Judicial Review of Right-to-Counsel Violations That Occur at Sentencing: The Rule of Automatic Reversal and the Doctrine of Harmless Error

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INTRODUCTION

After his conviction for multiple drug and firearm offenses, Tommie Crawford faced a statutory-minimum sentence of fifteen years’ imprisonment. Prior to his sentencing hearing, Crawford informed the district court that he wished to waive his right to counsel and moved to proceed pro se. The court granted Crawford’s request and allowed him to proceed at sentencing without the assistance of counsel. At the conclusion of the sentencing hearing, the court sentenced Crawford to the minimum term of imprisonment. On appeal, Crawford successfully argued that his waiver of counsel had not been knowing and intelligent; therefore, his Sixth Amendment right to counsel had been violated.

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While Crawford succeeded in challenging the validity of his waiver, he faced another obstacle to obtaining a new sentencing hearing. The rule of automatic reversal provides that the denial of a defendant's right to counsel throughout trial warrants a reversal of the conviction and a remand for a new trial.\(^8\) In the sentencing context, courts have consistently remanded for resentencing where a defendant was denied the right to counsel at the sentencing hearing.\(^9\) But in the situation where a trial court merely imposes a statutory-minimum sentence\(^10\) after a defendant was denied the right to counsel at sentencing, it is difficult to imagine how a resentencing hearing could result in a better outcome for the defendant. In that situation, a remand would seem an exercise in form over substance.\(^11\)

_Crawford_ presented that precise situation. Facing a confluence of constitutional rights, federal sentencing rules, and institutional concerns, the United States Court of Appeals for the Eighth Circuit had a choice. The court could have concluded that the rule of automatic reversal dictated a reversal _per se_ on account of the court's inherent inability to quantify the prejudice Crawford suffered from the denial of counsel. Alternatively, the court could have acknowledged the futility of remanding Crawford's case for resentencing in light of the certain result prescribed by the mandatory minimum statute. The latter option would necessarily involve a consideration of harmless-error review.

The unique circumstances of Crawford's case highlight several tensions inherent in the law: efficiency versus comprehensiveness, form versus substance, and judicial economy versus the appearance of fairness. In the context of the Sixth Amendment right to counsel, courts have frequently drawn a bright line in favor of comprehensiveness, form, and the appearance of fairness


\(^9\) See infra notes 95–165 and accompanying text.

\(^10\) In federal court, a sentencing judge has no authority to sentence a defendant below the statutory minimum sentence unless the government files a motion on account of the defendant's substantial assistance in the investigation or prosecution of another person or the defendant qualifies for safety-valve relief. See 18 U.S.C. § 3553(e)-(f) (West 2000); see also _Melendez v. U.S._, 518 U.S. 120, 124 (1996).

\(^11\) See _Crawford_, 487 F.3d at 1107.
by refusing to review invalid waivers of counsel for harmless error and instead remanding without further inquiry for new proceedings. Crawford's case illustrates that this approach (the rule of automatic reversal), while almost always appropriate, may not fit all cases.

This article considers the limited applicability, if any, of harmless-error review to Sixth Amendment right-to-counsel violations resulting from invalid waivers that occur at sentencing. Part One traces the development of the constitutional guarantee of the right to counsel, the corollary right to proceed pro se, and the corresponding requirements for waiving the right to counsel. Part Two outlines judicial review of Sixth Amendment violations and the doctrine of harmless-error review. Part Three discusses the application of these doctrines to sentencing cases. Part Four addresses whether harmless-error review is ever appropriate for right-to-counsel violations in light of this jurisprudence. Throughout this article, Crawford serves as a catalyst for discussion.

I. THE SIXTH AMENDMENT AND THE RIGHT TO COUNSEL

A. The Right to Counsel

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This amendment has been broadly interpreted to require that any criminal defendant facing the possibility of imprisonment be provided counsel, at the state's expense if necessary. Though this right is now entrenched as a bedrock principle of our criminal justice system, such expansive protection did not always exist. At the time of the ratification of the Bill of Rights, the Sixth Amendment was simply understood

12 U.S. CONST. amend. VI.
13 See 18 U.S.C. § 3006A (2000) (reinforcing by statute a criminal defendant's right to court-appointed counsel by requiring each U.S. district court to implement a plan for "furnishing representation for any person financially unable to obtain adequate representation"); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (explaining that persons charged with a crime who are unable to afford a lawyer will have one provided); FED. R. CRIM. P. 44(a) ("A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives that right."); see also Ala. v. Shelton, 535 U.S. 654, 672 (2000); Argersinger v. Hamlin, 407 U.S. 25, 37–38 (1972).
to permit a criminal defendant to hire his own counsel, which was contrary to the English rule generally forbidding counsel in criminal cases. The Supreme Court began to expand the right to counsel, however, through the Fourteenth Amendment Due Process Clause in Powell v. Alabama, where the Court held that in the circumstances of that case—the defendants, who were facing capital charges, were unable to procure their own lawyer and were unable to meaningfully defend themselves—the trial court was required to appoint counsel to ensure a fair hearing. Later, the Court significantly expanded the right to counsel and "construed [the Sixth Amendment] to mean that in federal courts counsel must be provided for defendants unable to employ counsel." The Sixth Amendment right to counsel was made applicable to the states through the Due Process Clause.

The Sixth Amendment right to counsel applies in cases in which a defendant is subject to the possibility of incarceration, including non-felony offenses. The right attaches "at or after the time that judicial proceedings have been initiated against [a defendant] - 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" A criminal defendant enjoys this right during "critical stages" of the criminal process.

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14 Throughout this article, when referring to a criminal defendant, the terms "he," "his," etc. are used. This gender-specific language is used on account of the reality that men are overwhelmingly more likely than women to commit criminal offenses. Women only represented 12% of convicted inmates in jail in 2002. See U.S. Dept of Justice, Bureau of Justice Statistics Special Report: Profile of Jail Inmates (2002), http://www.ojp.usdoj.gov/bjs/crimoff.htm#data (last visited March 5, 2008).


16 See U.S. CONST. amend. XIV, § 1 ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law").

17 287 U.S. 45 (1932).

18 Id. at 71.


20 Id. at 342 (overruling Betts v. Brady, 316 U.S. 455 (1942) and holding that the right to counsel applies to the states through the Due Process Clause).


including interrogation, arraignment, indictment, information, plea hearings, lineups, confrontations, psychiatric evaluations in capital cases, preliminary hearings, trial, sentencing, and appeal.

