure counsel." *Id.*

85. *Id.* at 1103.

86. *Lucarelli*, 971 A.2d at 1179.

87. *Id.* at 1180.

88. *Wentz*, 421 A.2d at 800.

89. *Lucarelli*, 971 A.2d at 1180.

90. *Wilkerson*, 412 F.3d at 452.

91. *Wentz*, 421 A.2d at 800.

92. *See, inter alia*, *Thomas*, 879 A.2d 251-253; *Lehman*, 749 N.W.2d at 82.

such as the right of a private attorney to choose his clients and the withdrawal of counsel which was granted by the trial court, which are not issues in a case where the defendant has been appointed an attorney. In particular, the dissent in *Lucarelli* attacked the majority's premise that Lucarelli's behavior was sufficiently "egregious" to constitute forfeiture.[93] If the majority had distinguished cases with factual examples of behavior more similar to *Wentz* than those they did choose to acknowledge, perhaps the dissenting justices could have better understood the range of behavior which legitimately qualifies as "extreme dilatory conduct."

Although the Supreme Court did appropriately determine that Lucarelli had forfeited his right to representation as the result of his behavior over the course of ten months preceding his trial, Chief Justice Castille made a worthwhile suggestion when he advised the Commonwealth's trial courts to protect the record by reading the Rule 121 colloquy to all *pro se* defendants. The court is constantly challenged by its duty to balance the rights of the accused with those of counsel as well as the necessary goal of efficient justice. The use of a colloquy for forfeiture, even if only similar to that in Rule 121, would best protect both the client and the court, providing both knowledge and sufficient warning to the defendant and satisfaction to the Superior and Supreme Courts that the trial judge took explicit notice of a defendant's forfeiture of rights.

Amanda Kraft

93. *Lucarelli*, 971 A.2d at 1184.