While the right to counsel has been made applicable to nearly all stages of the criminal process, the standard of performance guaranteed by this right is very minimal. It is true that the right to counsel refers not merely to a physically present attorney but to "effective assistance of counsel," yet counsel is deemed inef-

that "the need for such assistance [of counsel] may exist at every stage of the prosecution, from arraignment to sentencing." Carter v. Ill., 329 U.S. 173, 174 (1946). And even prior to Carter, the Court stated that a defendant "requires the guiding hand of counsel at every step of the proceedings against him." Powell v. Ala., 287 U.S. 45, 69 (1932) (emphasis added); see also Zerbst, 304 U.S. at 463.


26 Kirby, 406 U.S. at 689 (stating that the right to counsel extends beyond the trial itself and to the defendant's indictment).

27 Id. (clarifying that the right to counsel includes points of criminal proceedings beyond trial, including information).

28 Iowa v. Tarver, 541 U.S. 77, 80 (2004) (stating defendant has Constitutional right to counsel at plea hearing stage of criminal process, as this stage is critical).

29 See U.S. v. Wade, 388 U.S. 218, 236–37 (1967) (finding that pretrial lineup stage is of such critical nature that defendant's right to counsel at this stage is equivalent to such established right at the trial stage).

30 Stovall v. Denno, 388 U.S. 293, 298 (1967) (concluding that confrontation stage is also critical stage at which the right to counsel is guaranteed), abrogated in part on other grounds by Griffith v. Ky., 479 U.S. 314 (1987).

31 Estelle v. Smith, 451 U.S. 454, 470–71 (1981). The Court in Estelle noted, however, that the Sixth Amendment right to counsel does not require that the defendant's attorney actually be present during a psychiatric evaluation - on account of the nature of such meetings - but that the right does require the opportunity to consult with counsel prior to the evaluation. Id. at 471 n.14.

32 See Coleman v. Ala., 399 U.S. 1, 9–10 (1970) (determining preliminary hearing stage of State's criminal process is critical one in which a defendant has right to counsel).

33 See Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (holding adversarial system of criminal justice demands right to counsel during trial for those charged with crimes, in order to assure fair trials).

34 See Mempa v. Rhay, 389 U.S. 128, 134 (1967) (explaining sentencing nature is considered critical in criminal cases and therefore right to counsel applies); see also Townsend v. Burke, 334 U.S. 736, 741 (1948) (specifying that absence of counsel in sentencing violated criminal defendant's due process rights).


fective only if counsel's performance falls below the reasonableness standard as determined by prevailing professional norms and the deficient performance prejudiced the defendant's case.\textsuperscript{37} The right to effective counsel has not necessarily translated into the right to competent counsel on account of the prejudice prong.\textsuperscript{38}

\textbf{B. The Right to Proceed \textit{Pro Se}}

Conversely, American law has long-recognized the right of a criminal defendant to represent himself. Prior to the ratification of the Bill of Rights, parties were guaranteed the right to proceed \textit{pro se} in federal courts by the Judiciary Act of 1789.\textsuperscript{39} It was also the practice of the English legal system, as well as the colonial legal system, to permit self-representation.\textsuperscript{40} Moreover, most states have traditionally recognized this right.\textsuperscript{41} By 1948, the right of a defendant to "conduct[ ] his own defense at the trial" was a "recognized privilege."\textsuperscript{42} Therefore, when the Supreme Court was confronted with the question of whether the right to self-representation was protected under the Sixth Amendment, it acknowledged the "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."\textsuperscript{43}

Accordingly, in \textit{Faretta}, the Court solidified the right to self-representation as a "fundamental" part of American constitutional law.\textsuperscript{44} The Court determined that the collection of rights impliedly incorporates right to effective assistance of counsel); cf. \textit{supra} note 31 and accompanying text (exploring exception where physical presence of counsel during psychiatric evaluation is not Constitutionally required).


\textsuperscript{38} See Keith Cunningham-Parmeter, \textit{Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice From Representational Absence}, 76 \textit{TEMP. L. REV.} 827, 882 (2003) (discussing the effect of the \textit{Strickland} ineffective-assistance standard on Sixth Amendment right-to-counsel claims).

\textsuperscript{39} \textit{Faretta v. Cal.}, 422 U.S. 806, 812–13 (1975). Today this right is codified at 28 U.S.C. § 1654 (West 2000), which provides, "[i]n all courts of the U.S. the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

\textsuperscript{40} \textit{Faretta}, 422 U.S. at 818.

\textsuperscript{41} See \textit{id.} at 813–14 n.9–11.


\textsuperscript{43} \textit{Faretta}, 422 U.S. at 817.

\textsuperscript{44} \textit{id.} at 817–18.
embodied in the Sixth Amendment, including the rights to information, confrontation, and compulsory process, "necessarily implied" the right to self-representation. The Court emphasized that the right to self-representation was "independently found in the structure and history of the constitutional text," as opposed to merely arising from the ability to waive the assistance of counsel. This right exists at trial, and although the Supreme Court has not specifically considered the issue, the courts of appeal have assumed that the right to proceed pro se applies at sentencing as well. The Court in Faretta therefore made clear that a criminal defendant possesses two conflicting rights: the right to the assistance of counsel and the right to proceed pro se. Thus, after Faretta, a workable standard was necessary to determine how a defendant could effectively choose between these two rights.

C. Waiver of the Right to Counsel

As the right-to-counsel jurisprudence developed, so did the corresponding notion that a criminal defendant may waive that right in order to exercise his right to self-representation. In 1938, the Supreme Court stated, "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." Four years later in Ad-
ams v. United States ex rel McCann, the Court stated that the right to counsel embodied a "correlative right to dispense with a lawyer's help," and that "the Constitution does not force a lawyer upon a defendant."

In order to exercise his right to self-representation, a criminal defendant "necessarily must waive his [S]ixth [A]mendment right to counsel." This is not an easy task, as courts have traditionally "indulge[d] every reasonable presumption against waiver of fundamental constitutional rights," such as the right to counsel. Accordingly, the Supreme Court has mandated that a valid waiver of the right to counsel be made "knowingly and intelligently." Whether a knowing and intelligent waiver has occurred is determined by the facts and circumstances of each case, including the background, experience, and conduct of the defendant. Trial judges are advised to question the defendant about these circumstances even if the defendant states that he is informed of his right to counsel. Indeed, in a plurality opinion written over a quarter-century before Faretta, Justice Black stated, "A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Specifically, trial judges should consider: whether the defendant understands the nature of the charges against him; the statutory offenses involved; the applica-

51 317 U.S. 269 (1942).
52 Id. at 279.
53 Id.; See Moore v. Mich., 355 U.S. 155, 161 (1957) ("The constitutional right, of course, does not justify forcing counsel upon an accused who wants none."); Carter v. Ill., 329 U.S. 173, 174–75 (1946) ("Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant.").
54 Bruce A. McGovern, Note, Invalid Waivers of Counsel As Harmless Errors: Judicial Economy or a Return to Betts v. Brady?, 56 FORDHAM L. REV. 431, 431 (1987); see Faretta, 422 U.S. at 834–35; Strozier v. Newsome, 871 F.2d 995, 997 (11th Cir. 1989); Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982) (en banc) ("The right of self-representation entails a waiver of the right to counsel, since a defendant obviously cannot enjoy both rights at trial.").
55 Zerbst, 304 U.S. at 464 (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882)).
56 Faretta, 422 U.S. at 835 (quoting Zerbst, 304 U.S. at 464–65).
57 Zerbst, 304 U.S. at 464.
59 Id.
ble range of punishments; potential defenses and mitigating factors; and "all other facts essential to a broad understanding of the whole matter." These questions are not mandatory, however, as a valid waiver may occur without reference to all of these factors. But, "[a]n on-the-record colloquy exploring the dangers of self-representation is recognized as the preferred method of substantiating a waiver’s validity." If no colloquy is conducted, a reviewing court may examine the entire record to determine if "the defendant knew and understood the disadvantages of self-representation," and that he "had the required knowledge [to represent himself] from other sources [than an attorney]."

Even after a trial court is convinced that a defendant has knowingly and intelligently waived his right to counsel and can therefore proceed pro se, the court may terminate the defendant’s self-representation if the defendant "deliberately engages in serious and obstructionist misconduct." Additionally, the court may appoint “standby counsel” to assist the defendant or represent the defendant if self-representation is terminated.

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60 Id. The Benchbook for U.S. District Court Judges advises district judges to ask a defendant requesting to proceed pro se several questions concerning the defendant's understanding of the law, charges, penalties, sentencing guidelines, rules of evidence, and rules of criminal procedure; his experience in self-representation; and the voluntariness of his waiver. BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (Federal Judicial Center, 4th ed. 1996), at 4–5. District judges are also advised to warn the defendant that the decision to proceed without counsel is "unwise" and to "strongly urge" the defendant not to represent himself. Id. at 5.

61 U.S. v. Crawford, 487 F.3d 1101, 1106 (8th Cir. 2007) (explaining how court will uphold waiver of defendant's right to counsel as knowing and intelligent if either "(1) the district court adequately warns the defendant about the dangers and disadvantages of proceeding pro se or (2) the record as a whole demonstrates 'that the defendant knew and understood the disadvantages of self-representation'" (quoting U.S. v. Stewart, 20 F.3d 911, 917 (8th Cir. 1994))).

62 Id. In Crawford, the court stated that previous cases indicated that the court favored "a specific warning on the record of the dangers and disadvantages of self-representation" when a defendant seeks to proceed pro se. Id. (quoting Meyer v. Sargent, 854 F.2d 1110, 1114 (8th Cir. 1988)). See BENCHBOOK FOR U.S. DISTRICT COURT JUDGES, supra note 60, at 4 (stating that where a criminal defendant wishes to proceed pro se, the district court must "make clear on the record that defendant is fully aware of the hazards and disadvantages of self-representation").

63 Crawford, 473 F.3d at 1106 (quoting Stewart, 20 F.3d at 917).

64 Id. (quoting U.S. v. Yagow, 953 F.2d 427, 431 (8th Cir. 1992), cert. denied, 506 U.S. 833 (1992)).


66 Id.
A trial court’s dilemma in considering whether to allow a defendant to proceed pro se is that the defendant may later challenge the validity of his waiver. If a waiver was not knowing and intelligent, not only should the defendant have been prevented from representing himself, but he also will have been denied his right to counsel. If a defendant who lost at trial claims on appeal that his waiver was invalid, an appellate court must consider whether a right-to-counsel violation has occurred and if so, how to remedy that violation.

II. JUDICIAL REVIEW AND REMEDY OF SIXTH AMENDMENT RIGHT-TO-COUNSEL VIOLATIONS

In reviewing a challenge to a defendant’s purported waiver of counsel, a court of appeals must reexamine de novo whether the defendant knowingly and intelligently waived his right to counsel. If the trial court did not conduct a colloquy to establish a valid waiver and the record as a whole fails to demonstrate a knowing and intelligent waiver, then a violation of the Sixth Amendment right to counsel has occurred for which the court must fashion an appropriate remedy. Since the right to counsel is a fundamental right, reversal has often been considered the only appropriate remedy for a violation of that right. The doctrine of harmless error, however, raises questions about the appropriateness of that response in certain circumstances.

A. Structural Defect and the Rule of Automatic Reversal

The Supreme Court has repeatedly indicated that if a defendant is deprived of his right to counsel at trial, a reversal and remand for a new trial are required. In fashioning this rule of automatic reversal, the Court has distinguished "trial error[s],"

67 See, e.g., Strozier v. Newsome, 871 F.2d 995, 997 (11th Cir. 1989) ("[I]f [the trial judge] allows a defendant his right to proceed pro se, he runs the risk that he may have denied the defendant his right to counsel.").
68 See, e.g., U.S. v. Mahasin, 442 F.3d 687, 691 (8th Cir. 2006).
which "occur during the presentation of the case to the jury," from "structural defects in the constitution of the trial mechanism." The former are subject to harmless-error analysis, but the latter "require[] automatic reversal of the conviction because they infect the entire trial process." The Court has specifically identified the deprivation of the right to counsel at trial as a structural defect that requires automatic reversal of the conviction and that is not subject to harmless-error analysis. Similarly, in the context of ineffective-assistance claims, the Court has stated that the denial of the assistance of counsel is presumed prejudicial to the defendant.

The Court has stated that the rule of automatic reversal is necessary because the effect of Sixth Amendment violations that "pervade the entire proceeding," such as the denial of counsel at trial, are too "speculative" to quantify in terms of harm. And

72 See supra note 71 and accompanying text.
73 See infra notes 81–94 and accompanying text.
75 Id. See Rose v. Clark, 478 U.S. 570, 577 (1986), abrogated by Brecht, 507 U.S. 619; see also Del. v. Van Arsdall, 475 U.S. 673, 681 (1986) (reaffirming the principle that valid convictions should not be set aside if the reviewing court can say, beyond a reasonable doubt, that the constitutional error was harmless).
76 See Chapman v. Cal., 386 U.S. 18, 23 n.8 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)); see also Rose, 478 at 577. Twenty-one years prior to Chapman, the Court considered whether a defendant who had been represented by an attorney with a conflict of interest in violation of the Sixth Amendment right to counsel should automatically receive a new trial. Glasser v. U.S., 315 U.S. 60 (1942). The Court stated, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Id. at 76. The Court has also identified the deprivation of the choice of one's counsel, U.S. v. Gonzalez-Lopez, 126 S. Ct. 2557, 2564 (2006), the deprivation of the right to self-representation, McKaskle v. Wiggins, 465 U.S. 166, 177 n.8 (1984), and the deprivation of counsel on appeal, Penon v. Ohio, 488 U.S. 75, 89 (1988), as errors that are not subject to harmless-error review. Also, in Holloway v. Ark., 435 U.S. 475, 490–91 (1978), a conflict of interest throughout entire proceeding was not subject to harmless-error review, and in Hamilton v. Ala., 368 U.S. 52, 53 (1961), the absence of counsel at arraignment was not subject to harmless-error review. But see infra note 78 and accompanying text.
since an invalid waiver of counsel results in a total deprivation of counsel throughout the remainder of the proceeding,\textsuperscript{79} that violation triggers the rule of automatic reversal.\textsuperscript{80}

Implicit in this rule is the rejection of the argument that considerations of judicial economy warrant a contrary approach, such as the application of harmless-error review. But while the Court has prescribed a strict rule of reversal for cases involving the deprivation of counsel at trial, competing considerations could arguably produce different results at other stages of trial, including the sentencing stage.

\textbf{B. Harmless-Error Review}

In contrast to the rule of automatic reversal for structural errors, harmless-error review examines the quantitative effect of trial errors in the context of other evidence to determine whether reversal is appropriate.\textsuperscript{81} The Supreme Court has justified this rule as one that "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."\textsuperscript{82} The Court has stated more directly that a criminal defendant has a right to "a fair trial, not a perfect one,"\textsuperscript{83} as "there can be no such thing as an error-free, perfect trial."\textsuperscript{84}

The federal harmless-error statute provides, "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."\textsuperscript{85} This rule triggers a two-step process on direct review. First, the reviewing court determines whether the challenged
ruling was in fact erroneous.86 Second, the court determines whether the error affected the defendant's substantial rights.87

To determine whether the error affected the defendant's substantial rights, the court must categorize the error. If the error did not involve a constitutional right, it is deemed harmless unless it had a "substantial or injurious effect or influence in determining the jury's verdict" or it leaves the court in "grave doubt" as to whether it had that effect.88 Stated another way, "If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand."89 If the error involved a constitutional right, a more exacting standard is used, and reversal is required unless the error was harmless beyond a reasonable doubt.90

Some constitutional errors, however, cannot be analyzed under the harmless-error framework because they "cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless."91 These constitutional errors are the structural errors that require automatic reversal.92 The Court has identified "Sixth Amendment violations that pervade the entire proceeding" as errors incapable of review for harmless error.93 Accordingly, the total deprivation of the right to counsel at trial has been identified as a structural error requiring automatic reversal.94

C. The Tension

The rule of automatic reversal for right-to-counsel violations at trial and the doctrine of harmless-error review provide conflicting

86 See, e.g., U.S. v. Uder, 98 F.3d 1039, 1043 (8th Cir. 1996).
87 See MOORE ET AL., supra note 85, ¶ 652.03.
89 Id. at 764–65.
93 Satterwhite, 486 U.S. at 256.
94 Chapman, 386 U.S. at 23 n.8; see supra notes 12–38 and accompanying text.
guidance for courts considering a case such as Crawford. The Supreme Court has consistently stated that reversal is the only appropriate remedy for a violation of the right to counsel at trial, but the Court has not specifically considered the situation where a right-to-counsel deprivation occurs at sentencing. In a case where a remand for re-sentencing could not possibly result in a more favorable disposition for the defendant, a strict rule of automatic reversal would seemingly waste judicial resources. In this rare situation, a court must consider the impact of both the rule of automatic reversal and the doctrine of harmless error.

III. THE RIGHT TO COUNSEL AT SENTENCING

These doctrines—the right to counsel, the right to self-representation, waiver of the right to counsel, structural error, and harmless error—can simultaneously be implicated by a defendant at sentencing. A criminal defendant unquestionably has the right to counsel at sentencing, and he may waive this right and proceed pro se. Courts have analyzed waivers of the right to counsel at sentencing in somewhat less exacting fashion than waivers made during trial, however, generally allowing the waiver colloquy at sentencing to be less “exhaustive and searching [than] a similar inquiry before the conclusion of trial.” Courts have taken this approach because trials have historically been considered more complicated than sentencing.

Nonetheless, a trial court’s decision to allow a defendant to proceed pro se at sentencing must be supported by an on-the-record colloquy or by the record as a whole. What is required of

95 See Mempa v. Rhay, 389 U.S. 128, 134 (1967) (explaining that courts have been veering towards the application of the Sixth Amendment right to counsel at sentencing as well as during trial); see also Townsend v. Burke, 334 U.S. 736, 739 (1948) (noting that courts now recognize a due process violation in the absence of counsel since it can “result . . . in the prisoner actually being taken advantage of, or prejudiced . . . ”).
96 See, e.g., U.S. v. Crawford, 487 F.3d 1101, 1105 (8th Cir. 2007).
98 But see U.S. v. Smith, 997 F.2d 396, 398 (8th Cir. 1993) (Gibson, J., concurring) (“T]he guidelines . . . have created a complex hyper technical system consuming great amounts of judicial time for both trial and appellate judges.”). Compare U.S. v. Day, 998 F.2d 622, 626 (8th Cir. 1993) (“Sentencing hearings demand much less specialized knowledge than trials . . . .”) with Salemo, 61 F.3d at 219-20 (agreeing that sentencing hearings require less specialized knowledge than trials but also cautioning that sentencing is “often times [a] complicated part of the criminal process”).
99 See supra 95–98 and accompanying text; see also Salemo, 61 F.3d at 219 (“This distinction [between trial and sentencing] is clearly relevant to the content of the colloquy
a colloquy at sentencing is less rigorous than what is required at trial, though the Supreme Court has stated that it has increasingly "taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized."\textsuperscript{100}

If a reviewing court determines that a purported waiver of counsel at sentencing was invalid and therefore that a right-to-counsel violation has occurred, the effect of the violation can depend on the particular circumstances of the case. Several courts have concluded that a deprivation of the right to counsel at sentencing requires an automatic reversal and remand for resentencing in accordance with the structural-defect cases concerning deprivations at trial. These courts have explicitly rejected harmless error as the appropriate standard of review for right-to-counsel violations at sentencing.

For example, in \textit{United States v. Virgil},\textsuperscript{101} the Fifth Circuit, after concluding that the trial court did not conduct a proper colloquy before allowing the defendant to proceed \textit{pro se} at sentencing, considered whether that violation could be analyzed under the harmless-error framework.\textsuperscript{102} The court observed that most cases involving invalid waivers and corresponding right-to-counsel violations occur in the context of trial and that "virtually all of those cases reverse without ever entertaining the possibility of harmless error."\textsuperscript{103} The court then cited \textit{Rose v. Clark}\textsuperscript{104} and \textit{Penson v. Ohio}\textsuperscript{105} for the propositions that harmless-error analysis is inappropriate if the defendant was deprived of his right to

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\textit{Patterson v. Ill.,} 487 U.S. 285, 298 (1988); \textit{Salemo,} 61 F.3d at 219 ("the inquiry at sentencing need only be tailored to that proceeding and the consequences that may flow from it.").
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\textsuperscript{100} \textit{Id.} at 445.

\textsuperscript{101} 444 F.3d 447 (5th Cir. 2006), \textit{cert. denied}, 127 S. Ct. 365 (2006).

\textsuperscript{102} \textit{Id.} at 455.

\textsuperscript{103} \textit{Id.} (citing \textit{U.S. v. Jones}, 421 F.3d 359, 365 (5th Cir. 2005)).

\textsuperscript{104} 478 U.S. 570 (1986).

\textsuperscript{105} 488 U.S. 75 (1988).
counsel at trial or on appeal, respectively.\textsuperscript{106} Importantly, the court acknowledged that these cases, while establishing a clear rule of reversal for Sixth Amendment violations \textit{at trial}, do not necessarily compel the same result \textit{at sentencing}.\textsuperscript{107} Nonetheless, the court concluded that to review right-to-counsel violations at sentencing any differently than violations at trial would not be feasible.\textsuperscript{108} The court reasoned that because "sentencing has become more than just a rote exercise in delivering a term of years; it often entails probation, parole conditions, restitution, and other penalties," and because the sentencing guidelines "play a considerable role in determining a defendant's punishment," harmless-error analysis was inappropriate to review an invalid waiver of counsel at sentencing.\textsuperscript{109} Accordingly, the court held that a right-to-counsel violation resulting from an invalid waiver of counsel at sentencing is harmful \textit{per se}.\textsuperscript{110}

The court in \textit{Virgil} based its conclusion on the reasoning of a Third-Circuit case, \textit{United States v. Salemo},\textsuperscript{111} which, after concluding that the record did not support the defendant's purported waiver of counsel at sentencing, declined to engage in a harmless-error analysis.\textsuperscript{112} The court began its discussion of the waiver's invalidity by noting that with regard to the length of the colloquy, the fact that the case involved sentencing rather than trial was "clearly relevant."\textsuperscript{113} The court immediately stressed, however, that the district court was not excused from examining the sufficiency of the defendant's purported waiver because of the

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\textsuperscript{106} \textit{Virgil}, 444 F.3d at 455--56.
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\textsuperscript{107} \textit{Id.} at 456.
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\textsuperscript{108} \textit{Id.} The court stated, "we see only imperfect ways of drawing a line between the two situations of trial and sentencing." It buttressed its holding by stating, "[i]f a court's error in denying counsel at trial, see \textit{U.S. v. Cronic}, 466 U.S. 648, 659 (1984), and on appeal, \textit{Penson}, 488 U.S. at 88, cannot be rehabilitated with harmless error analysis, we fail to see how at sentencing this type of \textit{Faretta} error, which is the functional equivalent of improperly proceeding without \textit{any} counsel, can be reviewed for harmless error." \textit{Id.}
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\textsuperscript{109} \texti{Virgil}, 444 F.3d at 456.
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\textsuperscript{110} \textit{Id.} In reaching its holding, the court overruled Richardson v. Lucas, 741 F.2d 753 (5th Cir. 1984), which held that the deprivation of the defendant's right to counsel at trial was harmless beyond a reasonable doubt. \textit{Id.} at 757. The Ninth Circuit had predicted that the Fifth Circuit would follow in the footsteps of the Tenth Circuit in reconsidering \textit{Richardson} in light of the Supreme Court's holding in \textit{Penson}. See Cordova v. Baca, 346 F.3d 924, 928-28 (9th Cir. 2003); see also \textit{U.S. v. Gipson}, 693 F.2d 109, 112 (10th Cir. 1982), overruled by \textit{U.S. v. Allen}, 895 F.2d 1577, 1579--80 (10th Cir. 1990).
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\textsuperscript{112} \textit{Id.} at 221.
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\textsuperscript{113} \textit{Id.} at 219.
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posture of the case, and concluded that a deprivation of counsel had occurred.\textsuperscript{114}

Turning to the issue of remedy, the court noted that "sentencing is a critical and often time complicated part of the criminal process that contains subtleties which may be beyond the appreciation of the average layperson."\textsuperscript{115} The court detailed the complex nature of the sentencing guidelines, providing examples of how a defendant could suffer without the assistance of a trained counsel.\textsuperscript{116} Against this backdrop, the court concluded that a remand for resentencing was required.\textsuperscript{117} The court "decline[d] to engage in harmless error analysis"\textsuperscript{118} on account of the right to counsel's status as "one of the most fundamental and cherished rights guaranteed by the Constitution."\textsuperscript{119} The court cited a previous case, \textit{United States v. Welty},\textsuperscript{120} that had, in turn, cited \textit{Chapman} for the proposition that a violation of the Sixth Amendment right to counsel can never be treated as harmless error.\textsuperscript{121} Based on this reasoning, the court determined that "the deprivation of the defendant's right to representation at sentencing under the circumstances of this case [did not justify] a harmless error analysis."\textsuperscript{122}

In his concurrence, then-Judge Alito took issue with the portion of the majority's opinion that declined to engage in a harmless-error analysis.\textsuperscript{123} Judge Alito expressed his concern that the majority's opinion would be interpreted more broadly than in cir-

\textsuperscript{114} Id.
\textsuperscript{115} Id. at 220.
\textsuperscript{116} Id. at 220–21 (noting in the examples the sentencing court's ability to consider conduct that did not result in conviction and the potential for an inadvertent waiver of posttrial arguments). \textit{Id.} at 220; see, e.g., \textit{Howard v. U.S.}, 374 F.3d 1068, 1072–73 (11th Cir. 2004) (stating that a prisoner's claim can be procedurally barred in a habeas proceeding where he failed to challenge the use of prior conviction to enhance sentence at sentencing hearing); \textit{Elzy v. U.S.}, 205 F.3d 882, 884 (6th Cir. 2000) (concluding that the failure to raise breach-of-plea-agreement claim at sentencing constituted waiver of that claim in collateral proceeding); \textit{Reid v. U.S.}, 976 F.2d 446, 448 (8th Cir. 1992) (holding that prisoner's failure to object at sentencing and on appeal to district court's alleged violations of Rule 11 of the Federal Rules of Criminal Procedure constituted procedural default at post-conviction proceeding), \textit{cert. denied}, 507 U.S. 945 (1993).
\textsuperscript{117} \textit{Salerno}, 61 F.3d at 221.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 222.
\textsuperscript{120} 674 F.2d 185 (3d Cir. 1982).
\textsuperscript{121} \textit{Salerno}, 61 F.3d at 222.
\textsuperscript{122} Id. (emphasis added).
\textsuperscript{123} \textit{Salerno}, 61 F.3d at 222–23 (Alito, J., concurring).
cumstances similar to the instant case, as the court had relied on cases involving deprivations of the right to counsel at trial "that strongly suggest that the deprivation of counsel can never be harmless." Judge Alito posited that the majority opinion could be interpreted as meaning that a violation of the right to counsel at sentencing could never be subject to harmless-error analysis. In a footnote, Judge Alito envisioned a scenario in which a defendant did not validly waive counsel but still received the mandatory minimum sentence as an example of where an automatic remand would be unnecessary. Judge Alito cautioned that the cases relied upon by the majority involved deprivations of counsel at trial and expressed a desire to leave open the question of whether those cases' rationale should extend to the sentencing context. Ultimately, Judge Alito expressed no precise opinion with regard to whether the deprivation of the right to counsel at sentencing could be subject to harmless-error analysis.

In an earlier case, *Golden v. Newsome*, the Eleventh Circuit, after concluding that the defendant did not waive his right to counsel at sentencing by escaping custody, considered whether the resulting deprivation could be considered harmless error. The court began its analysis by noting that the right to counsel at critical stages of the criminal process had been established as a fundamental right, but then noted that while Golden had been deprived of his right to counsel, he had, in any event, received a sentence within the statutory range for his conviction. The court stated, however, that "the Supreme Court has made it abundantly clear that even though a defendant has no substantive right to a particular sentence within the range authorized by statute, the total denial of counsel at a critical stage such as sentencing is presumptively prejudicial and is not to be deemed

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124 Id. at 223.
125 Id.
126 Id. at 223 n.6.
127 Id. at 223 ("[I]t may well be that these precedents should be extended to govern the deprivation of counsel at sentencing, but neither the Supreme Court nor this court has yet done so, and I think that such an extension would warrant careful analysis.").
128 *Salerno*, 61 F.3d at 224 (Alito, J., concurring).
129 755 F.2d 1478 (11th Cir. 1985).
130 Id. at 1483–84.
131 Id. at 1483.
harmless error." Accordingly, the court vacated the sentence and remanded for a new hearing. But in a footnote, the court recognized what it described as an "obvious[]" exception to its holding: "[W]here the precise sentence for a particular offense is mandatorily fixed by law such that its imposition is merely a ministerial ceremony, with no discretion to be exercised by the sentencing judge, the absence of counsel at such a proceeding could not possibly be prejudicial. In that rare and narrow circumstance, the legal presumption of prejudice due to the absence of counsel would not apply."134

Two years after Golden, the Ninth Circuit briefly considered harmless-error review of an invalid waiver at sentencing in United States v. Balough.135 In that case, the defendant pleaded guilty but later filed pro se motions to withdraw his guilty plea and to proceed without the assistance of counsel.136 The district court granted the defendant's motion to proceed pro se and then conducted the hearing concerning the motion to withdraw the guilty plea.137 The court denied the motion to withdraw the plea and the defendant subsequently represented himself at sentencing.138 The court of appeals concluded that the defendant had not adequately waived his right to counsel at the hearing on the pro se motion and then considered whether harmless-error analysis could apply to that violation.139

The court determined that harmless-error review was inappropriate because the defendant was denied his right to counsel at both the hearing on his motion to withdraw his guilty plea and at the sentencing hearing.140 In reaching its conclusion, the court relied on Supreme Court cases stating that a defendant has a right to counsel at every stage of criminal proceedings where substantial rights may be affected and that harmless-error review pre-

132 Id. (citing U.S. v. Cronic, 466 U.S. 648, 659 (1984); Chapman v. Cal., 386 U.S. 18, 23 n.8 (1967)).
133 Id. at 1484.
134 Id. at 1484 n.9 (citing Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965)).
135 820 F.2d 1485 (9th Cir. 1987).
136 Id. at 1486.
137 Id. at 1486-87.
138 Id. at 1487.
139 Id. at 1489.
140 Id. at 1490.
supposes that the defendant was represented by counsel.\textsuperscript{141} Balough therefore provided support for the proposition that the deprivation of the right to counsel at sentencing requires automatic reversal, although the fact that the defendant was also denied the right at his plea-withdrawal hearing distinguished the case from Virgil and Salemo.

Against this backdrop, in Crawford the Eighth Circuit concluded that neither a colloquy nor the record as a whole supported the finding of a valid waiver of counsel prior to sentencing and then considered whether that violation could be subject to harmless-error analysis.\textsuperscript{142} The court began by observing that dictum from a previous case could arguably support the application of the harmless-error doctrine. In that case, after concluding that the defendant had validly waived his right to counsel, the court stated, “[T]here is nothing in the record to suggest that further delay and a fourth appointed counsel would have produced a different sentence.”\textsuperscript{143} The court in Crawford therefore reasoned that the “lack of prejudice suffered by [Crawford] could be relevant” to determining whether reversal was automatically required.\textsuperscript{144} The court then reviewed previous cases that had considered the issue, including Virgil, Salemo, Balough, and Golden, and also noted the Tenth Circuit’s holding in United States v. Allen\textsuperscript{145} that harmless-error review was not appropriate for waiver-of-counsel cases.

The court narrowed its focus to the specific circumstances of Crawford’s case and held that in the “unique circumstance” where the trial court “lacked the authority to impose a more lenient sentence that the defendant received,” harmless-error review was appropriate.\textsuperscript{146} The court expressly limited its holding to that “limited circumstance,” reasoning that Crawford could not show any resulting prejudice from the deprivation of counsel on account of the trial court’s inability to impose a lighter sentence.\textsuperscript{147}

\textsuperscript{141} See U.S. v. Balough, 820 F.2d 1485, 1490 (9th Cir. 1987) (citing Rose v. Clark, 478 U.S. 570, 578 (1986)).
\textsuperscript{142} U.S. v. Crawford, 487 F.3d 1101, 1107 (8th Cir. 2007).
\textsuperscript{143} U.S. v. Day, 998 F.2d 622, 627 (8th Cir. 1993).
\textsuperscript{144} See Crawford, 487 F.3d at 1107.
\textsuperscript{145} 895 F.2d 1577, 1580 (10th Cir. 1990).
\textsuperscript{146} See Crawford, 487 F.3d at 1107–08.
\textsuperscript{147} Id. at 1108.
\textsuperscript{148} See id.
The court rejected Crawford's argument that an attorney could have "taken advantage of the discretion available to courts after United States v. Booker," because Booker did not affect statutory sentences. The court concluded that there was "nothing any attorney could have done to achieve a more favorable result at sentencing."  

Crawford thus represents, to a certain extent, a departure from Virgil, Salemo, and Balough, and an explicit endorsement of the footnote in Golden and Judge Alito's concurrence in Salemo. As the court in Crawford made clear, however, that departure was owing to the very unique circumstances of Crawford's case.

IV. THE LIMITED ROLE OF HARMLESS-ERROR REVIEW IN DEPRIVATION-OF-COUNSEL CASES

The foregoing cases indicate that the rule of automatic reversal fits nearly all deprivation-of-counsel cases. In the context of trial, it is impossible to quantify the amount of prejudice suffered by a defendant who is not represented by licensed counsel. An attorney is not only familiar with procedural and evidentiary rules but also makes strategic decisions over the course of a trial that a layperson likely would not consider. It is similarly an exercise in futility to speculate as to what issues an attorney would have identified, much less meaningfully argued, during the pendency of an appeal. And during the course of a normal sentencing hearing in federal court, where the judge considers whether to grant departures or variances and weighs various factors in calculating the recommended range of imprisonment,  

149 543 U.S. 220 (2005); see also Gall v. United States, ___ U.S. ___, 128 S. Ct. 586 (2007) (holding that under Booker, an appellate court may only review a district court's sentence for an abuse of discretion).

150 See Crawford, 487 F.3d at 1108 (citing U.S. v. Rojas-Coria, 401 F.3d 871, 874 n.4 (8th Cir. 2005)); see also U.S. v. Gregg, 451 F.3d 930, 937 (8th Cir. 2006) ("Booker does not relate to statutorily-imposed sentences.").

151 Crawford, 487 F.3d at 1108.

152 See supra note 78 and accompanying text.

153 Indeed, the Supreme Court has recognized the impossibility of assessing prejudice where the defendant is merely denied his choice of counsel (as opposed the complete denial of any counsel) on account of the possibility that "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." U.S. v. Gonzales-Lopez, 126 S. Ct. 2557, 2564 (2006).


the arguments that an attorney may advance, particularly in this post-Booker era, are too numerous and too speculative to readily reconstruct on appellate review.\textsuperscript{156}

 Accordingly, the rule of automatic reversal appears to be the proper remedy for any right-to-counsel violation—no matter which stage of the criminal process is involved. But, this rule it is not necessarily appropriate for every case. In a rare case, common sense and concerns of economy can—and should—triumph over the fundamental right to counsel. \textit{Crawford} presented the first concrete example of such a case.

 Ostensibly, \textit{Crawford} was a unique mixture of facts and law that produced a narrow holding—a \textit{sui generis} case. Upon closer review, however, \textit{Crawford} raised broader questions concerning appellate review of Sixth Amendment right-to-counsel violations at sentencing. Most notably, the absolute prohibition against harmless-error review articulated in \textit{Virgil}, \textit{Salemlo}, and \textit{Balough} should be reexamined in light of the potential for extraordinary cases like \textit{Crawford}. Additionally, extreme cases like \textit{Crawford} should force courts to consider whether a fundamental right can ever be trumped by concerns of efficiency and practicality. In order to make such a judgment, these courts must consider whether any counsel could have possibly assisted a defendant or whether that assertion is belied by the facts of the case.

 These questions need only be considered in unusual cases, however, as \textit{Crawford} will not (and should not) change the manner in which courts review right-to-counsel violations that occur at sentencing. The rule of automatic reversal is still the standard for nearly all deprivations of the right to counsel, and \textit{Crawford} is only a unique exception to that general rule.\textsuperscript{157} The rule of

\textsuperscript{156} See generally \textit{MOORE ET AL., supra} note 85, ¶ 632.20 (detailing the numerous considerations in determining a sentence under the guidelines); see also \textit{Gall}, 128 S. Ct. at 587–98.

\textsuperscript{157} The rule of automatic reversal was recently applied by the Supreme Court in a different context than a right-to-counsel violation at sentencing. In \textit{U.S. v. Gonzalez-Lopez}, the Court, after determining that the defendant had been denied his choice of counsel at trial in violation of the Sixth Amendment, considered whether that violation could be reviewed for harmless error. 126 S. Ct. 2557, 2563 (2006). The Court reviewed its trial error/structural error dichotomy and ultimately had "little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.'" \textit{Id.} at 2564 (citation omitted). Because "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices
automatic reversal and the reasoning that underlies it will still encourage—if not explicitly direct—courts to order new sentencing hearings where defendants are denied counsel at sentencing.

But as Crawford illustrates, the rule of automatic reversal does not necessarily fit every deprivation case. Crawford is the first case in which a court has held that a right-to-counsel violation at sentencing may be reviewed for harmless error, and whether other courts are willing to consider applying harmless-error review to deprivation cases will depend on whether sufficient similarities exist between the facts of Crawford and future cases. In those cases, courts will encounter the same core issue that the deprivation-at-sentencing cases have considered.

The broad question that the courts in Virgil, Salemo, Balough, Golden, and Crawford each addressed is whether harmless-error review could ever be appropriate for examining right-to-counsel violations that occur at sentencing. As part of this inquiry, these courts were invited to consider whether any counsel could have made a positive difference for the defendant at re-sentencing. The Virgil, Salemo, and Balough courts each refused to engage in such review, while the court in Golden acknowledged that a unique situation may exist, and Crawford in turn presented that situation. The Crawford court narrowly circumscribed its holding, and this scenario may prove to be the only circumstance in which harmless-error review is appropriate for right-to-counsel violations. Even this limited holding, however, required the court to make a value judgment that previous courts had not.

Driving the court's decision in Crawford was the triumph of practicality and efficiency over form. Despite the strong language in cases describing the deprivation of counsel as unquantifiable, in the case of some deprivations, the resulting harm can actually be measured. In Crawford, the defendant received the mandatory minimum sentence. Therefore, there was no question on the outcome of the proceedings," the Court concluded that harmless-error review was inappropriate for that violation. Id. at 2465.

158 The court's statement in Golden was dictum, 755 F.2d at 1483 n.9, and Judge-Alito's concurrence was not joined by his colleagues, U.S. v. Salemo, 61 F.3d 214, 222 (3d Cir. 1995), cert. denied, 516 U.S. 1001 (1995).

159 U.S. v. Crawford, 487 F.3d 1101, 1108 (8th Cir. 2007). "[W]e limit our holding to the unique circumstance presented here: when the district court lacked the authority to impose a more lenient sentence than the defendant received . . . we agree with the Eleventh Circuit that harmless error review is appropriate." Id.
that Crawford would have been no better off with representation at resentencing. In cases like this, where the effect (or lack thereof) of the deprivation can be readily assessed, courts should embrace harmless-error review.

Courts are unlikely to undertake this analysis for several reasons, however. First, the facts of Crawford are so unique that a comparable case will not often arise. Second, even if courts are presented with a similar scenario as that in Crawford, they may remain reluctant to discount all possible benefits of representation. For example, courts may posit that while an attorney—or for that matter a judge—cannot avoid the application of a mandatory minimum statute, there does exist the possibility for a truly exceptional argument. Indeed, lawyers are ethically obligated to represent their clients zealously, within the bounds of frivolity. Building on this concept, Crawford argued on appeal that his sentencing counsel could have challenged the validity of the mandatory sentencing scheme, but the court dismissed that hypothetical as insufficient to avoid harmless-error analysis in light of clear precedent to the contrary.

But what if Crawford's hypothetical sentencing counsel would have challenged the constitutionality of the mandatory minimum statute? Or if she would have asserted that the government should have filed a motion on account of substantial assistance? These types of uncertainties justified the decisions in Virgil, Salemo, and Balough not to engage in harmless-error analysis. Those courts adhered to the rule of automatic reversal that is rooted in cases involving deprivations of counsel at trial, but as Crawford illustrates, this bright-line rule is not necessarily appropriate in all contexts. The defendant's arguments in Crawford did not warrant a new hearing before the district court, as the simple consideration of judicial economy compelled a common-sense result. This is not to say that the fundamental right to counsel should be balanced against institutional consid-

160 See MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (2002). In federal court, if counsel believes that an appeal is frivolous, the court is satisfied that counsel has conducted a diligent investigation into potential arguments, and the court agrees with counsel's evaluation, then counsel may withdraw from a case. See Anders v. Cal., 386 U.S. 738, 741-42 (1967).

161 A district court may review the government's decision not to move for a substantial-assistance departure if the refusal was based on an unconstitutional motive or not rationally related to any legitimate end. Wade v. U.S., 504 U.S. 181, 185-86 (1992).
erations as a matter of course, but in a unique case like *Crawford*, adherence to the trial rule of automatic reversal would have truly represented an exercise in form over substance.

Still, in addition to adherence to the rule of automatic reversal, appellate courts may be reluctant to describe a sentencing judge’s role as “ministerial” as justification for the use of harmless-error review. A federal sentencing hearing is virtually certain to involve a calculation of the appropriate guidelines range, including the assignment of criminal history points and the determination of a total offense level; the consideration of whether to grant upward or downward departures or variances; an analysis of the factors of 18 U.S.C. § 3553(a); a consideration of whether the sentence is reasonable; the application of mandatory minimum or maximum statutes; or an argument that the sentence is unconstitutional (e.g., cruel and unusual punishment in violation of the Eighth Amendment). Accordingly, judges and commentators have been more inclined to describe the federal sentencing guidelines as complex, confusing, and even “almost incomprehensible” than as simple or ministerial. Considering this inherent complexity in any sentencing hearing, appellate courts may decline to assume that any result, even involving a mandatory minimum statute, is unchangeable with the assistance of counsel at rehearing. Thus, courts may continue to use the rule of automatic reversal to avoid a calculation of prejudice, no matter how unavailing a defendant’s arguments may appear.

Nonetheless, the doctrine of harmless error can play a role, albeit minor, in deprivation-of-counsel cases. Cases like *Crawford*—where a defendant could not possibly have achieved a better result at sentencing, even with representation—should be reviewed for harmless error despite the existence of a Sixth Amendment violation. This approach would embody the purposes of harmless-error review, including the need to avoid duplicative litigation and the waste of judicial resources. It would also

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162 See *Golden*, 755 F.2d at 1483.
163 See generally *MOORE ET AL.*, supra note 85, ¶ 632.20.
164 *U.S. v. Smith*, 997 F.2d 396, 399 (8th Cir. 1993) (Bright, J., dissenting).
165 See id. (describing the then-mandatory guidelines as "exceedingly opaque" and making it "nearly impossible to sentence offenders in a straightforward and equitable manner"); Cris Carmody, *Sentencing Overload Hits the Circuits*, NAT'L L.J., Apr. 5, 1993, at 32 (quoting a description of the guidelines as an "incredibly insane, complicated system").
foster public confidence in a system that is often criticized for prolonged appeals and burdensome, protracted litigation.

CONCLUSION

Appellate courts have vigilantly protected defendants' right to counsel at all critical stages of the criminal process, including sentencing, by applying the rule of automatic reversal. While the institutional considerations underlying the doctrine of harmless-error review should not outweigh the importance of protecting this fundamental right, in certain situations, courts should tailor their review to reflect the unique circumstances of the given case. The rule of automatic reversal is indeed the standard remedy in deprivation-of-counsel cases, but the doctrine of harmless-error review can sometimes play a role as well.